

THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: MONITORING AND REALIZING INDIGENOUS RIGHTS IN CANADA

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KEY POINTS

- The Government of Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a tool for protecting indigenous rights in 2010, but has made very little progress toward its implementation.
- James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples (UNSRIP), recently declared that Canada faces a crisis when it comes to the human rights situation of indigenous peoples, ranging from adverse living conditions on reserve to unaddressed violence against indigenous women.
- The Government of Canada should implement targeted measures to address the UNSRRIP's concerns and improve the human rights situation of indigenous peoples in Canada.

INTRODUCTION

Indigenous peoples in almost all countries experience a lack of recognition of their fundamental political and human rights. Worldwide, tensions remain between state policies and indigenous requirements for legal recognition, land access and treaty rights.¹ Globally, indigenous peoples share the worst measures on all indicators of health, education, and social and political participation, including nutrition, employment and income. Experts have often commented on the disparity in well-being between indigenous and non-indigenous peoples around the world. UNSRRIP Anaya's recent visit to Canada

¹ While the *Canadian Oxford Dictionary* (which CIGI follows for its spelling conventions) spells "indigenous" with a lowercase "i," the convention in indigenous scholarship is to spell the word with a capital "I," as it is argued that indigenous peoples are subjects of international law rather than objects of the state. See Venne (1998).

ABOUT THE PROJECT

The lack of political power and autonomy — as well as human rights infringements — of over 340 million indigenous peoples worldwide have been major governance issues for over half a century. In the United States, Australia, New Zealand, Chile and Canada, tensions remain between state policies and questions of Indian status, land access and treaty rights.

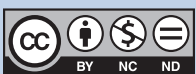
In the post-World War II period, recourse to global governance institutions has emerged as a major tool in the efforts to sustain, rebuild and reinvigorate indigenous cultures and governments.

This project advances policy discussions on indigenous governance and engagement at a time of unprecedented political change and indigenous empowerment globally, bringing together indigenous and non-indigenous scholars interested in the implications of global governance for indigenous peoples to study the impact of international institutions and global governance policy documents in promoting effective governance, legislative protection and culture survival for indigenous peoples.

This project will produce a synthesis and comparison of indigenous engagement with the global governance institutions, and with the policy contexts and models of governance (self and state) of indigenous populations in settler nations within North America, Australasia and South America.

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confirmed that it is no exception. Despite having high levels of human development as a country, Canada's indigenous peoples "live in conditions akin to those in countries that rank much lower and in which poverty abounds" (Anaya 2013).

UNSRIP Anaya carried out an official visit to Canada in October 2013. He recognized Canada's goal of reconciliation to repair the legacy of past injustices, "with the 2008 government apology for the residential schools and the creation of the Truth and Reconciliation Commission," and acknowledged that progress has been made since the visit of his predecessor in 2003, to "remedy gender disparities in the Indian Act and to provid[e] access to the Canadian Human Rights Commission for claims based on the Indian Act," but concluded his visit by declaring that there is an indigenous rights crisis in Canada (ibid.).

Anaya discussed the multiple social problems facing indigenous peoples across Canada, including unacceptable disadvantages in living standards, education, health and employment, stating that "it simply cannot be acceptable that these conditions persist in the midst of a country with such great wealth" (ibid.). The UNSRRIP expressed grave concerns about the living conditions of First Nations peoples on reserves and among the Inuit, and called on the Government of Canada to address inadequate housing in these communities. He articulated the link between overcrowded housing, health problems, family violence and low educational achievement — issues that have been repeatedly emphasized by indigenous leadership in Canada. He also identified concerns over the high levels of distrust between indigenous peoples and federal and provincial governments.

As well as a responsibility to address the rights of indigenous peoples and improving Canada's reputation on the world stage, Canada's own potential for future economic, social and sustainable development is contingent on closing the equality gap between indigenous and non-indigenous Canadians. Indigenous peoples form the fastest-growing segment of Canada's population, growing nearly six times faster than the non-indigenous population (Statistics Canada 2013). A clear, unequivocal commitment to addressing the rights of indigenous peoples with an eye to ultimately closing the inequality gap is needed. The Canadian government must work with indigenous peoples to identify significant and tangible solutions that address the current crisis and advance indigenous rights. To this end, the Canadian Human Rights Commission should review and address the 2014 report of the UNSRRIP, and establish federal, provincial, territorial and inter-ministerial mechanisms for the implementation of the UNDRIP (see UN General Assembly 2007a).

A critical means of addressing inequality between non-indigenous and indigenous peoples is through the implementation, monitoring and evaluation of the UNDRIP. By working to close gaps in the fulfillment of the individual and collective human rights of indigenous peoples, the economic and social realities of indigenous peoples will also improve. The Government of Canada endorsed the UNDRIP in 2010, but has since made very little progress toward its implementation. By implementing the standards articulated in the UNDRIP, Canada will improve government and indigenous relations, with a rights-informed approach that will address many of the enduring inequities and rights violations.

A BRIEF HISTORY OF THE UNDRIP

The United Nations reports that indigenous peoples around the world are facing serious and protracted struggles to assert their most basic human rights, and in recent decades, the United Nations has taken steps toward addressing the issues they face. In 1982, UN Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities, José R. Martínez Cobo, released a study about the systemic discrimination faced by indigenous peoples (see UN Department of Social and Economic Affairs 1982). The UN Economic and Social Council (UNECOSOC) responded to these findings by creating the Working Group on Indigenous Populations (WGIP), tasked with focussing exclusively on indigenous issues worldwide.

In response to the 1982 report on the discrimination of indigenous peoples, several decades of consultation and negotiation among indigenous and state leaders resulted in the signing of the UNDRIP. The declaration represents an important development in the recognition and internationalization of indigenous rights, as it provides an international rights standard for 148 member nations. Significantly, while existing international human rights treaties have been negotiated and drafted by experts, the UNDRIP is the only UN instrument that was drafted with the extensive participation of the affected population.

In consultation with indigenous representatives from around the world, the WGIP began drafting a declaration of indigenous rights in 1985. Developed over a period of eight years, the initial draft was submitted to the Subcommission on the Prevention of Discrimination and Protection of Minorities in 1993, and was approved the following year. Upon

its approval, the draft declaration was sent to the Commission of Human Rights, which established another working group consisting of human rights experts and over 100 indigenous organizations. The draft declaration was subjected to a series of reviews to assure UN member states that it remained consistent with established human rights practices — neither contradicting, nor overriding them.

In 2007, after more than two decades of drafting, the UNDRIP was formally brought before the UN General Assembly, and passed with 144 votes. The declaration sets “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” (article 43). With the adoption of the UNDRIP, states formally recognized the distinct status of indigenous peoples, as well as the international obligation to protect and promote their human rights (Stavenhagen 2009). The adoption of the UNDRIP serves to reinforce the fundamental rights and protections of indigenous peoples that were already recognized by international law, but often denied by states.

CANADA, AUSTRALIA, NEW ZEALAND AND THE UNITED STATES CONTEST THE UNDRIP

At the time of the adoption of the UNDRIP, four countries — Australia, Canada, New Zealand and the United States — voted against the declaration. Canada provided an explanation of its vote in a statement delivered by Ambassador John McNee at the UN General Assembly:

Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without

recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties. (UN General Assembly 2007b, 12-13)

The United States, Australia and New Zealand also took issue with the text at the UN General Assembly, expressing concern that the declaration, if adopted, would affect the territorial integrity and political unity of their respective states. Since 2007, however, each of these four countries originally opposed to the UNDRIP has adopted it. The Government of Australia was the first to reverse its position and offer official support for the UNDRIP, stating that its adoption was a step to improve indigenous and non-indigenous relations. A year later, the Government of New Zealand followed suit and formally endorsed the UNDRIP during the ninth session of the United Nations Permanent Forum on Indigenous Issues.

In November 2010, the Government of Canada also reversed its position on the UNDRIP as a means of reaffirming its commitment to strengthening relations with the indigenous peoples of Canada. The Canadian statement of support for UNDRIP was qualified, however, with the Government of Canada emphasizing that it remained concerned with the meaning and interpretation of certain provisions of the declaration. Accordingly, it was endorsing the declaration as an aspirational document rather than a document of customary international law. Finally, in December 2010, US President Obama announced that the United States would also reverse its previous position on the UNDRIP and officially sign the declaration.

The declaration now exists as an important benchmark for decision making by international and national governing bodies. The UNDRIP is an international instrument used by indigenous peoples to advance their rights. It establishes an international standard that states can use to actively promote and protect the cultural, political, territorial and economic security of indigenous peoples. It is a standard by which rights violations can be assessed and compared across nations and an important tool of reconciliation. In Anaya's words (2009), "the Declaration affirms that indigenous peoples in particular have the right of self-determination, recognizes that they have been denied enjoyment of that right, and marks the parameters for processes that will remedy that denial."



UNSRIP Anaya speaks to journalists.
(UN Photo/Paulo Filgueiras)

THE CHALLENGE OF IMPLEMENTING THE UNDRIP AND MONITORING INDIGENOUS RIGHTS

Despite the UNDRIP's progress, it is important to note that such UN declarations are, however, voluntary. UN member states are not required to ratify or sign declarations; rather, they can vote in favour of or against declarations, as in the

case of Australia, Canada, New Zealand and the United States with the adoption of the UNDRIP. Furthermore, UN declarations are non-binding. Accordingly, many legal scholars argue that UN declarations cannot be directly enforced against member states if they fail to uphold their obligations. UN member states are, however, expected to take measures to implement the UNDRIP and to ensure that national laws and policies uphold the standards articulated in the declaration.

To assist with the implementation, monitoring and evaluation of this process, the UN Human Rights Council has named a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. The Special Rapporteur is an expert appointed to investigate, monitor and evaluate progress made toward the realization of indigenous rights. The office reports to the UN Human Rights Council on the overall human rights situation of indigenous peoples in selected UN member states, and also reports on specific cases of alleged violation against the rights of indigenous peoples.

Since the adoption of the UNDRIP in 2007, the UNSRRIP has examined and reported on the human rights situation of indigenous peoples in 19 countries across the Americas, Europe, Africa, and Australia and Oceania. Following each visit, a report, which includes conclusions and recommendations targeted at improving the human rights conditions of indigenous peoples in the countries concerned, is delivered to the state and published by the Office of the High Commissioner for Human Rights. Upon receiving the report, states may respond by investigating its alleged facts, or by taking measures to prevent, end or remedy the rights violations

identified. In some cases, the Special Rapporteur conducts a follow-up visit to evaluate progress towards addressing rights violations.

CHALLENGES TO THE REALIZATION OF INDIGENOUS RIGHTS IN CANADA

In 2003, then UNSRRIP Rodolfo Stavenhagen paid an official visit to Canada and reported on the “unacceptable gaps between [indigenous] Canadians and the rest of the population in educational attainment, employment and access to basic social services” (UNECOSOC 2004, 2). Stavenhagen also reported that “poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, [and] child prostitution” were all significantly “higher among [indigenous] people than in any other sector of Canadian society,” and concluded his report with a number of recommendations to guide the Government of Canada in closing these gaps (ibid.).

The Government of Canada has long acknowledged the need for increased action to close the gap between the social and economic realities of indigenous and non-indigenous Canadians, and important steps have been taken over the past decade to address gross disparities between indigenous and non-indigenous Canadians. These steps include the extensive consultative processes leading up to the 2005 Kelowna Accord (abandoned by the current federal government); the 2008 federal apology for Indian residential schools; the Truth and Reconciliation Commission; and the signing of significant land claims. Despite these overtures, progress toward closing the gaps has been slow and contested. Indigenous peoples in Canada continue to experience significant levels of disadvantage and

marginalization. Furthermore, there is a sentiment that progress made on indigenous issues by the Canadian government has lacked adequate consultation with indigenous peoples.

UNSRIP Anaya conducted a follow-up visit to Canada in order to investigate the human rights situation of indigenous peoples, and to evaluate progress made toward remedying previously identified rights violations. Upon concluding his visit to Canada, Anaya issued a statement declaring that “Canada faces a crisis” in the area of indigenous rights (Anaya 2013, para. 5). Echoing concerns from his predecessor’s 2003 visit, Anaya identified numerous human rights violations against indigenous peoples, ranging from disrespect for treaty and land rights, to unaddressed violence against indigenous women. He reported on the poverty and poor living conditions of First Nations on reserves and for the Inuit, and expressed concern over the lack of adequate consultations that are necessary to achieve free, prior and informed consent, particularly in relation to resource extraction. Anaya also reiterated concern about indigenous peoples’ access to government services, highlighting issues related to housing, health care, education, water and child protection.

Anaya’s final report has not yet been delivered to the UN Human Rights Council or the Government of Canada, but his initial statement reveals that a more ambitious agenda is needed if Canada aspires to address inequality and improve the economic and social indicators of indigenous peoples across the country. Moreover, his remarks indicate that public policy and legislative reform are necessary if Canada wishes to uphold its international human rights obligations and fully realize indigenous rights.



A view of indigenous delegates attending the twelfth session of the UN Permanent Forum on Indigenous Issues.
(UN Photo/Rick Bajornas)

IMPLEMENTING THE UNDRIP AND MONITORING INDIGENOUS RIGHTS IN CANADA

The full implementation of the UNDRIP as part of Canadian domestic law would be a strategic and effective way to address inequality and realize indigenous rights in Canada. However, the Government of Canada has not passed the necessary legislation to implement the UNDRIP as part of its domestic law, stating that certain articles of the declaration conflict with existing legislation and human rights standards. Accordingly, the UNDRIP is not technically binding, nor currently enforceable in the Canadian context.

Even if the UNDRIP remains a non-binding declaration in Canada, as a member of the United Nations, Canada has an international obligation to ensure that its state laws and policies uphold the standards articulated in the UN document. While the Government of Canada finds certain articles of the UNDRIP problematic, the remaining articles could still be implemented as national legislation. The Government of Canada should identify specific

areas where it could reform its domestic laws in order to conform to the UNDRIP. This will help Canada progress toward the full realization of indigenous rights, even if full implementation of the UNDRIP as part of Canadian domestic law remains unlikely at this time.

The UNSRRIP's report will identify urgent areas of concern, as well as specific recommendations to end human rights violations against indigenous peoples in Canada. The Government of Canada can begin by addressing the concerns raised by the forthcoming report, using the UNDRIP as a framework. Through this action, Canada may begin to improve the social and economic indicators of indigenous peoples while demonstrating international leadership in the protection of indigenous rights.

The Government of Canada can also use the UNDRIP to guide engagement and decision-making processes with indigenous peoples. For example, the UNDRIP articulates that indigenous peoples have the "right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning" (article 14). As the Government of Canada proceeds with the development and implementation of the proposed First Nations Education Act, the Minister of Aboriginal Affairs and Northern Development could use this article to guide the process.

POLICY RECOMMENDATIONS

The crisis of indigenous issues in Canada identified by UNSRRIP Anaya in health, education, water, women's rights and housing are issues which are also prominent in his other country reports. In both

wealthy and developing nations around the world, indigenous peoples face similar challenges and violations of their human rights. In light of the serious and sustained socio-economic, cultural and political challenges facing indigenous peoples, the UNDRIP should be accepted as an international benchmark for indigenous well-being. Within the Canadian context, the UNDRIP should be used as a tool for informing policy processes, advancing political participation and building trust between indigenous leaders and state officials. The UNDRIP provides a framework for measuring the commitment of Canada to achieve reconciliation with indigenous peoples and to govern in a manner consistent with authentic indigenous participation in the advancement of their cultural, political, territorial and economic rights. As a signatory to the UNDRIP, Canada needs to develop mechanisms for monitoring and evaluating progress in the implementation of the declaration. The Canadian Human Rights Commission should develop and sustain a task force on indigenous rights.

CREATE A NATIONAL INDIGENOUS RIGHTS TASK FORCE AND ANNUAL REPORTING

A strategic mechanism for reviewing and addressing the concerns raised by UNSRRIP Anaya is long overdue. A first step would be for the Canadian Human Rights Commission to create a National Indigenous Rights Task Force within its National Aboriginal Initiative.

- The task force would be selected by First Nations, Inuit and Metis representatives, and would be responsible for reviewing, investigating and responding to the UN report. The task force would identify targeted activities, in consultation with all ministries, to address the concerns raised by Anaya

on the situation of human rights and fundamental freedoms of indigenous peoples.

- The task force would work with indigenous, federal, provincial and territorial governing bodies to promote greater awareness and understanding of the purpose and objectives of the UNDRIP across all ministries, and would develop processes to align existing and emerging legislation, policies and protocols with the UNDRIP.
- The task force would report annually on progress made toward addressing the human rights problems identified by the UNSRRIP, and by indigenous bodies in Canada. The annual report should be used to promote awareness of and national accountability regarding the indigenous rights situation in Canada, to improve the visibility of progress being made in Canada toward achieving indigenous rights, and to guide future priorities and strategies to address human rights violations against indigenous peoples and to advance a more just and equitable Canadian society.

CONCLUSION: A WAY FORWARD

The UNSRRIP focussed an international spotlight on the gross inequalities within Canada and declared a crisis of indigenous rights in 2013. Canada has an obligation to address this crisis with full respect for indigenous peoples' constitutional, treaty and internationally recognized rights, as outlined in the UNDRIP. The Government of Canada, in consultation with indigenous leadership, should develop an indigenous rights task force and implement targeted measures to address the human rights violations in

order to promote the dignity and quality of life of indigenous peoples in Canada.

Although the full implementation of the UNDRIP as part of Canadian domestic law remains challenging at this time, implementing these recommendations would act as a significant step toward addressing the indigenous rights crisis in Canada and would promote better relations between indigenous peoples and the federal, provincial and territorial governments.

The UNDRIP is an important global governance mechanism for the recognition and advancement of indigenous rights, developed with the extensive and prolonged participation of members of the global indigenous community. The UNDRIP serves as an international benchmark with which to monitor, assess and compare progress toward the achievement of indigenous rights both within Canada and internationally. The UNDRIP is an important tool for informing policy processes, advancing political participation and building trust between indigenous leaders and state officials. The Canadian Human Rights Commission is well placed to advance the implementation of the UNDRIP in addressing the third-world status of indigenous peoples in Canada.

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