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## Indigenous Rights in International Politics: The Case of “Overcompliant” Liberal States

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An overcompliant state is one that paradoxically takes actions that recognize specific rights or a category of rights that go beyond or even against that state’s international human rights treaty obligations or its normative international commitments. Since there is no existing IR literature that would explain why a state might paradoxically comply or “overcomply” with its stated commitments, there is also no theory to explain what would propel a state to “overcomply” with an emergent norm. Securing indigenous rights means that several critical changes in the international discourse must occur, including an alteration of the liberal international Westphalian system of state sovereignty toward a postliberal, plurinational sovereignty system that includes a separate nation-to-nation and consent-based shared sovereignty arrangement between states and indigenous peoples. “Overcompliance” in indigenous rights occurs under a particular set of conditions: (1) when there is a strong presence of the international indigenous-rights movement within the state; (2) when the state places high value on its reputation as a “good global citizen”; and (3) when change occurs in the state’s domestic discourse as it seeks to locate its own postcolonial identity in a globalized world. By examining state “overcompliance,” the author seeks to expose the limits of the current international discourse and the potential to push that discourse further to better accommodate the full spectrum of indigenous rights. **KEYWORDS:** overcompliance, indigenous rights, international politics, globalization, sovereignty

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For more than three decades, the indigenous-rights movement has been engaged in a struggle on the international level for recognition of indigenous peoples' rights. Almost universally, indigenous peoples have not demanded secession from states but instead have asked states to recognize and secure indigenous rights within the structure of the state.<sup>1</sup> Again almost universally, indigenous peoples desire recognition of their rights to land and self-determination—rights that, when protected together, enhance cultural integrity and the ability to survive as distinct peoples. While the majority of states either comply or undercomply with the international indigenous-rights treaties and conventions to which they have committed themselves, a handful of states have actually “overcomplied” with their indigenous-rights obligations.

How and why would states “overcomply” with their rights obligations? Why would a state recognize certain indigenous rights while simultaneously resisting treaties or norms that would bind the state to the very behavior that it is already partially, or sometimes, exhibiting? Finally, how does “overcompliance” in indigenous rights help rearticulate international discourse and consensus on human rights and the norms of state sovereignty and liberalism in the international state system? I argue in this article that certain liberal states have achieved a level of “overcompliance” in indigenous rights that is contributing to change in international discourse in two specific ways: a reconfiguration of the Westphalian system of sovereign states, and a reconstitution of liberal constructions of the state.

I define an “overcompliant” state as one that paradoxically takes actions that recognize specific rights or a category of rights that go beyond, or even against, that state's international human-rights treaty obligations or its normative international commitments. In other words, “overcompliance” in indigenous rights exists if (1) a state recognizes indigenous land or self-determination rights beyond that state's technical legal obligations; or (2) a state recognizes rights of indigenous peoples that extend into the realm of collective rights and indigenous self-determination rights, neither of which are included in current international human-rights law; or (3) a state recognizes a category of indigenous rights while opposing that same category of rights in international discourse. For example, if a state has signed the first indigenous-rights convention, ILO no. 107,<sup>2</sup> and behaves according to its provisions, then that state would be compliant. However, if a state has signed the more advanced ILO no. 169,<sup>3</sup> but its behavior matches only the weaker standards of ILO no. 107, it would be considered undercompliant. But if a state has signed ILO no. 107 yet shows reform behavior that brings it in line with the

stronger standards of ILO no. 169, then that state would be considered “overcompliant.”

I place the term *overcompliance* in quotation marks to indicate that while these states have exhibited some behavior that goes beyond their formal legal and/or normative international commitments, they still fall far short of indigenous peoples’ expectations and demands. This “overcompliance” does not indicate or imply that such states are completely complying with international indigenous-rights standards as articulated in the UNDRIP, the United Nations Declaration on the Rights of Indigenous Peoples.<sup>4</sup> (They are *not* complying.) It indicates only that these states are performing above the level that would be expected based upon their international commitments. Yet, if certain states can become “overcompliant” in indigenous rights, then the possibility may exist for the international indigenous-rights movement to push the international discourse toward better acceptance of the full spectrum of indigenous rights. By examining state “overcompliance” rather than simply compliance with indigenous-rights standards, I aim to expose the limits of the current international discourse and the potential to push that discourse further to better accommodate the full spectrum of indigenous rights.

The field of international relations is largely blind to the phenomena I explore in this article. The field assumes that an inherently self-interested state will only comply or undercomply with international treaties, law, and norms.<sup>5</sup> It has therefore missed a piece of the causal story of compliance. Since there is no existing literature on international relations that would explain why a state might paradoxically comply or “overcomply” with its stated commitments, there is also no theory to explain what would propel a state to “overcomply” with an emergent norm. However, if states sometimes comply with norms that they have not committed to or even those that they formally resist, then it follows that there are additional mechanisms involved in compliance behavior other than what have been explored in international relations to date.

I argue in this article that “overcompliance” in indigenous rights occurs under a particular set of conditions: (1) when there is a strong presence of the international indigenous-rights movement within the state; (2) when the state places high value on its reputation as a “good global citizen”; and (3) when change occurs in the state’s domestic discourse as it seeks to locate its own postcolonial identity in a globalized world.<sup>6</sup> I also aim to show that although “overcompliance” occurs only under a limited set of circumstances, it does potentially help to push the boundaries of the international human rights

discourse in a direction that will better accept international indigenous rights.

### **Background on International Indigenous Rights**

International human-rights law and discourse currently excludes the two elements that are critical to the indigenous quest for rights recognition and recovery.<sup>7</sup> First, the international human rights consensus does not include collective rights, yet when indigenous people seek land rights, they generally mean collective rights to the land.<sup>8</sup> Second, although self-determination is the one group right included in the international consensus on human rights, indigenous peoples' self-determination was specifically excluded from the decolonization regime by the "saltwater thesis" (sometimes known as the "blue water thesis"), which asserted that only overseas colonial territories were eligible for decolonization and self-determination.<sup>9</sup> Furthermore, the indigenous use of the term *self-determination* differs from how the term was used during the decolonization movement that followed World War II. When indigenous people speak of self-determination, it "should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live,"<sup>10</sup> rather than as secession or independence.

In spite of these conceptual differences between human rights and indigenous rights, the existing body of human rights law does provide indigenous people with certain rights under the rubric of nondiscrimination.<sup>11</sup> All existing international conventions on indigenous rights provide indigenous peoples the human rights of equality and protection from nondiscrimination within the state, including protection of their culture and religious practices. But, because the land and self-determination rights that indigenous people desire are both collective in nature, the existing body of human-rights law and discourse, designed around a liberal conception of the universality of individual rights, largely excludes indigenous rights as articulated by indigenous people. Yet the international indigenous-peoples' movement has been seeking to include collective rights to land and self-determination within the human rights frame.

The results from the three-decade-long international indigenous-rights movement are mixed. Certain states (Australia, Canada, and New Zealand)—states that vehemently opposed the UNDRIP—enacted, during this same time period, reforms that recognized indigenous peoples' rights to land and self-determination.<sup>12</sup> Meanwhile, other states have enacted limited reforms (such

as Colombia, Venezuela), while others (notably the United States) have remained fiercely resistant to such domestic reform of their relationship with indigenous peoples. Furthermore, the states that ratified the most advanced human rights instrument protecting indigenous rights, ILO Convention no. 169, were largely Latin American states. These are not the same states that made the most progress in domestic reforms regarding indigenous peoples.

The record of compliance by states with the existing body of human rights law regarding indigenous people is therefore puzzling. Not only is there no apparent correlation between ratification of ILO no. 169 and extensive domestic reforms, but there is also paradoxical compliance (that is, “overcompliance”) with human rights standards in certain states. Over the past three decades, Australia, New Zealand, and Canada have each made important reforms in their relationships with indigenous people, effectively recognizing some collective land and/or self-determination rights of indigenous people. They have made these changes while all along declaring (1) that they are complying with human rights standards that do not even exist under the current conception of human rights as adhering to the individual; or (2) that they are technically not obligated to so adhere because they have not ratified ILO no. 169; or (3) that they have no normative obligation so to adhere because they publicly opposed the UNDRIP (also known as “the declaration”) as an international normative standard of indigenous rights. How can this “overcompliance” by certain states be explained? Why do their policy practices exceed their formal legal obligations? and why do they *not* bring their obligations into sync with their practices?

### Explaining “Overcompliance”

The advancement of indigenous rights in certain countries and not in others is commonly explained as a matter of domestic demographic and political factors. Three arguments are typically offered to explain this phenomenon. First, it is said that these advancements are the result of a large indigenous population. Second, advancements in indigenous rights are thought to result from extensive political participation by indigenous people in domestic politics. Third, advancements in indigenous rights can be attributed to parliamentary or proportional-representative domestic political systems, as are used in Australia, Canada, and New Zealand.<sup>13</sup> These three arguments either cannot be well supported by the evidence or they do not take account of the international mobilization of indigenous people and their invocation of international human rights discourse.

The argument that a high population of indigenous people in a country leads to higher levels of indigenous rights sounds plausible at first, but the argument is not adequate. The countries that have enacted the greatest level of reform recognizing indigenous land and self-determination rights are Australia, Canada, and New Zealand. While New Zealand's Māori population is approximately between 15 and 17 percent of the country's total population of 3.5 million, both Canada and Australia show a population that is only between 2 and 3 percent indigenous, so a high population proportion is not the common factor among these champions of indigenous rights.<sup>14</sup> Meanwhile, the United States, which made no substantial progress in indigenous rights during this period, has a population that is between 1 and 2 percent indigenous, while Norway, which contains only a 1 percent Saami population, enacted significant reforms, including the founding of a Saami parliament and a special Saami Rights Commission.<sup>15</sup>

At first glance, the domestic political-participation explanation also appears plausible since indigenous people tend to be quite active in domestic (liberal democratic) politics in Australia, Canada, and New Zealand, often running candidates in elections, forming indigenous political parties, and contributing financially to national candidates who support indigenous issues. The problem with this explanation is that it does not account for the marked distinction in indigenous-rights advances between these three countries and the United States or Latin America. Indigenous groups in the United States are equally participatory in domestic politics,<sup>16</sup> yet indigenous rights in the United States have not witnessed the same advances as seen in the other three countries. In fact, indigenous rights in the United States, having enjoyed some advancement during the 1970s, 1980s, and into the 1990s, have witnessed a sharp negative turn in recent years, with increasing state encroachment on indigenous sovereignty and negative court rulings regarding indigenous rights.<sup>17</sup>

We may note some correlation between indigenous-rights advancements and domestic political structure. Parliamentary, proportional systems (as in Australia, New Zealand, Norway, Sweden, and Canada) seem more likely to show significant gains in indigenous rights than are seen in presidential or single-member district plurality systems (as in the United States and Colombia). While this may explain some of the variation among different countries, it cannot account for the case of New Zealand, which in 1996 changed its electoral system to a mixed-member proportional (MMP) parliamentary system.<sup>18</sup> Yet many of the significant Maori-rights advances took place prior to 1996, when the New Zealand political system was

decidedly majoritarian. Underlying all these arguments is the presumption that indigenous rights are an area of domestic concern with domestic solutions. But clearly, domestic politics alone cannot account for the different degrees of success in the indigenous-rights movement among various countries over the past three decades. If domestic politics is only part of the explanation of “overcompliance,” then a turn to the international sphere is warranted to see if it alone, or, more likely, in interaction with the domestic sphere, is a better explanation for this variation.

Theoretical approaches to international relations that seek to explain state compliance or noncompliance with international law, including human rights law, fall into three basic streams: rationalist, liberal, and constructivist.

The rationalist strand of explanation for state compliance or noncompliance is rule-based and claims that states, as rational actors, join and comply with international-law regimes that meet their national interests.<sup>19</sup> Under rationalist logic, there is likely no reason that any state would comply with human rights law in regard to indigenous rights. States have much greater material and discursive power than do their indigenous populations, and, if states view concessions to indigenous groups as a zero-sum game, then a state would stand only to lose power and capacity by making any domestic changes that would recognize indigenous rights within the state.

Liberal approaches ease up on some rationalist assumptions and allow for a disaggregation of the state into various domestic components, each with individual interests. One strand of liberal compliance theory claims that compliance involves conformity with norms that are made by a variety of actors, rather than a system of rules.<sup>20</sup> Compliance is thus understood as an outcome of political interaction of the aggregated preferences of relevant actors. The other strand of liberal theory rests on democratic regime type as a critical explanatory variable.<sup>21</sup> This strand of compliance theory argues that liberal democracies comply with international law better than nondemocracies.

If liberal theory is to explain state compliance and noncompliance with international human rights law pertaining to indigenous rights, then one could expect to see a much higher number of liberal democracies complying than nondemocracies. In fact, this is the case. Australia, New Zealand, and Canada are all liberal democracies with a strong record of compliance. Where the theory loses some of its explanatory power is that it accounts for neither the noncompliance of a liberal state like the United States nor the compliance of a rather illiberal state like Taiwan. Most damaging in terms of its explanatory power, neither strand of liberal theory can explain why

a state would recognize any collective rights, since in liberal thought, human rights adhere only to individuals and not to collectivities. Liberal theory also cannot explain why a state would recognize certain indigenous rights while simultaneously attempting to block the emergence of an international norm on indigenous rights in the form of the UNDRIP.

Constructivist explanations for compliance take a process-oriented, not rule-oriented, approach and “give central significance to the social construction of identities and meanings among actors in the international system”<sup>22</sup> so that interests and identities are intersubjectively constructed. Through this intersubjective process, law enables a society to self-constitute so that states and other relevant actors thus become what they imagine themselves to be. In other words, norms do not have a regulative function as they do in liberal explanations, but rather they have a constitutive function. Norms constitute the identities of actors, and it is these identities that drive their behavior.<sup>23</sup>

Koh argues that nations obey international law due to a process of interaction, interpretation, and internalization of international norms into domestic legal systems.<sup>24</sup> This transnational legal process claims that nation-states, international organizations, multinational corporations, NGOs, and private individuals interact in a variety of domestic and international arenas in order to make, interpret, and internalize international law. Thus, it is through this dynamic process of making, interpreting, and complying with legal norms that all relevant actors’ identities become intersubjectively shaped and constituted by the norm.

For the indigenous-rights movement, the explanation begins in the late 1960s and early 1970s when indigenous leaders in several countries began linking up transnationally in a common struggle for protection and recognition of their rights. By their dynamic interactions over time, both the indigenous movement and the states were socially constituted in certain ways. A new supranational identity called indigenous people, or indigeneity, emerged out of this process, and, at least among certain segments of indigenous peoples, this formed a new global layer of identity to indigenous peoples’ already complicated pattern of kinship, tribal, and national-minority identities.<sup>25</sup> Likewise, certain states gained an identity either as a “strong supporter of international human rights” or as a “human rights violator.” Furthermore, this dynamic interaction has begun to change the domestic political discourse in certain countries. Several states have increasingly distanced themselves from the British Crown and, during the last several decades, have enacted significant constitutional and electoral reforms to solidify their own

postcolonial identities. Thus, in order to establish a unique national identity, these countries needed to come to terms with their British colonial legacy. In distancing from the British Crown and reconciling their colonial past, these states have, to a certain extent, integrated their indigenous peoples, including a growing commitment to some indigenous rights, into their emerging national identities.

It is this dynamic interaction, constitutive of the identities of both states and indigenous people, that can most adequately explain why certain states and not others comply, and possibly “overcomply,” with human rights standards regarding indigenous people. The international indigenous movement framed its struggle within the human rights discourse even though their most desired rights were not technically included in the discourse, and, at the same time, certain states made some domestic reforms in order to enhance their identity as good stewards of human rights and reconcile their colonial legacy by adopting anticolonial stances, such as recognizing certain indigenous rights. States whose international identities were not constituted by their compliance with and advancement of human rights norms or who had no compelling desire to make postcolonial gestures during this time period (the United States, Latin America) did not make the same level of domestic reforms as other states that did develop these identities.

This constructivist explanation of “overcompliance” can also account for why a state that exhibits “overcompliant” behavior would simultaneously resist signing treaties that would commit the state to recognizing the full body of indigenous rights. There is a limit on indigenous-rights recognition that these liberal states can tolerate, which is significantly short of the standard desired by indigenous peoples. The constitutions of these liberal states are premised on the doctrines of individualism, equality, and multiculturalism that ultimately limit the possibility of fully recognizing indigenous peoples’ claims within the existing constitutional order. Even though these states are willing to make certain rights concessions to indigenous people, these concessions appear rooted in the state’s identity as a good and socially just global citizen and the state’s desire to be identified as distinct from its colonial past. By integrating indigenous identity into its emerging postcolonial state identity, a liberal state remains constrained by the doctrines of liberalism. Thus, the possibility of a full nation-to-nation relationship between indigenous nations and states in a plurinational state is excluded, or at least diminished, as a discursive possibility. Therefore, while dynamic interactive identities may compel states to “overcomply” with their human rights obligations in indigenous rights, they are likewise limited by that same dynamic. A liberal state that has integrated indi-

geneity into its postcolonial, humanitarian state identity can be expected to resist any international normative standard that would require that the state fully recognize the unique (that is, “special”) rights of indigenous peoples.

### **Empirical Cases: Australia, New Zealand, and Canada**

Beginning in the 1970s, Australian Aborigines, the Māori of New Zealand, and the native people of Canada were leading participants at the international level of indigenous activism, especially in the UN process during the 1980s and 1990s, asserting indigenous rights under an international human rights framework. Indigenous movements in all three countries used domestic and international campaigns of shame and embarrassment against the state.<sup>26</sup> The strong domestic presence of the international indigenous-rights movement and the desire of these states to be seen internationally as good stewards of human rights, coupled with changes in domestic political discourse, appears to have enabled significant changes to the status of indigenous rights in each country by the early 2000s.

#### *Australia*

Unlike other British-heritage countries with substantial indigenous populations, Australia never entered into treaties with the Aborigines but instead acquired land historically through the *terra nullius* (“empty land”) doctrine, which asserted complete Crown sovereignty over occupied lands, coupled with the denial of any indigenous rights. The *terra nullius* doctrine of “exclusive, universal and absolute beneficial ownership” of land by the Crown remained valid law under the Australian common law until 1975, when it was last referenced in court decisions.<sup>27</sup>

As Magallanes argues, “since 1975, international human-rights law has had a direct and very profound effect on Australia’s laws relating to . . . Aboriginal rights.”<sup>28</sup> Australia has ratified a number of international human rights treaties relating to indigenous peoples: the ICERD, the ICCPR, the optional protocol to the ICCPR, and ILO Convention no. 107. Australia did not ratify ILO Convention no. 169 and is therefore not technically obliged to uphold its cultural, land, and self-determination provisions. In order for Australia to be judged as compliant with its obligations under the body of ratified human rights instruments, it should be expected to honor the antidiscrimination provisions of the ICERD, the ICCPR, and the optional protocol, thus providing equal-rights protection against dis-

crimination for indigenous people as individuals and citizens of the nation.<sup>29</sup> Since it did not ratify ILO Convention no. 169, it need not be expected to honor collective indigenous rights to land or self-determination.<sup>30</sup> Yet the history of Australia's relationship with the Aborigines since 1975 demonstrates a record of "overcompliance" with its human rights obligations. It has recognized *some* collective land rights for the Aborigines and is, to a certain extent, engaged in a treaty process that potentially could respect the collective self-government rights of its aboriginal peoples.

The most monumental change in Australian law relating to aboriginal people in recent decades was the 1992 high court decision *Mabo v. Queensland*.<sup>31</sup> This decision nullified the terra nullius doctrine and recognized native title, a collective right, in Australian common law.<sup>32</sup> In the *Mabo* ruling, the justices stated that to be immune from arbitrary deprivation of property is a human right as articulated in article 5 of the ICERD, and given the Australian Racial Discrimination Act of 1975, which required all Australian citizens to be treated equally, regardless of race, it was necessary to recognize native title to land. The justices "believed that they were responding to changes in international and domestic values."<sup>33</sup> As Justice Brennan wrote in the opinion of the high court:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>34</sup>

The high court thus recognized native title to aboriginal lands under the Australian common law by invoking international human rights standards. Yet as Justice Brennan noted when referring to the *Mabo* case, "the term 'native title' [is used] to describe Indigenous inhabitants' interests and rights in land, whether communal, group or individual, under the traditional laws and customs."<sup>35</sup> Since native title adheres to the collectivity and not to individuals, the high court effectively recognized collective land rights for Aborigines, claiming that it was adhering to an international human rights standard of

nondiscrimination, which, in fact, only requires the high court to practice nondiscrimination against individuals, not collectivities. Furthermore, the court justified this move by referring to the international community's expectations of Australia, which are presumed to be high. In this ruling, the high court specifically relied on its duties to uphold the ICCPR (which it ratified), yet the substance of the ruling moves it much further: It actually places Australia in compliance with ILO 169, which it never ratified.<sup>36</sup>

What is curious about this ruling, and what, at the same time, demonstrates some of the various discursive forces at work in this case, is that native title, a group right, was protected under laws that protect only individual rights. By upholding international universal human rights and the national law of individual racial equality, Australia thus was compelled to recognize a right that lies outside the bounds of the liberal international consensus on human and also specifically indigenous rights.

A number of crucial changes in Australian demographics have also helped propel Australia toward a reconfiguration of its national identity. First, there has been an influx of immigrants during the second half of the twentieth century. Second, the ethnic composition of Australia has changed dramatically. New immigrants have come from southern and eastern Europe and various parts of Asia.<sup>37</sup> As a direct result of these changes, Australia was forced to move away from its prior identity of "white Australia" toward a more multiethnic and multicultural configuration. At the same time, Australia also began searching for its place in the post-Cold War world of globalization. As Duncan, et al., argue:

Far from being just another middle-ranking power, Australia can be a leading global citizen. Just as our UN delegation articulated in San Francisco nearly sixty years ago, the Australia that we imagine has a strong global conscience and uses its comparative diplomatic advantages to promote powerful and innovative ideas to improve the world.<sup>38</sup>

Moran argues that these demographic and other changes in Australian society have placed Australia at an identity crossroads.<sup>39</sup> He posits that the search for Australian identity is caught between two competing modes of settler-nationalist discourse. The first, which he calls assimilating, is rooted in the history of white Australia. This discourse has been dominant throughout most of Australia's history. The second, indigeneity, which emerged during the second half of the twentieth century, has attempted to come to terms with the nation's historical legacy. A cultural shift away from Great Britain

has also moved Australia to reassess its national identity and “has given rise to a new form of nationalism in a less triumphant and more self-reflective, mournful and reparative mode.”<sup>40</sup> This post-colonial Australian identity “involves a reinvention or a reclaiming of Aboriginal identities and an ongoing struggle and negotiation with the state over status, rights, and obligations.”<sup>41</sup>

The Keating government in the 1990s made an explicit goal to develop a clear and coherent Australian identity. The final report of the Council for Aboriginal Reconciliation articulated as one of its ten main principles that indigenous Australia is a central feature of Australia’s story and identity. In an analysis of Keating’s speeches and policy statements, Stokes concludes that that the major underlying issue in the reconciliation process was Australia’s international image in northern countries, especially the exclusion of indigenous people from Australian society.<sup>42</sup>

Robert Tickner, who served as minister for aboriginal and Torres Strait Islander affairs during the 1990s, claimed that the reason for reconciliation was

to contribute to the political momentum of the struggle for indigenous rights by setting up a process that would finish on 1 January 2001 and that would put considerable national and international pressure on the nation to address the human rights of indigenous people as a precondition of any proper celebration of Australian nationhood in 2001.<sup>43</sup>

In a popular book on reconciliation, written specifically for the Australian audience, Habel describes the reconciliation process as a “search for the soul of Australia.” He writes: “The way to the soul of Australia is a pilgrimage back through the landscape, through the stories, through suppressed memories to sites of resistance and suffering, the silent sacred places in Australia’s history.”<sup>44</sup> His dream is “of a mature country transcending the ‘shadow’ of Britain, and celebrating Australia’s identity as an equal player on the world stage.”<sup>45</sup> In other words, the way toward a unique and legitimate Australian identity is to embrace that which is distinctly Australian, and what could be more distinctively Australian than its indigenous people? As Duncan and associates wrote, “To make reconciliation work, Australians need to understand the Indigenous story and weave it throughout the national story.”<sup>46</sup>

In his book on the reconciliation process, Habel makes a crucial discursive move that demonstrates how this explanation for “overcompliance” has the potential to push the bounds of indigenous rights.<sup>47</sup> Habel notes that in order to cope with its past and

find the “substance of being Australian,” the nation must not just reconcile itself to its past, but must fully *embrace* aboriginality. He notes that

embracing extends beyond celebrating Aboriginal arts, music and mystery as exotic additions to our cultural displays. Embracing as an act of reconciliation means embracing the other party as “other”; it means respecting and celebrating the difference.<sup>48</sup>

Habel argues that “policies of rejecting, trivialising, ignoring and assimilating the ‘other’ as practiced in the past all failed to respect the existence of the ‘other.’” Rather, he advocates a new policy approach—one that will treat the “other,” the Aborigine, as equal in value and significance to “civilised Australians.”<sup>49</sup> In liberal thought, to be equal also means to give consent to be governed. Therefore, aboriginal Australia must be granted the opportunity to choose its own form of governance, even if that means the existence of an alternative form of sovereignty within the Commonwealth of Australia. Therefore, while “overcompliance” in Australia to date has remained limited by the framework of the liberal Westphalian state, it is these very same forces at work that have the potential to push the state even further, toward better acceptance of the full spectrum of indigenous land and genuine self-determination rights.

### *New Zealand*

Unlike Australia, the relationship between the Māori and the Crown has never been defined by the *terra nullius* doctrine. New Zealand signed a treaty with the Māori in 1840, the Treaty of Waitangi, that is considered the founding document of New Zealand. The treaty was originally intended to grant sovereignty to the Crown, and in exchange the Māori were to receive full possession of and self-government over their traditional lands.<sup>50</sup> Over time, however, the relationship between the Māori and New Zealand became one focused upon Māori social welfare and assimilation of the Māori into New Zealand society, which New Zealand liked to claim was completely free of racial tension.<sup>51</sup>

New Zealand is a country that takes its international reputation and its international human rights obligations very seriously. New Zealand has ratified numerous human rights instruments, including the ICERD, the ICCPR, and the optional protocol to the ICCPR. New Zealand has also passed a number of domestic legislative acts to uphold its international human rights obligations to nondiscrimination.<sup>52</sup> New Zealand did ratify ILO no. 107, but not ILO no. 169,

so under its ratified instruments, New Zealand is obligated to respect the equality of the Māori as citizens of New Zealand and take positive steps to ensure nondiscrimination of Māori as individual citizens of New Zealand but is not obligated under international human rights law to uphold indigenous land and self-determination rights. But, the transnational mobilization of the Māori-rights movement, coupled with New Zealand's interest in maintaining its positive international reputation, and an important shift in domestic discourse relating to the 1840 Treaty of Waitangi have all enabled New Zealand to uphold certain indigenous land and self-determination rights.

From the 1970s onward, the Māori increasingly invoked a discourse of indigeneity, including resurrection of an ancient mantra, *Tino Rangatiranga*, which, while subject to various interpretations, is often understood to mean Māori power, self-determination, Māori control over Māori things.<sup>53</sup> The New Zealand government seemed to be aware of international scrutiny and was increasingly wary of making any move to reduce Māori rights. At the same time, New Zealand faced some of the same internal and external pressures as Australia did to find its distinct identity in an increasingly globalized world, although New Zealanders also sought to distinguish themselves from Australians. "Many New Zealanders still distinguish themselves from their trans-Tasman neighbors by superior sporting prowess, gentility, closer ties with Britain, or sensitivity to Indigenous issues and the possession of a treaty."<sup>54</sup> Given the Māori challenge to its foundational myth of *he iwi kotahi tatou* ("we are one people") and its self-image as a society of racial harmony, New Zealand was compelled toward a bicultural identity as originally articulated in the Treaty of Waitangi.<sup>55</sup> As in Australia, this shift in the national narrative involved an integration of indigeneity into the national identity, an integration which is reflected in the change in the discourse surrounding the Treaty of Waitangi. As Denoon and Mein-Smith (2000) suggest:

Multiculturalism then challenged the dichotomy of biculturalism. Moving beyond Maori-Pakeha (European) relations required first settling them. In the sequelae to Waitangi, the treaty and the treaty principles re-established themselves, at least at the level of political identity, and the treaty claims began to produce results.<sup>56</sup>

In 1975, New Zealand passed the Treaty of Waitangi Act, which after 135 years finally "accorded some effect to the Treaty."<sup>57</sup> The act created the Waitangi Tribunal, which is not simply a land-claims settlement tribunal. Reports and recommendations range from monetary settlement for old land claims to return of disputed

lands. Although the tribunal does not have direct enforcement powers, its recommendations impact the actions of all three branches of the New Zealand government.

During the 1980s, a series of legislative changes and high court decisions fundamentally altered the very nature of the New Zealand constitution and the Maori's place in it. First, the Constitution Act of 1986 formally constitutionalized the Treaty of Waitangi and officially broke with the old imperial order. Second, the Māori Language Act of 1987 made Māori an official language of New Zealand, which reflected the increased presence of binationalism in New Zealand's domestic discourse. In addition to these legislative acts, decisions were also handed down by various New Zealand courts recognizing and upholding Māori fishing rights as part of their self-determination status articulated in the Treaty of Waitangi.

### *Canada*

Canada stands apart from Australia and New Zealand in indigenous-rights compliance and can best be described as a paradox. On the one hand, it is viewed internationally as a beacon of engaging with indigeneity, touting its "Canadian way" of various cultures living side by side harmoniously within Canadian society. On the other hand, Canada is highly criticized for failing to match its ideals with reality when it comes to respecting the rights of its indigenous people. While Canada maintains an international reputation for engaging indigeneity, it is also widely renounced for mistreating indigenous peoples.

In 1982, Canada ratified its new constitution, which included the Canadian Charter of Fundamental Rights and Freedoms. Significantly, s. 35 (1) of the Canadian Constitution provides constitutional protection for "any existing Aboriginal right." From the indigenous perspective, this constitutional protection, while valuable, does not go far enough since it only protects the rights secured up until that point in history. It does not include protections for indigenous collective land ownership and self-determination. Therefore, aboriginal First Nations in Canada have worked in the international sphere since the 1970s, attempting to use international pressure to encourage the Canadian government to recognize further indigenous rights to land and self-determination.

Like Australia and New Zealand, Canada never ratified ILO no. 169. Yet, during the past several decades, Canada also enacted certain domestic policies that brought it into at least partial compliance with some of the provisions of ILO no. 169. Several land and self-government agreements have been negotiated across Canada.

Further, in 1995 the Canadian government adopted a policy that recognized the inherent right of First Nations to self-government. While these changes in Canadian law can be partially attributed to domestic rather than international politics, it is important to note that First Nations from Canada have deliberately sought to draw international attention to their concerns in order to embarrass the Canadian government, a government that relies on its good international reputation to define its identity.

The primary difference between Canada, on the one hand, and Australia and New Zealand, on the other, is that Canada has not integrated indigeneity into its state identity to the same extent as Australia and New Zealand. As Kernerman observes:

The defining narrative of Canada is of an unwieldy political project, always in search of unity and forever attempting to constitute itself as a political community. . . . The results are a continued preoccupation with determining their common identity *as Canadians* and a fixation on the sources of cohesion that will, at minimum, hold them together as members of a single political community.<sup>58</sup> (emphasis in the original)

Canadians aim to stake out their unique place in the world not just by separating themselves from Great Britain but also by separating their identity from that of the United States.<sup>59</sup> While a primary cleavage in both Australia and New Zealand is between indigenous and nonindigenous, this is not the case in Canada, where there are two primary domestic cleavages (i.e., French- and English-speakers; indigenous and nonindigenous.) The Canadian challenge, then, is to find unity in its diversity.<sup>60</sup> Thus, in celebrating its diversity, Canada has not integrated indigeneity into its identity in the same manner as Australia and New Zealand have. As a result, their record of indigenous-rights compliance has not advanced to the same extent as that in Australia and New Zealand.

\* \* \*

As the empirical cases of Australia, New Zealand, and Canada have demonstrated, domestic reforms recognizing a certain measure of indigenous peoples' rights to land and self-determination have been achieved through an interactive dynamic process of (1) strong participation by domestic indigenous groups in the international indigenous-rights movements, (2) a state identity constituted as a good and socially just global citizen, and (3) changes occurring in the state's domestic discourse as it seeks to locate its own postcolonial identity in a globalized world. Several conclusions follow from this finding.

First, this research must be expanded to encompass a wider range of cases, including cases from other governmental systems, in order to more fully investigate the role played by domestic political structure.

Second, this unique combination of explanatory factors seems highly contextual. It has achieved a high degree of success in only a handful of countries over the course of more than thirty years and does not initially appear to be a process that is widely generalizable since “overcompliance” seems to rely partially upon the state’s global identity as being good and socially just.

Third, this explanation for state “overcompliance,” especially the element involving a discursive shift in state identity, places the indigenous-rights movement in a dilemma. The indigenous movements in Australia and New Zealand have experienced their level of success at least in part through the integration of indigeneity into the nation’s emerging identity, a discursive move that not only challenges indigenous peoples’ effort to retain their distinctiveness in society but also renders incomplete the indigenous-rights victories gained to date. While the inroads made are important, it is also critical that the indigenous movement recognize the possible limits of this discursive environment. Full and meaningful self-determination for indigenous peoples requires that the state move beyond the model of the liberal Westphalian state in order to accept a legitimate nation-to-nation relationship with indigenous nations, reflecting a shared sovereignty arrangement reached either through treaties or new constitutional orders. As an international normative standard that incorporates this understanding of indigenous nations, the United Nations Declaration on the Rights of Indigenous Peoples is a critical first step in this process, but it is not enough to secure indigenous rights.

Finally, a new discourse is needed at the international level. Because the international human rights framework is inherently liberal in character and based upon individual rights, indigenous rights are not yet human rights under the existing legal framework and discourse. While most of the UN declaration addresses the rights of indigenous peoples as individuals, it is the articles that pertain to collective land or self-determination rights that can be problematic. Achieving a meaningful nation-to-nation relationship between indigenous nations and the state thus requires a discursive shift at the international level to include a postliberal, plurinational conception of the state. By placing additional international moral pressure on “overcompliant” states that are concerned about their international standing and engaged in a search for their unique identity, the international indigenous-rights movement has the potential to push the

international-rights discourse to better accommodate the full spectrum of indigenous rights. In order for liberal states to resolve their inner identity conflicts, states must ultimately listen to and accommodate indigenous viewpoints on what true reconciliation should look like. With enough moral pressure, the very nature of liberalism should ultimately compel such states to accept the full spectrum of indigenous rights since the liberal concepts of equal treatment and government by consent necessitate that indigenous views not only be heard but accommodated in a consent-based, nation-to-nation, shared sovereignty arrangement between states and indigenous nations.

### Notes

1. Indigenous people are defined by the United Nations as meaning a group of people who were (1) the first occupants of the land; (2) colonized; (3) subordinated by or incorporated into alien states in their original territory and, as a result, became marginal to or dominated by the state that claims jurisdiction over them; and (4) remain culturally distinct from the dominant society. Because some of these criteria can also apply to other national minorities that are not indigenous, both the United Nations and the ILO rely on self-definition as an essential element of indigeness.

2. The first international treaty dealing with indigenous issues, *International Labor Organization (ILO) Convention no. 107 on Indigenous and Tribal Populations Concerning Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, was passed in 1957. Drafted and passed without indigenous participation, this convention became criticized later for its paternalistic tone. States that ratified ILO no. 107 pledged to “protect” indigenous populations against discrimination and other social ills and also committed the state to assist indigenous populations toward “progressive integration into the life of their respective countries.”

3. *ILO Convention no. 169, Concerning Indigenous and Tribal Peoples in Independent Countries*, was passed in 1989. No. 169 represents a significant advance over the paternalistic tone of no. 107. It no longer presumes the eventual disappearance or assimilation of indigenous peoples, as no. 107 did. Rather, it includes provisions for some collective land rights and political self-determination.

4. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, or “the declaration”) was passed by the United Nations General Assembly on September 13, 2007. As a UN declaration, UNDRIP is not yet an international convention and is not considered to be international law, but it does represent a normative international consensus on the rights of indigenous peoples. It should be noted that the three states examined here—Australia, New Zealand, and Canada—are among only four states that voted against the UNDRIP in the General Assembly.

5. Existing IR compliance literature falls into three basic explanatory categories: instrumental rationalist, liberal, and constructivist. Each of these theories attempts to explain only patterns of state compliance or

undercompliance with international treaties, law, or norms. International relations currently lacks an effective framework to deal with a state that simultaneously complies with an international norm while opposing it as international legal standard.

6. The terminology I use to articulate state identity (“good global citizen”) is taken directly from contemporary Australian discourse. The same type of sentiment is echoed in New Zealand and Canadian representations of state identity, although the precise verbiage differs in each country.

7. Andree Lawrey, “Contemporary Efforts to Guarantee Indigenous Rights under International Law,” *Vanderbilt Journal of Transnational Law* 23, no. 4 (1990): 703–777; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1998); Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1996).

8. Indigenous conceptions of land ownership are distinct from Western conceptions of land ownership and land title. While the Western model of land ownership means that an individual has a property right to buy, sell, and control land as a commodity, indigenous conceptions of land have a cultural and spiritual character. They invoke a mutual responsibility and relationship between the land and the people. Indigenous conceptions, therefore, require collective land rights in order to ensure the survival of indigenous peoples’ culture, spiritual life, and identity.

9. Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Juris Publishing, 2002), pp. 874–875.

10. E.-I. A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” in S. J. Anaya, ed., *International Law and Indigenous Peoples* (Burlington, Vt.: Ashgate, 2003), p. 375.

11. The body of human rights law relevant to indigenous peoples includes the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Convention on Civil and Political Rights (ICCPR); and the optional protocol, the International Convention on Economic, Social, and Cultural Rights (ICECR); International Labor Organization (ILO) Convention no. 107; and, the most advanced human rights instrument in terms of indigenous-rights protection, ILO Convention no. 169. As mentioned in note 4, the newly passed UN Declaration on the Rights of Indigenous Peoples is a UN declaration, and not yet a convention. Therefore, it is not yet a part of the body of international law on indigenous rights.

12. Again, these states should not be considered as champions of indigenous rights. On the contrary, each of these states has been widely criticized for their mistreatment of indigenous peoples and their inattention to indigenous rights. This article is merely examining a state’s policy behavior in light of its legal and normative commitments.

13. Arendt Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, Conn.: Yale University Press, 1999). As Lijphart argued, minorities in parliamentary, proportional-representative systems have better representation than they receive in presidential and single-member district plurality systems, as are found in countries like the United States and many countries in Latin America.

14. Sigfried Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis,” in S. James Anaya, ed., *International Law and Indigenous Peoples* (Burlington, Vt.: Ashgate Publishing, 2003), p. 26–33.

15. Frank Orton and Hugh Beach, "A New Era for the Saami People of Sweden," in *Human Rights of Indigenous People*, ed. Cynthia P. Cohen (Ardsey, N.Y.: Transnational Publishers, 1998).

16. David E. Wilkins, *American Indian Politics and the American Political System*, 2d ed. (Lanham, Md.: Rowman & Littlefield, 2006).

17. *Ibid.*

18. D. Alves, *The Māori and the Crown: An Indigenous People's Struggle for Self-Determination* (Westport, Conn.: Greenwood Press, 1999).

19. Harold Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106, no. 8 (1997): 2599–2659; Abram Chayes and Antonia Chayes, "On Compliance," *International Organization* 47, no. 2 (1993): 175–205; George W. Downs, David Rocke, and Peter Barsoom, "Is the Good News About Compliance Good News About Cooperation?" in Lisa Martin and Beth A. Simons, eds., *International Institutions: An International Organization Reader* (Cambridge, Mass.: MIT Press, 2001), pp. 279–306.

20. Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy," *The American Journal of International Law* 92 (1998): 414–457.

21. Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, no. 4 (1997): 514–553; Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law* 6, no. 4 (1995).

22. Kingsbury, note 20.

23. Koh, note 19.

24. *Ibid.*

25. Ken S. Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Hampshire: Palgrave Macmillan, 2004); Duncan Ivison, Paul Patton, and Will Sanders, introduction to Ivison, Patton, and Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000); Ronald Neizen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003).

26. Neizen, *ibid.*

27. Wiessner, note 14, p. 272.

28. C. J. I. Magallanes, "International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand," in P. Haveman, ed., *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 1999), p. 245.

29. *Ibid.*

30. Allison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford: Stanford University Press, 2000).

31. *Mabo v. Queensland* (no. 2) [1992] HCA 23; 175 C.L.R. 1 (3 June 1992) F. C. 92/014.

32. Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence," *Saskatchewan Law Review* 61, no. 2 (1998): 247–276.

33. *Ibid.*, p. 263.

34. *Mabo v. Queensland*, note 31, pp. 28–29.

35. Peter Butt and Robert Eagleson, *Mabo: What the High Court Said and What the Government Did*, 2d ed. (Sydney: Federation Press, 1996), p. 40.

36. Lee Swepston, "The Indigenous and Tribal Peoples Convention (no. 169): Eight Years after Adoption," in Cohen, note 15.

37. Andrew Markus, *Race: John Howard and the Remaking of Australia*

(Crows Nest, NSW: Allen & Unwin, 2001), pp. 11–12.

38. MacGregor Duncan, et al., *Imagining Australia: Ideas for Our Future* (Crows Nest, NSW: Allen & Unwin, 2004), p. 229.

39. Anthony Moran, “The Psychodynamincs of Australian Settler-Nationalism: Assimilating or Reconciling with the Aborigines?” *Political Pyschology* 23, no. 4 (2002): 667–701.

40. *Ibid.*, p. 670.

41. *Ibid.*

42. Geoffrey Stokes, “Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Thought,” in Geoffrey Stokes, ed., *The Politics of Identity in Australia* (Cambridge: Cambridge University Press, 1997), pp. 158–174. The fact that Stokes concludes that Australia is most concerned about its image in northern countries is symptomatic of the one-sidedness of reconciliation discourse in Australia. The primacy of concern with northern countries’ opinion of Australian policy behavior vis-à-vis indigenous peoples demonstrates the limits of this discourse. Rather than seeking a true cosmopolitanism and a genuine equality with indigenous peoples or developing nations, Australia continues to operate under the presumption of the superiority of Western culture, discourses, and forms.

43. Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen & Unwin, 2001), p. 33.

44. Norman C. Habel, *Reconciliation: Searching for Australia’s Soul* (Sydney: Harper Collins, 1999), p. 152.

45. *Ibid.*

46. Ivison, et al., note 25, p. 33.

47. Habel, note 44.

48. *Ibid.*, p. 155.

49. *Ibid.*, pp. 155–156.

50. Wiessner, note 14, p. 270.

51. Alves, note 18; Paul Havemann, ed., *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2000).

52. These acts include the Race Relations Act of 1971, the Human Rights Commission Act of 1977, and the New Zealand Bill of Rights Act of 1990. See Magallanes, note 28.

53. R. Maaka and A. Fleras, “Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa,” in Ivison, Patton, and Sanders, eds., note 25, p. 99.

54. Donald Denoon and Philippa Mein-Smith, *A History of Australia, New Zealand, and the Pacific* (Oxford: Blackwell, 2000), p. 451.

55. F. M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law, and Legitimation* (Auckland: Auckland University Press, 1999); J. Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment* (Auckland: Auckland University Press, 1995).

56. Denoon and Mein-Smith, note 54, p. 461.

57. Wiessner, note 14, p. 271.

58. Gerald Kernerman, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (Vancouver: University of British Columbia Press, 2005), p. 13.

59. Philip Resnick, *The European Roots of Canadian Identity* (Peterborough, Ont.: Broadview Press, 2005).

60. Kernerman, note 58, pp. 15–16.