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978-1-107-02244-7 - Indigenous Rights in the Age of the UN Declaration

Edited by Elvira Pulitano

Excerpt

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Indigenous rights and international law: an introduction

ELVIRA PULITANO

The reality of human rights provisions is more literary irony than protection. Yet, the declaration is a profound source of endurance in native stories, creative literature, and the everlasting narratives of survivance.

Gerald Vizenor, "Genocide Tribunals"

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration), bringing to a conclusion a period of negotiations between nation states and indigenous peoples which had lasted nearly twenty-five years. By a vote of 143 in favor, with 11 abstentions and 4 against (Australia, Canada, New Zealand, and the United States), the Declaration defines the individual and collective rights of millions of indigenous peoples worldwide, and underscores the General Assembly's crucial role in setting international standards and moral and political and, at times, legal guidelines for states.¹ Unanimously celebrated as a landmark achievement for indigenous peoples and the UN system, the Declaration represents a momentous success for international law as well. For Claire Charters and Rodolfo Stavenhagen, "the Declaration is the most comprehensive and advanced of international instruments dealing with indigenous peoples' rights," and the fact that indigenous peoples, the "right bearers themselves," played a crucial role in the negotiations over its content, makes it "a first

¹ According to the UN Permanent Forum on Indigenous Issues (UNPFII), "more than 370 million indigenous people [currently live] in some 90 countries worldwide" (About UNPFII). UN official figures, however, are approximate, as these numbers are based on information provided by states and do not account for indigenous peoples not included in official state censuses. I am indebted to Mililani Trask for this information. The UNPFII is one of the three UN bodies responsible for dealing with indigenous issues. Established in 2000 by United Nations Economic and Social Council (ECOSOC) Resolution 2000/22, it reflects the growing concern on the part of the human rights organs and bodies of the UN over the plight of indigenous peoples (About Us/Mandate).

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in international law” (“UN Declaration” 10). In April 2009, at the Durban Review conference, 182 states from all regions of the world issued a document in which they “Welcome[d] the adoption of the UN Declaration on the rights of indigenous peoples which has a positive impact on the protection of victims and, in this context, urge[d] States to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination” (Outcome Document para. 73).

Since the moment of adoption, the four countries that originally voted against the Declaration have changed their position. In April 2009 Australia officially endorsed the Declaration, a decision considered an important symbolic step towards rethinking the relationship between indigenous and non-indigenous Australians. In April 2010 New Zealand declared its support for the Declaration, followed in November and December by Canada and the United States respectively. In a fifteen-page document explaining the US government’s position on the Declaration and discussing recent initiatives on Native American issues, it is stated that the Declaration “expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the US Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies” (Announcement).² While referring to the fact that the Declaration is not a legally binding document, the United States acknowledges its moral and political force and would appear to be open to the possibility for improvement in laws and policies regarding indigenous rights.³ Within this context, supporters of the Declaration are correct in welcoming it as an unprecedented opportunity for the international community to promote and confirm the collective rights of indigenous peoples in the twenty-first century. Within a month of its adoption, S. James Anaya, at the time of writing UN Special Rapporteur on the rights of indigenous peoples, and Siegfried Wiessner, now chair of the International Law Association’s Committee on the Rights of Indigenous Peoples, celebrated the Declaration as “a milestone in the re-empowerment of the world’s aboriginal groups.” In their influential op-ed piece in the *Jurist*, they also stated that, in important parts, such as the rights to culture, self-determination, and land, the

² A closer look at the language of the Announcement, however, invites a cautious response as to what exactly the United States’ support of the Declaration means. See Glenn Morris’s commentary in *Indian Country Today* (“Still Lying”).

³ I elaborate on the legal status of the Declaration later on in this chapter.

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Declaration also “reaffirms customary international law in the field” (Anaya and Wiessner).

The importance of the Declaration as an instrument of international law has drawn further scholarly attention, thanks to a growing body of literature devoted to its critical assessment; *Making the Declaration Work*, published in 2009 by the International Working Group of Indigenous Affairs (IWGIA), based in Copenhagen, was the first collection of essays produced by some of the participants directly involved in the drafting and adoption of the Declaration. Edited by Claire Charters and Rodolfo Stavenhagen, the volume “tells the story of the Declaration from the inside” while reflecting on “its broader social, cultural, and political significance into the future” (“UN Declaration” 11). For Stavenhagen, the Declaration “has opened the door to indigenous peoples as new world citizens” (“Making the Declaration Work” 355); whereas for Claire Charters the legitimacy of the Declaration, as a result of procedurally legitimate processes, fair content, and level of engagement, will obligate states to effect its provisions (“Legitimacy” 280, 298). *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011), edited by Stephen Allen and Alexandra Xanthaki, also situates the Declaration within the context of international law while offering an in-depth institutional, thematic, and regional analysis of its content. Both collections raise interesting questions with regard to implementation and reflect on the significance of the Declaration for the governance of states. In the words of Allen and Xanthaki, the adoption of the Declaration represents “the beginning of a new phase in the debate on indigenous rights. Having focused on the coherence of indigenous claims within current international law, discussions should now turn to the challenges that the Declaration faces as well as the ones that the Declaration poses” (*Reflections* 7).⁴

Indigenous Rights in the Age of the UN Declaration contributes to the ongoing scholarship on the Declaration by advancing some of the discussions aforementioned. Specifically the volume interrogates whether international law, as illustrated in UNDRIP, is an instrument that indigenous peoples can use effectively for their emancipation and cultural

⁴ An additional collection, *Indigenous Voices: The Declaration on the Rights of Indigenous Peoples* (2011), edited by Claire Charters, Les Malezer, and Victoria Tauli-Corpuz, is forthcoming in 2013. For additional legal assessments of UNDRIP, see Wiessner, “Indigenous Sovereignty”, Odham and Frank, and, most recently, the Interim Report issued by the International Law Association Committee on the Rights of Indigenous Peoples (hereafter ILA Interim Report). This committee is entrusted with the mandate to write an authoritative legal commentary on the Declaration and on indigenous peoples’ rights in general.

flourishing, and whether or not the quintessentially Eurocentric nature of international law can be changed upon considering indigenous epistemologies and perspectives. With an interdisciplinary orientation ranging from legal to anthropological to literary perspectives and indigenous worldviews, the volume targets both specialized academic audiences and a general public, located mostly (but not necessarily) in North America and/or Europe and whose knowledge of indigenous histories and cultures remains significantly limited. As Kathleen Martin points out in her contribution when discussing specifically the United States context, “the struggle between Western and Native views with regard to ownership and land use continues to reveal ‘cultural differences and conflicts’” (Chapter 7). In most cases, Martin suggests, these cultural misperceptions originate from past governmental actions against indigenous peoples. Even though it might be argued that the utmost disrespect for indigenous peoples’ rights has been prompted by vested economic and political interests, it is undeniable that a general lack of education on indigenous histories and cultures as well as a public attitude based on individual rights has resulted in governments’ policies aimed at ignoring indigenous peoples’ claims to self-determination. As has been contended by the main actors involved in the development of the Declaration, indigenous legal perspectives and cultures need to be taken into account if international law is to be reoriented away from its Eurocentric origins. Contributors to this volume evaluate the extent to which the Declaration represents the beginning of a new phase in the debate of indigenous rights and the potential that this landmark document has in affirming indigenous self-determination. Important as it is, they argue, the Declaration by itself will not produce significant change in the everyday lives of the millions of indigenous peoples whose rights it purports to affirm. Change will ultimately come only if states, the general public, and the international community join together with indigenous peoples themselves to make decisions and carry out programs that might indeed benefit indigenous peoples at the grassroots level.⁵ Such positive decisions have already been made in many parts of the world, by both domestic legislators and judges and by international human rights bodies, and contribute to an ever denser global quilt of state practice and *opinio juris*. UN Special Rapporteur James

⁵ A similar view was expressed by the Office of the High Commissioner for Human Rights and the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples at the 2008 International Day of the World’s Indigenous Peoples (International Day).

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Anaya, in particular, without contestation, measures state conduct using the legal “yardstick” of the Declaration (ILA Interim Report 5).

Unlike previous studies, this book also includes the literary perspective of indigenous writers on some of the issues discussed in the Declaration, setting up an interesting conversation between literature and law, theory and practice, legal discourse and lived experience. In the North American context specifically, Gordon Henry, Jr. (Anishinaabe), Thomas King (Cherokee), and Gerald Vizenor (Anishinaabe) among others have written with unrelenting humor about questions of repatriation of remains, museum collections, and ownership (the subject of Articles 11 and 12 of the Declaration), always upholding the centrality of stories to affirm Native histories and identities.⁶ Whereas Western legal discourse is skeptical of the validity of stories and oral testimony as admissible evidence, Vizenor forcefully contends that stories have allowed individuals such as Charles Aubid, during a dispute with the federal government over the regulation of wild rice in Minnesota, to affirm “his *anishinaabe* human rights and sovereignty” (“Genocide Tribunals” 131). “Stories are wondrous things,” Thomas King also states. “And they are dangerous” (*Truth* 9). So many stories have been told about Natives in North America that it is difficult to distinguish between (real) Natives and imaginary Indians. Yet, King states, “for those of us who are Indians, this disjunction between reality and imagination is akin to life and death” (*Truth* 54). Native American writers have been challenging imaginative constructions of *indianness* with stories that assert the presence of Native people on the American continent.⁷ Against Western narratives of assimilation, termination, and conquest, Native writers tell stories of resilience and survival, stories that interrogate the past, make sense of the present, and imagine the future. In the specific context of the Declaration, Native writers continue to tell stories that affirm “the inherent dignity” and “inalienable rights” of indigenous peoples. These stories are also part of the debate on indigenous rights that the Declaration has contributed to fueling. And they deserve to be heard.

⁶ My use of the term “Native American” (capitalized) in this study reflects commonly accepted usage among the writers whose work is the subject of analysis. The term “American Indian” is also currently accepted in the United States and is the term that Lee Schweninger uses in his contribution on repatriation and museum ownership. As for the use of the term “indigenous,” this study adopts the “working definition” of indigenous peoples contained in the study by Martínez Cobo. I discuss the contested nature of the definition (or lack thereof) of the term “indigenous” in the Declaration below.

⁷ Vizenor challenges representation of Native identity as “*indian*” by insisting that the term be spelled lower case and in italics. The word “*indian*,” he says, is “a colonial enactment . . . [a] simulation that has superseded real tribal names” (*Manifest Manners* 11).

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The reality of human rights, Vizenor argues in “Genocide Tribunals,” quoted in the epigraph to this chapter, is a rather ironic discourse for indigenous peoples, upon considering that blatant violations and down-right denial of the most basic human rights have characterized the lives and experiences of indigenous peoples throughout history. At the same time, however, human rights provisions, as they were enunciated in the Universal Declaration of Human Rights (UDHR) and as they have now been reaffirmed in the UNDRIP, have inspired indigenous peoples to fight for the right of self-determination against ongoing attempts at assimilation and the eradication of their cultures.

From a broad historical perspective there is indeed a certain irony in the fact that the Declaration is framed in the language of international human rights law, the same law that legitimized the superiority of imperial colonial powers and the destruction of indigenous cultures. But international law is not immune to change any more than any other system of legal norms. The irony that various commentators have detected upon assessing the idiom of the Declaration might instead be welcomed as a significant change of direction in the legal tradition of states. According to H. Patrick Glenn, the Declaration plays a key role in moving international law “away from its original founding purpose and more open to non-state priorities, a movement recently described as ‘humanizing’” (“Three Ironies” 174). In this sense the Declaration represents a significant shift in “the nature and direction of international law itself” (ibid. 174). In juxtaposing different truths, the Declaration, Glenn concludes, points to the possibility of the existence of “different types of law in the world” (ibid. 182). By demanding that the same human rights and freedoms contained in various UN human rights instruments be now extended to indigenous peoples, indigenous peoples in or through the Declaration have written the latest chapter in what Vizenor calls “the everlasting narratives of survivance” (“Genocide Tribunals” 156).

Whereas the two previously published collections have drawn attention to discussions on indigenous peoples’ rights in an international framework by addressing regions such as Africa, Asia, the Arctic, and northern Europe, this volume has more of a North American focus.⁸ Yet it could be argued that the North American angle of the essays presented here is representative of the status of most indigenous peoples globally. Indigenous

⁸ And yet even these previous studies are limited in the kind of “global” reach they cover. Allen and Xanthaki, for instance, made the decision to “give priority to regions that have not been the focus of the literature on indigenous rights to date” (*Reflections* 6).

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peoples in North America comprise Federally Recognized Tribes and Status Tribes, unrecognized tribes and groups, some of which are mixed-blood (part white, Metis, Kanaka), while others are tribes recognized by states but not by the federal government.⁹ Clearly the status issue is going to play a key role in the implementation of the Declaration. Moreover, given the fact that the strongest opposition to the Declaration came from the United States and Canada and that these two governments continue, despite the recently announced endorsement, to oppose implementation in critical international arenas such as economic development and natural resources, it is most likely that their policies, clearly determined by their vested interests, are going to have an impact on other indigenous peoples from other regions.¹⁰

A closer look at the language of the Announcement of US support for the Declaration reveals significant ambiguities about what exactly the United States' pronounced support of the Declaration means. For example, when it comes to strengthening the government-to-government relationship with tribes, the announcement states: "the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, *but not necessarily the agreement of those leaders*, before the actions addressed in those consultations are taken" (Announcement, emphasis added). Yet the Declaration affirms the principle of participation of indigenous peoples in matters that concern their internal affairs by stating that their "free, prior, and informed consent" must be obtained before states can adopt legislative measures that affect them (Articles 19, 32).¹¹ In light of these ambiguities, the North American focus of this collection, both geographically and in terms of how international law and the Declaration are perceived, provides an essential context for considering ways in which the Declaration could in the near future be used to influence the development of national laws and policies on indigenous issues. Upon considering the regional orientation of the collection as a whole (including the important

⁹ The Kanaka Maoli of Hawaii, for instance, belong to the category of unrecognized people without any authority to command land and/or other rights, a privilege which is granted to the other Federally Recognized Tribes in the country.

¹⁰ I am indebted to Mililani Trask for pointing out the importance of the status issue for the indigenous peoples of North America and the way in which it factors into the Declaration (Message to the Author, 26 April 2011).

¹¹ On the political participation recognized by UNDRIP, see s. 4 of the ILA Interim Report.

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contribution on Australia's Northern Territory's recent policies affecting Aboriginal people), it is all the more interesting to observe that three of the four major countries to have endorsed the Declaration lately are also those that continue to oppose broad claims to self-determination on the part of their indigenous peoples.

A long and complex document, with a preamble and 46 articles, the Declaration recognizes the wide range of basic human rights and fundamental freedoms of indigenous peoples. It addresses topics as diverse as the indigenous peoples' inalienable collective right to the ownership, use, and control of lands, territories, and natural resources; their right to maintain and develop cultural and religious practices; their right to establish and control their educational systems; their rights to traditional medicine and cultural and traditional knowledge (intellectual property rights). The Declaration also recognizes the controversial "right to redress," whether in the form of monetary or land compensation, for the lands, territories, and resources which indigenous peoples "have traditionally owned or otherwise occupied or used"; it affirms in Article 3 a broad right to self-determination although cabined by references to internal and local affairs (Article 4) and the territorial integrity of states (Article 46). Central to all these issues is the question of the indigenous peoples' right to self-determination under international law, an issue where the positions of government representatives and indigenous peoples may be seen as incommensurable.¹² Arguably, there is discrepancy between Article 3, which, as stated, affirms the right to self-determination, and Article 46, which safeguards the "territorial integrity or political unity of sovereign independent states." Originating in the language of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of Article 46 are standard in international law. According to Mililani Trask, international law provides that "States have the right to exist as long as they recognize the right of self-determination of peoples" (Message, 3 April 2010).¹³ For James Anaya the

¹² Although many of the rights set out in the Declaration are collective in nature, framed in the terms "indigenous peoples have the right ...," references to the rights of individuals to enjoy all human rights and fundamental freedoms guaranteed in the UN Charter add to the controversy surrounding the nature and content of the Declaration. In most cases, as James Anaya notes, both sets of rights tend to coincide ("Right" 193). For Anaya and other prominent indigenous rights advocates, the Declaration substantiates the principle of self-determination and related human rights historically denied to indigenous peoples. See also Schulte-Tenckhoff's chapter in this volume.

¹³ A renowned attorney with expertise in international and human rights law, Mililani Trask was appointed as the Pacific representative to the Permanent Forum on Indigenous

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tension between self-determination and state sovereignty doctrine provides “an animating force for efforts toward reconciliation.” He writes:

While state sovereignty doctrine limits the application of self-determination norms through the international system, the limitations are conditional and should not be considered as incompatible with, or debilitating to, self-determination values. Ideally, sovereignty doctrine and human rights precepts, including those associated with self-determination, work in tandem to promote a stable and peaceful world. (“Right” 196)

Yet when it comes to the Declaration it is far from clear in what sense states are going to accept the right of self-determination for indigenous peoples. It is often reiterated that indigenous peoples do not seek secession but a degree of autonomy and self-government within the state in which they live. In other words, they are more interested in exercising the right of *internal* rather than *external* self-determination. This, however, does not preclude the argument that they might pursue secession in appropriate cases. As stated in the Interim Report of the International Law Association (ILA) Committee on the Rights of Indigenous Peoples (2010), “under general international law indigenous peoples who find themselves in such a condition have the right to pursue secession. In this and other self-determination-related-respects, indigenous peoples must be exactly considered as all other peoples” (10). Self-determination for indigenous peoples often entails the right to determine their own destiny and govern themselves or, in the words of Mme Erica Irene Daes, the former chair of WGIP, “to live well and humanly in their own ways” (“Concepts of Self-Determination”).

Upon analyzing the language of Articles 3 and 4 in the Declaration, the nature and scope of the right of self-determination for indigenous peoples is indisputable. But when considering that the exercise of this right has to be interpreted in the light of other provisions – notably Article 46 – then it might be argued, as some of the contributors to this volume maintain, that the Declaration promotes a limited right to internal self-determination for indigenous peoples.¹⁴ More significantly, the language of the Declaration,

Issues to serve a three-year term beginning in January 2002. As a member of the Working Group on Indigenous Populations (WGIP) in Geneva, Trask worked on the Draft Declaration along with Mme Erica Daes, chair of the WGIP, from the very beginning of the negotiations.

UNGA Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples rejects “any attempt aimed at the partial or total destruction of the national unity and the territorial integrity of a country.”

¹⁴ See also Helen Quane’s discussion in Allen and Xanthaki.

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by stressing the benefits of collaboration between states and indigenous peoples when it comes to control over lands and natural resources, makes the overall question of internal self-determination much more difficult to resolve.

The ILA Interim Report concludes the section on self-determination with the following statement: “Because indigenous peoples are numerous and diverse, the implementation and application of Article 3 should not be uniform. But the language of Article 3 will be important in facilitating the ability of indigenous peoples, who have been marginalized for so long, to live their lives in conformity with the values that are important to them” (11–12). Siegfried Wiessner has recently concluded that this goal of safeguarding cultural diversity undergirds the entire Declaration:

The threat to the survival of their culture ... underlies indigenous peoples’ demands to live on their traditional lands, to continue their inherited ways of life, to self-government. Cultural preservation and flourishing is thus at the root of the claims as recognized by the states; this goal, not primarily political or economic objectives, inspires the positive law guarantees. In this broad sense, all the rights of indigenous peoples are cultural rights, and any interpretation of these rights, whether in UNDRIP or other instruments and prescriptions recognizing rights of indigenous peoples, ought to keep this *telos* in mind. (“Cultural Rights”)

The conciliatory rhetoric envisioned by the Declaration and endorsed by its supporters might result in “a world that might someday be” (Sambo Dorough 264),¹⁵ but as the contributors to this volume point out, as Trask argues in the afterword, and as Anaya himself recognizes throughout his impressive range of work and the interventions he has made in the role of Special Rapporteur on the rights of indigenous peoples, the reality is much more complex than what legal provisions might at first suggest.¹⁶ The fact that all the existing literature on the Declaration to date has drawn attention to the necessity of implementing its provisions testifies to what Stavenhagen calls the “implementation gap between laws and practical reality” (“Making the Declaration Work” 367).

¹⁵ Sambo Dorough’s expression is borrowed from Margaret Wise Brown’s *The Dream Book*.

¹⁶ Created in 2001 by the Human Rights Council, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, now designated as the Special Rapporteur on the rights of indigenous peoples, works to promote agreements between indigenous peoples and states, reports on human rights violations against indigenous peoples in selected countries, and engages states in constructive dialogue. Crucial also is his role in promoting UNDRIP. Professor Anaya was elected Special Rapporteur in 2008, replacing Rodolfo Stavenhagen (James Anaya – UNSR Website).