

EDITED BY ELVIRA PULITANO

INDIGENOUS RIGHTS

IN THE AGE OF
THE UN DECLARATION

The background of the cover is a textured, earthy-toned image featuring several handprints. The handprints are rendered in shades of brown, tan, and white, appearing as if they were painted or etched into a rough, stone-like surface. They are scattered across the lower half of the cover, with some overlapping. The overall aesthetic is one of ancient or indigenous art.

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INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION

Edited by
ELVIRA PULITANO

With an Afterword by
MILILANI B. TRASK



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107022447

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First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Pulitano, Elvira, 1970–

Indigenous rights in the age of the UN Declaration / Elvira Pulitano, Mililani B. Trask.
p. cm.

Includes bibliographical references and index.

ISBN 978-1-107-02244-7 (hardback)

1. Indigenous peoples–Civil rights. 2. Indigenous peoples–Legal status,
laws, etc. 3. Indigenous peoples (International law) 4. United Nations. General
Assembly. Declaration on the Rights of Indigenous Peoples. I. Trask, Mililani. II. Title.
K3247.P85 2012
342.08'72–dc23
2012007318

ISBN 978-1-107-02244-7 Hardback

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INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION

This examination of the role played by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in advancing indigenous peoples' self-determination comes at a time when the quintessentially Eurocentric nature of international law has been significantly challenged by the increasing participation of indigenous peoples on the international legal scene. Even though the language of human rights discourse has historically contributed to delegitimizing the rights of indigenous peoples to their lands and cultures, this same language is now upheld by indigenous peoples in their ongoing struggles against the assimilation and eradication of their cultures. By demanding that the human rights and freedoms contained in various UN human rights instruments be now extended to indigenous peoples and communities, indigenous peoples are playing a key role in making international law more "humanizing" and less subject to state priorities.

ELVIRA PULITANO is an associate professor in the Ethnic Studies Department at California Polytechnic State University (Cal Poly, San Luis Obispo). Her research and teaching interests include indigenous studies, African diaspora literatures, Caribbean studies, theories of race and ethnicity, migration, diaspora and human rights discourse.

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CLINT CARROLL is an enrolled citizen of the Cherokee Nation and is currently a post-doctoral associate in the Department of American Indian Studies, University of Minnesota. He completed his doctoral dissertation in the Department of Environmental Science, Policy, and Management, University of California, Berkeley.

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racism and the museumization of indigenous remains, the other on the historical (in)visibility of Australia's Aboriginal peoples) and a jointly edited book on indigenous peoples and genetic research.

CARRIE GARROW (Akwesane Mohawk) is the Executive Director of the Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law, as well as an adjunct professor. She received her BA from Dartmouth College, JD from Stanford Law School, and has an MPP from the Kennedy School of Government. Ms. Garrow's writings include "Treaties, Tribal Courts, and Jurisdiction: The Treaty of Canandaigua and the Six Nations' Sovereign Right to Exercise Criminal Jurisdiction," 2 *Journal of Court Innovation* (2009); "Following Deskaheh's Legacy: Reclaiming the Cayuga Indian Nation's Land Rights in the Inter-American Commission on Human Rights," 35 *Syracuse Journal of International Law and Commerce* (2008); (with Joseph Thomas Flies-Away and Miriam Jorgensen) "Native Nation Courts: Key Players in Nation Rebuilding," in Miriam Jorgensen, ed., *Rebuilding Native Nations, Strategies for Governance and Development* (2007); (with Joseph Thomas Flies-Away and Miriam Jorgensen) "Divorce and Real Property on American Indian Reservations: Lessons for First Nations and Canada," 29:2 *Atlantis: A Women's Studies Journal* (2005); (with Sarah Deer) *Tribal Criminal Law and Procedure* (2004); (with Paul Robertson and Miriam Jorgensen) "Indigenizing Evaluation Research: Raising the Tipi in the Oglala Sioux Nation," 28 *American Indian Quarterly* (2004).

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ELVIRA PULITANO is an associate professor in the ethnic studies department at California Polytechnic State University, San Luis Obispo. Her research and teaching interests include indigenous studies, African diaspora literatures, Caribbean studies, theories of race and ethnicity, migration, diaspora, and human rights discourse. A Fulbright scholar from Italy, Dr. Pulitano holds a PhD in English from the University of New Mexico, where she specialized in Native American literatures and post-colonial studies. She is the author of *Toward a Native American Critical Theory* (2003) and has published essays on the work of Gerald Vizenor, Louis Owens, V. S. Naipaul, Caryl Phillips, Jamaica Kincaid, and Edwidge Danticat. She is also the editor of *Transatlantic Voices: Interpretations of Native North American Literatures* (2007). She is currently completing a monograph exploring literary representations of diaspora in Caribbean-born writers living in the United States. Before her current appointment at Cal Poly, she taught postcolonial literatures and theory at the universities of Geneva and Lausanne.

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volume *Altérité et droit* (2002), as well as numerous articles published in Switzerland, France, and Canada.

LEE SCHWENINGER is Professor of English at the University of North Carolina Wilmington, where he teaches American Indian literature and serves as coordinator for the Native American Studies minor. In addition to several essays in book collections, he has published essays in such journals as *Studies in American Indian Literatures*, *American Indian Quarterly*, and *American Indian Culture and Research Journal*. He has published a book-length study of N. Scott Momaday (2001), and most recently a study of several Native American writers and the environment, *Listening to the Land: American Indian Literary Responses to the Landscape* (2008).

MILILANI B. TRASK is a Native Hawaiian attorney with an extensive background in Native Hawaiian land trusts, resources, and legal entitlements. In 1993, Ms. Trask became a member of the prestigious Indigenous Initiative for Peace (IIP), a global body of indigenous leaders convened by Nobel laureate Rigoberta Menchu-Tum. In 1995, she was elected the second vice chair of the General Assembly of Nations of the Unrepresented Nations and Peoples Organizations (UNPO), an international body founded by his holiness the Dalai Lama as an alternative forum to the United Nations. Ms. Trask is an acknowledged peace advocate, and studied and worked for seven years with Mother Theresa of Calcutta. In 2001, Ms. Trask was appointed as the Pacific representative to the United Nations Permanent Forum on Indigenous Issues and is currently considered an indigenous expert to the United Nations in international and human rights law. She is recognized as one of the primary authors of the United Nations Declaration on the Rights of Indigenous Peoples.

SHARON H. VENNE is an Indigenous Treaty person (Cree) and by marriage a member of the Blood Tribe within Treaty 7 with one son. She worked at the United Nations prior to the establishment of the Working Group on Indigenous Peoples in 1982. The background research to the many clauses on the Declaration on the Rights of Indigenous Peoples is included in her book: *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (1998). In addition, Venne has written numerous articles and edited materials related to the rights of indigenous peoples. She has lectured on the rights of indigenous peoples in Australia, Canada, France, Hawaii, Italy, New Zealand, Norway, Sweden, and the United States. In addition to her work on the

Declaration, she worked to secure a UN Study on Treaties. From the first introduction of the resolution in 1983 until the report was finalized in 1999, Venne worked to ensure that the report reflected indigenous laws and norms. All her work internationally and domestically relates to the promotion of the rights of indigenous peoples, especially rights related to lands, resources, and treaties. Some of her works on laws of the Cree Peoples related to treaty making were published in *Aboriginal and Treaty Rights in Canada* (Michael Asch, ed.) and *Natives and Settlers – Now and Then* (Paul DePasquale, ed.).

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ACKNOWLEDGMENTS

Projects such as these usually rely on the insight, support, and encouragement of many people. While it is impossible to list all the individuals to whom I owe a debt of gratitude for helping me shape ideas, finding sources, and offering suggestions, I would like at least to express my sincere thanks to a few. Deborah Madsen at the University of Geneva believed in this project from the very early stages, and I would like to acknowledge her long-time friendship and support. Conversations about the potential that the UN Declaration on the Rights of Indigenous Peoples offered for an interdisciplinary volume such as this one initiated at an international symposium on Native literatures and cultures at California Polytechnic State University, in San Luis Obispo, in autumn 2008. Deborah's enthusiasm was contagious and together we began sketching ideas and setting up the project's goals. We were both firmly convinced that this was going to be an important and timely collection, and I trusted our judgment. My research on indigenous peoples' presence at the United Nations goes back to the years 2002–2005 during my appointment as an assistant professor at the universities of Geneva and Lausanne, and I would like to thank the English departments of both institutions for giving me the opportunity to teach some inspiring courses in the field of postcolonial and indigenous studies. Gerald Vizenor, a long-time friend and inspiration, provided generous support and encouragement. The title for this book originated in a conversation we had on indigenous peoples' rights and international law, and I would like to acknowledge his original ideas on Native literatures and narratives of survivance. Equally grateful am I to Gordon Henry, Jr., and Kimberly Blaeser, whose creative vision has continued to inspire me in ways they cannot possibly imagine. I also thank Gary Dunham for supporting my scholarship over the years and for his excellent editorial work on indigenous literary studies.

I owe a special note of thanks to Kēhaulani Kauanui at Wesleyan University, who proved to be a valuable source of information in terms of suggesting potential contributors and offering overall support for this

collection. My department colleague and friend Kate Martin deserves special recognition for her insight and knowledge, and for always reminding me that this was a project worth pursuing.

Mililani Trask's work as a human rights advocate has been truly inspiring, and I would like to thank her for supporting this collection all the way through, for helping me navigate some of the complexities of international law as they relate to the rights of indigenous peoples, and for her generous comments and observations during our conversation in Honolulu, in April 2010. Special thanks to my research assistant, Nestor Veloz, for transcribing my interview with Ms. Trask. I also owe a note of gratitude to Dore Minatodani at the Manoa Library, University of Hawaii, for helping me locate the reviews of the Peoples' International Tribunal and for sending precious information prior to my trip to Honolulu. Joan Lander, of Nā Maka o ka 'Āina video production team, offered generous and insightful comments on some of my questions on the Tribunal, and I would like to acknowledge her willingness to participate in a few e-mail exchanges. Special thanks to Joan and Puhipau for all those excellent documentaries on Hawaii.

John Purdy, at Western Washington University, deserves special thanks for providing valuable feedback when needed, editorial wisdom, and good humor, and I would like to thank him for his friendship and mentorship over the years. On the other side of the Atlantic, Mario Corona, at the University of Bergamo, has been an inspiring scholar and teacher, and I would like to acknowledge his continuous support during my numerous transatlantic crossings.

I would also like to thank all the contributors for their enthusiastic response to the subject of the Declaration, for their patience, and for working hard to bring this book into completion. I owe a special note of gratitude to Siegfried Wiessner for supporting this project from the very beginning, for generously sharing his expertise in international law in response to my numerous questions, and for providing excellent feedback as I was completing my introductory chapter. My students at California Polytechnic State University raised intriguing comments on indigenous rights and the evolving discipline of indigenous studies, and I want to thank them for their willingness to stand up against injustice and discrimination and to work for a better world. I also thank all my colleagues in the ethnic studies department – Victor Valle, Grace Yeh, Denise Isom, Jane Lehr, Aaron Rodrigues, and Don Ryujin – for their sincere support and encouragement. Thanks to Yolanda Tiscareño for being such a pillar in that department. I am also thankful to Michael Lucas, Tom Trice,

Brian Kennelly, Christina Firpo, and George Cotkin for believing in my work, for supporting ethnic studies at Cal Poly, and for all those excellent interdisciplinary conversations.

However, my biggest debt of gratitude is to my family and dear friends in Italy, whose love, care, and unconditional support have guided me throughout these years. To my father, who left me halfway through this journey, I offer my most heartfelt thanks. May his spirit and wisdom continue to guide me as I find my way away from home. *Ti voglio bene papà.*

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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).

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.

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.