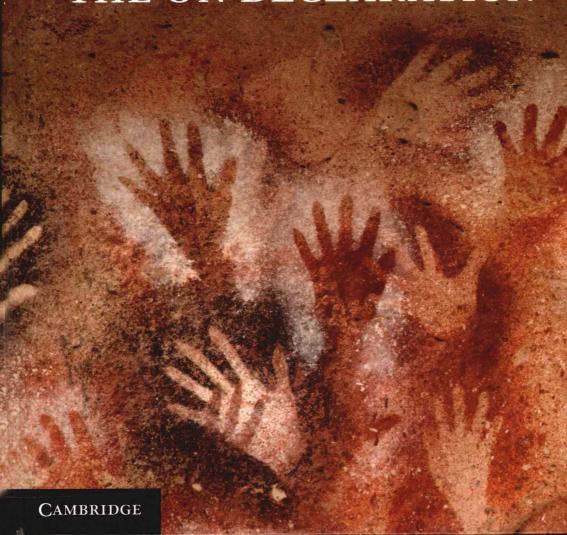


INDIGENOUS RIGHTS

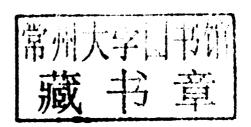
IN THE AGE OF THE UN DECLARATION



INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION

Edited by
ELVIRA PULITANO

With an Afterword by MILILANI B. TRASK





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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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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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Indigenous rights and international law: an introduction

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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

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.