



# Reflections on the UN Declaration on the Rights of Indigenous Peoples

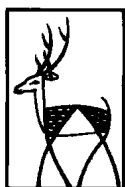
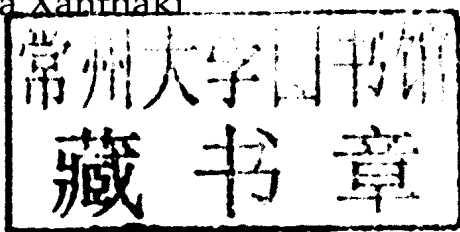
Edited by

Stephen Allen & Alexandra Xanthaki

STUDIES IN INTERNATIONAL LAW

# Reflections on the UN Declaration on the Rights of Indigenous Peoples

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Stephen Allen  
and  
Alexandra Xanthaki



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# *Introduction*

STEPHEN ALLEN AND ALEXANDRA XANTHAKI

THE ADOPTION OF the Declaration on the Rights of Indigenous Peoples by the UN General Assembly in September 2007 has been widely viewed as a momentous occasion for indigenous peoples, for the United Nations system and for international law in general. The Declaration was the product of over 20 years of focused debate and negotiation between indigenous representatives, States, UN officials and other institutional actors. In 1982, the UN Economic and Social Council established the UN Working Group on Indigenous Populations (WGIP) as a subsidiary organ of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Protection and Promotion of Human Rights). The WGIP was charged with the task of developing international standards on indigenous rights. It produced a draft declaration in 1993, which was subsequently adopted by the Sub-Commission in 1994;<sup>1</sup> and referred to the Commission on Human Rights. The Commission established an Inter-sessional Working Group for the purpose of reviewing the draft.<sup>2</sup> This Group meticulously scrutinised the draft over 11 annual sessions. In 2006, a compromise text was recommended to the Human Rights Council, the Commission's successor. The Council endorsed the draft Declaration and recommended it to the General Assembly with a view to adoption.<sup>3</sup> Concerns expressed by certain States meant that it was not adopted by this body at the first opportunity. After a further period of institutional activity, the Declaration was adopted on 13 September 2007.<sup>4</sup> One hundred and forty-three States voted in favour of the Declaration. The USA, Canada, Australia and New Zealand voted against, and there were 11 abstentions.

The Declaration is more comprehensive in substance and more extensive in scope than any other existing international instrument specifically dedicated to indigenous issues. It recognises (inter alia): the right

<sup>1</sup> Resolution 1994/45.

<sup>2</sup> Commission on Human Rights Resolution 1995/32.

<sup>3</sup> Human Rights Council Resolution 2006/2.

<sup>4</sup> General Assembly Resolution 61/295.

to self-determination; land/resource rights; the right to restitution; cultural rights; the right to separate political institutions and systems; the right of indigenous peoples to participate in governmental decision-making processes that affect them (including the right to prior, free and informed consent); intellectual property rights; the right to development; and the right to treaty recognition. Further, by elaborating the above rights the Declaration has bolstered the concept of collective rights and many of its articles demonstrate the ways in which individual and collective rights interrelate to protect and promote indigenous identities.

This collection of essays resulted from a perceived need to examine the Declaration critically and to situate it within the context of international law. The passionate claims advanced by the transnational indigenous movement during the processes which led to the Declaration's adoption and the normative analysis offered by international lawyers along the way have neglected—perhaps justifiably—some difficult questions regarding the content and the status of the Declaration in international law. This collection has been written on the premise that it is now time to engage with these issues, given the confidence that the Declaration's adoption has afforded. It is suggested that such a process of critical reflection is the only way that this ground-breaking instrument can become a vehicle for palpable change and global justice.

Against this background, the book explores the Declaration's normative resonance for international law and considers the ways in which it could be used to prompt and shape institutional action and influence the development of national laws and policies on indigenous issues. It contains essays written by the main protagonists in the Declaration's development; indigenous representatives; and field-leading academics. It offers comprehensive institutional, thematic and regional analysis of the instrument. Moreover, the book seeks to examine in depth a number of fundamental questions raised by the Declaration, and to reflect upon the wider challenges that confront the realisation of the rights of indigenous peoples in a variety of settings. In this respect, the collection addresses some crosscutting questions, which include:

- What is the status of the Declaration (and its provisions) as a matter of international law? What are the implications of achieving international legal recognition?
- How do the Declaration's provisions contribute to development of the substantive rights proclaimed in the instrument?
- How will the Declaration influence other areas of international human rights law and the work of United Nations treaty-based bodies?
- How can the Declaration's provisions be implemented?

- What will be the impact of the Declaration in different regions and national settings and how can best practice on indigenous issues be shared in this regard?
- What are the implications of the Declaration for other sub-State societal groups?
- What are the consequences for the structures and processes of international institutions given the unprecedented levels of indigenous participation in the Declaration's development?
- What is the significance of the Declaration for the internal structures of governance of States and for the institution of the State itself?
- Has the Declaration advanced the cause of global governance?
- Has the Declaration contributed to the re-orientation of international law away from its Eurocentric origins?

The first part of the collection discusses the emergence of the Declaration from the United Nations system while exploring its impact on the existing mechanisms and international instruments that have focused on indigenous rights. The first chapter provides a comprehensive overview of the United Nations system's engagement with the Declaration, written by the main driving force behind the instrument, Erica-Irene Daes. In her essay, Daes highlights a range of important instruments and discussions within key United Nations bodies that pushed the Declaration towards adoption. In the next chapter, Julian Burger, who headed the Indigenous Peoples' Programme at the Office of the United Nations High Commissioner for Human Rights (1991–2009), discusses how United Nations bodies can help the Declaration to become an engine for change, particularly at the national level. Specifically, he shows how the Declaration has been shaped by indigenous experiences and he analyses the Declaration's twin pillars: the principles of non-discrimination and self-determination.

In his essay, Patrick Thornberry, a member of United Nations Committee on the Elimination of All Forms of Racial Discrimination, shows how that Committee has internalised indigenous rights into its mandate with considerable success. Accordingly, he argues that the International Convention on the Elimination of All Forms of Racial Discrimination has achieved a generally symbiotic relationship with the Declaration. Thornberry emphasises United Nations treaty bodies' pivotal role in interpreting this Declaration and prompting its implementation given the absence of a fully equipped monitoring body for the instrument. In the light of its pioneering role in the development of international standards concerning indigenous issues, the work of the International Labour Organization (ILO) is profoundly important to the emergence and consolidation of the Declaration. In Chapter 4, Andrew Erueti discusses the ILO's contribution to the internationalisation of the Declaration and more generally, the challenges that internationalisation

confronts in terms of goals of indigenous peoples and the underlying justifications for indigenous rights recognised in different regions of the world. In particular, he argues that the use of the concept of 'cultural difference' to support emerging indigenous movements has provided a means of connecting indigenous peoples to the global indigenous movement.

Clive Baldwin and Cynthia Morel's chapter provides an in-depth analysis of a number of legal cases (particularly the *Endorois* case, the Chagos Islanders litigation and the claims made by the Tasmanian Aboriginal Centre) in order to demonstrate that litigation offers a useful means of grounding the Declaration. Further, they show that litigation allows the interpretation of general human rights instruments in ways that draw upon the content of the Declaration and clarify and consolidate the rights of indigenous peoples.

The second part of the collection is dedicated to thematic analysis of the Declaration. The issues of status and implementation have dominated debates about the Declaration in the aftermath of adoption. Rodolfo Stavenhagen addresses the latter issue. Drawing upon his experience as the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People between 2001 and 2008, he believes that the Declaration provides an opportunity to link the global and the local, through a process of 'glocalisation', and he views the Declaration as a 'statement of redress' as well as a 'map of action'. In contrast, H Patrick Glenn identifies the conventional ironies embedded in the Declaration: it advances indigenous law by harnessing 'the profoundly western notion of international law', a source responsible for the dispossession and subjugation of indigenous peoples throughout the world; it uses the idiom of western 'culture theory' to advance different world views; and finally, Glenn notes the formal opposition to the Declaration by those States that have been among the most active in developing municipal laws for the benefit of indigenous peoples. However, Glenn believes that these ironies can reveal the extent to which normative interdependence has occurred. Will Kymlicka is also critical of the Declaration. Although he considers the Declaration's value to be a precedent for other culturally distinct sub-State groups and an important example of the 'multicultural model of political ordering', Kymlicka suggests that the Declaration's precedential significance for national minorities might be much more limited in practice, as indigenous rights claims have been endorsed by the international community on the tacit understanding that they have no conceptual or legal implications for such minorities.

The collection moves on to address the question of the Declaration's status. Emmanuel Voyiakis accepts that resolutions can provide the inspiration for the development of customary international law but his

interest lies in what resolutions tell us about the attitudes of those States participating in the General Assembly's voting procedures and their significance in relation to the creation of customary international law. In particular, he considers whether the proper interpretation of a State's vote in this context should be determined by its intentions as expressed by the exercise of its vote and its subsequent practice. In his chapter, Stephen Allen questions the techniques used by some indigenous activists and international lawyers supportive of indigenous rights to promote the significance of the Declaration for international law. The essay argues that the Declaration's significance stems from the political legitimacy it embodies rather than its claimed international legal character and reiterates the importance of indigenous political engagement at a national level to close the existing 'implementation gap'.

The third part of the collection considers the Declaration's substantive provisions. Undoubtedly, the most important issue for indigenous peoples remains the right to self-determination. Helen Quane examines the Declaration's provisions on self-determination and participation and asks whether they are indicative of a new direction for international law. Quane considers whether the right to self-determination and rights of participation could coalesce to form a meta-right of effective participation in public life, thereby signalling a shift away from the troubled discourse of self-determination and towards more pragmatic approaches which combine explicit legal and political considerations.

The next series of essays concentrate upon specific manifestations of the right to self-determination for many indigenous peoples. Jeremie Gilbert and Cathal Doyle discuss the growing body of international human rights law concerning indigenous peoples' land/territorial rights. After considering the procedural doctrine of free, prior and informed consent, they argue that not only does the Declaration represent an integral component of the normative framework on indigenous land rights, it also provides the conceptual means for the elaboration and realisation of such rights in the foreseeable future. In her chapter, Stefania Errico examines the doctrine of free, prior and informed consent with respect to natural resources. She argues that while that States can dispose of sub-soil resources located in indigenous lands, the Declaration establishes a specific framework within which any extractive activity must be carried out and requires that States engage with indigenous peoples effectively in connection with projects for exploitation of natural resources to be carried out in their lands. Joshua Castellino considered the relationship between the right to self-determination and the right of development. Against a background of the general struggle to realise economic and social rights, he advances a holistic interpretation of this right of development and analyses the extent to which the Declaration's provisions contribute to its normative evolution. In addition, Castellino assesses the

Declaration's capacity to bring about the practical aim of securing a more equitable redistribution of economic and social resources for indigenous peoples despite the instrument's soft law status and the aspirational nature of the rights it proclaims.

The collection then turns to questions of identity and culture. Elsa Stamatopoulou, Chief of the Secretariat of the Permanent Forum on Indigenous Issues, maps the path towards the recognition of indigenous cultural rights and situates the Declaration's provisions concerning these rights within a wider international legal framework. The adoption of the Declaration, she argues, has unleashed tremendous potential for positive change in mending historical injustices and it represents a significant shift towards more inclusive, poly-cultural societies. Alexandra Xanthaki focuses on the challenges that such poly-cultural societies may face and, specifically, the possible conflicts between indigenous rights as confirmed in the Declaration and women's rights. She argues that now—following the adoption of the Declaration—is the time to discuss such difficult issues in order to address them, and highlights ways in which the Declaration and international law must resolve such conflicts. Another challenging issue is that of indigenous rights to heritage, which Johanna Gibson examines in her chapter. Gibson argues that current international law provides the foundations for deference to customary law with respect to community knowledge, as recognised in the Declaration, but she cautions that the *sui generis* protection of indigenous heritage rights may be an unobtainable goal in the foreseeable future.

The final part of the collection reflects upon the impact of the Declaration in specific regions. The book has sought to give priority to regions that have not been the focus of the literature on indigenous rights to date. Nevertheless, such a collection would not be complete without discussing the link between the Declaration and the Inter-American system. In his chapter, Luis Rodríguez-Piñero explains how the ground-breaking jurisprudence on indigenous rights of the Inter-American system interrelates with the Declaration via the eclectic processes of normative cross-fertilisation, as demonstrated by the *Awas Tigni* case. At the same time, the Inter-American system provides the institutional apparatus for implementing the Declaration's provisions within the adjudicative context, as evidenced by the recent case of *Saramaka People v Suriname*. The collection then turns to Africa. Despite not being materially involved in the elaboration of the Declaration, many African States refused to endorse the instrument when it first came before the United Nations General Assembly in the 2006 session. Rachel Murray's essay discusses the reasons behind this and the African Union's response to the Declaration in the aftermath of this session. In particular, she examines the extent to which the African Commission on Human and Peoples'

Rights' Working Group on Indigenous Populations/Communities (supported by a number of non-governmental organisations) managed to influence the position of African States on indigenous issues, which led to the decision of many African States to endorse the Declaration at the General Assembly meeting in September 2007.

Dalee Sambo Dorough, one of the most active indigenous representatives at the international level and a protagonist in the emergence of the Declaration, uses the Inuit example to demonstrate how the Declaration is important in counter-balancing the asymmetrical nature of negotiations between States and indigenous peoples. Dorough discusses several developments in the Arctic countries that have been important in giving indigenous peoples control over their affairs. She believes that the Declaration has the capacity to make an important contribution to Inuit lives. In the following chapter, Malgosia Fitzmaurice focuses on the 2005 Norwegian Finnmark Act and the 2005 Draft Saami Convention, a draft treaty between Finland, Norway and Sweden. Fitzmaurice uses these sources in order to highlight the extent to which the Declaration has influenced developments in these regions and, in turn, how such regional developments have the capacity to bring about the Declaration's implementation. Finally, Javaid Rehman analyses a very topical—albeit unexplored—issue with reference to Asia: the branding of indigenous peoples as suspects of terrorism by States in an attempt to curtail their rights. Rehman uses the situations of the Pachtuns and Beluchis in Pakistan in order to discuss whether the Declaration as a norm of international law can effectively help such cases; his conclusion coincides with the voices emphasising the political nature of the Declaration.

The adoption of the Declaration is perceived by the editors of this volume to be 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. We hope that this collection contributes to this debate. We would like to thank Richard Hart for giving us the platform for this volume and Rachel Turner for her support throughout its development. We would also like to thank Patrick Thornberry for pushing us in the right direction, Gudmundur Alfredsson for standing beside us in our first tentative steps on this journey, and, of course, all the contributors to this volume for their enthusiasm, their patience and, most of all, their ideas and for giving us an insight into their vision for indigenous rights.





**Section A**

**Institutional Perspectives**