

1-6-2011

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Recommended Citation

Nicholas A. Robinson, “*Minimum Standards: The UN Declaration on the Rights of Indigenous Peoples*,” 28 Pace Envtl. L. Rev. 346 (2010)

Available at: <http://digitalcommons.pace.edu/pelr/vol28/iss1/12>

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SYMPOSIUM

“Minimum Standards:” The UN Declaration on the Rights of Indigenous Peoples

NICHOLAS A. ROBINSON*

The foundation of public international law is equity. The principle of equity is binding on all States. It is also a principle found within each of the world’s legal traditions and enshrined in national law. Without fairness there is injustice. Equity requires mutual respect and a willingness, in good faith, to engage together toward accommodating different views and interests. Equity entails the exchanging of views and listening to one another, for equity is informed by knowledge. States, and nations, so accept the legitimacy of equity as a basic principle that they often pay mere lip service to it, rather than tackling the hard work that is needed to produce equitable relations.¹ Doing

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1. For example, Aristotle’s conception of proportionate equity suggests that equity should be proportionate to what is due or deserved. ARISTOTLE, *NICOMACHEAN ETHICS*, Book V, 3. Equity necessarily leads to further inquiries about what society agrees are expectations of what is due or deserved. If Human Rights are due to each individual, are Indigenous Peoples accorded their substantive or procedural human rights? If such rights were denied in the past, what proportionate measures are needed to prevent the recurrence of such denials or to repair the harm done by past denials? If the process involves ongoing and overwhelming loss, such as is evident in the destruction of the natural homelands of indigenous peoples (whether in the Arctic or the Amazon), what proportionate steps of equity may be appropriate in the light of what scientific inquiry teaches about the deteriorating conditions of the global environment? See, e.g., Piers Forster et al., *Changes in Atmospheric Constituents and Radioactive Forcing in WORKING GROUP I REPORT: THE PHYSICAL SCIENCE BASIS, FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 131, 131-217 (Susan Solomon et al. eds., 2007). Such inquiries are beyond the scope of this essay but will doubtless become themes addressed in further ethical and legal studies about how to implement the U.N. Declaration on the Rights of Indigenous Peoples.

equity is, in fact, never easy, but it has produced salubrious and peaceful relations.

When the General Assembly of the United Nations collectively debated and adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007,² it both acknowledged the need to do equity for the Indigenous Peoples of the Earth and established terms of reference for the on-going debate about how to attain more equitable relations between Earth's U.N. Member States and the Indigenous Nations. The Declaration obliges all governments to examine how they will come to evolve systems that recognize and embrace the "minimum standards" set forth in the Declaration.³ The Declaration advances an inter-generational dialogue and pattern of practices that aspire toward equity. The Declaration's provisions will not be implemented at once, or easily, but the Declaration is of inestimable importance in establishing a clear framework for advancing and measuring the implementation measures that will be forthcoming.

The stream of life flows as a river. It matters perhaps less when one enters the stream than to have done so and to be swimming purposefully amidst the eddies and flows of the stream's waters. Past generations created the inequitable relations that legal systems perpetuate with respect to the lives of indigenous peoples and their heritage and all their relations in the lands and forests and skies and waters. Present generations inherit these inequities. Most do not swim purposefully but passively go with the flow, mostly oblivious to the rivers' sources

2. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/68, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (hereinafter *Declaration*). Following consultation among all Members of the General Assembly led by Ambassador Hilario G. Davide, Jr., as is discussed in the introduction to the Symposium of which this essay is a part, the matter was taken up for adoption in the 107th Plenary, directly, without reference to a Main Committee. The then newly reconstituted Human Rights Council had recommended adoption of the draft Declaration on the Rights of Indigenous Peoples the year before. See G.A. Res. 61/53, U.N. GAOR, 61st Session, Supp. No. 53, U.N. Doc. A/61/53, at pt. one, ch. II, § A (2006). The General Assembly had decided to defer consideration on the Declaration to allow time for the further consultations that Ambassador Davide undertook at the request of the President of the General Assembly. G.A. Res. 61/178, U.N. Doc. A/RES/61/178 (Dec. 20, 2006).

3. *Declaration*, *supra* note 2, at art. 43.

or whither it may flow. They awaken in times of flood or drought, but extreme events carry loss and sadness. Better to plan for such events and anticipate needs as the Onondaga do “for seven generations” and anticipate how to survive extreme events and purposefully live in the river. The U.N. Declaration on the Rights of Indigenous Peoples is a unique and precious legal instrument, one that draws us all into the river purposefully. By struggling to come to terms with the Declaration’s mandates, contemporary magistrates of government are obliged to redesign their settled but unjust practices and seek to do equity.⁴ In doing equity, they shall build the just relations with Indigenous Peoples and by extension with all of life.⁵

To understand how the Declaration promises to build toward such a just global community, one must return to events long forgotten by most. Since 15th century, when colonial exploitation of Indigenous Peoples and traditional communities began,⁶

4. The Universal Declaration of Human Rights signaled a comparable change after its adoption. As Jorge Castañeda observed in *THE LEGAL EFFECTS OF UNITED NATIONS*, the Declaration of Human Rights “symbolizes and concretizes the a new politico-juridical conception: force, inasmuch as some of its provisions establish rights, universally or almost universally as human rights, whereas others provisions express on a common ideal.” JORGE CASTAÑEDA, *THE LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 175* (1969). The U.N. Universal Declaration of Human Rights has become integral to understanding the U.N. Charter itself, although this now obvious consensus in international law was much debated in the period from 1948 to the 1970s.

5. The U.N. World Charter for nature provides a parallel recognition of the rights that governments “shall” accord to Earth’s nature and natural systems. Indigenous knowledge and practice encompasses a relationship between humans and nature like that set forth in the U.N. World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982); see generally *INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW* (Lawrence Watters ed., 2004). When rights are accorded to Indigenous Peoples, this act necessarily includes the Indigenous Peoples’ own worldviews including stewardship for nature. See *Declaration*, *supra* note 2, at art. 29 (discussing the conservation of nature and protection of the environment).

6. The Papal Bull, *Romanus Pontifex*, of 1455 authorized Christian Nations to take and extract the wealth from “heathen” areas of the Americas and elsewhere, where the presence of Indigenous Nations was not accorded legal recognition. See Special Rapporteur for the Permanent Forum on Indigenous Issues, *Preliminary Study on the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery: Report by the Special Rapporteur*, ¶¶ 9-18, IN Doc. E/C/19/2010/13 (February 4, 2010); see generally STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE*

respect for the principle of equity has been degraded. Equity might be required for persons from the colonial nations or between colonial nations but was deemed inapplicable to those whose lands, persons, and cultures were appropriated by colonial powers without their consent. Colonial exploitation by definition lacked equity and established patterns of governance that cultivated a culture with a lack of equity so deeply embedded that over the years governments became blind to their double standards. They could demand and provide equity for their own citizens or in their own intergovernmental relations with other sovereign states, but they could deny the same for Indigenous Peoples or Indigenous Nations in their midst and be blind to the hypocrisy of their unequal practices.⁷

The United National Declaration on the Rights of Indigenous Peoples pulls aside the scales of blindness that this culture of inequity has bred. The Declaration provides that its recitation of fundamental rights “constitute the *minimum standards* for the survival, dignity and well-being of the Indigenous Peoples of the world.”⁸ The Declaration’s preamble echoes the Universal Declaration of Human Rights in proclaiming it “as a standard of achievement to be pursued in a spirit of partnership and respect.”⁹ The Declaration, then, provides all

DOCTRINE OF CHRISTIAN DISCOVERY (2008). The Christian right to take possession of Indigenous homelands in North America was also sanctioned by the Royal Charters granted by the King of England, as sovereign and as the head of the Church of England. *See, e.g.*, ROYAL CHARTER TO JOHN CABOT OF 1496; *see* JAMES A. WILLIAMSON, THE CABOT VOYAGES AND BRISTOL DISCOVERY UNDER HENRY VII (1962).

7. The colonial dispossession of Indigenous Peoples homelands in the United States began in the colonial era but was perpetuated by state and federal governments after the American Revolution. The legal foundation for the dispossession of the Indigenous Peoples in the United States, including the decision in *Johnson’s Lessee v. McIntosh*, 8 Wheat. 543 (1823), has been demonstrated to be based upon a fraud committed by litigants before the U.S. Supreme Court. *See* LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSED INDIGENOUS PEOPLES OF THEIR LANDS (2005). The Supreme Court has not acted to acknowledge or correct this fraud, either *sua sponte* once the fraud was documented, or in subsequent cases. *See, e.g.*, *City of Sherrill v. Oneida Indian Nations of New York*, 125 S. Ct. 1478 (2005); *see also* *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (giving an earlier definition).

8. *Declaration, supra* note 2, at art. 43 (emphasis added).

9. *Id.* at Preamble.

States with set of tasks, to achieve implementation of the minimum standards set forth within the rights of Indigenous People. Even a casual comparison of the explicitly enumerated rights and the plight of Indigenous Peoples globally will reveal how far States are from achieving the minimum standards required.¹⁰

“Indigenous People and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination.”¹¹ In many nations, the Indigenous are not free and not equal. Equity is denied them, and they lack a neutral forum or any court or parliamentary committee wherein they can meet on equal grounds with those whose laws deny them equity in order to seek justice.¹²

The legal implications of the U.N. Declaration on the Rights of Indigenous Peoples are far reaching. Professor Angelique Awanwicake Eaglewoman has suggested one relative to Declaration Articles 31 and 32 on the foundations of Indigenous knowledge and intellectual property rights. John Dieffenbacher-Krall has examined how inter-governmental relations accommodate sharing decision-making between Indigenous Nations and the States and their municipal governments at a local level. Nearly every Article of the Declaration is touched upon when local authorities exercised their authority affecting Indigenous Nations and communities that are co-located in their region. Equity will require the creation of new legal instrumentalities that facilitate the equitable exchange of views and dialogue to achieve consensus decisions about such issues as health, housing, education, land use and other socio-economic questions, as provided in Articles 14, 23, and 25. This Symposium lacks the time to examine but a few of the legal implications posed by the U.N. Declaration on the Rights of Indigenous Peoples.

One legal realm where International Law and national law transect is the area of treaties between Indigenous Nations and colonial nations and the successor nations that assumed the

10. There is a large body of scholarly literature on this theme. *See, e.g.*, STUART BANN, *HOW THE INDIANS LOST THEIR LAND* (2005).

11. *Declaration, supra* note 2, at art. 2.

12. *Declaration, supra* note 2, at art. 28 (discussing access to justice).

international obligations of the treaties. Article 37 provides that “Indigenous Peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements included with States or their successor and to have States honor and respect such treaties, agreement and other constructive agreements.”¹³ In 1992, Chief Oren Lyons recalled for the U.N. General Assembly that “there are 371 ratified treaties and agreements between the Indian nations and the United States.”¹⁴ When we step back in time, and look at just the State of New York alone, there are many treaties that Indigenous Nations made with the Dutch and British Crown and then with the sovereign State of New York after the revolution against the British. The State of New York holds these treaty obligations as part of New York State law. They have not been taken over by the federal government, and they remain in full force and have effect as a matter of law. Sadly, their terms are neglected and justice is denied those who in good faith have relied upon those terms of law.

The Declaration invites lawyers, as officers of the court, and all other officials in New York to rethink our current inter-governmental arrangements in light of our treaty obligations within the State. Simply because they are for a time forgotten does not negate their force. If the State of New York honors the rule of law, it will revisit these treaty obligations. When the Haudenosaunee welcomed the Dutch to Manhattan, they entered into an agreement known as the two-row wampum. The treaty embodies the principles of mutual respect and fairness. The wampum is two parallel lines, symbolizing the undertaking to live together in parallel and not to displace one or the other in their peaceful relations. That relationship assumed that all creation, all flora and fauna, was to be sustained, as within the relations of the human beings. The two-row wampum was based on equity.

Doing equity in the case of Indigenous Peoples goes beyond recognizing the human rights of individuals. The U.N.

13. *Declaration, supra* note 2, at art. 28, § 1.

14. OREN LYONS, VOICE OF INDIGENOUS PEOPLES: NATIVE PEOPLE ADDRESS THE UNITED NATIONS 34 (Alexander Ewen ed., 1994), available at www.ratical.org/many_worlds/6Nations/OLatUNin92.html.

Declaration on the Rights of Indigenous Peoples recognized a community right in the Indigenous Nation and community and tribe. The two-row wampum reflected the community on each side. There were Indigenous Nations in New York and the Dutch and British acknowledged their legal capacity to treat with them as nations. For later officials to fabricate the so-called “Doctrine of Discovery” and to adopt a legal fiction that the lands therein were a *terra nullius*, without nations or proprietors, is contrary to the fact of historical record. Acts taken in reliance on this legal fiction continue the legal agreements in force then and still extant today. Both the Holy See and the Church of England will need to renounce the Papal Bulls and Royal edicts that launched colonialism and gave birth to the so-called doctrine of discovery. The Episcopal Church in the United States has done so, and the matter is under discussion in the Church of England. Once the discredited moral right to dispose Indigenous Peoples is renounced, States and governments will need to examine anew how to do equity to the Indigenous Peoples who co-exist among them.

Indigenous Peoples have collective rights, which the U.N. Declaration acknowledges. This is a major step forward in International Law, for its acknowledged human rights for a collective of Peoples and not just for the individual. In terms of the treaties in New York, it means that that collective of Indigenous Peoples can address the treaty obligations. That an Indigenous Nation is not a member of the United Nations in no way diminishes the treaty obligations under International Law. Indeed, when United Nations was established, many nations continued to hold colonies. The era of environmental protection became a part of the U.N. agenda only in 1972 with the U.N. Stockholm Conference on Environment and Development. Neither nature nor Indigenous Peoples were a concern of the nations that founded the U.N. in 1945. Today, both have become major concerns. Just as the U.N. examined the injustice of colonialism, so today it begins to examine the injustice of denying Indigenous Peoples their national existence. To deny the injustice of past five centuries of violations of Indigenous Peoples’ individual and community rights, and to fail to address the on-going consequences of those violations, is itself a violation of currently binding Human Rights law as elaborated in the U.N.

Declaration of the Rights of Indigenous Peoples. While the form of the U.N. General Assembly Declaration appears to be “soft law,” in the case of the human rights declarations, it accepted general principles of law and even customary law that is as hard as if written into a treaty instrument. There is no need to wait for a treaty to enshrine these rights, as they are mostly all already a part of accepted public international law. What does remain is to apply the law as it is.

In the context of New York, for instance, treaty rights contained within State law have been violated, and past acts undertaken were patently illegal. There is no statute of limitations for a violation of human rights. One cannot turn back the clock, but one can design equitable procedures for moving forward. This has been the subject of treaty debates in New Zealand under the Treaty of Waitangi, which in 1840 was signed by more than five hundred Maori chiefs and the British Crown’s representative William Hobson.¹⁵ No mystical *terra nullius* doctrine clouds the efforts in New Zealand to find and define and attain equitable relations. This is an often contentious and ongoing debate about how to share and sustain the two parallel communities that share the same lands and waters. The example of New Zealand illustrates that New Yorkers should not shirk from seeking to do equity with the Haudensosaunee and other Indigenous Nations within what today is the State of New York. What may be characterized as the “residue of guilt” hangs over New York and today’s leaders find it too convenient to neglect the truth and pretend that Indigenous Peoples issues are not their issues. This amnesia is inequitable. A fair dialogue about implementing Indigenous Rights deserves to begin anew in the State of New York.

The City and State of New York should take the first step. Each should adopt resolutions embracing the U.N. Declaration of the Rights of Indigenous Peoples as their own. Once the policies are deemed to apply locally, the debate can begin to examine how to apply them. Both the State and City took these steps and built the substantive and procedural measures that made Human Rights law a reality today. They should extend and

15. See CLAUDIA ORANGE, *THE TREATY OF WAITANGI* (1987).

proportionately adapt their human rights systems to address issues of Indigenous Rights. Since the State and the City have done so with Human Rights, it should not be controversial to make the same decision that the U.N. General Assembly did in 2007 in adopting the Declaration on the Rights of Indigenous Peoples.

The converse (doing nothing) should be considered. Before New York abolished slavery, as an early abolitionist, U.S. Chief Justice and N.Y.S. Governor John Jay urged that slavery was contrary to natural law and to what today we acknowledge as basic human rights. The colonial master, or slaveholder, corrupts himself just by holding equals in bondage. International law came to abolish slavery, as did our New York laws and federal law after the Civil War. Slavery was the essence of an inequitable situation, a denial of basic justice. We have since been rebuilding the relationship between a slave-holding economy and society and those that renounced slaveholding. It is time to build the same dialogue with the Indigenous Peoples.

The U.N. General Assembly adopted the Declaration in this City of New York and in this State of New York. For the State and City not now to follow this lead will be perpetuate injustice, not unlike the years when segregation and discrimination over race poisoned relations in the struggle to find equity after the abolition of slavery. Just as New York ratified the Great Lakes Compact and works with the Tribal governments around the watershed of the Great Lakes in the Canadian Provinces and sister States of the Great Lakes basin, so New York needs to build a new stewardship ethic for the care of our shared nature and natural resources. As Chief Oren Lyons observed in this Symposium, the consequences of climate changes will make this ever more important. New York can also take guidance from Ontario's co-stewardship arrangements with First Nations there; the N.Y.S. Department of Environmental Conservation should engage in co-stewardship and "constructive arrangements" that share governmental land use and natural resource stewardship duties with the Indigenous Peoples over their ancestral homelands, covering what is now both municipal and private lands, over which migratory species and pollutions flow. Finally, New York should work with the Indigenous Peoples to provide

stewardship of the aquifers and ground water, over which Indigenous Rights remain. The Indigenous Nations of New Have have reserved water rights, which are likely to be tested as new technologies like hydraulic-fracking seek to divert vast amount of tribal water to be used to obtain natural gas from the Marcellus Shale regions within New York State. The Indigenous Nations and the State need to come to an agreement in their reserved water rights.

Is it not time to rebuild the partnership and think in terms of where climate change will take us all in seven generations?

New York has a legal basis for restoring the two-row wampum to guide relations between Indigenous Peoples and the State. It may take a longer time for the federal government to catch up with New York, but in a federal system some states need to lead the process forward. If New York leads in this respect, it benefit itself as well as do equity with the Indigenous Peoples whose homelands New Yorkers have come to “share.” For the U.S. Supreme Court to do justice, to be just, it will need to confront and renounce the fraud that was perpetrated upon in the case of *Johnsons’ Lessee v. McIntosh*. Today’s Supreme Court is not much different than the Court that ruled in *Plessy v. Ferguson*. Political accommodations that are unjust cannot prevail over time. Upholding the discredited Doctrine of Discovery today is akin to perpetuating slavery, and compounds past injustices anew. Indeed, it is inescapable that the U.N. Declaration on the Rights of Indigenous Peoples requires renunciation of the Doctrine of Discovery.

But the U.S. Supreme Court is not the only apologist for the Doctrine of Discovery and other excuses that deny justice to Indigenous Peoples. There are many other legal institutions worldwide that need to reconsider their policies and legal decisions and laws in light of the rights of Indigenous Peoples. The U.N. Declaration does an extraordinary service by obliging all governments to rethink how they respect these basic rights. The governments are now on notice that they cannot continue to ignore Indigenous Rights. Extant treaties need to be studied and their obligations accommodated. Where circumstances have changed with the times, States need to remake their laws in partnership with the Indigenous Nations. In doing so, they will

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build a new equitable relationship among Indigenous Peoples and other Peoples and ultimately between humans and nature.