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NEW DIRECTIONS FOR INTERNATIONAL LAW AND INDIGENOUS PEOPLES

WENONA T. SINGEL*

INTRODUCTION

In 1923, Deskaheh, Chief of the Younger Bear Clan of the Cayuga Nation, traveled from his home in the Grand River Territory of the Cayuga Nation to Geneva, Switzerland, carrying a Haudenosaunee-issued passport as his only travel document. His mission was to speak before the League of Nations about the Canadian government's Indian policies toward his people, the Haudenosaunee Confederacy, and to lay out the grounds for his people's claim to independent sovereignty.¹ Once he arrived in Geneva, he spent a year collecting petitions and successfully seeking the support of foreign delegates.² Nevertheless, his ultimate request to speak before the League was refused.³ Rejected, Deskaheh used a nearby hall to describe the injustices that his people experienced as a result of Canada's actions against them. No League of Nations officials attended, but the hall was packed nevertheless and Deskaheh received a standing ovation.⁴ After returning to North America, Deskaheh lived the remainder of his life in exile, unable to return to his home in Canada.⁵ Deskaheh died two years later in 1925, just three months after giving a radio address in Rochester, New York, in which he again demanded recognition of Haudenosaunee sovereignty.⁶ In that final speech, Deskaheh stated, "Over in Ottawa, . . . they call [Indian] policy 'Indian Advancement.' Over in Washington, they call it 'Assimilation.' We who would be the helpless victims say it is tyranny."⁷

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1. The Haudenosaunee Confederacy, also referred to as the Iroquois Confederacy by the French, was originally made up of the Senecas, Cayugas, Mohawks, Oneidas and Onondagas. Later, additional nations joined, including the Tuscaroras, Wyandots, Delaware and Tutela.

2. INDIANS & EUROPE: AN INTERDISCIPLINARY COLLECTION OF ESSAYS 435 (Christian F. Feest ed., 1999).

3. Carrie E. Garrow, *Following Deskaheh's Legacy: Reclaiming the Cayuga Indian Nation's Land Rights at the Inter-American Commission on Human Rights*, 35 SYRACUSE J. INT'L L. & COM. 341, 341 (2008).

4. *Id.*

5. *Id.*

6. Audra Simpson, *Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS. 191, 205-06 (2008).

7. Robert G. Koch, *George P. Decker and Chief Deskaheh*, CROOKED LAKE REVIEW, Sept. 1992, http://www.crookedlakereview.com/articles/34_66/54sept1992/54koch.html.

Although Deskaheh's attempt to have his people's concerns heard before the League of Nations failed, his actions set in motion a series of developments that slowly advanced the recognition of indigenous peoples rights in international law. These developments include several actions of the International Labour Organization (ILO), including an early investigation into the use of "native populations" as forced labor, the adoption of the ILO Convention on Indigenous and Tribal Populations of 1957 (Convention No. 107), and the later adoption of the more progressive ILO Convention on Indigenous and Tribal Peoples of 1989 (Convention No. 169).⁸ Beginning in 1970, the United Nations also played a growing role in assessing the status of indigenous peoples and working to articulate their rights in international law. These actions included the recommendation by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities that a comprehensive study be completed on the situation of indigenous peoples. In 1977, the U.N. hosted a conference of NGOs on discrimination against indigenous peoples, and close to 200 indigenous representatives traveled to Geneva to attend. These representatives successfully lobbied for the right to participate in the conference because indigenous groups failed to fit into any of the recognized categories of organizations that could participate in U.N. conferences. Later developments at the U.N. included the establishment of the Working Group on Indigenous Populations in 1982, the proclamation of 1993 as the International Year of the World's Indigenous People, and the proclamation of 1995 through 2004 as the International Decade of the World's Indigenous People. In addition, the year 2000 also saw the formation of the Permanent Forum on Indigenous Issues at the U.N.⁹

Each of these twentieth century advances in indigenous peoples rights has brought us closer to a fuller recognition of the fundamental rights of indigenous peoples. On September 13, 2007, the U.N. General Assembly brought us closer toward this goal by adopting the Declaration on the Rights of Indigenous Peoples.¹⁰ The adoption of the Declaration "represent[s] the dynamic development of international legal norms and reflect[s] the commitment of [U.N. member] states to move in certain directions, abiding by certain principles," with respect to the more than 370 million indigenous people worldwide.¹¹ As such, the Declaration's

8. Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 178 (2008).

9. Permanent Forum on Indigenous Issues, G.A. Res. 57/191, U.N. GAOR, 57th Sess., 77th plen. mtg., U.N. Doc. A/RES/57/191 (Dec. 18, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/550/88/PDF/N0255088.pdf>.

10. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter *Indigenous Rights Declaration*], available at <http://www.unhcr.org/refworld/docid/471355a82.html>.

11. See Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfi/documents/faq_drips_en.pdf (last visited May 6, 2009).

adoption is a historic moment that warrants our reflection and analysis from a variety of perspectives.

The vote in favor of the Declaration's adoption, with 144 countries in favor of its adoption, four opposed and eleven abstaining, represents a significant shift in international law toward the widespread legal recognition of indigenous peoples' rights.¹² This shift is particularly remarkable because it represents a continued movement toward the legal recognition of group rights in addition to individual rights in international law.¹³

The Declaration's adoption also marks the culmination of a more than three-decade effort by indigenous peoples to assert their rights and needs in their own voices in the international community.¹⁴ Given that the development of international law has historically been the work of nations that excluded the participation of indigenous groups residing within national boundaries, the participation of indigenous voices in the Declaration's conception, drafting, and negotiation is ground-breaking.

Furthermore, the Declaration's adoption introduces a new era in which we will witness the assertion and protection of indigenous peoples' claims within the framework of the Declaration's enunciation of several fundamental areas of indigenous peoples' rights. Included within the rights recognized by the Declaration are the right of indigenous nations to continue their existence and to exercise the powers of self-government and self-determination.¹⁵ The Declaration also describes, among other rights, rights to control and ownership of land, rights to manage resources and to protect and conserve the environment, rights to the enforcement of treaties, rights to education, culture, intellectual property and language, and procedural rights that apply to claims brought by indigenous peoples within their nation's domestic legal system and that apply to actions taken by nations that impinge on indigenous peoples' rights.¹⁶

The Declaration's passage also gives new urgency to the need to evaluate the domestic laws of nations to determine whether they are consistent with the scope and content of rights articulated in the Declaration. This process of using the Declaration as a standard for evaluating domestic law will apply to new enactments as well as existing enactments and common law doctrines.

12. *Id.*

13. See Robert T. Coulter, *International Norms and Indigenous Peoples: The Contest Over Group Rights*, 94 AM. SOC'Y INT'L L. PROC. 314 (2000); Osvaldo Kreimer, *Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States*, 94 AM. SOC'Y INT'L L. PROC. 315 (2000).

14. See Coulter, *supra* note 13, at 314 ("Indigenous peoples became directly involved in 1976 and 1977 when a major NGO Conference on the Rights of Indigenous Peoples in the Americas was held in Geneva. For the first time indigenous leaders played the leading role in planning the conference and in presenting detailed documentation and analysis of the widespread abuse of their fundamental rights by states.")

15. Indigenous Rights Declaration, *supra* note 11, arts. 3, 4, 5, 7, 8.

16. *Id.* arts. 8, 11-16, 18, 19, 26-29, 31, 32, 37, 40.

Finally, the U.N.'s adoption of the Declaration strengthens the momentum in international law for formally recognizing the rights of indigenous peoples. The Declaration's adoption creates a strong signal that the rights articulated within it constitute binding international customary law. It also builds support in the international community for completing the Organization of American States' Draft American Declaration on the Rights of Indigenous Peoples.

This Edition presents four articles that address the issues outlined above. Kimberly Alderman's paper, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*,¹⁷ leads off the symposium with a discussion of the ethical problems associated with cultural property trade and repatriation, focusing on the assertion of rights to cultural property by Indigenous Peoples. Alderman's paper is intended to cut through the heated rhetoric and emotional disputes over cultural property by properly laying an ethical foundation for future discussion by using the 5Ps of ethical decision making.

Tim Coulter's short recitation of the complex origins of the discussion leading to the U.N. Declaration—a thirty-one-year trek—is critically important reading for any student of Indigenous Rights. Coulter, one of the original participants, drafted the original discussion paper that started the whole process—a list of twelve principles entitled “Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.”¹⁸ His paper, entitled *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*,¹⁹ describes the state of Indigenous Peoples in America in the 1970s that compelled activists to demand a declaration of first principles from the United Nations. He then offers a description of the important features of the U.N. Declaration that he argues makes the Declaration “extraordinary and history-making.”²⁰

Professor Angelique EagleWoman's paper, *The Eagle and the Condor of the Western Hemisphere: Application of International Indigenous Principles to Halt the United States Border Wall*,²¹ argues that the guiding principles of the U.N. Declaration should be interpreted in light of the reality of Indigenous Peoples in the Western Hemisphere. Professor EagleWoman details the long-standing interaction between the Indigenous Peoples of what is now the United States and Canada with the Peoples of what is now Central and South America, interaction that predates and predetermines the artificial international borders that now

17. Kimberly L. Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515 (2009).

18. Robert T. Coulter, Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere (unpublished manuscript), available at <http://turtletalk.files.wordpress.com/2008/08/coulters-original-12-principles.pdf>.

19. Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539 (2009).

20. *Id.* at 547.

21. Angelique EagleWoman (Wamdi A. WasteWin), *The Eagle and the Condor of the Western Hemisphere: Application of International Indigenous Principles to Halt the United States Border Wall*, 45 IDAHO L. REV. 555 (2009).

often serve to separate them. The border wall (or “fence,” as the American government calls it) under construction on the border between the United States and Mexico is only the most recent manifestation of these artificial barriers dividing Indigenous Peoples. She asserts forcefully that the U.N. Declaration should be used to as a backdrop for the restoration of the alliance between Indigenous Peoples, and the end of the construction of the border wall.

Professor Bill Rice’s paper, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*,²² offers the U.N. Declaration as a starting point for developing a solution to an immediate and potentially devastating threat to vast swaths of American Indian Country – the United States Supreme Court’s decision in *Carcieri v. Salazar*.²³ *Carcieri* interpreted the provisions in the Indian Reorganization Act (IRA) allowing, even mandating, the Secretary of Interior to acquire lands for the purpose of restoring the American Indian land base²⁴ to mean almost exactly the opposite of what Congress intended in passing the Act. Professor Rice draws from the U.N. Declaration several key principles about American Indian landholdings, principles he argues Congress generally followed in enacting the IRA, to justify and guide a possible “fix” for the *Carcieri* decision.

As this Edition demonstrates, the adoption of the Declaration heralds a new era in the protection and assertion of indigenous peoples rights. Although there are significant strides that must still be made—including the adoption of the American Declaration on the Rights of Indigenous Peoples by the OAS—the adoption of the Declaration brings Deskaheh’s demands for the international recognition and protection of indigenous sovereignty that much closer to realization.

22. G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575 (2009).

23. 129 S. Ct. 1058 (2009).

24. 25 U.S.C. § 465 (2006).

