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Symposium on Indigenous Rights Introduction

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INTRODUCTION

Symposium on Indigenous Rights Introduction

PROFESSOR NICHOLAS A. ROBINSON

On May 13, 2010, Pace University School of Law, the International Council of Environmental Law, and the George Gustav Heye Center of the Smithsonian Institution's National Museum of the American Indian held a Symposium on Indigenous Rights in New York City at the Museum of the American Indian. The focus of the Symposium was the Declaration of the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations. The Symposium honored Chief Oren Lyons, Faithkeeper of the Onondaga Nation of the Haudenosaunee (Iroquois Confederacy), and through him all the leaders of indigenous peoples who led the inter-generational efforts that has resulted in the adoption of the U.N. Declaration on the Rights of Indigenous Peoples. The Symposium also honored Ambassador Hilario Davide Jr., former Permanent Representative of the Republic of the Philippines to the United Nations and former Chief Justice of the Philippine Supreme Court, for his extraordinary efforts in securing the affirmative vote in the U.N. General Assembly that resulted in the adoption of the Resolution. Finally, the Symposium provided a forum for brief commentaries, printed here, about indigenous rights and the contributions that the Declaration makes to their recognition and eventual vindication. The Symposium had, in the words of Pace University Provost Dr. Geoffrey Brackett, "as its core principle. . .the issues of survival, and issues of sustainability, and issues of global importance and cultural importance."¹

1. Dr. Geoffrey Brackett, Pace University Provost, Opening Remarks at the Symposium on Indigenous Rights, Prospects for the United Nations Declaration on the Rights of Indigenous Peoples 3 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

John Haworth, Director of the George Gustav Heye Center, took note of the context for the Symposium in that, spatially, New York City “has the largest urban Native American population of any American city, and temporally [it occurred] at the midpoint of the United Nations’ recognition of the second international decade of the worlds Indigenous People, which falls from 2005 to the year 2015.”² He noted that Indigenous Rights are being denied even in the wake of the adoption of the U.N. Declaration, as illustrated in

[T]he clear cutting of traditional Indigenous homeland in the Amazon, the devastating losses in the Indigenous Arctic villages as a result of severe climate changes, and the ongoing challenges of cultural survival, protecting languages and cultures during a time of armed conflict, and severe economic dislocation, poverty, and disease in many traditional tribal homelands.³

Coinciding with the trends exemplified by these on-going crises, Haworth noted contrary trends, such as the work in New Zealand, Australia, Canada, and France to establish Museums of Indigenous art, culture, history, and knowledge, like those of the Museum of the American Indian, which he observed is appropriately called “An Infinity of Nations” celebrating “the Native American community of the western hemisphere from the Arctic Circle to the tip of Chile.” Haworth welcomed the Symposium as a contribution to the programs of the Museum of the American Indian:

With an enormously challenging global context, the work collectively is necessarily complicated. How do we all do this respectively? Advancing policies that value ethnic morality and multi-culturalism, actively encouraging the participation of Indigenous Peoples and the issues of interest, including the most basic human rights, economic participation, respect for their cultural histories and languages is a complex challenge indeed, both on the international level and, yes, on the national level

2. John Haworth, Director of the George Gustav Heye Center, Opening Remarks at the Symposium on Indigenous Rights 7 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

3. *Id.*

here in the United States. Advancing economics, social and political, and cultural inclusion is at the heart of this particular discourse. I believe that all of us gathered today recognize the urgency of bringing a native perspective to a higher level of discourse globally. Helping provide a place at the table is important for Indigenous People; being included, being a simple part of the discussion, being totally and fully engaged, and also being part of the broader, highly inclusive work internationally, is profoundly important. . . . On the international level, cultural institutions, the academies, the media, public intellectuals, artists, and others throughout the public here engage in what is called 'densely argued cultural politics.' . . . We wrestle with these issues every single day of our lives. . . . Many people have been guided by leaders recognized for their ability to inspire. . . . Their political and ceremonial authority is based on the acquisition of cultural knowledge and their use of that knowledge to sustain relationships between human society and the spiritual and natural worlds. And among groups wise and unwise. This is certainly at the heart of what both Chief Lyons and Ms Frichner are champions. . . .

The complex history of the Americas includes very bleak periods when massive numbers of Native People were massacred, coupled with devastation to their ways of life, to their cultures and to their languages. In the 19th and early 20th centuries, some artists and writers felt compelled to document American Indian culture, informed by their sense of urgency and the belief that no doubt Indian cultures might disappear. In 1989, Congressional legislation. . . is providing the process for museums and federal agencies to return certain Native American cultural items, including human remains, to lineal descendants and culturally affiliated Indian Tribes. . . and created the National Museum of the American Indian. . . And flash forward, all of the work for two decades to create the [United Nations General Assembly's] Permanent Forum [on Indigenous Issues]. . . Rather than getting the cultural authority to outsiders always studying what have been indigenous traditions, we look to the authority and voice of the Indigenous Peoples to tell their own stories. The Permanent Forum empowers their voices.⁴

4. *Id.* at 9-13.

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The drafting of the U.N. Declaration of the Rights of Indigenous Peoples extended for more than a decade. The adoption of the Declaration, recommended by the U.N. Human Rights Council to the U.N. General Assembly, extended over two sessions of the General Assembly. Political opposition to the Declaration from various governments and interests had to be overcome. It was the negotiating genius and civic dedication of Chief Justice and Ambassador Hilario Davide, Jr., that overcame the procedural delays of the State opposing the Declaration and brought the Draft Declaration to the point of a vote on the floor of the General Assembly and to adoption. Chief Justice Davide had already distinguished himself as a jurist dedicated to human and environmental rights when he authored the decision of the Philippine Supreme Court in *Oposa v. Factoran*, which acknowledged and applied the right to the environment in the Philippine Constitution and under natural law. He understood the import of the Declaration.

Pace University's President Stephen J. Friedman remarked:

We're gathered in this beautiful room at the Smithsonian's Museum of the American Indian to reflect on the importance of taking steps to respect the rights of Indigenous Peoples around the world, and we are, of course honoring Ambassador Davide for his exception leadership in building consensus for the adoption of the Declaration on the Rights of Indigenous Peoples by the U.N. General Assembly.⁵

He noted that Pace University Law School and the International Council of Environmental law had established the Elizabeth Haub Award for Environmental Diplomacy "to honor the legacy of Elizabeth Haub, a true environmentalist, a women devoted to appreciating nature and to conservation and protection of natural resources."⁶ He observed too that the Award's creation was timed to commemorate the 25th anniversary of the 1972

5. Stephen J. Friedman, President of Pace University, Remarks at the Symposium on Indigenous Rights 95 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

6. *Id.* at 96-97.

Stockholm Conference on the Human and Environment and the 5th anniversary of the 1992 “Earth Summit” in Rio de Janeiro, the U.N. Conference on Environment and Development.⁷ The latter event is significant for the award to Ambassador Davide, since the Rio Earth Summit itself included a global gathering of leaders from Indigenous Nations on the eve of the Conference of U.N. Member States. This set the stage for the creation of the U.N. Permanent Forum on Indigenous Issues and gave impetus to the negotiation of the U.N. Declaration of the Rights of Indigenous Peoples.

President Friedman’s remarks were seconded by the Executive Governor of the International Council of Environmental Law, Dr. Wolfgang E. Burhenne, who emphasized:

Everyone working for the environment and sustainable development recognizes that there is no way to effect lasting change without the full involvement of Indigenous Peoples. This has been neglected for too long in many nations. The Declaration is a mighty step toward improving this situation. Ambassador Davide’s success also draws attention to the complexity of the negotiations and the poise required to reach a compromise without taking sides and following only facts and logic. Above all, it is an indication of the labors that lie ahead to inspire the Declaration’s fulfillment. Let me finish by congratulating Hilario Davide as a pioneer in advancing the rights of Indigenous Peoples throughout the world and upholding their integral function in the sustainability of our environment.⁸

In accepting the Elizabeth Haub Award for Environmental Diplomacy conferred for the year 2008, Ambassador Davide remarked about the adoption of the Declaration that:

Diplomacy has not ended. It has only begun. . . I understand that the Award is in recognition of my work for the General Assembly

7. *Id.*

8. Dr. Wolfgang E. Burhenne, Executive Governor of the International Council of Environmental Law, Remarks at Symposium on Indigenous Rights 107-08 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

of the United Nations in advancing the adoption of the U.N. Declaration on the Rights of Indigenous Peoples. . .As regards the Declaration, it was my rare privilege to have been designated by the President of the General Assembly, H.E. Sheika Haya Rashed Al Khalifa, as sole facilitator to conduct further consultations on the draft of the Declaration pursuant to the mandate of General Assembly Resolution 61/178 and to submit a report thereon not later than mid-July 2007. The draft Declaration was earlier approved by the newly created Human Rights Council. In fact, it was the first resolution adopted by the Council. It was in June 2006. As facilitator, I conducted open and inclusive consultations in a progressive manner among the key delegations, including Indigenous Peoples, which had put forward major positions on the Declaration, with an end in view of effectively striking a middle-ground between being faithful to the text adopted by the Human Rights Council and the outstanding concerns of some Member States. In the initial stages, I engaged in preliminary sessions with major interest groups, then entered into dialogues with the major regional groups in the U.N., and finally with the entire membership of the U.N. Thereafter, I presented various options that were drawn up following a careful analysis of the concern of Member States. The result was an outstanding success. I was able to come up with a report, which eventually became the basis for the final Declaration. The adoption of the U.N. Declaration on the Rights of Indigenous Peoples by the General Assembly on 13 September 2007 is an historic point in time where the U.N. Member States acknowledge the fundamental rights of the world Indigenous Peoples.

Essentially, the Declaration provides that Indigenous Peoples have the right to full enjoyment, as a collective group or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law. Indigenous Peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination in the exercise of their rights, particularly those based on their indigenous origin or identity. Indigenous Peoples have the right of self-determination, and the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the mainstream political, economic, social and cultural life of the State. After almost three

decades of diplomatic setbacks, the General Assembly's approval of the Declaration had been hailed as a milestone in the recognition of rights of Indigenous Peoples around the world and brings to an end their long struggle for self-determination.

But we are too close to recent events to hand down the verdict of history. Even so, I can say with all conviction that we must have a vision. When there is no vision, there will be no action. And when there is no action, there will be no future. Consensus building must be sustained at the grass roots. Policymaking has not ended – it has only begun. The diplomacy continues. It remains to be seen how the Declaration will pass muster under our national and international courts of law. Much depends on the political and legislative will of the Member States and the ways in which the Declaration can be transposed to local circumstances.

Article 40 of the Declaration states in part: "Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights." As Vice President of the Economic and Social Council (ECOSOC) in 2007 and as head of the Philippine Delegation to ECOSOC. . . I attended many Plenary Sessions, round tables, informal policy dialogues, and forums where we reviewed trends in international development cooperation, such as South-South and triangular cooperation. I collaborated with U.N. working groups and experts dealing with issues on Indigenous Peoples. We tackle important questions of human rights, as well as cultural, political, economic, civil, social, environmental developmental and educational issues. We proposed international and domestic instruments under the auspices of ECOSOC and took resolute action. At the committee level and up to the Plenary Sessions, many Member States expressed concerns over the binding nature of the Declaration as International Law. Many had misgivings that the Declaration would set a precedent for secession and dismemberment of territories. Many complained that its provisions were vague and purposefully crafted to exclude precise definition, and that the text suffered from serious flaws. We had to meet these challenges. But in the genius of the moment, we held the world together, and we succeeded.

Nonetheless, the real test lies in the ways in which national governments assimilate the norms and practices embodying the Declaration. There can be great normative differences between the ideal of the Declaration and local community standards. Here I expect there will be some resistance, as some Member States still carry the suspicion that the Declaration may be too great an intrusion into state sovereignty. Domestic courts and agencies perhaps remain to be the most important vehicles for Indigenous Peoples, considering that these constitute the first line of available legal remedies. If we can sustain the spirit of cooperation and dialogue that had prevailed in the Working Group, in the Human Rights Council, and the U.N. General Assembly, we can achieve a great deal. The hope remains that any future work should be conducted in this constructive spirit, cooperation and flexibility, especially considering that the issue at hand involves the fate of almost 400 million individuals in the world.⁹

In the progressive development of public international law, the adoption of the U.N. Declaration of the Rights of Indigenous Peoples is truly an heroic milestone. It is a capstone for the process that U.N. Secretary-General Boutros Boutros-Ghali began on Human Rights Day 1992, when he launched 1993 as the International Year of the World's Indigenous Peoples. The U.N. General Assembly chose the theme for that year as "Indigenous Peoples – a new partnership."¹⁰ Partnerships are not always easy relationships. The Declaration's adoption is the fruit of the collaboration as partners between U.N. Member States and Indigenous nations. The text of the Declaration elaborates the aspirations of Chapter 26 of *Agenda 21*, the blue print for sustainable development adopted by the U.N. Earth Summit in Rio de Janeiro in 1992 and moves well beyond the consensus there expressed. It sets forth norms that all governments need to consider and implement. Many of these norms already reflect fundamental human rights, *lex lata*, and thus are currently binding on States. Others, while reflecting basic rights, may be

9. Ambassador Hilario Davide, Jr., Remarks at the Symposium on Indigenous Rights 109-18 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

10. G.A. Res. 47/75, U.N. Doc. A/47/L.33 (Dec. 14, 1992).

regarded by some as *lex ferenda* and constitute an agenda for future legal implementation. Until their norms are embraced, justice for Indigenous Peoples will continue to be denied.

In implementing the Declaration, as in good faith States are bound to try to do, we may do as much for the citizens of U.N. Members States as for the Indigenous Peoples. When Boutros-Boutros Ghali launched the year of Indigenous Peoples, he reflected:

[I]n respecting them, defending them, in helping them to take their place in the community of nations and in international life, it is perhaps the world itself that we are protecting, accordingly to the view that we have of this very diverse world. And, ultimately, we will be protecting every culture, every people, every unique being – in the final analysis, each one of us is a unique being.¹¹

When Chief Oren Lyons addressed the U.N. General Assembly in 1992, he described the injustices and perils suffered by Indigenous Peoples historically, currently and globally. He also described the destruction of nature and natural resources that characterizes Earth's ecological degradation and today's environmental crises. His words to the General Assembly inform the mandate for change embodied in the U.N. Declaration of the Rights of Indigenous Peoples:

Five hundred years ago, you came to our pristine lands of great forests, rolling plains, and crystal clear lakes, streams, and waters. Since then we have suffered in your quest for god, for glory, for gold. But we have survived. Can we survive another five hundred years of 'sustainable development?' I don't think so. Not with the definition of sustainable used today – I don't think so. So reality and natural law will prevail; the law of the seed and regeneration. We can still alter our course. It is not too late. We have options. We need the courage to change our values for the regeneration of our families, the life that surrounds us. Given this opportunity, we can raise ourselves. We must join hands with the rest of creation and speak of common sense,

11. Boutros-Boutros Ghali, *Forward* to CHIEF OREN LYONS, VOICES OF INDIGENOUS PEOPLES: NATIVE PEOPLE ADDRESS THE UNITED NATIONS 15, 15 (Alexander Ewen ed., 1994).

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responsibility, brotherhood, and peace. We must understand that the law is the seed, and only as true partners can we survive.¹²

This Symposium on the U.N. Declaration on the Rights of Indigenous Peoples was convened to foster understanding of this interdependence. Echoing the observation of Ambassador Davide, this Symposium is but one, modest contribution to the beginning of the walk together to the next milestone.

12. CHIEF OREN LYONS, VOICES OF INDIGENOUS PEOPLES: NATIVE PEOPLE ADDRESS THE UNITED NATIONS 35-36 (Alexander Ewen ed., 1994).