

SYMPOSIUM ON THE IMPACT OF INDIGENOUS PEOPLES ON INTERNATIONAL LAW

THE SWEET SPOT BETWEEN FORMALISM AND FAIRNESS: INDIGENOUS PEOPLES' CONTRIBUTION TO INTERNATIONAL LAW

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Standing back, the greatest influence of Indigenous Peoples on international law is our contribution to a pragmatically-driven yet conscious reframing of its foundations. Partly as a result of our participation in international law, it is changing its nineteenth and twentieth century state-centric, colonial, and positivist character to a more informal, flexible, and partially decolonizing system of law.¹ In this way, Indigenous Peoples are crafting a legal system that achieves the “sweet-spot.” It has sufficient “hard-law” quality to restrain the self-interested instincts of powerful states—much needed by Indigenous Peoples seeking to realize their claims against states—and systemic inclusion and justice. The examples I use to illustrate this point, which continue to develop in real time, include:

- the inclusion of Indigenous Peoples in the making of international law;
- the widening content of the right to self-determination to include newer forms of independence; and
- changes to the methods of interaction between the international legal system and domestic legal systems.

The examples come from my own “everyday” experience of international law as an Indigenous advocate, former UN official, academic, and independent expert advising the New Zealand government. In this way, I deliberately attempt to uncover the “real” international law rather than formal or state-centric/dominated narratives.²

The Big Picture

Antony Anghie sets out his vision of international law as follows:³

I continue to hope, together with the many scholars who are working to reconstruct international law precisely because of their awareness of the many ways in which it has operated to exclude and subordinate people on account of their gender, race and poverty, that international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power. At the very least, I believe that the Third World cannot abandon international law

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¹ S. James Anaya made a similar point in 1996, noting the burgeoning shift from positivism to humanist-centric legal doctrine in his first edition of the leading text, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

² Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 VERFASSUNG UND RECHT IN ÜBERSEE/LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 195 (2012).

³ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 318 (2005).

because law now plays such a vital role in the public realm in the interpretation of virtually all international events.

As Anghie hoped, Indigenous Peoples' norms under international law, and Indigenous Peoples' participation in international law, evidence a path that captures the benefits of international law—its ability to restrain power—while simultaneously reforming it so that it is more fair and inclusive.

Indigenous Peoples have challenged the colonial association of international legality with positivism and state-centrism, especially Euro-centrism.⁴ Now, partly as a result of the influence of Indigenous Peoples on the international legal order, international law includes rules and lawmaking processes that are more informal, flexible, justice-focused, and inclusive of non-state collectives.⁵

In this way, Indigenous Peoples have contested “the crits” outright rejections of international law, which dismiss the capacity of law to reform structurally to include the formerly excluded, such as Indigenous Peoples. Indigenous Peoples have also endorsed and reinforced the advantages of law over politics, encapsulated generally in the idea of the rule of law: that law can constrain arbitrary, self-interested and unjust expressions of power. In other words, Indigenous Peoples challenge the Koskenniemi binary of international law as either utopian (above politics) or apologist (not above politics). We instead have expanded the content and process of formal law while maintaining the distinction between law and politics.⁶

Indigenous Peoples have achieved this basic change in international law through pragmatism rather than an especially coordinated and/or ideologically-driven approach to international law. While each Indigenous People has its own objectives and reasons for engaging with international law, most seek the advantage that law provides: to impose obligations on states to behave in a just way, articulated today in instruments such as the UN Declaration on the Rights of Indigenous Peoples. We also seek an international law that is decolonized in content by, for example, recognizing our authority, such as our right to self-determination. To achieve this, we required a shift in the quality of international law to one that permits and embodies flexibility, a de-centering of the state, the inclusion of new international legal subjects, more informal sources of law, and an openness to different and non-state sources of legal authority and approaches to international law.⁷

In sum, Indigenous Peoples have carved out a middle ground between the benefits of formalism and informality, between positivist international law where hard rules are binding and norms based on more fluid sources of law, between strict rules of legality and principles of fairness. Indigenous Peoples' norms reflect, in this way, the “resistance and reform” framework that has been idealized in more moderate and contemporary critical approaches to international law:⁸ that unjust forms of international law can be eradicated while still retaining the instrumentally valuable aspects of an international legal order that has the potential to restrain state power.

Indigenous Peoples' Participation in Law-Making

Indigenous Peoples have changed how international law is made from an activity exclusive to states to one inclusive of Indigenous Peoples, particularly when the norms being made are relevant to Indigenous Peoples. This

⁴ Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, RECHTSGESCHICHTE – LEGAL HISTORY 19, 152–155 (2011).

⁵ Robert A. Williams Jr, *Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World*, 1990 DUKE L.J. 660 (1990).

⁶ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Reissue with new epilogue, 2005).

⁷ JEAN D'ASPERMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* (2011).

⁸ *Eslava & Pahuya*, *supra* note 2, at 199.

development is part of a wider and older phenomenon of increasing non-state actor participation in international lawmaking⁹ but, in the case of Indigenous Peoples, it has been buttressed by the international legal recognition of our right to self-determination and our unique character as governing peoples.¹⁰

Building on practice established during the drafting of the UN Indigenous Declaration from the mid-1990s onwards, Indigenous Peoples participate as equals to states in the meetings of the Expert Mechanism on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues. Further afield, the Human Rights Council, for instance, includes Indigenous Peoples in what was, until more recently, state-only internal negotiations when developing text on resolutions specific to Indigenous Peoples. In the norm-making activities of these bodies, Indigenous Peoples' consent is required, at least informally, for approval of a resolution, policy, or norm-interpretation. Indigenous Peoples also participate in other norm-making and norm-interpreting international fora in ways that are more significant than other non-state actors and civil society. An important example is in UN Climate Change processes. Indigenous Peoples have a specific platform in which their representatives participate alongside state representatives to influence climate change norms and policies.¹¹

The latest development is the General Assembly process to agree to a resolution to enhance Indigenous Peoples' participation in the United Nations, including in the General Assembly. This process has a long history. It began in the League of Nations in the early 20th century, picking up momentum during negotiations on the Indigenous Declaration in the early twenty-first century, gathering steam in the Expert Mechanism from 2009 onwards, and then reflected in a 2011 Secretary General report on Indigenous participation. In 2014, states agreed in the outcome document to the General Assembly's 2014 World Conference on Indigenous Peoples to consider "ways to enable the participation of Indigenous Peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them."¹²

While the General Assembly process is ongoing, it is clear that a significant majority of states agree to Indigenous Peoples' participation in the General Assembly as Indigenous Peoples. This is a significant development given that the General Assembly is the highest-level global decision-making domain and until now made up almost exclusively of states (with a few exceptions for multilateral and mostly state-comprised entities). In agreeing to this level of Indigenous Peoples' participation, states are accepting that Indigenous Peoples have a status different from, and more state-like than, other groups, individuals, or civil society generally. The outstanding issue—for a select few Asian and African states only—relates not to participation in the General Assembly per se but to how Indigenous Peoples are determined to be eligible for participation.

In this way, we see international law's juris-generative decision-making processes evolving flexibly to include Indigenous Peoples, alongside states, while retaining their basis in formal procedure, in this case under the UN Charter which established the General Assembly. A balance is being struck between change to make the system more just—realizing Indigenous Peoples' self-determination in practice—and the formalism required by a system of law.¹³

Ongoing Changes to the Content of International Law

Indigenous Peoples have ushered in new understandings of self-determination. From the 1950s through the early 1980s, self-determination under international law was confined to the decolonization of territories and

⁹ ALEXANDER C. KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 167 (3d ed. 2004).

¹⁰ Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, 7 HARV. HUM. RTS. J. 33 (1994).

¹¹ *Local Communities and Indigenous Peoples Platform*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE.

¹² UN General Assembly, *Outcome Document of the High-level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples*, UN Doc. A/Res/69/2 (Sept. 22, 2014).

¹³ Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177 (2008).

peoples under remote, usually European, rule, excluding many Indigenous Peoples still residing on their own territories in so-called independent states where the colonizer had moved in. Today, self-determination can be exercised by peoples residing *within* territories regulated by the *on-site* colonial power, as is the situation of many Indigenous Peoples. There are also many more options available between integration, free association, and secession and independence,¹⁴ including autonomy and shared power.¹⁵

Changes to the meaning of self-determination in international law are of especial note because self-determination is, arguably, international law's second highest prize for any political group, behind the related concept of sovereignty. It is also an international legal norm that is fiercely guarded by states, which perceive self-determination as a threat to their authority and territories. Yet self-determination is also particularly important to Indigenous Peoples as a mechanism for breaking the shackles of colonization: in other words, for achieving a semblance of justice. As Bruce and Gilio-Whitaker make clear, "[t]his represents a degree of restoring original Indigenous independence (what some may call decolonisation). It is no less than a paradigm shift away from political relationships grounded in the dynamics of hegemony/subordination to mutual respect/cooperation."¹⁶ Macklem might argue that this shift in international law also constitutes a form of redemption of international law.¹⁷ In other words, self-determination remains a significant and well-established norm in international law but its content has changed to accommodate Indigenous Peoples' just claims, and to weaken the protection it provides to colonial state hegemony. A balance has been struck.

Moving forward into the present, the understanding of Indigenous Peoples' right to self-determination continues to evolve as it is realized domestically by governments, courts, and other domestic as well as international juris-generative bodies.

In the Aotearoa | New Zealand context, the working group established to advise the government on a national plan of action to realize the Indigenous Declaration considered in-depth how self-determination might be realized in Aotearoa | New Zealand. It drew on the advice of the UN Expert Mechanism on the Rights of Indigenous Peoples, which visited New Zealand in 2019 to advise the state government and Māori on an effective process to develop a plan of action. In the end, we recommended a model that is essentially pluralist in nature: creating spaces for state and Māori sovereignty to be exercised alongside one another and, in some cases, over the same territorial spaces (technically, with a mix of territorial and personal jurisdiction). It would be built up over time and also include spaces for shared Māori and state authority working in partnership. The particular steps recommended also align with Māori authority as guaranteed in Te Tiriti o Waitangi, Aotearoa | New Zealand's founding constitutional compact between Māori and the Crown.

Over time, this and other pluralist understandings of self-determination will enter the international legal lexicon of reasonable and permissible interpretations of self-determination. It will do so alongside other existing or to-be-developed examples of self-determination: Greenland's self-rule, American Indians' inherent sovereignty, Canadian First Nations' governance agreements, Latin American examples of autonomous regional governance, the formal recognition and practice of Indigenous law in Africa and the Pacific, requirements for Indigenous Peoples' free, prior, and informed consent, the establishment of Indigenous parliaments, and so on. Often these examples are reinforced by international bodies, sometimes cited as best practices, and sometimes criticized, including by human rights treaty bodies. Either way, this accumulation of practice, state recognition, and judicial

¹⁴ Claire Charters, *A Self-determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making*, 17 INT'L J. OF MINORITY & GROUP RIGHTS 215 (2010).

¹⁵ [INDIGENOUS PEOPLES' RIGHTS TO SELF-GOVERNMENT AND AUTONOMY AS A MANIFESTATION OF THE RIGHT TO SELF-DETERMINATION](#) (2019).

¹⁶ Heidi Bruce & Dina Gilio-Whitaker, *Indigenous Nations and Polical Autonomy*, 13 FOURTH WORLD J. 69 (2014).

¹⁷ [Macklem](#), *supra* note 13, at 180.

acknowledgment, reinforced by international institutional reaction and comment, contributes to the development of customary international law (both state practice and *opinio juris*). It also informs general principles of law regulating self-determination (often supported by judicial decisions and academic commentary).

Interactions Between the International and Domestic Legal Orders

Traditionally, settled international and domestic rules regulate the relationship between the international legal order and domestic legal orders. These rules stem from monist and dualist approaches and make distinctions between hard law and soft law. Today, however, the character of the relationships between domestic legal systems and international law is much more fluid, reactive, and inclusive of multiple actors, to the point that the intersection could be more accurately described as a dialogue. International legal norms and actors and domestic legal norms and actors interact in important and influential ways that are not completely determined by, or captured by, positivistic, formal rules, both downwards (international law to domestic law) and upwards (domestic law to international law).

Equally, however, these dialogic inter-legal system interactions are not completely foreign to formal international law with regard to the relationship between the international and domestic legal systems. For example, even under “hard” international legal rules, domestic juris-generative actors have an important role to play in developing understandings of international law. Under Article 38(1) of the Statute of the International Court of Justice, domestic actors, including courts and tribunals, also play an important role:

- contributing to the development of customary international law;
- developing general principles of law; and
- as secondary but authoritative “sources” of international law.

Indigenous Peoples have contributed to the changing legal character of the intersection between legal systems by arguing for the application of international Indigenous Peoples’ norms domestically in ways that are not captured by the formal legal narrative. Similarly, Indigenous Peoples have contributed to the content of international law by raising examples of domestic law, policy, and practice in international institutions in ways that influence and reinforce developing international law. International law and its rules are being adapted and buttressed in legally significant ways by these more informal and non-traditional interactions.

By way of example, there is a dialogic approach in a downwards direction in the New Zealand government’s and its courts’ engagement with the Indigenous Declaration.¹⁸ While New Zealand is formally dualist, requiring conventional international law to be explicitly incorporated into domestic law before it is directly applicable, and the Indigenous Declaration is not formally binding, New Zealand’s highest court has referred to it in influential ways when developing the common law and interpreting statutory provisions relevant to Māori claims. New Zealand’s Waitangi Tribunal has similarly referenced the Indigenous Declaration in support of its interpretation of the principles of the Treaty of Waitangi, as have members of parliament when developing legislation.

In turn, these judicial, parliamentary, and executive references to international norms, together with developing initiatives in New Zealand to realize Māori self-determination, work upwards to the international legal realm. For example, they routinely inform the reports of Special Rapporteurs, international human rights treaty bodies’ jurisprudence, and, especially, interpretations of Indigenous Peoples’ rights by UN institutions focused on Indigenous Peoples. This process is dialogic as international institutions interact with domestic institutions, and Indigenous

¹⁸ Claire Charters, *The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism*, in CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, UNDRIP IMPLEMENTATION: COMPARATIVE APPROACHES, INDIGENOUS VOICES FROM CANZUS 43 (2020).

Peoples participating in both spheres draw the attention of the domestic and international legal orders to the relevance of the respective developments.

Dialogic methods of inter-legal system engagement that develop and complement existing formal rules strike a balance that is important for Indigenous Peoples. In this way, the law retains the authority that comes from the formalism attached to it, while having a level of flexibility that helps it better achieve its objectives.

Conclusion

Indigenous Peoples play an important role in restructuring the international legal order so that it can achieve greater justice. We have paved a road on which international law and process retains sufficient formalism to remain an authoritative tool to constrain unlawful state power. Simultaneously, international law and method are developing the flexibility needed to incorporate newer norms, processes, and inter-legal system relationships that better realize Indigenous Peoples' rights and inclusion. In so doing, Indigenous Peoples are decoupling the historical connection between formalism on the one hand and colonial law and method on the other. This is a considerable contribution to the international legal order.