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SYMPOSIUM ON RABIAT AKANDE, "AN IMPERIAL HISTORY OF RACE-RELIGION IN INTERNATIONAL LAW"

THE SIGNIFICANCE OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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Rabiat Akande's article, "An Imperial History of Race-Religion in International Law," persuasively demonstrates the interplay of racial and religious discrimination both historically and today, and argues that this race-religious nexus is not now adequately addressed by international law.[1] Featured in the article is a historical account of the early colonial-era practices and patterns of thought that regarded people indigenous to the Americas and Africa as inferior in significant part due to their non-Christian religious practices and identities. The article's assessment of contemporary international law as it relates to the "race-religious othering" provides important insights into the shortcomings of formal international legal sources and their application. That assessment, however, sidelines or even downplays relevant developments that can provide hope for the victims of that othering, developments that include the adoption of the UN Declaration on the Rights of Indigenous Peoples ("the Declaration" or "the UN Indigenous Rights Declaration").[2] Akande's article summarily dismisses the significance of the Declaration with cursory questioning of its impact and legal character. This essay responds to Akande's treatment of the Declaration and overall sidelining of relevant developments internationally concerning Indigenous peoples.

Contemporary Developments on Indigenous Peoples and the UN Declaration Sidelined

Having recounted in detail the historical oppression of Indigenous peoples and religions, Akande gives little treatment to the multiple developments since the latter part of the twentieth century aimed at addressing the legacies of that very oppression. That topic is addressed in an oddly placed footnote 34 in the historical part of the article,[3] and in

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[1] Rabiat Akande, *An Imperial History of Race-Religion in International Law*, 118 AJIL 1 (2024).

[2] GA Res. 61/295, UN Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). Other relevant developments, including the work of several human rights bodies and initiatives addressing the intersection of racial and religious discrimination within the framework of international legal system, are detailed in a report by the UN Office of the High Commissioner for Human Rights. OHCHR, *Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief*, UN Doc. A/67/178 (2012). This report is briefly referenced by Akande without examination of the multiple developments it recounts. *See* Akande, *supra* note 1, at 33 & n. 161. Also cited and given short shrift, in the same passage, are several reports of UN Human Rights Council-appointed experts, some of which, upon examination, can be seen to provide authoritative interpretations of existing international law as standing against discrimination at the race-religion intersection.

[3] The footnote observes, "References to Indigenous communities have featured in the ICERD race-religion debate . . . . However, Indigenous peoples have largely been elided in the ICERD discussions," apparently referring to the discussion on the proposed race-religion

a later, regrettably incomplete, and hence misleading, reference to the UN Indigenous Rights Declaration. Footnote 34 explicitly recognizes a sui generis body of international law concerning Indigenous peoples;[4] but absent from the footnote—and from the entirety of the article—is any discussion of the relevance of this contemporary body of international law to addressing the problem at the center of the article, that is, discrimination at the race-religion nexus—a problem the article identifies in large part by examining the historical discrimination against Indigenous peoples.[5]

At the leading edge of contemporary international law's treatment of Indigenous peoples is the UN Declaration on the Rights of Indigenous Peoples.[6] Akande acknowledges that the "race-religion intersection is . . . now referenced by the widely endorsed" UN Indigenous Rights Declaration and describes this standard-setting document as "a result of the sustained efforts of scholars and activists."[7] In fact, the Declaration was born of the sustained efforts of Indigenous peoples throughout the world themselves, through their representatives who advocated for the document and directly participated in the discussions leading to its adoption by the UN General Assembly. Although a number of scholars and non-Indigenous activists had some part in those discussions, it was Indigenous representatives that most influenced the drafting of the Declaration with their accounts of racial othering and related legacies of historical oppression. It was those accounts, along with Indigenous advocacy extending from a worldwide Indigenous rights movement, that generated the moral and political force enabling the Declaration's adoption.[8]

Building on the incomplete characterization of the Declaration's origins, Akande renders the document to be of no significance to the article's assessment of international law, and of diminished significance generally, in a mere two sentences. According to Akande, although "awareness of the race-religion interplay" exists in the Declaration,

> that consciousness is tamed by caution and has not yielded robust state action. Moreover, questions about the force and ultimate impact of [the UN Indigenous Rights Declaration] remain given its status as a non-

protocol to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which is highlighted at the beginning of the article. *Id.* at n. 34. The asserted lack of attention to Indigenous peoples in those discussions, according to the footnote, "may be due in part to the *sui generis* nature with which First Nations are treated under international law." *Id.* The footnote goes on to provide examples of affirmations of Indigenous peoples' rights within the inter-American and African human rights systems.

[4] *See id.* (relevant language of footnote 34 quoted above).

[5] Given the article's focus on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as in need of reform, noteworthy is the absence of reference to the numerous opinions of the Committee on the Elimination of Racial Discrimination—established by ICERD to monitor compliance with the treaty—that interpret ICERD as requiring the dismantling of racial discrimination in its multiple dimensions against Indigenous peoples today. *See* Indigenous Peoples Rights International, A Compilation of UN Treaty Body Jurisprudence: Special Procedures of the Human Rights Council, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples Vol. 9, 18–137 (Fergus Mackay ed., 2023) (discussing multiple decisions and observations of the committee related to Indigenous peoples in the application of ICERD). Of particular significance is the committee's General Recommendation No. 23: Indigenous Peoples, Report of the Committee on the Elimination of Racial Discrimination, Annex, UN Doc. A/53/18 (Sept. 26, 1997) (stating that "the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention [on the Elimination of All Forms of Racial Discrimination] and that all appropriate means must be taken to combat and eliminate such discrimination").

[6] *See generally* The UN Declaration on the Rights of Indigenous Peoples: A Commentary (Jesse Hohmann & Marc Weller eds., 2018) (a collection of essays on the background and content of the Declaration and its influence on the development of international law).

[7] Akande, *supra* note 1, at 32–33.

[8] *See* Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples 16–107 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

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> binding declaration and the lack of consensus over whether it has crystallized to the status of customary international law.[9]

In these two sentences, a lead article of the *American Journal of International Law* provides support, unintentionally no doubt, to those powerful forces that prefer to see the Indigenous Rights Declaration as devoid of legal meaning or otherwise of significant weight, to the detriment of Indigenous peoples worldwide who look to the Declaration as a force in their aid. It is therefore vital to expose the errors in this characterization of the instrument.

Response to a Faulty Characterization of the Declaration

The assertion of a "tamed" "awareness" of the race-religion nexus in the Declaration goes entirely unexplained. But it is inconsistent even with the Declaration's language quoted by Akande, which condemns as "racist" policies or practices of religious superiority.[10] Other parts of the Declaration express concern for "historical injustices" suffered by Indigenous peoples "as a result, inter alia, of colonization;"[11] recognize the "urgent need to respect and promote" their "inherent rights . . . which derive from their . . . cultures, spiritual traditions, histories and philosophies;"[12] and affirm Indigenous peoples' right to be free from "any kind of discrimination"[13] along with their "right to manifest, practice, develop and teach their spiritual and religious traditions, customs, and ceremonies,"[14] and related rights.[15]

There are of course questions about the Declaration's impact, just as there are questions about the impact of treaties that are unquestionably legally binding on the parties to them. Such questions do not alone preclude, for any UN General Assembly resolution or treaty, the presence of legal obligation or *potential* for impact. And it is manifestly clear that human rights instruments, treaty or other, are not to be sidelined even if they have failed to yet lead to "robust state action."

In fact, however, the Declaration and the normative system it is part of, which includes multiple international instruments that repeat the core principles of the Declaration, have been accompanied or followed by meaningful protections of Indigenous cultural heritage and religious traditions at the state level,[16] although these protections are still not sufficient. More generally, the Declaration's normative weight on states can be seen in patterns of constitutional and legislative reform that approximate conformity with the Declaration's terms,[17] and in multiple judicial decisions invoking it.[18] The Declaration's influence can also be seen in the development of corporate policy as

[9] Akande, *supra* note 1, at 33 (footnote omitted but discussed *infra*).

[10] UN Indigenous Rights Declaration, *supra* note 2, pmbl. (quoted in Akande, *supra* note 1, at 33).

[11] *Id.*

[12] *Id.*

[13] *Id.* Art. 2

[14] *Id.* Art. 12.1.

[15] Including the right of Indigenous peoples to "have access in privacy to their religious and cultural sites; the rights to use and control their ceremonial objects; and the right to the repatriation of their human rights." *Id.*

[16] *See, e.g.*, Mexico's Federal Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (Jan. 18, 2022) (with reforms to 2023) (including protection of "spiritual and religious ceremonies and sacred places"); Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (with amendments to 2016) (supplementing Australian state-level protections for places and objects of cultural and religious significance to aboriginal people); Public Law 103-344 (1994), 42 U.S.C. § 1996a (permitting traditional Indian use of peyote).

[17] *See* International Law Association, *Rights of Indigenous Peoples*, Interim Report, The Hague Conference (2010).

[18] *E.g.*, Aurelio Cal et al. v. Attorney General of Belize, Claim 121/2007, Judgment of Oct. 18, 2007 (Sup. Ct.) (Belize) (Mayan land rights) paras. 131–133; Canada (Canadian Human Rights Commission) v. Canada (Attorney General) [2012] FC 445, paras. 350–54 (aff'd [2013] FCA 75) (Can.).

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it relates to Indigenous peoples.[19] The Declaration's normative weight and influence, unfortunately, escapes Akande's article.

Akande further diminishes the Declaration's significance with a footnote referring to the votes cast against it by four "specially affected states" when it was adopted by the UN General Assembly in 2007.[20] Glaringly omitted is that by 2010 each of these four states—the United States, Canada, Australia, and New Zealand—had reversed their positions and, through widely circulated official statements, endorsed the Declaration, thereby joining the overwhelming majority of states that voted for it at the General Assembly.[21]

The only other support provided for questioning the legal significance of the Declaration is a 2017 law review article by Sylvanus Gbendazhi Barnabas, cited without comment in the same footnote.[22] That article examines the legal status of the Declaration and surmises, in part, "that it may be erroneous to view" it or substantial parts of it as customary international law.[23] In another glaring omission, Akande's article fails to include Barnabas's overall conclusion—based upon a comprehensive assessment—that the Declaration *does* otherwise represent international legal obligation. This conclusion bears quoting at some length:

> As a [UN General Assembly] resolution, the legal significance of [the UN Indigenous Rights Declaration] may not be as clear-cut as an international human rights treaty. However, it carries significant legal weight and far-reaching legal implications in international human rights law in relation to [Indigenous peoples] and their rights. Like the [Universal Declaration on Human Rights] which has been widely accepted as a universal standard in the context of articulating and providing for generally acceptable human rights norms globally, the initial negative votes against [the UN Indigenous Rights Declaration] by four States "specially affected" by its provisions do not appear to have affected its legal status or effect in international law over ten years since it was adopted. Although such negative votes may hamper its emergence as [customary international law] at a global level, it has been argued that as an international human rights instrument containing preambular and substantive provisions highlighting its relationship with both "soft" and "'hard" international human rights instruments, [the Declaration] carries significant legal weight.[24]

The foregoing conclusion that the UN Indigenous Rights Declaration carries "significant *legal* weight" due to its relation to the existing "hard" law (as well as "soft" law) of human rights—apart from whether or not it constitutes

[19] *E.g.*, International Council on Mining and Metals, Indigenous Peoples and Mining: Position Statement (2013). The International Council on Mining and Metals is the association of the world's major mining companies.

[20] *See* Akande, *supra* note 1, at n. 164

[21] *See* *16 Years of the UN Declaration on the Rights of Indigenous Peoples, Cultural Survival* (Sept. 12, 2023); Aboriginal Affairs and Northern Development Canada, Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (Nov. 12, 2010); Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs (Australia), Statement on the United Nations Declaration on the Rights of Indigenous Peoples (delivered at Parliament House, Canberra, Apr. 3, 2009); Hon. Dr. Pita Sharples, Minister of Maori Affairs, Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples, (delivered at the ninth session of the UN Permanent Forum on Indigenous Issues, Opening Ceremony, New York, Apr. 19, 2010); Barack Obama, President of the United States of America, Remarks at the White House Tribal Nations Conference, (Washington, D.C. Dec. 16, 2010).

[22] Akande, *supra* note 1, at n. 164. (citing Sylvanus Gbendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 Int'l Hum. Rts. L. Rev. 242 (2017)).

[23] *Id.* at 252.

[24] *Id.* at 260.

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customary international law—has also been made in various contexts by a number of other authors, including the present one.[25]

As for the Declaration's relation to customary international law, Barnabas's skepticism on account of the four negative votes is unwarranted. Those votes have effectively been nullified by the reversal of positions, mentioned earlier, by each of the four states. Moreover, there is substantial authority to establish that at least parts of the Declaration, with its now broad endorsement by states, constitute customary international law or general principles of international law. For example, in a case decided before the Declaration was adopted, the Inter-American Commission on Human Rights articulated standards of Indigenous land tenure, in terms similar to those now incorporated in the Declaration, and referred to those standards as general principles of international law.[26] For its part, the Inter-American Court of Human Rights in a case decided after the Declaration's adoption held that the duty of states to consult Indigenous peoples, a standard likewise incorporated in the Declaration, is a general principle of international law.[27] More generally, a committee of the International Law Association of twenty-six international law experts from almost as many countries conducted a far-reaching study of the Declaration's legal implications. The committee found that, "even though the [Declaration] as a whole cannot be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law" as well as norms that have "crystalized in the realm of customary international law."[28] This conclusion was affirmed by the full conference of the Association.[29]

There are surely those who do not concur with the foregoing authority on the relationship of the Indigenous Rights Declaration to customary international law or general principles of international law. Nonetheless, the strength of this and similar authority (the foregoing being non-exhaustive), as juxtaposed against any dissenting views, makes inapposite a cursory reference to a lack of consensus on the matter. Furthermore, any lack of consensus on the Declaration's relation to customary international law does not resolve the question of its legal significance. As acknowledged by the very source cited by Akande, and explained as well in other sources, the Declaration has legal implications apart from whether or not it incorporates customary international law.

Conclusion

Regardless of the precise legal status of the Declaration or its relation to binding international law, its significance should not be diminished or shrouded by legal formalism. The Declaration advances Indigenous peoples' aspirations to overcome the legacies of the racially motivated suppression of their self-determination and to be free from racial discrimination due to their religious practices. Moreover, the Declaration is an authoritative standard that is influencing states and other powerful actors in the world, even if only incrementally. The UN Declaration on the Rights of Indigenous Peoples is contributing to an international legal order that is more broadly attentive to the interplay of racial and religious discrimination.

[25] *See, e.g.*, S. James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, paras. 18–43, UN Doc. A/HRC/9/9 (2008) (linking the international legal character of the Declaration to a larger body authority based on human rights treaties); Mattias Åhrén, Indigenous Peoples' Status in the International Legal System 103–19 (2016) (extensive analysis demonstrating the legal character of the Declaration in relation to multiple sources of international law).

[26] Mary and Carrie Dann v. United States, Inter-Am. Comm. H.R., Report No. 75/02, Dec. 27, 2002, OAS Doc. OEA/Ser.L/V/II.117 Doc. 1 rev.1, para. 130 (2003) (Indigenous land tenure standards constitute "general international legal principles").

[27] Sarayaku v. Ecuador, Judgment, Inter-Am. Ct. H.R. (Ser. C) 245, paras. 164–65 (June 27, 2012) ("obligation to consult . . . is also a general principle of international law").

[28] International Law Association, *supra* note 17, at 43.

[29] International Law Association, Resolution No. 5/2012 – Rights of Indigenous Peoples, para. 2, adopted at the 75th Conference of the International Law Association held in Sofia, Bulgaria, August 26–30, 2012.

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