1. Internationalization of the law of Indigenous rights

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The international Indigenous rights project is a fascinating example of a set of rights held by different communities on account of their deep connections with particular places developing into a body of international law at a global level. My task in this chapter is to say something about this historically significant phenomenon, about the opportunities this internationalization has opened for Indigenous peoples and for better relationships with states, and about some of the challenges that ensue in the wake of turning something inherently rooted in local places in each instance into something global and international at a more abstract level. In the course of doing so, I will link together certain strands of the different chapters that follow, showing how they fit into a larger narrative concerning the international Indigenous rights project, its opportunities, and its challenges. At the same time, it bears noting that I will be linking only certain strands, and the chapters that follow contain rich discussions of many dimensions going beyond those to which I will allude here in the context of discussing the theme of the internationalization of Indigenous rights.

The development of a substantial body of international Indigenous rights law did not come in one step, but it has accelerated in recent decades and years. Its early beginnings in an international treaty context were arguably even somewhat uninspiring. While International Labour Organisation processes were concerned with the plight of the world’s Indigenous peoples in the 1950s, these concerns were in older-style liberal egalitarian terms that would have sought integration—or, in effect, assimilation. So, the original ILO Convention 107 bears traces of these attitudes, along with paternalistic attitudes, and marks an awkward beginning to international treaty-making on Indigenous rights but nonetheless a beginning.

A significant period of Indigenous activism began shifting attitudes in the 1960s and 1970s and led more toward the more recent approach, beginning to recognizing Indigenous populations as entities with claims to self-determination, as would begin to be reflected in the later ILO Convention 169 in the late 1980s. Accordingly, it is perhaps appropriate to recognize the ILO’s earlier involvement as well-motivated even if ill-informed and thus amounting to a beginning toward international treaty-making on Indigenous rights.

Of course, international law on Indigenous rights did not develop solely in the context of international treaties. Indeed, the two ILO conventions never attained large numbers of state
parties, even while they have had a meaningful impact in some regions. Perhaps more significant over a number of decades was the gradual accumulation of decisions for Indigenous parties under broader international human rights mechanisms, in regional contexts like the Inter-American Court of Human Rights, and in customary international law. Here, practices of states on some issues involving Indigenous rights gradually developed in ways such that it became possible to identify at least certain norms of customary international law even before there was an international declaration on Indigenous rights. Obviously, though, the attempt to achieve an international declaration became a key objective of international Indigenous rights activism, and there was a decision to pursue one international declaration even if there were some differing objectives in, for instance, the context of Indigenous peoples in the global North and in the global South. That said, speaking of that one international declaration should not take focus away from ongoing regionally differentiated projects, with regional treaties on Indigenous rights being able to focus on issues that escape international attention and thus to be ongoing complements to the globalized international body of Indigenous rights law, with the American Declaration on the Rights of Indigenous Peoples (ADRIP) being a key example.

Nonetheless turning to that one international declaration, part of what stands out about the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly in 2007, is how much it came from Indigenous agency and Indigenous activism. Indeed, the process leading up to the 1994 Draft Declaration was substantially Indigenous-led, such that the 1994 Draft Declaration perhaps stated best the preferred Indigenous position on some issues. Negotiations with states followed, and those led to a different formulation of some rights within the ultimate 2007 UNDRIP. But, even

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4 On some of these decisions, a classic reference is Patrick Thornberry *Indigenous Peoples and Human Rights* (Manchester University Press 2002). For a discussion of more recent activities of human rights bodies see Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016). With the sort of highly detailed coverage provided by these works, it has been unnecessary to include in this work a chapter on the application of broader international human rights law to the contexts of Indigenous peoples, and the focus tends to be on the specific body of law that has accumulated as international Indigenous rights law.

5 There have been various comments on the significant work of the inter-American Court of Human Rights on Indigenous rights. For one helpful example see Tom Antkowiak ‘Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court’ (2013) 35 *U Penn J Int’l L* 113. However, for important cautions about there being more to be learned from Latin America on Indigenous rights than just from the Inter-American Court, see Lucas Lixinski ‘Regional Indigenous Rights and the (Dis) Contents of Translation: A View from Latin America’, chapter 2 in this volume.


7 Ibid.

8 Andrew Erueti has the fascinating perspective, developed from a close engagement with the drafting history, that the UNDRIP has a bifurcated meaning, offering essentially different guarantees in the global South and in the global North. See Andrew Erueti *The UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach* (University of Toronto PhD thesis 2016).


where Indigenous representatives did not achieve every position they sought, it is possible to identify an enormous Indigenous influence on this international legal instrument, manifesting a powerful Indigenous rights movement achieving key goals in sophisticated ways.\textsuperscript{12}

That said, a focus on one particularly interesting dimension of the UNDRIP may illustrate how the influence of Indigenous peoples achieved some meaningful shifts in the texture of international law even while being subject to also meaningful constraints. The 1994 Draft Declaration contained many explicit references to collective rights,\textsuperscript{13} and the extensive discussion of collective rights would have made it a relatively revolutionary instrument on the matter of collective rights had it been adopted in its draft form. However, many states were resistant to the concept of collective rights,\textsuperscript{14} making this a major issue in the discussions leading up to the final UNDRIP, getting most of the explicit references to collective rights removed, and in a number of instances making interpretive statements about the UNDRIP even at the time of voting for it in which they indicated their ongoing opposition to the concept of collective rights.\textsuperscript{15}

Does this example mark out a lack of Indigenous influence on the final form of the UNDRIP? On the contrary, the final form of the UNDRIP contains what must properly be called a complex mediation of individual and collective rights,\textsuperscript{16} notably covering many more topics than often receive discussion.\textsuperscript{17} Within this reality, though, the fact that a widely supported declaration now contains explicit reference to the rights of ‘Indigenous peoples’—discussed as ‘peoples’ rather than ‘populations’—is in itself immensely significant. Indeed, there has been a significant shift from Indigenous peoples being thought of as small groups of concern to state governments to now being thought of as peoples with rights of self-determination.\textsuperscript{18}

A matter like self-determination illustrates how the UNDRIP makes statements concerning rights held by Indigenous peoples generally even while these rights stem from their own specific circumstances, their own rootedness in specific territories, their own existence. Self-determination is a centrally important concept for international Indigenous rights law


\textsuperscript{13} See the many references to collective rights in Draft Declaration (n 11).

\textsuperscript{14} I both traced and tried to respond to some of these objections in Dwight G Newman ‘Theorizing Collective Indigenous Rights’ (2006/2007) 31 Am Indian L Rev 273, which drew on a larger body of work on collective rights eventually to be published as Dwight Newman Community and Collective Rights: A Theoretical Framework for Rights Held by Groups (Hart Publishing 2011).


\textsuperscript{17} For a piece in this collection examining a much underdiscussed article of the UNDRIP, see Adrienne Tessier ‘Indigenous Religious Freedom in International Law: A Discussion of the Potential of Articles 12 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)’, chapter 18 in this volume.

\textsuperscript{18} See generally Alexandra Xanthaki ‘Self-Determination Rights’, chapter 6 in this volume.
generally.\textsuperscript{19} It helps to interpret matters like the interplay between Indigenous resource rights claims and claims by states, thus offering forms of mediation on complex questions of exactly whom the permanent sovereignty over natural resources principle is meant to benefit.\textsuperscript{20} It also helps to undergird participatory rights of Indigenous peoples, and those who read the concept of free, prior, and informed consent (FPIC) in certain ways would see it as a manifestation of self-determination, a central protection against decisions being made in ways that limit the self-determination of Indigenous peoples or otherwise vitiate their rights.\textsuperscript{21} It bears noting, though, that not all scholars see FPIC in the same way, and there is a particularly interesting clash of views on FPIC in neighbouring chapters of this book as between a view ascribing it independent significance and a view seeing it as more derivative from other substantive rights apart from self-determination.\textsuperscript{22} There are complex concepts at stake throughout.

Some of these issues, like self-determination and FPIC, certainly generated controversies with states in the processes leading up to the UNDRIP. Over time, as it becomes less a recently realized achievement and more a part of the broader history of the internationalization of Indigenous rights, there will be more nuanced discussions about the history of the UNDRIP negotiations. Some very critical things have been said, for instance, about the position taken by African states who forced last-minute changes to the UNDRIP after threatening to vote against it, even while they were simultaneously speaking of wanting to be able to vote for it as part of a broader project of decolonization. But there were underlying reasons in their own post-colonial position for African states to have some of the concerns that they did, some of which were triggered by discussion of self-determination of a set of potentially undefined Indigenous peoples potentially indistinguishable from other minority groups within the postcolonial African state that wrestled with challenges like arbitrarily imposed borders.\textsuperscript{23} The international Indigenous rights project interacts in inherently complex ways with other international human rights projects, including other projects associated with decolonization.\textsuperscript{24}

Beyond self-determination and potentially associated participatory rights, another central concern for Indigenous peoples is land and resource rights. The very etymology of the word ‘Indigenous’ has connections to land or territory or country. Thus, several chapters that follow consider issues related to land rights and resource rights, doing so from different angles, including perspectives focused on renewed Indigenous agency in environmental protection, on

\textsuperscript{19} Ibid.
\textsuperscript{21} See e.g, Cathal Doyle ‘Free Prior and Informed Consent and Indigenous rights: A Bulwark against Discrimination and Platform for Self-determination’, chapter 7 in this volume.
\textsuperscript{22} See the analysis of FPIC offered in Mattias Åhrén ‘Indigenous Resource Rights at Their Core (And What These Are Not)’, chapter 8 in this volume.
\textsuperscript{24} See Nnaemeka Ezeani and Dwight Newman ‘Definitional Complexities and the Boundaries of the Concept of Indigenous Peoples’, chapter 21 in this volume.
achieving fairer terms around resource development, and on considering comparative ways of developing more detailed land rights doctrine for Indigenous land rights claims.25

The last of these is an initiative on which it is worth commenting further, for it speaks to states engaged in ongoing ways with differing approaches to land rights even in an era of globalized approaches. Some might see these ongoing differing approaches as holdovers from complex histories, with common law states having developed a body of Aboriginal title law within the particular methodologies of the common law and with those methodologies not permitting of rapid change to that body of law.26 But it is also possible to note that the land rights provisions in the UNDRIP left enough ambiguity that they may come to be applied in ways that differ in certain details in different states. The text of article 26 of the UNDRIP differentiates between land still in the possession of Indigenous peoples and that which traditionally had been. For land still in possession, it refers to a ‘right to own, use, develop and control’ those lands.27 But for those not in possession, it refers to a more ambiguous ‘right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’.28 A ‘right to the lands’ as distinct from ‘a right to own, use, develop and control the lands’ may have a very different meaning, thus permitting a certain discretion to states in aspects of how they develop their land rights law. The internationalization of Indigenous rights law on some important topics may be incomplete and may instead support closer attention to comparative law on some land rights issues. There have also been profound divisions between even different Indigenous legal scholars on how to interpret the land rights provisions, in terms of underlying interpretive methodology, that illustrate the need for better interpretive methodology and larger conversations about the interpretation of the UNDRIP.29

The idea that there needs to be attention to details of land rights issues is unsurprising in so far as property law generally has a set of complex interactions with society, both on broader cultural issues and on economic issues as one specific area of impact. While Indigenous peoples’ connections to land are cultural and spiritual in their deeper origins, Indigenous land rights do also have inherently economic dimensions. These realities have been challenging in contexts like the development of Canadian Aboriginal title jurisprudence, which I have

26 On the general history of the doctrine of Aboriginal title, see the important work of PG McHugh Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights (Oxford University Press 2011).
27 UNDRIP (n 10) art 26(2).
28 Ibid., art 26(1).
argued previously has tended to lack coherent theoretical structure, has seen the courts leave many matters undecided in ways that were not beneficial to anyone, and has seen the courts impose stereotypes on Indigenous peoples in ways that undermine their modern realities and aspirations that may include economic growth for some communities based on their modern use of land. Issues of Indigenous land rights raise inherently complex questions, and the UNDRIP was frankly incapable of speaking to the full range of scenarios that could arise in respect of different Indigenous land rights issues. So, again, there may be limitations on what a global body of internationalized Indigenous rights law can do, even on some matters that are of central concern for Indigenous peoples everywhere.

While economic dimensions of land rights are just one facet of what is at stake there, there needs to be more attention to other economic contexts in which Indigenous rights matter. Some Indigenous peoples in some countries have achieved increasingly significant roles in business activity. In any event, all Indigenous peoples are potentially affected by aspects of international investment law and international trade law in ways that warrant attention. More attention to economic contexts and Indigenous peoples than made its way into the UNDRIP is essential, and these sorts of issues probably call for much research that is not being done.

Apart from the challenges of interacting with circumstances around the world and the challenges of grappling with areas that have been receiving insufficient attention, another challenge facing a fixed international declaration is that of grappling with new areas that may be changing rapidly. The contents of international Indigenous rights law obviously go beyond one fixed instrument, as they have to adapt to changing law on cultural heritage more generally and need to grapple with new technological developments that intersect with already complicated issues related to intellectual property and Indigenous knowledge.

The complexities of an internationalized Indigenous rights law are complicated yet farther by its intersections with various features of the state-dominated system in which it has emerged—and to which it is partly a response. The UNDRIP does not define Indigenous peoples but appears to assume circumstances of marginalization, raising some questions on


31 For discussion see Ken Coates and Carin Holroyd ‘Participation of Indigenous Peoples in Global Economic Activity’, chapter 15 in this volume.


33 See Coates and Holroyd ‘Global Economic Activity’ (n 31) for discussion of some areas of scholarship needing more attention.

34 See Federico Lenzirini ‘Indigenous Cultural Heritage and International Law’ (chapter 16) and Chidi Oguamanam ‘Indigenous Peoples’ Rights in Equitable Benefit-Sharing Over Genetic Resources: Digital Sequence Information (DSI) and a New Technological Landscape’ (chapter 17).

35 For an important theoretical argument on how Indigenous rights are one of a number of rights systems formulated to reduce injustices otherwise arising from the organization of the international order in terms of states, see Patrick Macklem The Sovereignty of Human Rights (Oxford University Press 2015).
how it applies in the context of a state that has a majority-Indigenous population,\textsuperscript{36} with that latter circumstance being perhaps sometimes the very realization of self-determination, meant to be exercised internally in most circumstances but perhaps sometimes leading to the creation of Indigenous-majority jurisdictions as the realization of Indigenous rights that should not then lead paradoxically to their denial. The UNDRIP is attentive to the possible need for transboundary exercises of Indigenous rights but does not address all of the issues that it could, thus giving rise to a need for further discussion on these complexities arising from state boundaries.\textsuperscript{37} And, in its lack of definition of Indigenous peoples, the UNDRIP may create some particular problems in specific places, raising broader questions about whom it is meant to protect and who it is not, about how much it distinguishes Indigenous peoples as the very specific beneficiaries of a set of rights, and about to what degree it pushes broader changes in international law for others as well.\textsuperscript{38}

The ongoing work on Indigenous rights at both international and domestic levels raises many questions in the years and decades ahead. The international Indigenous rights project is ultimately not meant to be an abstract one but saw the formation of an international coalition so as to support Indigenous peoples rooted in particular places. Canada’s national government has recently enacted legislation that commits it to a process of implementation of the UNDRIP.\textsuperscript{39} The UNDRIP was adopted precisely to encourage changes in various domestic contexts, and others around the world will be interested in what a state like Canada does now in applying such legislation, something surely to be emulated in various ways elsewhere within the complex texture of Indigenous rights considered once again globally.

The international Indigenous rights project raises many fascinating questions. The chapters in this volume wrestle with many of these and offer new insights. They may also raise, in turn, new questions. There remains much scholarly work to be done in thinking about Indigenous rights, in envisioning better futures, and in reshaping the world in various ways.

\textsuperscript{36} See Dominic O’Sullivan ‘Fiji and the UN Declaration on the Rights of Indigenous Peoples: Indigeneity and the Right to Self-Determination in a Majority-Indigenous Context’ (chapter 19).

\textsuperscript{37} See Harum Mukhayer ‘Transboundary Rights and Indigenous Peoples Between Two or More States’ (chapter 20).

\textsuperscript{38} See Ezeani and Newman (n 24).

\textsuperscript{39} \textit{United Nations Declaration on the Rights of Indigenous Peoples Act} SC 2021 c 14 (Canada).