

INTRODUCTION TO THE SYMPOSIUM ON THE IMPACT OF INDIGENOUS PEOPLES ON INTERNATIONAL LAW

S. James Anaya and Antony Anghie**

The field of Indigenous Peoples' rights has transformed international law. This is reflected in recent developments relating to Indigenous Peoples across a range of areas of international law. For example, in addition to the adoption of international instruments specifically concerning Indigenous Peoples, the United Nations and regional authorities now routinely interpret major UN human rights and regional treaties as establishing special protections for the rights of Indigenous Peoples. The World Trade Organization agreements and other international law instruments are now constructed to enable the protection of Indigenous Peoples in executing policies. In 2016, the World Bank updated policies that protect Indigenous Peoples against violations by lending recipients and contractors. International organizations incorporate the participation of Indigenous Peoples within their norm-building and -implementation activities, and the duty to consult Indigenous Peoples on matters affecting their interests—both international and domestic—has been firmly established. While there is a relatively robust literature on international Indigenous Peoples' rights and policy, there is little systemic analysis of the ways in which international law as a whole is changing as a result of the efforts of Indigenous Peoples to validate their legitimate interests, concerns, and aspirations.

This symposium explores how Indigenous Peoples are changing international law. It focuses on the expansion of international law's traditionally state-centric lens, its evolving capacity to accommodate concepts outside that paradigm, and the ways in which challenges by Indigenous Peoples expand mainstream sources of legal authority.

Because Indigenous Peoples' law and policy is now a distinct field of international law (and not just a subset of international human rights law), the symposium starts with an essay that explores the state of international law-making concerning Indigenous Peoples today. Kristen Carpenter of the University of Colorado and Alexey Tsykarev, both members of the UN Expert Mechanism on the Rights of Indigenous Peoples, describe how Indigenous Peoples are emerging as influential actors in international diplomacy.¹ As the authors show, the Expert Mechanism and the UN Permanent Forum on Indigenous Issues have become sites of various forms of diplomacy among Indigenous Peoples and states in the interpretation of international obligations. The process serves to further realize Indigenous Peoples' rights over time.

In the next essay, Claire Charters of the University of Auckland argues that Indigenous Peoples are influencing international law through their "contribution to a pragmatically-driven yet conscious reframing" of foundational concepts.² Charters claims that Indigenous Peoples have taken a pragmatic approach to international law that embraces its positivist, state-constraining features, while also seeking to decolonize it by embracing flexibility, a

* *Dean and University Distinguished Professor, University of Colorado School of Law, Boulder, Colorado, United States.*

* *Professor of Law, National University of Singapore and the University of Utah, Salt Lake City, Utah, United States.*

¹ Kristen Carpenter & Alexey Tsykarev, *Indigenous Peoples and Diplomacy on The World Stage*, 115 AJIL UNBOUND 118 (2021).

² Claire Charters, *The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law*, 115 AJIL UNBOUND 123 (2021).

“de-centering” of the state, and an openness to new participants and sources of legal authority. Drawing on an examination of efforts to realize Māori self-determination in Aotearoa | New Zealand, Charters argues for an “inter-legal system engagement” that reflects a dialogue between Indigenous, state, and international law and legal institutions.

Similarly, Roger Merino from the Universidad del Pacífico in Lima, Peru describes how Indigenous influences on the concepts of territory and sovereignty in Latin America started centuries ago. Spanish and British colonial powers developed legal theories that recognized some degree of Indigenous sovereignty over land, before newly independent states brought “the total decoupling of property and territory,” affording Indigenous Peoples only the former.³ Merino argues that Indigenous efforts to achieve self-determination “have located territory at the center of struggles for social and state transformations,” seeking a plurinationalism where “power is shared and decisions over land cannot overrule Indigenous priorities.”

Finally, Kirsty Gover of the University of Melbourne focuses on the concept of nationality as an expression of sovereignty.⁴ Gover uses examples from the Australian and Canadian context to demonstrate how international Indigenous rights jurisprudence has contributed to the emergence of a distinctive status for non-citizen Indigenous persons. Gover further suggests that the cross-border effects of Indigenous connections to land could supply an Indigenous-specific dimension to international law concepts of nationality and rights of return.

Overall, the symposium aims to spark a productive conversation about the ways in which Indigenous Peoples are contributing to changes in international law, and explore the implications of this transformation for Indigenous interests and their advancement. As Indigenous Peoples assert a more active role in international lawmaking, they are contributing to a more just international legal order.

³ Roger Merino, *The Land of Nations: Indigenous Struggles for Property and Territory in International Law*, 115 AJIL UNBOUND 129 (2021).

⁴ Kirsty Gover, *The Potential Impact of Indigenous Rights on the International Law of Nationality*, 115 AJIL UNBOUND 135 (2021).