BOOK REVIEW

INDIGENOUS PEOPLES, CONSENT AND RIGHTS: TROUBLING SUBJECTS BY STEPHEN YOUNG (ROUTLEDGE, 2020) 276 PAGES. PRICE AUD252.00 (HARDBACK). ISBN 9780367344627.

In 2007, the United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[1] Recognised as a 'milestone in the re-empowerment of the world's aboriginal groups',[2] the Declaration was welcomed as representing 'the beginning of a new phase in the debate on Indigenous rights'.[3] Much of this debate has centred on one particular, central but complicated concept: the right to free, prior and informed consent ('FPIC').[4] In *Indigenous Peoples, Consent and Rights: Troubling Subjects*, Stephen Young of the University of Otago, New Zealand, advances this debate — and challenges much of the literature — in a theoretically informed way.

In an international legal system premised on the dispossession of Indigenous peoples of their lands and the denial of their entitlement to self-determination and self-governance,[5] the notion of a right to FPIC has long been regarded as especially significant. As scholars have remarked, 'FPIC provides a particularly powerful resource for Indigenous peoples in their efforts to strengthen and protect their rights to land'.[6] This is because the notion is not only normatively predicated on Indigenous peoples' right to self-determination,[7] but it also holds out a promise that states will respect that right by seeking the agreement of Indigenous communities before taking actions that will affect them, their lands or their livelihoods.[8] In this way, FPIC has 'transformative power', carrying with it the potential 'to restructure the relationship between Indigenous peoples, States and industry from one based on power and dominance, to one premised on equality

---

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex ('*United Nations Declaration on the Rights of Indigenous Peoples*') ('*UNDRIP*').

2 S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment', *Jurist* (Web Page, 3 October 2007) <http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>, archived at <https://perma.cc/M2EH-AV9B>. See generally James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Purich Publishing, 2008) ch 9.

3 Stephen Allen and Alexandra Xanthaki, 'Introduction' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 1, 7.

4 Matthew I Mitchell and Davis Yuzdepski, 'Indigenous Peoples, UNDRIP and Land Conflict: An African Perspective' (2019) 23(8) *International Journal of Human Rights* 1356, 1356–7.

5 See generally Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010).

6 Mitchell and Yuzdepski (n 4) 1359.

7 Nathan Yaffe, 'Indigenous Consent: A Self-Determination Perspective' (2018) 19(2) *Melbourne Journal of International Law* 703, 724–5.

8 Adrienne McKeehan and Theresa Buppert, 'Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation' (2014) 35(3) *Harvard International Review* 48, 49–50.

and consent'.[9] By re-empowering Indigenous communities with the authority long denied to them, FPIC can ensure that relations are structured in an 'equitable and amicable' manner.[10]

Young's analysis troubles this picture. In three detailed case studies exploring attempts at developing extractive projects on Indigenous peoples' lands in the Philippines and Australia and land titling in Latin America, Young demonstrates how FPIC has not been able to empower autochthonous communities with the authority to control development on their lands.[11] While the Tampakan Copper-Gold Project in Mindanao and Adani's Carmichael mine in the Queensland Galilee Basin may not (yet) have been developed, Young's careful study reveals how FPIC has had little substantive influence on protecting and promoting the rights of the B'laan and the Wangan and Jagalingou peoples. Similarly, successive wins in the Inter-American Court of Human Rights ('IACtHR') have provided autochthonous communities in Latin America with little clear-cut practical benefit. In all three cases, FPIC has restructured peoples and communities, but not in a manner that transforms relationships around notions of equality and amicability.[12] Rather, as Young traces, FPIC has served to further integrate various autochthonous communities into a legal system not of their making.

In part, this is not a new story. For many years, scholars have acknowledged that FPIC has been unable to reset the relationship between Indigenous peoples, states and industry.[13] Across the globe, development on Indigenous lands without Indigenous consent continues apace, causing significant and devastating effects.[14] Young addresses this issue, noting in a clear and well-argued Chapter 3 that the two major problems that are often identified with FPIC centre on its legal status and its ambiguous scope.[15]

---

9 Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2015) 262.

10 Marcus Colchester and Fergus MacKay, 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent' (Conference Paper, Conference of the International Association for the Study of Common Property, August 2004) 8.

11 See generally Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge, 2020) chs 3–4 ('*Indigenous Peoples, Consent and Rights*'). On terminology, see at 9–10. Young adopts the phrase 'autochthonous communities' to emphasise that such communities are transformed into 'Indigenous peoples' via a process of discourse.

12 Ibid ch 6.

13 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, *Free, Prior and Informed Consent: A Human-Rights Based Approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, 39th sess, Agenda Items 3 and 5, UN Doc A/HRC/39/62 (10 August 2018) 15–17; Shalanda H Baker, 'Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects' (2012) 30(3) *Wisconsin International Law Journal* 668, 685–95; Alexander Dunlap, '"A Bureaucratic Trap": Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico' (2018) 29(4) *Capitalism Nature Socialism* 88.

14 See generally James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or near Indigenous Territories*, 18th sess, Agenda Item 3, UN Doc A/HRC/18/35 (11 July 2011).

15 Young, *Indigenous Peoples, Consent and Rights* (n 11) 79–91.

On the former point, the right to FPIC is enshrined in a range of international legal standards,[16] but it features most prominently in *UNDRIP*. While it is accepted that UN General Assembly declarations do not create legal obligations, considerable attention has been paid to ascertaining whether the process of this particular declaration's negotiation and adoption means that it enjoys a distinctive character or carries certain authority.[17] Others have argued that although the Declaration is a soft law instrument, many of its provisions, including those on self-determination, political participation and consultation, reflect hard law norms.[18] Even on this reading, however, *UNDRIP* may provide 'a framework that states can adopt to underpin their relationship with Indigenous peoples', but it does not 'create any binding legal obligations in domestic legal systems'.[19] It seems then that scholars keen to bolster or support the obligatory nature of FPIC and *UNDRIP* are forced either to collapse the distinction between law and morality to argue that 'it morally and politically binds' states,[20] or to draw on its normative power as the pre-eminent international Indigenous rights instrument to employ it as a tool of political persuasion that *should* influence domestic law and policy.[21]

---

16 See, eg, *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) arts 6, 15; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (26 September 1997) annex V ('*General Recommendation on the Rights of Indigenous Peoples, Adopted by the Committee, at Its 1235th Meeting, on 18 August 1997*') art 4(d); Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, Para 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 43rd sess, UN Doc E/C.12/GC/21 (21 November 2009) para 55(e); *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. 1) (1993) annex I ('*Rio Declaration on Environment and Development*') 7 (Principle 22); World Bank, *Indigenous Peoples* (Operational Manual No OP 4.10, July 2005).

17 See, eg, Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6(2) *International Human Rights Law Review* 242; Clive Baldwin and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 121, 123–4; Dwight Newman, 'Interpreting FPIC in UNDRIP' (2020) 27(2) *International Journal on Minority and Group Rights* 233, 244–9.

18 See, eg, Javaid Rehman, 'Between the Devil and the Deep Blue Sea: Indigenous Peoples as the Pawns in the US "War on Terror" and the Jihad of Osama Bin Laden' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 561, 561–2, 583–4; James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya*, 12th sess, Agenda Item 3, UN Doc A/HRC/12/34 (15 July 2009) 12–15 [38]–[42].

19 Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9(2) *Melbourne Journal of International Law* 439, 465.

20 Rodolfo Stavenhagen, 'Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 147, 151.

21 Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 225, 225.

Significantly, in neither case is FPIC an explicit legal obligation.[22] Perhaps, therefore, states do not need to obtain consent.

Even if we assume that FPIC is obligatory, clarifying what it actually requires in practice has also proven exceedingly difficult. In an important piece reflecting on FPIC five years after *UNDRIP*'s adoption, Mauro Barelli lamented that 'uncertainties … continue to surround the actual meaning and scope of this principle'.[23] Unfortunately, the passage of time has not assisted. In part, this is because the right to FPIC appears in several different textual forms at different points in the Declaration. For instance, art 10 places a categorical requirement of consent, providing:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.[24]

Article 19, by contrast, is more ambiguous. It provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[25]

Does this distinct language mean that art 19 requires that states obtain consent or simply that they initiate consultations with the goal of achieving consent? The latter may allow states to enact measures that affect Indigenous peoples and communities even where consent is not forthcoming. Perhaps the most we can say is that consent is required in some, but not all, circumstances.[26] Plainly, deep divisions on this point between Indigenous peoples and states during the negotiation and drafting of *UNDRIP* led the parties to adopt a degree of ambiguity.[27] Unfortunately, that does not get us any closer to a clear understanding of the principle's scope and meaning. It is no wonder then that the implementation of FPIC is a major challenge.[28] To put it lightly, FPIC is a 'thorny issue'.[29]

Young does not discount the challenges of status and scope. He is sympathetic to legal scholars' natural inclination to seek to stabilise or fix the difficulties regarding FPIC by clarifying its scope or ascertaining when it is required (if only

---

22 Stavenhagen (n 20) 151; ibid 227.

23 Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *International Journal of Human Rights* 1, 8.

24 *UNDRIP*, UN Doc A/RES/61/295 (n 1) art 10.

25 Ibid art 19.

26 Mauro Barelli, 'Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 247, 268–9. See also S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67(4) *University of Toronto Law Journal* 435, 460–2.

27 See Amy K Lehr and Gare A Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Foley Hoag, 2010) 19–20. See generally Newman (n 17).

28 See, eg, Kathryn Tomlinson, 'Indigenous Rights and Extractive Resource Projects: Negotiations over the Policy and Implementation of FPIC' (2019) 23(5) *International Journal of Human Rights* 880, 881.

29 Mitchell and Yuzdepski (n 4) 1357.

we can work out when states must seek FPIC and what FPIC involves, then Indigenous peoples can gain its protection). However, Young's focus is on a more fundamental and problematic concern, and one that scholars and practitioners should take seriously. Young asks whether human rights law is an appropriate vehicle for Indigenous empowerment. In other words, why did anyone expect that FPIC would help?

In a series of articles, Young has explored how Indigenous peoples and communities are shaped both by and through domestic and international legal discourse, as well as how those peoples and communities construct themselves in order to engage in that discourse.[30] As that work has perceptively identified, communities seeking to empower themselves by asserting control over decision-making in internal and local affairs must necessarily transform themselves into objects that are recognisable by the state and the international legal system.[31] In constructing themselves as 'Indigenous peoples' for the purposes of international law, autochthonous communities become entitled to legal rights granted or recognised as inherently belonging to 'Indigenous peoples'.

It is that process of transformation that Young identifies as the crux of the challenge facing Indigenous peoples and communities. Paradoxically, in that very act of self-determination, Indigenous peoples and communities become subject to and objects of international law. Young worries that as a result, the control such communities seek may well be illusory:

> [F]or one to express agency through the law is also to become identifiable as a legal subject who has, whether one intends to or not, already professed obedience to the powers that one conscripts.[32]

FPIC may promise communities 'the ability to control their futures, but claiming FPIC or self-determination requires free and willing subjection to laws that claimants do not control'.[33] Though Indigenous communities may draw on FPIC in an effort to transcend colonialism and extricate themselves from the political and legal structure of the state, it ultimately leads to further entanglement. According to Young, human rights will not transform Indigenous–state relations and will not give Indigenous peoples the control that they desire.

Young develops his argument through the lens of legal performativity. Drawing on Michel Foucault, Judith Butler and Karen Zivi, Young interrogates international legal discourse to assess why and how international legal scholars both overestimate what FPIC is capable of delivering for Indigenous peoples and underestimate the demands that claiming FPIC places on those communities.[34] His answer is both nuanced and illuminating. As Young explains, legal performativity's focus on the production and reproduction of discourse reveals that

---

30 Stephen Young, 'The Material Costs of Claiming International Human Rights: Australia, Adani and the Wangan and Jagalingou' (2020) 20(2) *Melbourne Journal of International Law* 597; Stephen Young, 'Re-Historicising Dissolved Identities: Deskaheh, the League of Nations, and International Legal Discourse on Indigenous Peoples' (2019) 7(3) *London Review of International Law* 377; Stephen Young, 'The Self Divided: The Problems of Contradictory Claims to Indigenous Peoples' Self-Determination in Australia' (2018) 23(1–2) *International Journal of Human Rights* 193 ('The Self Divided').

31 See, eg, Young, 'The Self Divided' (n 30).

32 Young, *Indigenous Peoples, Consent and Rights* (n 11) 19.

33 Ibid.

34 Ibid 10.

the process of rights claiming is not a value-free act. Rather, it is 'a form of legal, political, social and relational action' in which claimants performatively act as Indigenous peoples in domestic and international forums in order to become 'subjects of international legal discourse'.[35] When Indigenous peoples assert those rights, they appear to do so as natural pre-legal groups rather than as subjects of international legal discourse.[36] It is the failure of legal scholars to recognise that Indigenous peoples — and the rights that they claim — are produced by and products of international legal discourse that leads them to overestimate what law is capable of.[37]

This careful though complex argument is illustrated through Young's case studies. Consider, for example, the experience of Indigenous communities before the IACtHR.[38] In the celebrated *Mayagna (Sumo) Awas Tingni Community v Nicaragua* case,[39] the IACtHR found for the first time that the right to property, protected by the *American Convention on Human Rights: 'Pact of San José, Costa Rica'*,[40] encompasses Indigenous peoples' customary land and resource tenure.[41] However, notwithstanding their apparent success, Young argues that the process of claiming rights before the IACtHR has had deleterious effects for the Awas Tingni. The community members were compelled to performatively articulate themselves and their traditions into a form comprehensible to the Court as 'Indigenous'. In doing so, and in claiming a human right to property, the Awas Tingni became identifiable as a subject of international legal discourse and thus a subject of state regulation. Indeed, the remedy ordered by the Court required Nicaragua to delimit, demark and title Awas Tingni's traditional lands in order for the State to protect their land.[42] But this very action required the Awas Tingni to subject themselves to the State,[43] foreclosing any possibility of control and re-empowerment:

> They did not gain control or self-government and there was not a zero-sum shift in a negative power from states to Indigenous peoples. Rather, the Court provided [Nicaragua] with a means for regulating the claimants as Indigenous peoples.[44]

Even in its victories, international human rights discourse is imbricated with violence. Of concern for international lawyers more broadly, on Young's analysis, is that the same dynamic repeats itself in the community activism against particular extractive industry developments in the Philippines and Queensland. In these

---

35 Ibid 186.

36 Ibid 57.

37 Ibid 101.

38 Ibid ch 6.

39 *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 79, 31 August 2001) ('*Awas Tingni*').

40 *American Convention on Human Rights: 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 21.

41 *Awas Tingni* (n 39) [148]–[149]. See also S James Anaya and Claudio Grossman, 'The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19(1) *Arizona Journal of International and Comparative Law* 1, 1.

42 *Awas Tingni* (n 39) [153], [173(4)].

43 Young, *Indigenous Peoples, Consent and Rights* (n 11) 170–1, quoting Special Feature, 'Conference Transcript: Heeding Frickey's Call: Doing Justice in Indian Country' (2013) 37(2) *American Indian Law Review* 347, 397–400 (Joseph Bryan). See also *Awas Tingni* (n 39) [153], [164], [173(3)].

44 Young, *Indigenous Peoples, Consent and Rights* (n 11) 199.

cases, while the B'laan and the Wangan and Jagalingou peoples draw on FPIC to protect and promote their interests, they nonetheless become subject to power and discourse they may influence but cannot control.

Young's analysis raises difficult questions about the viability of international human rights law. He is, however, careful to note throughout the book that his focus is on the act of rights claiming and how international legal discourse both produces and conceals power rather than on the substantive merits of human rights. Nonetheless, it is clear that he is doubtful about the prospect or ability of rights to protect and promote Indigenous peoples' forms of life. As he explains, because controversies between autochthonous communities and the state are primarily political, rights talk 'might slow, halt or prevent some state or industry actions', but it cannot and will not end a dispute.[45] International legal scholars and practitioners' emphasis on fixing, stabilising or operationalising FPIC is thus misguided.

It would be one thing if rights merely failed to realise their promise, but Young's larger concern is that the process of claiming rights can do violence to those claimants by displacing autochthonous communities' own legal orderings and understandings of the world. This is a real worry. Owing to power imbalances, Indigenous peoples are generally compelled to articulate their claims in the language of the state. As Jeremy Webber has noted in another context, Indigenous interests that are recognised in and by the state are invariably 'expressed in a form that involves some accommodation to the need for the rights to be intelligible within the broader legal framework', so there is always 'a measure of translation and adjustment in the very act of recognition'.[46] The Victorian Treaty Advancement Commission recently identified this same issue when reflecting on some of the challenges involved in negotiating a treaty over 200 years after first contact:

> Before colonisation, we had traditional ways of doing business. There was no need for a statewide Representative Body. Colonisation has changed this. We now need a way to talk Treaty with the state … Our unique situation needs a unique response. We have to make a Body that fits our unique culture, history and traditions. But it must also represent us in the modern world.[47]

The process of transformation has alarmed some Aboriginal Victorians. Concerns have been raised, for example, that the Victorian Treaty process does not 'reflect [Aboriginal] culture or show due respect to all the Clans and Nations

---

45 See ibid 198–9.

46 Jeremy Webber, 'Beyond Regret: Mabo's Implications for Australian Constitutionalism' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 60, 66. See generally Burke A Hendrix, *Strategies of Justice: Aboriginal Peoples, Persistent Injustice, and the Ethics of Political Action* (Oxford University Press, 2019) ch 3.

47 'Treaty Statewide Gathering' (Booklet, Victorian Treaty Advancement Commission) 3, archived at <https://perma.cc/3N57-FQTT>.

across the state'.[48] In particular, the model of representation adopted has been criticised as marginalising and disempowering Wurundjeri people.[49]

Indigenous Peoples, Consent and Rights picks up on this challenge. For Young, FPIC, as well as international human rights law more broadly, cannot empower Indigenous peoples with the 'freedom to imagine their own futures … [and] translate these visions into reality'[50] because, per Foucault, it 'involves inscribing legal discipline on oneself and one's community'.[51] Indigenous peoples cannot be 'masters of their own fate' because

> there are no means of free agentic expression without some correlative degree of discipline and oppression. To use power and to be empowered is to be a subject of power. To claim FPIC requires relationships between Indigenous peoples, NGOs, states and industry. Each relationship involves disciplinary powers that are oppressive as well as constitutive of subjective self-expression and self-determination.[52]

This is, of course, true; power relations cannot be wished away. However, Young's conclusions seem decidedly more pessimistic than Webber's and the Victorian Treaty Advancement Commission's, both of whom acknowledge these challenges but recognise practical and pragmatic reasons for engagement. Indeed, towards the end of the book, Young is more explicit as to his fundamental criticism. It is not only that rights claiming is unlikely to be effective or that it involves becoming a subject of power and discourse; rather, Young argues that rights claiming is an assimilative act. As an attempt 'to enlist state powers via legal processes that states have sanctioned', rights claiming 'is precisely what good citizens do in furtherance of democratic state-building projects'.[53] Claiming that FPIC is a means of 'supporting … legal hierarchies and mechanisms'[54] because it requires communities 'to continuously and indefinitely perform a technology of self that assimilates and integrates them into states', Young maintains that 'it does not break from the assimilationist and integrationist aspects of international law that is colonial'.[55]

Perhaps FPIC *has* transformed relationships between Indigenous peoples, states and industry, just not in a manner desired by Indigenous peoples and their supporters.

I would not go so far. While Young's case studies demonstrate how international human rights law may not always be capable of realising its promise to Indigenous peoples, two issues are worthy of attention. First, although Young acknowledges that Indigenous peoples themselves have been the driving force in the international movement to recognise Indigenous rights,[56] this fact deserves

---

48 These are the words of spokesperson and Gunnai-Kurnai Gunditjmara woman Lidia Thorpe: George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 275, citing Sarah Maddison and Dale Wandin, 'So Much at Stake: Forging a Treaty with Authority and Respect' (2019) 413 *Australian Book Review* 13, 14.

49 Maddison and Wandin (n 48) 14.

50 Doyle (n 9) 267.

51 Young, *Indigenous Peoples, Consent and Rights* (n 11) 20.

52 Ibid 178.

53 Ibid 193.

54 Ibid 214.

55 Ibid.

56 See especially ibid ch 2.

greater weight in his argument. Indigenous peoples and communities understand well the power imbalance that they face vis-à-vis the state. It is for this very reason that they have engaged in international human rights lawmaking. As Lillian Aponte Miranda explains, the international Indigenous rights movement is

> part of a strategy aimed at shifting the balance of power in contested domestic, political struggles stemming from claims to increased protection of cultural practices, greater control over ancestral lands and resources, and ultimately, the meaningful exercise of self-determination.[57]

That strategy may not always succeed, but contra Young, it has had some positive effects for communities around the world.[58] In any case, the strategy reflects an informed decision made by Indigenous communities themselves.

Second, owing to those existing power relations, it is difficult to imagine what other strategies, beyond protest and direct action,[59] are open to Indigenous communities. Perhaps, as Young hints, the problem is that by working within a rights-based framework that will not lead to Indigenous re-empowerment, communities and scholars have foreclosed 'the ability to reform, contest and explore [alternative] legal or political possibilities'.[60] Even so, Young shies away from outlining a different approach for Indigenous communities and their allies. Although it is fair to argue that self-determining Indigenous communities are best placed to identify, develop and undertake that alternative political project, Young's position would have been more persuasive if he had sketched one or two approaches, at least in broad terms, if only to help those of us sympathetic to Indigenous peoples' ongoing resistance to understand where we should direct our energies. Indeed, towards the end, Young suggests that the task before Indigenous communities is a difficult one, confessing: 'I have not articulated nor directed a normative program for future action. I have not because I should not articulate a program of action. Additionally, I cannot.'[61]

Nonetheless, the final chapter does gesture towards an alternative, albeit without entirely endorsing it. Young draws on critical Indigenous scholars such as Taiaiake Alfred,[62] Glen Coulthard,[63] Leanne Simpson[64] and Irene Watson[65] to

---

57 Lillian Aponte Miranda, 'Indigenous Peoples as International Lawmakers' (2010) 32(1) *University of Pennsylvania Journal of International Law* 203, 206.

58 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned — 2007–2017*, 16th sess, Agenda Item 5, UN Doc A/HRC/36/56 (7 August 2017); Federico Lenzerini, 'Implementation of the UNDRIP around the World: Achievements and Future Perspectives' (2019) 23(1–2) *International Journal of Human Rights* 51.

59 See, eg, Nick Estes, *Our History Is the Future: Standing Rock versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso, 2019).

60 Young, *Indigenous Peoples, Consent and Rights* (n 11) 100. See also at 41.

61 Ibid 221.

62 See, eg, Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (University of Toronto Press, 2005) ('*Wasáse*'); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 2nd ed, 2009).

63 See, eg, Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) ('*Red Skin, White Masks*').

64 See, eg, Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (ARP Books, 2011).

65 See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2014).

suggest that Indigenous peoples and communities could (should?) disengage from the state. As articulated by Alfred, resurgence scholars argue that meaningful change in Indigenous–state relations is only possible after Indigenous communities 'regenerate ourselves and take back our dignity'.[66] For that reason, Indigenous communities should 'recreat[e] our existences, regenerat[e] our cultures'[67] and live as original peoples 'with integrity'.[68] This is a compelling project, carrying with it the promise of dismantling all forms of subordination, be they political, racial or economic. Yet, as I have argued elsewhere, it is not clear to me, let alone to many Indigenous peoples themselves,[69] whether and how entrenched structural power imbalances can be displaced simply by 'turning away' from the state.[70] It is a brute fact that many significant issues facing Indigenous communities may most effectively be addressed by leveraging the power of the state, including its coercive powers of redistribution. Indeed, even Coulthard acknowledges that Indigenous struggles 'for land and freedom' require Indigenous peoples to 'continue to engage with the state's legal and political system'.[71]

Indigenous Peoples, Consent and Rights challenges international legal scholars to revisit their assumptions. Rather than explore the content, meaning or status of the right to FPIC as a means to understand its power or potential value, Young draws vital attention to a preliminary but no less important question, asking what it means to claim the right to FPIC. His argument is philosophically rich and well-illustrated by valuable case studies, and his conclusion is potentially troubling. International legal scholars overestimate the benefits of FPIC and underestimate the demands it places on Indigenous peoples.

Inequitable relationships and power imbalances mean that Indigenous peoples are forced to articulate their claims in a language comprehensible to the state and international law. For this reason, Young's call for 'more careful analysis of the formative and productive power of legal discourse and the consequences of the performative enactment of Indigenous peoples' subjectivity'[72] is necessary, but I do not share his pessimism as to potential outcomes. The process of transformation and re-articulation that Indigenous peoples unfortunately are often required to undergo is difficult and unfair. The state should accept and meaningfully accommodate Indigenous peoples on their own terms. This is a simple condition of equality: autochthonous peoples have 'original teaching, original thoughts,

66 Alfred, *Wasáse* (n 62) 38.

67 Ibid 19.

68 Ibid 24.

69 See, eg, Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003); Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press, 2006); Sheryl Lightfoot, 'The Pessimism Traps of Indigenous Resurgence' in Tim Stevens and Nicholas Michelsen (eds), *Pessimism in International Relations: Provocations, Possibilities, Politics* (Springer, 2019) 155.

70 Harry Hobbs, 'Public Law, Legitimacy and Indigenous Aspirations' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing, 2020) 227, 230–2. See also Glen S Coulthard, 'Subjects of Empire: Indigenous Peoples and the "Politics of Recognition" in Canada' (2007) 6(4) *Contemporary Political Theory* 437, 453–6.

71 Coulthard, *Red Skin, White Masks* (n 63) 179.

72 Young, *Indigenous Peoples, Consent and Rights* (n 11) 185.

original values, and original lifeways',[73] and they 'must be free, like other people, to choose' how they wish to realise those lifeways.[74] Until and unless this happens, however, that transformation will be necessary. The question is when and how it can be done fairly and effectively. In drawing attention to the problematic features of rights claiming, Young reminds us that there are no easy answers.

HARRY HOBBS*

[73] Larry W Emerson, 'Diné Sovereign Action: Rejecting Colonial Sovereignty and Invoking Diné Peacemaking' in Lloyd L Lee (ed), *Navajo Sovereignty: Understandings and Visions of the Diné People* (University of Arizona Press, 2017) 160, 165.

[74] Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 141.

* Lecturer, Faculty of Law, University of Technology Sydney.