CRITIQUE AND COMMENT

THE PLACE OF THE FIRST PEOPLES IN THE INTERNATIONAL SPHERE: A LOGICAL STARTING POINT FOR THE DEMAND FOR JUSTICE BY INDIGENOUS PEOPLES

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The place of Indigenous peoples at the intersection of domestic and international arenas has shifted. While international law was traditionally used by states to oppress Indigenous peoples, today it can be used by Indigenous peoples to hold states to account and to assert specific demands for continued participation in law and politics at a domestic and international level. This shift is evidenced by the transformation of the concept of indigeneity. This was originally a term imposed upon Indigenous peoples by colonial powers, and was used to bind various groups of Indigenous peoples and to account for state action in relation to them. However, in recent years Indigenous peoples have had a significant stake in creating and clarifying the imposed concept and its contemporary use and meaning. This has transformed indigeneity from a tool of oppression to a tool of potentially greater freedom. For those Indigenous peoples searching for and demanding justice, this suggests a necessary starting point at the intersection of the domestic and the international.

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I Introduction

This article examines the concept of indigeneity, as placed at the intersection between the domestic and the international.[1] The concept of indigeneity has been created at the international level in order to bind various groups of Indigenous peoples, and to account for state action in relation to them; and the international has failed to protect Indigenous peoples and nations from the harms done in the process of colonial expansion and territorial control between the nations that made up the 'international order'. Originally, the concept of indigeneity emerged at the international level as a tool to justify colonial expansion and events occurring within domestic borders. However, in recent years, and particularly with the passage of the *United Nations Declaration on the Rights of Indigenous Peoples* ('*Declaration*'),[2] the concept of indigeneity has gained power and prominence at the international level, as a tool for Indigenous peoples to hold domestic behaviour to account, and as a place for the ongoing recognition, practice and maintenance of the Indigenous international.[3] Importantly for us as international law scholars and participants, the international is another space in which Indigenous jurisdictions can be evidenced; through actions of other international actors (Indigenous and nation-states) and through many other formal and informal mechanisms. The issue that confronts international legal scholars now is to look at the evidence that already exists and to reimagine that evidence, and its use.

The evidence of Indigenous jurisdictions is as old as the international itself. Indigenous nations' participation in the international is also not something new. It did not begin with, nor does it reside only within, the international

[1] By 'the domestic' and 'the international', we mean the orders of both law and politics, which exist at the level of the nation-state and of the international. 'The domestic' is related to the nation-state. 'The international' is related to the interactions between nation-states and to organisations such as the United Nations, and includes international law.

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

[3] See Ravi de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (UNSW Press, 2006) 6–8; Mark McMillan, '*Koowarta* and the Rival Indigenous International: Our Place as Indigenous Peoples in the International' (2014) 23 *Griffith Law Review* 110, 111–12.

human rights frameworks since the Second World War; nor with decolonisation as a discrete activity of the international order. For us, the international is about the continuing coexistence of jurisdictions of territory with its etymology based on territorial acquisition and control. In other words, the international created the Indigenous for the stability of the international order. The Indigenous international exists *because* the international exists. For as long as nation-states have existed — and, by corollary, the domestic has existed — Indigenous jurisdictions and nations were inscribed as a necessary basis for understanding the international and the domestic. Indigenous nations jurisdictions were pre-existing (and continuing) at that moment of the emergence of the 'Indigenous', 'savage', 'native', 'barbarian' and 'heathen', and yet the concept of indigeneity was created for the justification of seeking of new territories and to make sense of western civilisation.[4] Indigeneity and reference to the Indigenous nations and jurisdictions was made central to the international order, and therefore the domestic. Indigenous peoples and nations are able to have a sense of self and place that has always been (since time immemorial), and has been adapted to meet the needs of the now and the future.

While originally a mechanism to justify atrocities committed against Indigenous peoples, indigeneity is now a way to unite and empower Indigenous peoples, and to measure state actions in relation to Indigenous peoples against a normative instrument. And while originally a term imposed upon Indigenous peoples by colonial powers, indigeneity is now a concept that Indigenous peoples have had a significant stake in creating and clarifying. Thus, what was once a tool of oppression has become a possibility for justice (as demanded and defined by Indigenous peoples and nations) and greater action, and this movement has occurred in the space between the domestic and the international.

The shift is profound because the modern international agenda seeks to atone for the consequences of the colonial modes of acquisition by focusing on the very thing that was created to justify the taking of territory — indigeneity. This article examines possibilities for Indigenous peoples in achieving justice at the transitional intersection of the Indigenous and the modern international. We commence with an examination of the lack of an agreed

[4] See generally Robert A Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (Palgrave Macmillan, 2012).

formal definition of indigeneity. We argue that this allows indigeneity an important degree of flexibility, and that this supports its ability to be politically active. We then examine the concept of indigeneity in historical context, and show the ways in which international law was used to promote the interests of the colonial powers, and protect their treatment of Indigenous peoples from scrutiny. We then move to consider the role of the modern international in the concept of indigeneity, particularly with regards to the drafting and passage of the *Declaration*. We conclude by examining the potential of the concept of indigeneity to be used as a tool for greater justice in the modern international agenda.

II Our Place as Lawyers between the Domestic and the International

This article can properly be understood as a conversation. As authors, we come to this article from different backgrounds, and seek to bring different approaches to the question of indigeneity in the space between the domestic and the international. We do this from the positions of Indigenous and non-Indigenous. This conversation, an act of storytelling, is in furtherance of exerting and practising our distinct jurisprudences — to each other, the international, the domestic and the Indigenous international. The international order is a source of law and has its own jurisprudence and jurisdiction. Additionally, international law is exercised in a myriad of ways. It has been stated previously[5] with respect to the complicated way that meeting places of law (through conversation in particular) must be operated between individual people as actors of our particular jurisprudences. One particular meeting place for the exchange of jurisprudence and the exercising of multiple jurisdictions is through conversations of scholars. What we mean as authors of this concept of meeting places and jurisdictions has been previously stated by Mark McMillan:

> Jurisdiction is an outward expression of the internal structure of a particular existence. In order to understand a jurisdictional boundary or meeting point there must be a recognition of the structured existences of the other to observe (and respect) its jurisdiction. More importantly Dorsett and McVeigh assert that jurisdiction or 'speaking the law' is an activity that must be practised to be

[5] See generally de Costa, above n 3.

> maintained. Jurisdictional thinking may allow for a better explanation for how our lives, our existences (through our laws) are structured.[6]

McMillan also wrote:

> The activity of practising jurisprudence through storytelling is neither new nor novel. Christine Black and John [Borrows] are Indigenous legal scholars and practitioners in both Indigenous and Western systems of law. They emphasise that this practice is not new or novel to them; rather, that practice through storytelling is as old as our societies themselves.[7]

Mark: As a Wiradjuri man growing up 'on country'[8] in the west of New South Wales with a particular knowledge of the Wiradjuri (Indigenous), the international, and the domestic, storytelling and engaging with other scholars (like Sophie) is the meeting point that Christine Black and John Borrows refer to.[9] I conceive of the Wiradjuri jurisdiction and jurisprudence as that of an atom. My nucleus is my Wiradjuri jurisdiction and jurisprudence — they hold the atom together. It is my ontology and my ontological connection to my country. The domestic and international jurisdictions are the electrons that orbit the nucleus. All three are needed to make up the atom — but there is a nucleus as the core. My Wiradjuri knowing is my core. Conversation with Sophie allows the exploration of the limits of experiences and understanding of the Indigenous, international and domestic.

[6] McMillan, above n 3, 118 (citations omitted).

[7] Ibid 112 (citations omitted). Dr Christine Black is a Kombumerri and Munaljahlai woman: Griffith University, *Dr Christine Black* <https://www.griffith.edu.au/engineering-information-technology/griffith-centre-coastal-management/staff/christine-black>; Professor John Borrows is Anishinabe (also called Ojibway or Chippewa). He is a member of the Chippewa of the Nawash First Nation from Georgian Bay, in the Lake Huron area of Ontario, Canada: The University of Victoria, *John Borrows* <http://www.uvic.ca/law/facultystaff/facultydirectory/borrows.php>.

[8] 'Country' for the context used in this article means '[a] term used by Aboriginal people to refer to the land to which they belong and their place of Dreaming. Aboriginal language usage of the word country is much broader than standard English': Australian Museum, *Glossary of Indigenous Australia Terms* <http://australianmuseum.net.au/glossary-indigenous-australia-terms>. Country is much more than the land; it is also the place of our jurisdiction and jurisprudence. There has always been governance existing of the land with the peoples that are connected to it. European conceptions of governance exist in tandem with the Indigenous nations that exist over the same territory.

[9] McMillan, above n 3, 112.

Sophie: Growing up as the grandchild of Polish people displaced by war, I was attracted to the hope of the international from an early age. I saw international law as being able to offer redress for wrongs. This view has been nuanced through time working as a defence lawyer at the International Criminal Tribunal for the Former Yugoslavia. Having worked closely with Kosovars in the newly independent Kosovo, I have seen the potential of international law to support the claims of peoples to self-determination. My current research is positioned in the field of critical approaches to international criminal law, and my continued belief in the possibilities of international law is now present in my view that international law must transform into a stronger system than it is presently. In the current conversation, I am grounded in my appreciation of how international law might operate as a tool for peoples to use to pursue claims to justice.

In this article, we are engaged in a dialogue that rests upon different approaches to, and experiences of, international law. We are able to interrogate the hope of international law from different perspectives, in order to determine whether and how it can be of assistance to Indigenous peoples. This conversation necessitates a note on terminology: we use the collective ('us', 'our', 'we') to describe arguments or ideas we share in this conversation — a meeting point between our Indigenous and non-Indigenous ways of knowing. We use plural and alternative terms ('us or them', 'our or their', 'ourselves or themselves') to demonstrate a space of belonging to which non-Indigenous people do not have full access. As a non-Indigenous scholar, Sophie does not seek to claim the same space as Mark inhabits — indeed, this is why the current conversation is occurring, in order to better understand our respective ways of knowing. Words like 'ourselves' indicate Mark's indigeneity and belonging to Indigenous communities. Its attendant 'themselves' indicates that Sophie does not hold the same belonging.

A *Defining Indigeneity*

There is no one agreed definition of indigeneity.[10] A study undertaken by the United Nations Special Rapporteur José Martínez Cobo ('Cobo Study'), to

[10] Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9 *Melbourne Journal of International Law* 439, 443; Hurst Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649, 662.

examine discrimination against Indigenous peoples, provided a working definition of Indigenous peoples:

> those which, having a historical continuity with pre-invasion and pre-colonial societies … [who] consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[11]

This definition is the most frequently cited, but is not an official definition.[12] For some states, the Cobo Study definition is unacceptable.[13] For some Indigenous peoples too, a formal definition is problematic: Indigenous peoples have routinely asserted the right to define ourselves or themselves.[14]

Nonetheless, the lack of an official or agreed definition is not necessarily problematic for the concept of indigeneity. Benedict Kingsbury argues that the international concept of Indigenous peoples can be understood in either positivist or constructivist terms,[15] and we adopt his view that the constructivist approach 'better captures its functions and significance in global international institutions and normative instruments'.[16] The constructivist approach deals with the concept of Indigenous peoples as not something that is clearly defined by agreed criteria, but rather

> as embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society,

[11] José R Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations — Volume V: Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7 and Add.4 (March 1987) 29 [379].

[12] Davis, 'Indigenous Struggles in Standard-Setting', above n 10, 442–3.

[13] Ibid.

[14] Robert A Williams Jr, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' [1990] *Duke Law Journal* 660, 663–4 n 4. See also Hannum, above n 10, 665.

[15] Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414, 414–15.

[16] Ibid 415.

> then made specific again at the moment of application in the political, legal and social processes of particular cases and societies.[17]

This approach shows the place of the concept of indigeneity at the intersection of the domestic and international: it moves between these spheres, allowing the domestic (and local) application of the international. This fluidity is important, because 'many specific problems as to the meaning of "indigenous peoples" and related concepts can be solved only in accordance with processes and criteria that vary among different societies and institutions'.[18] While much binds various groups of Indigenous peoples, there is also much variation between the communities. This is true not only between nation-states, but in some cases, within them: Australia, for example, has hundreds of Aboriginal nations. A constructivist approach to the concept of indigeneity allows not only recognition, but also celebration, of the complexity of Indigenous peoples and our or their heritages, experiences, and cultures.

Some may argue that this approach is overly politicised, fluid, and problematic — even indeterminate. For example, Jeremy Waldron argues that these 'definitional uncertainties reflect an instructive ambivalence as to the basis of indigeneity's importance'.[19] Waldron suggests that definitions of indigeneity rest on either the principle of first occupancy (which focuses on indigeneity as linked to peoples being the first to occupy the land), or the principle of prior occupancy (which focuses on the idea of indigeneity as relative to colonial powers).[20] To Waldron, both are flawed, and both have consequences for exclusionary proprietary interests.[21] Focusing particularly on the principle of first occupancy, Waldron suggests that a concept of indigeneity that rests upon the question of '[w]ho was here first' poses 'difficulty and danger'.[22] Waldron is particularly concerned with the motivations behind definitions and claims of indigeneity:

> Indigeneity calls for a more radical approach — not just remedial measures to address maldistribution, but a *restoration* to the descendants of indige-

[17] Ibid.

[18] Ibid.

[19] Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy' (2003) 1 *New Zealand Journal of Public and International Law* 55, 65.

[20] Ibid 55–6.

[21] Ibid 56.

[22] Ibid 82.

> nous peoples of some or all of the rights — rights of sovereignty, rights of property — that were once held by their ancestors.[23]

It is therefore not only the lack of definitional clarity that concerns Waldron, but what might flow from this, particularly in terms of land distribution and rights. As Kingsbury points out, there has been significant disagreement

> over the justifications inherent in the concept of 'indigenous peoples' as currently understood. Controversy arises in particular from the implication that distinctive rights of indigenous peoples are justified by the destruction of their previous territorial entitlements and political autonomy wrought by historic circumstances of invasion and colonization.[24]

Such concerns link the perceived lack of clarity around indigeneity to the existence of specialised Indigenous rights. Kirsty Gover demonstrates that these rights are particularly vulnerable, as they

> appear to derive from a particular set of historic circumstances or experiences, or else from political bargains, and so fall outside of the corpus of universal human rights that vest in all human beings by virtue of their humanity.[25]

And because there is no real consensus around *why* such rights are needed, and whether they are political rights rather than inherent human rights, 'questions arise as to their political purpose and function, requiring justifications of the kind that are seldom sought of individual civil and political rights'.[26] Waldron can perhaps be seen as a typical example of these concerns. While Kingsbury suggests that the most appropriate way of addressing this is to interpret the concept flexibly so that it can accommodate a range of justifications,[27] Waldron's concerns about what he sees as the indeterminacy of indigeneity are unlikely to be assuaged by this approach.

We are not as concerned as Waldron by any indeterminacy of the concept of indigeneity. Indigeneity is, for us, not something that must be 'determined' in the way that Waldron calls for. As we have noted above, Indigenous peoples

[23] Ibid 61 (emphasis in original).

[24] Kingsbury, above n 15, 419.

[25] Kirsty Gover, Review Essay: *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* by Karen Engle (2011) 12 *Melbourne Journal of International Law* 419, 425.

[26] Ibid.

[27] Kingsbury, above n 15, 419.

themselves may reject formal definitions. Another aspect that needs to be raised in the conversation is: so what? This issue of how non-Indigenous scholars seek to place Indigenous peoples in the international is seemingly limited, as the discourse is confined to issues of what indigeneity means for people and its requirement for such definitions to be fixed. This fixity seems to be desired so that scholars can make sense of the international order for where Indigenous peoples might fit, or the international as a particular space where Indigenous peoples may have a voice — but the place of that voice within the international order, and the conditions in which the space operates, are dictated. There is a whole other dimension as to that assertion of the creation of space and dictating the terms of its operations — that is, what do we say the space is as Indigenous peoples? What are the conditions in which we participate in the space? We or they dictate those terms and the conditions on which those terms evolve and adapt.

As international legal scholars, we understand the importance of the work of Kingsbury and Waldron. However, we seek to explore why it is that non-Indigenous people strive to allow Indigenous peoples to be. We also want to explore the conditions in which Indigenous peoples assert who and what we or they are. This is the place of the Indigenous in the international: it is up to Indigenous people to decide — and not for non-Indigenous people to place, define and confine within a definitional sense. Although it may be comforting to western scholars and institutions to assert a definition for indigeneity, it is important to recognise that Indigenous peoples do not exist for the comfort of others. It is the considerations of Indigenous peoples that should be paramount in any discussions on the need or otherwise for a definition of indigeneity.

It should be the job of non-Indigenous scholars to interrogate the international, so that the international Indigenous can make sense for them. International legal scholars should establish better meeting points of jurisdictions, in order to better understand the lawful relationships of jurisdictions that are in fact defined. Indigenous peoples know who we or they are. This is how we or they know the worlds that we or they inhabit and share. It has been this way — always. Not just commencing at the point of the international. What is not fixed, that Kingsbury takes comfort in, is that way in which the *international order* adapts its own processes and etymologies because it now knows things about the Indigenous international that have always been. The meeting place is changing — but not from an Indigenous point of reference. The international is changing because it is required to adapt as a result of new

knowledge about the Indigenous international: not that it [the international] created the Indigenous international, but that it is now allowed to witness the Indigenous international in different ways.

Moreover, we argue that this lack of fixedness is useful for indigeneity as a tool to be used for justice for Indigenous peoples. Kingsbury's point is that a constructivist approach to indigeneity allows the concept to be deployed at multiple levels for a variety of purposes, and to us this demonstrates the capacity of the concept of indigeneity to act as a political tool for justice for Indigenous peoples. Acting as a tool for justice is particularly important when we consider how, historically, the concept of indigeneity has been used as a tool for oppression and to justify the actions of colonial powers against Indigenous peoples. This overt acceptance of the political uses of indigeneity may be confronting for some, as shown in the above discussion of Waldron's concerns, and the purported use of indigeneity to 'justify' rights. In accepting the political use of the concept of indigeneity, we perhaps leave it vulnerable to attack from those who are concerned by what a concept might be politically employed to achieve. However, any such fear is perhaps indicative of the very need to employ indigeneity as a tool for greater justice and rights. We acknowledge that Indigenous communities are political actors, capable of pursuing various actions to realise particular goals. Indigenous communities are not only beneficiaries of rights, but are able to invoke tools in order to realise justice. The concept of indigeneity, we argue, is one such tool. It is therefore important to examine how indigeneity has been used historically to oppress Indigenous peoples, before analysing its use in the modern international agenda.

B *Defining Justice*

When considering the justice claims of Indigenous peoples, it is important to consider the importance of governance. Indigenous rights are not simply human rights or minority rights, but necessarily involve a claim of governance and self-determination. As Robert A Williams Jr notes, the rights that matter most to Indigenous peoples are collective rights, land rights, self-determination, and international legal status.[28] These rights are core to the conception of justice, and acknowledge the importance of jurisdiction. The

[28] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 685–99.

recognition of the Indigenous in the international is similarly integral to this conception of justice.

In defining justice, an understanding of injustice might also assist. Injustice has included dispossession (from land, from culture, from country), imposition (of illness, of jurisdiction) and disrespect (of sovereignty, of power, of ways of knowing). These injustices were facilitated by — indeed, could not have happened without — the creation of the concept of indigeneity which provided for territorial acquisition. Justice, then, will be realised in part through advancement of nation-building, acknowledgment of sovereignty and self-determination. Integral to all these is indigeneity: it is impossible to imagine a nation, sovereignty, or self-determination in the absence of indigeneity. For Indigenous peoples, justice cannot be achieved without our or their being Indigenous. Indigeneity is crucial to justice, as it was to injustice. Without the creation of indigeneity for the purposes of the territorial acquisition which grounded and foregrounded the injustices perpetrated against Indigenous peoples, there would not be the need for justice to be done.

C *Defining the International*

It is important to recognise the different variations of the transnational and international. As noted above, even within nation-states, there may be a number of Indigenous nations. Our or their interactions are rightly conceived of as transnational. By Indigenous transnationalism, we mean the interactions and relationships between Indigenous peoples or nations. This is a form of internationalism: it is the recognition by Indigenous sovereigns and jurisdictions, of other Indigenous sovereigns and jurisdictions. This ensures that Indigenous internationalism is not bounded by either the domestic or the international as traditionally conceptualised, but rather, it is a form of transnational interaction between nations that exist separately from the nation-state. Indeed, Indigenous transnationalism is most appropriately seen as the activities of Indigenous peoples outside the traditional nation-state.[29] In other words, Indigenous transnationalism is the activities that occur in the space between the domestic and the international.

Indigenous transnationalism is not a recent phenomenon. Ravi de Costa notes that there is a long history of Indigenous peoples going beyond the

[29] de Costa, above n 3, 2–3.

nation-state in order to advance their position and pursue justice.[30] While Indigenous transnationalism is not new, the discourse around it has gained prominence in recent times.[31] Indigenous nations have — despite the efforts of colonisation — continued to recognise the sovereignty of other Indigenous nations, and the interactions between Indigenous nations have been premised on the sovereignty, jurisdictions and governance of those nations. Such interactions are evidenced in, for example, the songlines of Aboriginal Australia. As McMillan points out, to sustain such relationships, 'there was, and still remains, a very strong sense of the international'.[32] While colonising powers may not have witnessed these relationships, they have nonetheless continued to thrive.[33] The concept of the international is, therefore, familiar to Indigenous peoples, who have navigated relationships for millennia. As McMillan argues, in Australia this permits a collective jurisdiction of Indigenous nations, allowing a creation and maintenance of jurisprudence.[34]

When we consider Indigenous transnationalism, it is clear that there are borders within borders; internal borders are present within nation-states. The transnational allows work to occur at these different levels of internationalism. The international arena, in McMillan's words, 'provides a place where the Indigenous jurisdictions are not dependent on the jurisdiction of the nation state to exist'.[35] It is this which provides much possibility for the advancement of Indigenous rights in the international realm.

[30] Ibid 5.

[31] McMillan, above n 3, 123–4. See also ibid 4.

[32] McMillan, above n 3, 123.

[33] See generally Mark McMillan and Martin Clark, 'Making Sense of Indigeneity, Aboriginality and Identity: Race as a Constitutional Conundrum since 1983' (2015) 24 *Griffith Law Review* 106.

[34] McMillan, above n 3, 123.

[35] Ibid 118.

III Indigeneity as a Tool of Justification for Colonial Expansion

With colonial expansion, the arrival of settler societies created an Indigenous descriptor to be applied to people who already inhabited that land.[36] The term Indigenous set apart those who lived in the land from those who sought the land. Thus, the concept of indigeneity was necessarily created from colonial expansion: before colonialism's need to 'other' the original inhabitants of the land, there had been no requirement to define or label those who would become Indigenous.[37] From this beginning, the concept of indigeneity was used in various ways during the period of colonial expansion. While the transnational has existed for Indigenous peoples for a long time, it is the international that has created the concept of indigeneity, for the purposes of the international and its expansion.

Anaya has set out the historical context of international legal thought concerning Indigenous peoples.[38] Throughout, we can see the ways in which Indigenous peoples were defined, in ways that would both permit and justify colonial behaviour. Anaya separates his historical account into four periods. First, the 'early naturalist' period is typified by Francisco de Vitoria and his articulation of 'the grounds on which Europeans could be said validly to acquire Indian lands or assert authority over them'.[39] While de Vitoria was of the view that American Indians were rational human beings,[40] he also articulated another view which would permit Spanish administration over Indian lands for the benefit of the Indians. This view preceded the trusteeship doctrine used by 19th century colonial powers to justify their actions.[41]

The 'early modern state system and the law of nations' period saw the development of the concept of sovereignty as applicable to nation-states rather

[36] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2000) 3. See also Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003) 8.

[37] See also Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 *Government and Opposition* 597.

[38] Anaya, above n 36.

[39] Ibid 10. For more on de Vitoria, see generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007) 13–31.

[40] Anaya, above n 36, 11.

[41] See ibid 11–12.

than to groups.[42] In Anaya's third historical period, the 'positivists' international law' period of the late 19th and early 20th centuries, positivists ensured that international law 'would become a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples'.[43] The primacy of states and their sovereignty ensured that Indigenous peoples were excluded from participating in the development of international law, and could not use international law to affirm their rights (once seen as inherent, by virtue of natural law).[44] As a result, states were able to use international law both to maintain their claims to Indigenous territories, and to treat Indigenous peoples in accordance with domestic policies, protected from international scrutiny or accountability by virtue of the concept of sovereignty.[45] International law was both a shield and a sword for colonising powers in their claims to Indigenous lands, and their interactions with Indigenous peoples: international law was able to both justify the claims of colonial states and to protect them from any outside interference. As time progressed, colonial powers frequently invoked notions of trusteeship to justify actions towards Indigenous peoples.[46] This was grounded in 'scientific racism', and had the objective of 'civilising' Indigenous peoples.[47] Indigeneity was formulated through the alleged superiority of the colonisers on physical, political, racial and religious grounds. This justificatory taxonomy, and its application to 'civilise' Indigenous peoples and attempt to dispossess us or them of culture and heritage, created a further injustice that exacerbated the appropriation of the 'old lands' of Indigenous peoples.

Similarly, Williams has outlined historical approaches to Indigenous rights under the 'doctrine of discovery'.[48] As he sets out, western scholars of international law interpreted the doctrine of discovery and its widespread use

[42] Ibid 13–14.

[43] Ibid 19.

[44] Ibid.

[45] Ibid 19–20.

[46] Ibid 23–4.

[47] Ibid 24. See generally Anghie, above n 39.

[48] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 672–6. For more on the doctrine of discovery, see also Robert A Williams Jr, 'Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-determination' (1991) 8(2) *Arizona Journal of International and Comparative Law* 51; Robert A Williams Jr, 'The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought' (1983) 57 *Southern California Law Review* 1.

in settler states as evidence of customary laws of dealing with Indigenous peoples, and they concluded that indigenously-occupied lands could be considered terra nullius.[49] Williams argues that '[t]hrough the preachings of these Western theorists, indigenous peoples were effectively dismissed as subjects of concern in international legal discourse'.[50] Indigenous peoples were 'simply "not a legal unit of international law"'.[51]

Throughout these different historical periods, then, Indigenous peoples were recognised — but in ways that would justify colonial claims to territory. Indigenous peoples were unable to enjoy sovereign status or rights in international law, and international law was 'able to govern the patterns of colonization and ultimately to legitimate the colonial order'.[52] Indigeneity was not only accepted but in fact promoted as a way to solidify the claims of the colonialists. International law used indigeneity to protect domestic action of settler states. In the space between the domestic and the international, indigeneity was used against Indigenous peoples.

Are there implications of this historical background for how Indigenous peoples conceive of, and pursue, justice? Karen Engle argues that the different ways in which colonial expansion occurred has led to differences in goals and advocacy in Indigenous communities.[53] Areas that were colonised by British and French forces, relying on the use of treaties or by invoking the doctrine of terra nullius to acquire the land, have subsequently pursued self-determination claims as being of primary importance.[54] Areas of Latin America that were colonised by the Spanish, who relied on doctrines of conquest for territory acquisition, endured policies of 'wardship and assimilation',[55] and ultimately have 'focused on the need for cultural, if not physical or territorial, distinction'.[56] Thus, we can see that the ways in which Indigenous communities have delineated justice, and implemented strategies to achieve it,

[49] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 673–5.

[50] Ibid 675.

[51] Ibid 676, citing *Cayuga Indians (Great Britain v United States of America)* (1926) 6 RIAA 173, 174.

[52] Anaya, above n 36, 22.

[53] Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010) 18–19.

[54] See Gover, above n 25, 421, citing ibid 21, 47.

[55] Ibid.

[56] Engle, *The Elusive Promise*, above n 53, 47.

have been affected by the justificatory tools invoked by colonising powers. Justice is a product of historical injustice. Contemporary activism has been influenced by the ways in which Indigenous groups were historically treated, and the ways in which their domestic dispossessions were justified by international law. It is now important to examine this contemporary activism, and how the modern international agenda constructs indigeneity.

IV Indigeneity in the Modern International

International law, and its relationship to the domestic, has shifted since the days of colonialism, in ways that Indigenous peoples can employ in order to address historic and ongoing wrongs. As Anaya argues, while international law was once an 'instrument of colonialism', it has 'developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples' demands'.[57] This movement can be seen at the particular level of the concept of indigeneity. Recently, the place of Indigenous peoples in the international sphere is expressed in starkly different terms compared to times of colonial expansion. The modern international agenda seeks to atone for the consequences of these modes of acquisition focusing on the very thing that was created to justify the taking of territory — indigeneity.

Political action by Indigenous peoples was traditionally limited within the state. However, transnational Indigenous activism has proliferated in recent decades.[58] This increase in transnational activism has been facilitated by a move away from state-centrism in international law, towards a plurality of actors and a greater role for non-state actors.[59] Greater investigation into the behaviour of states has been permitted, with sovereignty not the shield it once was. This has changed the norms around state behaviour vis-à-vis their citizens, as shown by the burgeoning of fields like international criminal law and the doctrine of the responsibility to protect. There has also been an increase in the discourse around collective rights and activism.[60] These shifts have all had implications for the concept of indigeneity. A number of Indigenous communities have joined together to pursue common goals, and as a

[57] Anaya, above n 36, 4.

[58] de Costa, above n 3.

[59] Ibid 39–40.

[60] Ibid 42.

sign of solidarity in their common struggles. The similarities and differences between these Indigenous communities have informed the concept of indigeneity; and as noted above, a constructivist approach to the concept allows both these similarities and differences to be appreciated.

Kingsbury charts the change in the term Indigenous peoples since the 1970s, arguing that there has been a transformation

> from a prosaic description without much significance in international law and politics, into a concept with considerable power as a basis for group mobilization, international standard setting, transnational networks and programmatic activity of intergovernmental and nongovernmental organizations.[61]

Indigenous peoples or indigeneity has therefore become an 'overarching self-conception to unify the international political movement of indigenous peoples'.[62] This can be seen as culminating in the *Declaration*. While the *Declaration* does not define Indigenous peoples or indigeneity, it rests on the acknowledgement of these concepts. The *Declaration* recognises the meaning of Indigenous peoples — to, and for, Indigenous peoples — and acknowledges the suffering of Indigenous peoples from

> historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources … [as well as the] need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.[63]

With its application to 'Indigenous peoples and individuals',[64] the *Declaration* operates both on the collective and the individual levels. This is crucial, as the

[61] Kingsbury, above n 15, 414.

[62] Ibid 421.

[63] *Declaration* Preamble. See also Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing, 2010); Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009); Karen Engle, 'On Fragile Architecture: The UN *Declaration on the Rights of Indigenous Peoples* in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141.

[64] See, eg, *Declaration* art 2.

Declaration legitimates and affirms the 'value of protecting indigenous peoples' ways of life and cultures per se'.[65]

Through the Working Group on Indigenous Populations, an organisation that formed the genesis of the drafting and advancing of the *Declaration*, it became apparent that there was a

> universality to the narrative of oppression and racial discrimination described by Indigenous peoples as a consequence of colonisation … [and] a commonality to the ways colonisers had dispossessed Indigenous peoples of their lands.[66]

Again, these commonalities could be drawn upon, and they provided a basis for the *Declaration* as a document that could tie indigeneity — the original justification for this oppression and dispossession — to a greater call for justice.

Williams argues that formalised structures, particularly the Working Group on Indigenous Populations, allowed Indigenous peoples to tell their stories; and through this, 'indigenous peoples have begun to transform legal thought and doctrine about the rights that matter to them under international law'.[67] In particular, the *Declaration* can 'translate' these stories 'into terms that settler state governments, particularly in the West, will take seriously'.[68] In working through these formal structures, engaging strategically with political processes and aims, and employing the language of rights, Indigenous peoples have been able to use international law for their own advancement.[69] Nonetheless, there are still further advancements to make. The *Declaration* acknowledges the right to self-determination,[70] but does not go as far as acknowledging the wrongs of settler and colonial relations, or a right of secession. Indeed, the international legal system still sees the 'cultural survival, territorial integrity, and self-determining autonomy of indigenous peoples as matters within the exclusive jurisdiction of the settler state regimes that invaded and subjugated them'.[71] Megan Davis writes that the choice

[65] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 687.

[66] Megan Davis, 'To Bind or Not To Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On' (2012) 19 *Australian International Law Journal* 17, 20.

[67] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 682.

[68] Ibid 684.

[69] Ibid 701, 704.

[70] *Declaration* arts 3–4.

[71] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 672.

of internal self-determination in the *Declaration* is a pragmatic decision and a political choice.[72] While this is undoubtedly true, it remains important to inquire into the consequences of such a reality, and to acknowledge the placement of the *Declaration* within a system that still prioritises the settler state regime.

A key element of the significance of the *Declaration* is that it can be invoked to hold the behaviour of states, in relation to Indigenous peoples, to account against a normative standard. While it does not create any new rights in international law, nor any binding obligations in domestic legal systems,[73] the *Declaration* has several important functions at the domestic level. These include its moral value, its educative value, and its role as a source for the domestic judiciary.[74] In Australia — a country which does not have a treaty with its Indigenous peoples, nor any recognition of them in its national constitution — the *Declaration* will be 'the primary basis upon which indigenous peoples conduct their affairs with the state'.[75] The *Declaration* also specifies certain obligations on the state. These include the need to provide effective mechanisms for the prevention of, and redress for, actions of dispossession of culture or land, or for any form of propaganda designed to promote or incite racial or ethnic discrimination directed towards the Indigenous peoples.[76] The *Declaration* thus specifies actionable rights to be implemented at the domestic level, and provides a normative framework for the behaviour of states in relation to Indigenous peoples. As Williams argues, the *Declaration* is capable of commanding

> attention and response in many domestic political and legal arenas … Its proscriptions could be used in a variety of highly-publicized forums by any number of groups and individuals to challenge state action which threatens the survival of indigenous peoples.[77]

[72] See Davis, 'To Bind or Not To Bind', above n 66, 47.

[73] Davis, 'Indigenous Struggles in Standard-Setting', above n 10, 465. See also ibid 39; Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27.

[74] Davis, 'Indigenous Struggles in Standard-Setting', above n 10, 468.

[75] Ibid 470.

[76] *Declaration* arts 8, 11(2); see also at arts 12–17.

[77] Williams, 'Encounters on the Frontiers of International Human Rights Law', above n 14, 683–4.

The *Declaration* is, therefore, a prime example of Indigenous peoples working at the international level, in order to advance their rights at a domestic level.

V Conclusion

We can therefore see that the place of Indigenous peoples at the intersection of the domestic and the international has shifted. While traditionally international law was used by states to oppress Indigenous peoples, today international law can be used by Indigenous peoples to hold states to account and to assert our or their specific demands for continued participation in the international, and as a consequence, the domestic. As an example, the passage of the *Declaration* has meant that Indigenous peoples have a particular international tool to use in order to measure state and domestic behaviour in relation to Indigenous peoples.

Indigeneity was originally a term imposed upon Indigenous peoples by colonial powers, but in recent years Indigenous peoples have had a significant stake in creating and clarifying the imposed concept and its contemporary use and meaning. Particularly through the drafting, negotiating and passing of the *Declaration*, Indigenous peoples have moved from being the object of the discussion, to the subject. This fact alone demonstrates the potential for the concept of indigeneity to be used at the intersection of the domestic and the international, to achieve justice for Indigenous peoples. As Williams notes, through drafting the *Declaration*, Indigenous peoples could begin 'to redefine the terms of their survival in international law'.[78] And Davis reiterates the importance of this: 'Indigenous peoples are in the international sphere, not just as a manifestation of our external self-determination, but because international law has mattered'.[79] We see here the transformative potential, and the transformative uses, of international law.

However, further advancements must be made for Indigenous peoples to realise justice — on our or their terms. Indigeneity demonstrates the way a concept can move from being a tool of oppression to a tool of potentially greater freedom. This suggests a necessary starting point for the place of Indigenous peoples in our or their activism for justice at the intersection of the domestic and the international. And in addition, the international order

[78] Ibid 700.

[79] Davis, 'To Bind or Not To Bind', above n 66, 48.

bears a duty to the ongoing development of Indigenous peoples. Having created the concept of indigeneity, the international is responsible to it. Acknowledging where the concept of indigeneity emerged from — and the reasons for its creation by the international — brings the Indigenous claims to justice closer. With the World Conference on Indigenous Peoples in 2014, and its outcome document,[80] the place of Indigenous peoples in the international is continuing to gain momentum.

[80] *Outcome Document of the High-Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples*, GA Res 69/2, UN GAOR, 69th sess, Agenda Item 65, UN Doc A/RES/69/2 (22 September 2014).