Review Essay

An Indigenous Right to Be Heard on the International Stage?

Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance by Natalie Jones (2024) Cambridge University Press, 362 pp, ISBN 9781009406314

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Abstract

In the early 20th century, Indigenous peoples were effectively locked out of international organisations. In *Self-Determination As Voice*, a hugely valuable work of scholarship, Natalie Jones surveys the extent to which that has changed. Mechanisms for Indigenous participation in the United Nations and other organisations have proliferated since the creation of the Working Group on Indigenous Populations in 1982 and especially since the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007. Jones concludes that it is arguable that there is now sufficient practice and *opinio iuris* to evidence a rule of customary international law about Indigenous participation in international governance. In this review essay, it is suggested that some might not fully agree with her analysis, either because they are more doubtful about the *opinio iuris* or because they place more weight on the practice of economic organisations and treaties that continue to exclude Indigenous peoples. But in any case the book identifies an accelerating trend. It also raises challenging questions about the role of soft law and how much it differs from international law in the strict sense.

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I Introduction

Natalie Jones begins *Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance* by introducing us to the Haudenosaunee (Iroquois) and Māori leaders who petitioned the League of Nations in the early 20th century but who were turned away without a hearing.[1] Another Indigenous leader, who she does not mention but whose story will resonate with Australian readers, is Pearl Gibbs, a Ngemba or Muruwari woman and the general secretary of the Aborigines' Progressive Association.[2] Gibbs wrote to the League in 1938 about the 'ill treatment of the aborigines throughout Australia' and asked it to intervene in the Northern Territory 'in the cause of justice'.[3] An official from the League simply noted on the file: 'I don't think any action is possible or desirable'.[4]

How much has changed?

International organisations frequently still cannot act in the cause of justice; their power is limited by politics and practicalities. But insofar as they have influence, a precondition for getting these organisations to exercise it is to *participate* in them: to receive the hearing that Gibbs was denied. What Jones achieves in this book is to show that Indigenous participation in international governance is desirable and possible — and becoming more and more common. I begin this review essay by highlighting the value of that achievement. I then focus on two points where Jones might have deepened her analysis: the question whether this participation is an actual binding right under international law, and the question why its legal status matters.

II The Value of Surveying Indigenous Participation in International Governance

Figuring out what international law says on a topic can be an arduous task. Sometimes a treaty tells us explicitly and comprehensively. But often we face the daunting prospect of locating and weighing up the two elements that can evidence a rule of customary international law: 'a general practice' (primarily of states but sometimes also of international organisations) and the 'acceptance as law' of that

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1 Natalie Jones, *Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance* (Cambridge University Press, 2024) 1–3.

2 It is uncertain whether her mother was Ngemba or Muruwari: Jack Horner, 'Pearl Gibbs: A Biographical Tribute' (1983) 7(1) *Aboriginal History* 10, 10 n 1. See also Heather Goodall, 'Gibbs, Pearl Mary (Gambanyi) (1901–1983)' in Diane Langmore (ed), *Australian Dictionary of Biography: Volume 17* (Melbourne University Press, 2007) 429.

3 Letter from Pearl Gibbs to President of the League of Nations, 4 July 1938 (ILO Archives, Political Section 1/34895), quoted in Marilyn Lake, 'Women's International Leadership' in Joy Damousi, Kim Rubenstein and Mary Tomsic (eds), *Diversity in Leadership: Australian Women, Past and Present* (ANU Press, 2014) 71, 84.

4 Lake (n 3) 85. See further Sophie Rigney, 'On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations' (2021) 2 *Third World Approaches to International Law Review* 122, 133–5, cited in Jones (n 1) 3 though without discussion of the particular example of Pearl Gibbs.

practice (*opinio iuris*).[5] That can involve trawling through a vast and open-ended category of materials comprising everything from diplomatic notes to public speeches to judgments by domestic courts.[6] If we come across a shortcut — as when a court or the International Law Commission does the work — we sigh with relief.[7]

Jones does not take any shortcuts; she does the work herself. Much of *Self-Determination As Voice* is an encyclopaedic survey of Indigenous participation in international organisations. She begins with the creation in 1982 of the Working Group on Indigenous Populations at the 'lowest level' in the United Nations system.[8] She progresses through milestones such as the emergence of the United Nations Permanent Forum on Indigenous Issues in 2000 and, in 2007, the adoption by the General Assembly of the *United Nations Declaration on the Rights of Indigenous Peoples* ('the *UNDRIP*', about which I will have more to say).[9] She looks at specialised agencies such as UNESCO, at development institutions such as the World Bank, at regional processes in the Arctic and the Americas and elsewhere, at environmental standard setting, and at potential future developments. She leads us with assurance through a forest of acronyms.

Jones is conscious that her perspective — like mine — is that of a non-Indigenous scholar who is writing about a system of international law whose origins and sensibility are Western.[10] She weaves Indigenous voices into her narrative while acknowledging that they are not monolithic and 'that mechanisms for Indigenous peoples' participation in international governance may function in part to legitimize and protect (neo)colonial global structures'.[11]

Even with that unavoidable caveat, her achievement is hugely valuable. This book is where other international lawyers will turn first whenever they want information on this topic.

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5 'Conclusions on Identification of Customary International Law' [2018] 2(II) *Yearbook of the International Law Commission* 90, 90 (Conclusion 2) ('Conclusions on Identification'). On international organisations, see at 97 (Conclusion 4 Commentary [5]) (citations omitted): the 'practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties)'. This reasoning is applied in Jones (n 1) 73–8.

6 'Conclusions on Identification' (n 5) 90 (Conclusion 6) (on forms of practice), 91 (Conclusion 10) (on forms of *opinio iuris*).

7 See further Rowan Nicholson, 'The International Court of Justice as a "Shortcut" to Identifying Custom' (2021) 20(3) *Law and Practice of International Courts and Tribunals* 490.

8 Douglas Sanders, 'The UN Working Group on Indigenous Populations' (1989) 11(3) *Human Rights Quarterly* 406, 407, quoted in Jones (n 1) 92.

9 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, UN Doc A/RES/61/295 (13 September 2007) annex ('*UNDRIP*').

10 Jones (n 1) 9–10.

11 Ibid 269.

III Is Indigenous Participation in International Governance Legally Obligatory?

Though all other international lawyers will value the evidence that Jones gathers, some might draw different conclusions from it. In particular, some might not fully agree with her analysis of whether, under customary international law, Indigenous peoples have a binding right to participate in international governance that other entities are obliged to respect.

A strength of her analysis is how she positions it within the wider law of self-determination. Historically the most important function of that body of law has been decolonisation: to give certain peoples the right to establish their own independent states or to choose some other external status.[12] But this right to external self-determination only unambiguously and uncontroversially applies to Western colonies in Africa, Asia and elsewhere — in technical terms, trust and non-self-governing territories — and in analogous cases such as Palestine.[13] Relatively few cases like that remain.[14] External self-determination has generally not been seen as applicable to Indigenous minorities in settler colonies that are already independent, such as Australia — and in fact the *UNDRIP* provides explicitly that none of its provisions may be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[15] But as Jones observes, the law of self-determination continues to evolve: other 'specific legal rules have emerged in a remedial manner so as to provide redress' for other 'situations of domination, subjugation, or exploitation'.[16] Thus Indigenous peoples now have a right to self-determination of a different kind: to 'freely determine their political status and freely pursue their economic, social and cultural development' within the boundaries of an existing state.[17]

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[12] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, UN Doc A/RES/1514(XV) (14 December 1960); *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations*, GA Res 1541 (XV), UN GAOR, UN Doc A/RES/1541(XV) (15 December 1960) annex, principle VI; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, UN Doc A/RES/2625(XXV) (24 October 1970) annex, principle (e) ('The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination').

[13] *Re Secession of Quebec* [1998] 2 SCR 217, 282–6 [126]–[133]. On Palestine, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 230–48. There is a debate about whether the right also applies in rare cases of 'remedial secession': see Abhimanyu George Jain, 'Bangladesh and the Right of Remedial Secession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar, 2022) 312.

[14] One remaining non-self-governing territory that has both an Indigenous population and a population descended from settlers is the French 'sui generis collectivity' of New Caledonia: see John Connell, 'The 2020 New Caledonia Referendum: The Slow March to Independence?' (2021) 56(2) *Journal of Pacific History* 144.

[15] *UNDRIP* (n 9) art 46(1).

[16] Jones (n 1) 24.

[17] *UNDRIP* (n 9) art 3.

Jones argues that 'international organizations and collectives of states exert power over Indigenous peoples' in ways that create 'a relationship of the kind self-determination is concerned with … one of alien domination, subjugation, or exploitation'[18] and that 'it can be argued that the law of self-determination is called on to evolve to provide a remedy'.[19] Has it in fact evolved to answer that call? Several provisions of the *UNDRIP* may be relevant, depending on how they are interpreted, including arts 18 and 23.[20] The most directly on point is art 41, in particular its final sentence on participation in international organisations:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

The *UNDRIP*, since it is not a treaty, is not in itself legally binding.[21] At least some of its provisions correspond with binding rules of customary international law, though this must be assessed article by article or perhaps even by distinguishing between parts of a single article based on criteria articulated by the International Court of Justice.[22] The prevailing view up to now has been that art 41 is *not* one of the provisions that correspond with custom. Willem van Genugten and Federico Lenzerini — writing several years before Jones published her book — described art 41 as 'not controversial, either from a political or from a legal perspective' and pointed out that, in contrast to most of the surrounding provisions of the *UNDRIP*, it

> does *not* use the word 'right' or refer to law-related matters, such as legislative measures. That implies that the drafters of the Article did not mean to create a legally enforceable right to assistance, although the provision might evolve in that direction. Given the fact that the United Nations and other international organizations are the duty-holders of Article 41, it would in any case not be easy to apply the traditional customary law standards.[23]

Jones does not directly disagree with this. Her claim is modest and qualified: that, as van Genugten and Lenzerini foreshadowed, it is 'arguable that a rule of custom' about Indigenous participation in international governance now 'exists, or is at least emerging'.[24] She presents abundant practice by states and international organisations to support such a rule.

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18 Jones (n 1) 30.

19 Ibid 35.

20 See ibid 51–8 for discussion of the relationship between these provisions and art 41.

21 'A resolution adopted by an international organization … cannot, of itself, create a rule of customary international law': 'Conclusions on Identification' (n 5) 91 (Conclusion 12.1). See further Jones (n 1) 66–71.

22 Willem van Genugten and Federico Lenzerini, 'Legal Implementation and International Cooperation and Assistance: Articles 37–42' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 539, 570; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 255; 'Conclusions on Identification' (n 5) 108 (Conclusion 12 Commentary [5]–[6]) (summarising further statements by the Court).

23 Van Genugten and Lenzerini (n 22) 571 (emphasis in original).

24 Jones (n 1) 259.

One respect in which her analysis might be deepened is in how she identifies the other element required for a customary rule: *opinio iuris*. Sometimes — I do not suggest she does this everywhere — she relies on assertions by states or international organisations that participation in an international body is 'a requirement of the *UNDRIP*'.[25] For example, 'some states, as well as [the Conference of the Parties to the *United Nations Framework Convention on Climate Change*] itself, have stated that the participation of Indigenous peoples in [the Local Communities and Indigenous Peoples Platform] is required by the *UNDRIP*'.[26] In its plain meaning this is an unremarkable and straightforward observation about what the *UNDRIP* says: it just applies the final sentence of art 41 to the particular case of the Platform. Affirming that something is a requirement of the *UNDRIP* is not necessarily the same thing as accepting it as a binding legal requirement — the kind of acceptance that qualifies as *opinio iuris*. To some extent Jones acknowledges this. When she quotes Australia's view that the Platform should facilitate Indigenous participation in line with the *UNDRIP*, she clarifies in a footnote that 'Australia does not accept that the *UNDRIP* represents binding international law, so it is unlikely that this statement can be viewed as an instance of *opinio juris*'.[27] But the problem is not restricted to states such as Australia; it exists wherever a statement refers solely to the *UNDRIP*, as distinct from going further by referring expressly or impliedly to binding law. Despite this problem with the evidence Jones cites, she concludes that the Platform 'is a good example of a mechanism for Indigenous participation … that states are beginning to accept as required by law'.[28]

The result is that, though Jones can also point to clear instances of *opinio iuris*, she intermingles them with statements that are unlikely to be *opinio iuris*. That may overplay the evidence for a customary rule on Indigenous participation in international governance. Similarly, she may underplay countervailing evidence, in particular from economic bodies such as the World Trade Organization. As she points out, 'of all existing treaties, only trade and investment treaties have consistently achieved their intended objectives'.[29] She makes an astute observation about how these bodies and treaties represent barriers to Indigenous self-determination:

> [A]ll of the international organizations, treaties, and processes discussed herein relate to the environment, development, human rights, and regional governance. What the previous chapters have not discussed is Indigenous peoples' participation in international economic law-making, policymaking, and decision-making. This is because states and international organizations, on the whole, have not enabled Indigenous peoples to participate in these processes.[30]

This may suggest that the practice of facilitating Indigenous participation in international organisations is not 'general' enough — meaning 'both extensive and

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25 Ibid 190.
26 Jones (n 1) 198, citing *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered in force 21 March 1994).
27 Jones (n 1) 198 n 274.
28 Ibid 199.
29 Ibid 266.
30 Ibid 265.

virtually uniform'[31] or 'sufficiently widespread and representative, as well as consistent'[32] — in order to constitute customary international law. It may be that states and international organisations are willing to engage in the practice in some contexts but wish to remain free *not* to engage in it when that suits them. Jones does not seem to give this due weight in her survey of practice.

IV Why Might It Matter Whether Indigenous Participation Is Legally Obligatory?

Since Jones does not assert categorically that Indigenous peoples have a right to participate in international governance under customary international law — only that it is 'arguable'[33] — my comments about how she deals with practice and *opinio iuris* are ultimately just quibbles. Most international lawyers will agree that it is not possible to speak categorically either way. What Jones establishes beyond doubt is that, at a minimum, there is a body of soft law on Indigenous participation in international governance that includes provisions of the *UNDRIP* such as art 41 but is being extended further through the practice of international organisations.

'Soft law' is law in the same sense that plant-based meat is meat. That is to say: it is not law at all; the term is just an analogy. It refers to

> principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law … a complex of norms lacking binding force, but producing significant legal effects nevertheless.[34]

In theory, the distinction between the two categories of norms is sharp. But in practice in international law the categories blur together. Frequently — unlike at the domestic level, where the police can be called in — international law in the strict sense is no more enforceable than soft law. Frequently both law and soft law serve, instead, to influence the behaviour of states and international organisations in more subtle ways. And frequently, as seen here in *Self-Determination As Voice*, the content of both can be fuzzily expressed and difficult to pin down.

All those propositions are true of the *UNDRIP* insofar as it applies to Indigenous participation in international governance. It might have been interesting, then, to hear more from Jones about why the distinction between law and soft law might matter in this context.

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31 *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3, 43 [74].

32 'Conclusions on Identification' (n 5) 91 (Conclusion 8.1). In addition, inaction or 'negative practice' may, in limited circumstances, constitute a form of practice in itself: at 91 (Conclusion 6.1), 99 (Conclusion 6 Commentary [3]).

33 Jones (n 1) 259.

34 Daniel Thürer, 'Soft Law' (2009) in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online, September 2024) [5], [37]. See further CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International & Comparative Law Quarterly* 850; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, both cited in the discussion of the status of the *UNDRIP* in Jones (n 1) 66–71.

For example, if the participation of Indigenous peoples is — or becomes — legally obligatory under international law whenever issues affect them, will that have implications for the interpretation of the internal rules of international organisations or in other areas of international law? Will that have any effect on economic bodies and treaties that continue to exclude Indigenous peoples from participation? And precisely how much participation will be obligatory in a particular case? As Jones observes, the meaning of the term 'participation'

> varies across a spectrum: at one extreme lies Indigenous peoples' exclusive control over decision-making; close by lies co-governance or power-sharing with states; while at the other extreme Indigenous peoples might be invited to consultations, have one seat or a small minority of seats on a decision-making committee, or make up an advisory body to the decision-maker.[35]

It might be assumed that, if their participation becomes legally obligatory, the law will also have to contend with some other difficult questions, including which peoples qualify as Indigenous and which individuals and entities can represent them.[36] Jones suggests that, on the contrary, the term 'Indigenous peoples' has 'in no case … needed to be defined in order for mechanisms enabling their participation to effectively function' and '[w]e have also not seen any requirement for participating Indigenous peoples' organizations to demonstrate that they are representative'.[37]

V An Inchoate and Developing Area of Law

These may be matters for future legal research that builds on the foundations laid by Jones. She identifies some further open questions and possible future developments. One is the potentially 'transformative' idea of 'a category of membership for Indigenous peoples at the General Assembly … designed in a way that preserves and promotes Indigenous self-determination and sovereignty'.[38] Another is how Indigenous experiences 'might inform the questions asked by other peoples and marginalized groups when seeking access to, or justice from, international institutions and the wider international community'.[39] *Self-Determination As Voice* illustrates how much progress has been made since Pearl Gibbs sought a hearing in 1931 but, at the same time, suggests that this is still an inchoate and developing area of international law.

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35 Jones (n 1) 260.

36 Some of these questions are discussed in ibid 178–82. Further on the definition of 'Indigenous' see José R Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7 (March 1987) vol 5, 29 [379]–[380], quoted in Jones (n 1) 11 n 38; *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) art 1; Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing, 2016) ch 1.

37 Jones (n 1) 261.

38 Ibid 271.

39 Ibid 272.