The Globalization of International Law, Indigenous Identity and the "New Imperialism"

Author(s): A. Claire Cutler, University of Victoria

The globalization of international law is intensifying and deepening links between local and global politico-legal orders. This is creating tensions between the claims to autonomy of local communities and groups and those of global and transnational corporations. This is particularly so for Indigenous peoples. Indeed, the relationship between Indigenous peoples and international law is complex and has a history that is bound up with the origins of international law and foundational legal doctrines governing sovereignty, imperial expansion, and capitalism.

From its inception, international law has been an imperial project facilitating the material and cultural expansion of capitalism and private property rights. The interrelated nature, both historically and analytically, between legal doctrines governing sovereignty, property rights, and indigenous identity raise important questions concerning the impact of the globalization of international law on Indigenous peoples. Specifically, it raises concerns about the way in which indigenous claims to autonomy and identity are treated under international law. What is the historical relationship between Indigenous peoples and international law? Has international law affected the autonomy or self-governance of Indigenous peoples? What is the nature of current claims to indigenous identity and are they impeded or facilitated by the globalization of international law? Does international law offer any prospects for enhancing indigenous identity and autonomy?

Historically, Indigenous people were framed in the periphery of international law as entities incapable of exercising sovereign rights or of possessing property. They were framed by the doctrine of international legal personality as "objects" and not "subjects" of international law. International legal personality refers to entities that have the capacity to enter into legal relations and to have rights and duties under international law. Traditionally, states have been regarded as having international legal personality as "subjects" of international law. In contrast, non-state entities, such as individuals and corporations, are "objects" of the law in that they may benefit under the law, but they cannot hold rights.

Various other legal doctrines were developed that contributed to the treatment of Indigenous peoples as less-than-sovereign peoples subject to different standards of treatment under international law. Such differential treatment enabled their material dispossession by imperial powers and prevented their recognition as autonomous identities. The expansion of European society through colonialism at the end of the nineteenth century and the conquest of non-European peoples for economic and political advantage brought most of the territories of Asia, Africa, and the Pacific under imperial rule. This was facilitated by international legal doctrines that permitted the appropriation of lands occupied by Indigenous peoples who were not regarded as having the capacity to exercise sovereign rights of occupation and ownership. Criteria of statehood were developed to facilitate colonial expansion and capitalist accumulation and to generally regulate European contact with non-Europeans. International law thus developed as a highly racialized order, framed as a law among sovereign states, marginalizing and dispossessing Indigenous peoples.

Contemporary international law continues to work the dispossession of Indigenous peoples. However, whereas historically this was achieved through the law of empire and expanding territorial ambitions, today it is worked by the "new imperialism" and a new form of sovereignty that is territorially unbounded. The "new imperialism" is anchored in neo-liberal economic logic and neo-conservative politico-strategic logic. "Neo-liberal economic logic" is a type of reasoning that privileges economic over non-economic values and minimal economic regulation through privatized, market mechanisms. In international economic relations it involves the expansion of trade, investment, and finance through the reduction of national barriers and binding dispute settlement through privatized arbitration proceedings. "Neo-conservative politico-strategic logic" is reasoning that places primary value upon order, both internally and globally, and implies the need for strong leadership on top and compliance from below.

Together these logics facilitate capital accumulation through the dispossession and appropriation of property rights as progressively more peoples, things, places, and spaces are opened up to commodification and capitalist exploitation. Indigenous peoples continue to be constituted through a legal dialectic of exclusion and reinclusion as racialized and commodified identities. This is acutely evident in the emerging international intellectual property regime. The TRIPS Agreement signals a transition from international to global regulation and makes possible the creation and expansion of opportunities for commodifying and marketing non-material sources of wealth. New forms of wealth and appropriation are being created by biotechnology and the globalization of knowledge and information technology. The economic significance of the capacity of appropriating traditional or indigenous knowledge is profound and pits local Indigenous peoples and their traditional practices against the interests of global pharmaceutical companies under protected intellectual property rights. However, once again, international law works a dispossession and exclusion as these laws prove inadequate to protect indigenous knowledge, cultural property, and ways of life.

Paradoxically, indigenous identity and autonomy are framed by international law, not as public principles of constitutional law, but as private rights to intellectual property. The creation of new technologies of appropriation through the globalization of intellectual property rights is giving rise to new forms of sovereignty and new claims to autonomy. By linking indigenous claims of self-determination and autonomy to the protection of traditional knowledge and cultural property, claims to identity are being framed as commodifiable and appropriable private property rights. Indigenous peoples on the periphery of international law are not being included as "subjects" of law, but are again excluded on the periphery by intellectual property laws that are incapable of recognizing indigenous claims. These laws produce a commodification of indigenous identity, open it up to private appropriation and dispossession by others, and then lock Indigenous peoples out by making it increasingly difficult for Indigenous farmers, artists, and the like to compete with corporate rights holders or to constitute recognized legal claims of right. International law thus works against the autonomy of Indigenous peoples through the commodification and dispossession of indigenous identity.

Global intellectual property laws serve the interests and autonomy of transnational pharmaceutical corporations and work against the autonomy of local Indigenous individuals and groups, displacing and dispossessing indigenous claims to identity and property. Similar tendencies are present throughout the natural resource and extractive industries and raise important questions about the nature of the relationship between the globalization of international law and the autonomy of local Indigenous groups, communities, and peoples.

However, Indigenous peoples have made modest advances in gaining enhanced legal status through

international law. While this status falls short of self-determination, in that it must be exercised within the confines of an existing state, it does raise the possibility that the globalization of international law might have potential for enhancing indigenous autonomy. The International Labour Organization recognizes the indigenous right of self-government within the state, while the Earth Summit articulated a right to indigenous environmental security within the state. The United Nations has produced a draft Declaration on the Rights of Indigenous Peoples and a number of international institutions are considering fuller indigenous representation. However, international law has a long way to go before it provides an efficacious means for advancing indigenous autonomy.

The inadequacy of international legal protection for Indigenous peoples has generated legal challenges to the operations of transnational corporations under domestic and regional systems of law. The Awa Tinghi, Indigenous peoples in Nicaragua, successfully challenged in the Inter-American Court of Human Rights, a timber concession granted to a foreign corporation over what was claimed to be ancestral lands. In Canada and Australia, a number of high-profile court rulings are building a body of law that recognizes significant indigenous rights to lands subject to logging, mining, and other leases and concessions. Other efforts are being undertaken to create localized regimes in the form of community-based intellectual property rights and resource rights regimes. In addition, efforts to mobilize civil society groups to challenge the dominant property regime are developing in Thailand and India, Indonesia, and the Philippines. Indigenous resistance is facilitated by the growing network and strategic alliances of Indigenous peoples who are challenging the global intellectual property regime. There is a growing effort to create special, localized property regimes that are tailored to meet the specific needs of Indigenous peoples. This is significant for it indicates that it is the local level and local practices that must be the target of indigenous claims to autonomy. This insight is particularly relevant for Empire's law, for although its appears to be unbounded in reach and unassailable, it is at the local level where international law is ultimately enforced and where opportunities for contestation and resistance may well be ripe.