LEGAL IMAGINARIES

INDIGENOUS PEOPLES IN INTERNATIONAL LAW: RESISTANCE, REFUSAL, REVOLUTION

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Despite advances in the international legal protection of Indigenous peoples, contemporary state-centric international law continues to subordinate Indigenous peoples by denying them sovereignty. International law-making in the area is circumscribed by state sovereignty and state prerogatives, which requires the corresponding silencing of Indigenous peoples. Thus, even as Indigenous peoples assert their goals and aspirations, international legal institutions do not hear them. Examining the development of the Indigenous right to self-determination through the lens of epistemic violence, this article proposes that international law must be fundamentally reimagined if we are to create an equitable international community between Indigenous peoples and states. Such a radical reimagination would involve making space for Indigenous or Fourth World Approaches to International Law.

Keywords: Indigenous peoples' rights; epistemic violence; indigeneity; Fourth World Approaches to International Law; the Fourth World; Third World Approaches to International Law

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I. Introduction

Due in large part to Indigenous peoples' persistent and creative engagement with international legal institutions, the past few decades have seen a rise in various instruments that acknowledge Indigenous peoples' rights and mechanisms that provide for their legal protection.[1] Through these strategic engagements, Indigenous concepts such as spiritual relationships to the land and communal land ownership have made their way to the growing body of international law on Indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] However, it

[1] See for instance, Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002); S James Anaya, *Indigenous Peoples in International Law* (2nd ed., Oxford University Press 2004).

[2] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007. The UNDRIP affirms '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' and aims to have these rights recognised in binding legal instruments. While UN declarations are generally not binding, the UNDRIP is arguably the most significant instrument embodying Indigenous peoples' rights, considering its adoption by the overwhelming majority of states at the United Nations General Assembly (as well as its subsequent acceptance by States that voted against its adoption), as well as its widespread use by national and international courts in cases concerning Indigenous peoples' rights. *See for instance* 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.

is important to recognise that engagement with international law requires playing by international law's rules, foremost of which is the primacy of the state and its exclusive claim to sovereignty. While Indigenous peoples have been able to make major inroads both in the international legal system and in domestic legal systems, these achievements have been circumscribed by the dominance of states and prevailing conceptions of state sovereignty, which limit the transformative potential of their legal advocacies.

This article argues that international law creates a hierarchical relationship between states and Indigenous peoples, thereby perpetuating colonial logics of subordination even in those projects that are widely perceived to be liberative. Innovations such as the UNDRIP's articulation of Indigenous peoples' right to self-determination, the development of the norm of free, prior, and informed consent (FPIC), and the emergence of legal remedies for the protection of Indigenous land rights are implemented in the context of the state's authority over Indigenous peoples and are, consequently, severely restricted by state prerogatives. Using the framework of epistemic violence as an analytical lens, the article examines the development of Indigenous peoples' right to self-determination to show that the state-centricity of international law limits the redress available to Indigenous peoples by undermining Indigenous sovereignty. The article not only aims to confront the colonial legacies in international law but also seeks to expose the ways in which it rationalises ongoing colonial conditions against Indigenous peoples. Thus, while it is inspired by the political commitments of Third World Approaches to International Law (TWAIL), as well as the insights of scholarship critical of empire more generally, it endeavours to contribute to alternative Fourth World Approaches to International Law[3]

[3] *See for instance* Usha Natarajan, 'Decolonization in Third and Fourth Worlds' in Xavier, S., Jacobs, B., Waboose, V., Hewitt, J.G., & Bhatia, A. (eds), *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (Routledge 2021); Armi Beatriz E Bayot, 'Free, Prior, and Informed Consent in the Philippines: A Fourth World Critique' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance*

that foreground Indigenous peoples independently of colonial/postcolonial states. Employing a Fourth world perspective, this article ends with a challenge to international lawyers: if using international law's own rules against itself does not suffice, how can we reconceptualise international law to facilitate meaningful and equitable international community among states, Indigenous peoples, and other non-state nations?

II. THE EPISTEMIC VIOLENCE OF INTERNATIONAL LAW

The concept of epistemic violence, as employed by Gayatri Chakravorty Spivak in her work in postcolonial studies, operates with two mutually reinforcing notions of 'representation' i.e., political representation (*vertreten*) and re-presentation (*darstellen*, a reimaging, 'staging' or 'framing'). Silencing through epistemic violence is such that even when the subaltern speaks, she is not heard because the prevailing systems of discourse do not recognise her speech as speech, nor the intentions behind the speech.[4] Both notions of representation have been at play against Indigenous peoples through several

(Springer 2019); Hiroshi Fukurai, 'Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law' (2018) 5(1) Asian Journal of Law and Society 221; Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14(1) Oregon Review of International Law 131.

[4] Gayatri Chakravorty Spivak, '"Can the Subaltern Speak?"' in Rosalind C Morris (ed), *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press 2010); Donna Landry and Gerald Maclean, 'Subaltern Talk: Interview with the Editors', *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge 1996); *see also* Suzana Milevska, Gayatri Chakravorty Spivak and Mirushe Hodja, 'Resistance That Cannot Be Recognized as Such: Interview with Gayatri Chakravorty Spivak: Rezistenca e Cila Nuk Mund Të Njihet Si e Tillë: Intervistë Me Gayatri Chakravorty Spivak' (2003) 2(2) Identities: Journal for Politics, Gender and Culture 27.

waves of colonial rule around the world, and they continue to colour Indigenous peoples' relations with the international community today.[5]

Indigenous peoples' relations with the state-centred and Eurocentric international legal system are characterised by continuities of epistemic violence that manifest in the form of silencing of persons and peoples, resulting in their being cut off from political, economic, and cultural power.[6] The colonial project relied on the silencing of non-European populations. According to colonisers' account, this was achieved by reimagining non-Europeans as barbaric and uncivilised 'Others,' resulting in confiscatory legal rules built on top of these narratives.[7] Narratives of the primitive native have been utilised to underpin centuries of colonial rule. Francisco de Vitoria thus argued in 1557 that Spain established a government in the New World to act as trustees over uncivilised Indians 'unfit to found or administer a lawful State up to the standard required by human and civil claims.'[8] Centuries later, Emer de Vattel would assert that the 'failure' to cultivate land and make it productive not only revealed a moral failure on the part of certain people groups, but also justified the taking of their land by more industrious nations.[9] James Cook similarly asserted in the 1770s that, being uncivilised, the Indigenous peoples of Australia had no form of land tenure or claim to

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[5] *See for instance* Silvel Elias, 'Epistemic Violence against Indigenous Peoples' (*International Work Group for Indigenous Affairs (IWGIA)*, 25 November 2020) <https://www.iwgia.org/en/news/3914-epistemic-violence-against-indigenous-peoples.html#> accessed 4 August 2023.

[6] Spivak (n 4).

[7] *See* Audra Simpson, 'On Ethnographic Refusal: Indigeneity, "Voice" and Colonial Citizenship' (2007) 9 Junctures-the Journal for Thematic Dialogue 67, 69-70.

[8] Francisco de Vitoria *De Indis et De Ivre Belli Relectiones* (Ernest Nys ed, John Pawley Bate tr, Carnegie Institute of Washington 1557/1917) *cited in* Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739.

[9] Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns* (Charles G. Fenwick tr, Carnegie Institution of Washington 1916) *cited in* Antony Anghie, 'Vattel and Colonialism: Some Preliminary Observations' in Vincent Chetail and Peter Haggenmacher (eds), *Vattel's International Law from a XXIst Century Perspective* (Brill | Nijhoff 2011).

land ownership. This paved the way for the application of the doctrine of *terra nullius* or "empty land" in Australia, effectively dispossessing Indigenous peoples of their lands.[10]

Audra Simpson writes that the impact of Cook's account lies not only in establishing difference but also in establishing presence, meaning that it establishes the terms of even being seen.[11] In the colonial encounter, the coloniser established these terms. Antony Anghie refers to these terms as the dynamic of difference between 'civilised' and 'uncivilised' – the animating distinction of imperialism which compels the coloniser to bring the uncivilised to civilisation while also instituting a strict hierarchy between them.[12] The dichotomy between coloniser and the colonised is closely linked with changing frameworks concerning the idea of 'human progress'. Over the centuries, similar dichotomies have been used to categorise peoples as Christians/non-Christians, human/subhuman, progressive/backward, modern/primitive, and civilised/uncivilised, indicating where they could be found in the hierarchies of progress.[13] These categories are at the heart of colonisation's 'civilising mission,' which involved both the imperative to civilise humans and the prerogative to take lands from those whom colonisers deemed unfit to hold them.

Although more sophisticated in its language use, contemporary international law continues to rely on silencing to institute the dynamic of difference between Indigenous peoples and state populations. The international community of states continues to employ *vertreten* and *darstellen* to constrain Indigenous peoples through international law-making. Epistemic violence

[10] Only overturned in 1992 in the Mabo decision, *see Mabo and Others v. Queensland* (No 2) (1992) 175 CLR 1 [*Mabo*].

[11] Simpson, 'On Ethnographic Refusal' (n7) 70.

[12] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739.

[13] Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

marks various encounters between Indigenous peoples and international law. Epistemic violence is present in the trusteeship notions that animated Britain's special administrative regimes over the native peoples in its colonies, the Berlin Conference on Africa, and the modern laws that pit Indigenous peoples' ways of life against states' claims over lands, natural resources, and the environment. States have spoken and continue to speak on behalf of Indigenous peoples through the creation of laws and legal instruments that impact on their lives, their lands, and the endurance of their communities. International law's definition of rights in its various instruments limit the content and scope of rights that Indigenous peoples can claim and exercise within the state-centred international legal system, and it bars them from making sovereignty claims over their lands.

III. EPISTEMIC VIOLENCE AND THE FOURTH WORLD

In the face of international law's state-centricity and epistemic violence, several legal scholars have begun to explore Indigenous and Fourth World perspectives to international law. This emerging body of work has come to be known as Fourth World Approaches to International Law (FWAIL).[14] As used in this article, FWAIL are critical approaches to international law that seek to correct its centuries-long framing of Indigenous peoples' identities, geographies, and histories.[15] These approaches are inspired by the advocacy and scholarship produced by the Indigenous peoples, particularly the work produced by the Fourth World Movement. The latter was one among many transnational pan-Indigenous advocacies that mobilized in the 1970s and early 1980s to support the political, economic, and cultural survival of

[14] The use of the term Fourth World Approaches to International Law and the acronym 'FWAIL' appears to have been first used by Fukurai at the Inaugural Asian Law and Society Association (ALSA) Conference in Singapore in 2016 n (1).

[15] Objectives of the Fourth World movement, *see* Bernard Nietschmann, 'The Fourth World: Nations versus States' in George J Demko and William B Wood (eds), *Reordering the World: Geopolitical Perspectives on the Twenty-first Century* (Westview Press 1994).

Indigenous peoples.[16] The Fourth World Movement[17] identified with the anti-colonial sentiments of the then newly decolonised or decolonising Third World. However, the Fourth World's demands were distinct from the Third World's – the movement sought an end to the continued imposition of authority on Indigenous peoples by states, including newly independent states, even after decolonisation. The term 'Fourth World' is often credited to George Manuel's 1974 book, *The Fourth World: An Indian Reality*.[18] The Fourth World can be described not only as a political project against colonialism and imperialism, but also as a particular demographic, as Manuel stated,

> We are the fourth world, a forgotten world, the world of aboriginal peoples locked into independent states but without adequate voice or say in the decisions which affect our lives.[19]

Fourth World scholars[20] have identified several goals shared by Indigenous peoples, which they argue are vital for the continued endurance of Indigenous communities. Among these goals is the continued care of humans' relationship to land and nature. Yvonne P Sherwood argues, for instance, that land is seen by Indigenous peoples not as an abstract concept, but as unique and concrete places that are linked to the unique and concrete

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[16] Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 47-66.

[17] George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (University of Minnesota Press 2019).

[18] Manuel and Posluns (n 17); Richard Griggs, 'The Meaning of Nation and State in the Fourth World' (1992) Fourth World Documentation Project, Occasional Paper #18 <http://www.nzdl.org/cgi-bin/library?e=d-00000-00---off-0ipc--00-0----0-10-0---0---0direct-10---4-------0-1l--11-en-50---20-about---00-0-1-00-0--4----0-0-11-10-0utfZz-8-10&cl=CL1.5&d=HASHe0f6e4aaf0d3baeb51a527&x=1> accessed 6 April 2022.

[19] George Manuel, 'Statement to the Mackenzie Valley Pipeline Inquiry, 1969' *This Magazine* 10, no. 3 (1976) 17, *cited in* Manuel and Posluns (n 17) *xii.*

[20] Many scholars continue to write in advancement of the Fourth World Movement's goals and ideals. Both scholars from the Fourth World Movement of the late 20th century and more contemporary scholars who write in support of Fourth World goals are hereinafter referred to as Fourth World scholars.

identities of diverse Indigenous peoples who claim such places as their lands and territories.[21] Other Fourth World scholars write that, for Indigenous peoples, nature is viewed as life-giving resource, which underscores the inseparability of humans and nature and militates against activities that burden and destroy the natural environment.[22] This relationship has been described by Aileen Moreton-Robinson as the ontological basis of Indigenous sovereignty.[23] Indigenous sovereignties[24] are seen in terms of relativity,[25] in the sense that people experience the universe as alive and everything in the natural world as in relationship with every other thing.[26]

While the term 'sovereignty' itself is a non-Indigenous term, the term 'Indigenous sovereignty' has been used within Indigenous political and legal scholarship to encompass several meanings, including people who have never surrendered their lands, as well as opposition to illegal occupation; inherent rights in territories; belonging to a particular Indigenous people; holding tribal citizenship, a political and moral claim to inclusion within

[21] Yvonne P Sherwood, 'Toward, With, and From a Fourth World' (2016) 14(2) Fourth World Journal 15, 17-19.

[22] Sherwood (n 21) 17-21; Manuel and Posluns (n 17) 255-258; Rudolph Carl Ryser and Dina Gilio-Whitaker, 'Fourth World Theory and Methods of Inquiry' in Patrick Ngulube (ed), *The Handbook of Research on Theoretical Perspectives on Indigenous Knowledge Systems in Developing Countries* (IGI Global 2017) 54-55.

[23] Aileen Moreton-Robinson, 'Incommensurable Sovereignties' in Brendan Hokowithu and others (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge 2020); While Moreton-Robinson is not herself affiliated with the Fourth World movement, her work is cited here as an example of Indigenous scholarship that supports Fourth World scholars' claims.

[24] The plural form is deliberate, as the sovereignties of Indigenous peoples correspond to their diverse, place-based identities, see Sherwood (n 21) 17.

[25] Citing Deloria's definition: "(E)verything in the natural world has relationships with every other thing and the total set of relationships makes up the natural world as we experience it. This concept is simply the relativity concept as applied to a universe that people experience as alive and not as dead or inert." In Vine Deloria Jr, 'Relativity, relatedness, and reality' in Barbara Deloria and others (eds), *Spirit and Reason: The Vine Deloria, Jr., Reader* (Fulcrum 1990); *see also* Ryser and Gilio-Whitaker (n 22) 54-62, 68.

[26] Moreton-Robinson (n 23).

settler colonial states; recognition as first peoples; and treatment as sovereign nations. The common thread among these various conceptions is opposition to the assumption of state sovereignty over Indigenous peoples.[27]

Another key goal identified by Fourth World scholars is an equitable relationship between Indigenous peoples with other nations in the international community.[28] For many Fourth World scholars, Indigenous peoples are not just nations within states, but are also nations within the larger geopolitical processes of today. They exist simultaneously within and beyond the conceptual limits of the state and have existed far beyond and far earlier than the founding of the modern state system. Indeed, for this reason, some Fourth World scholars have rejected the term 'Indigenous' in favour of 'Fourth World nations' to reiterate their difference, while rejecting the implications of backwardness and inherent vulnerability that the notion of indigeneity has come to acquire in the popular imagination.[29] In the Fourth World vision of international community, Indigenous peoplehood is given the same political space to thrive as European nations and even their former colonies. [30]

IV. Resistance and the Limits of Relief within the International Legal Order

The question remains, however, as to how states might be compelled to give this kind of meaningful political space to Indigenous sovereignty. Fourth World scholars speak of negotiating with states for the space to assert their Indigenous nationhood alongside (and not under) states – which assumes the

[27] ibid 258.

[28] Some Fourth World scholars emphasise the unnaturalness of the concept of statehood, and call attention to the importance of cultivating relationships of the Fourth World with other non-state nations, *see* Sherwood (n 21) and Ryser and Gilio-Whitaker (n 22).

[29] Griggs (n 18); Ryser and Gilio-Whitaker (n 22).

[30] Nietschmann (n 15); Manuel and Posluns (n 17) 214-266; Ryser and Gilio-Whitaker (n 22).

existence of effective mechanisms for Indigenous peoples to speak and a willingness and ability on the part of states to listen. Epistemic violence against Indigenous peoples, however, is at play even in the international legal projects that purport to support and uphold their rights. The experience of Indigenous peoples in their efforts to claim a political right to self-determination under international law illustrates the limits to what can be achieved within the international legal order.

In 1960, the UNGA Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples provided that,

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.[31]

This declaration set the stage for decolonisation and resulted in the recognition of the right of colonised peoples to external self-determination under international law. Despite having been subject to colonial rule, however, Indigenous peoples remained under the authority of sovereign states as newly independent states emerged from former colonies. The granting of independence was limited to Trust Territories, Non-Self-Governing Territories, and other territories that were then 'under tutelage' for future self-governance. On the other hand, the doctrine of *uti possidetis* required former colonies to maintain colonial borders upon the establishment of an independent state regardless of the pre-existing historical claims of Indigenous peoples to their lands.[32]

For many Indigenous peoples' advocates, the question of Indigenous peoples' self-determination remained the 'unfinished business of

[31] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

[32] *See for instance* James Summers, *Peoples and International Law* (BRILL 2013) 1-82; 192-210.

decolonization'.[33] During the 1970s and early 1980s, Indigenous peoples' movements sought freedom for Indigenous peoples to exercise Indigenous sovereignty and control over their lands. They used the language of self-determination to articulate these claims, and they used self-determination to encompass claims ranging from autonomy to secession.[34] Indigenous peoples were sceptical of human rights discourses during this period as they perceived undertones of the 'civilising mission' in human rights law. Also, many Indigenous peoples' advocates believed it failed to capture and address issues of Indigenous peoples' distinctive land base and their collective political rights.[35]

Indigenous peoples' engagement with international and regional institutions revealed strong institutional and state opposition to the framing of Indigenous rights as linked to political self-determination. The Inter-American System of Human Rights, the Human Rights Committee, and the International Labour Organization were not keen to recognise a right to political self-determination in favour of Indigenous peoples but were open to entertaining Indigenous rights claims under the human right to culture. States and international institutions deemed the notion of Indigenous peoples' self-determination as a threat to states' territorial integrity or exclusive claim to authority within their borders, and human rights seemed to be the less dangerous avenue for Indigenous claims.[36]

This opposition made it necessary for Indigenous peoples to frame their self-determination claims in terms of human rights.[37] This turn to human rights

[33] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (Sage 1993).

[34] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) European Journal of International Law 141, 151–152; Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 46–99.

[35] Ibid.

[36] Ibid.

[37] Engle, *The Elusive Promise of Indigenous Development* (n 34).

influenced the negotiation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which describes Indigenous peoples' self-determination as a form of collective human right premised on the right to culture.[38] The UNDRIP took over two decades to negotiate and complete owing to the various points of contention raised by states regarding the scope and content of Indigenous peoples' rights. One of the key issues raised during the negotiations was the application of common Article 1 of the human rights conventions on self-determination to Indigenous peoples.[39] The debates on Indigenous peoples' self-determination were resolved only after the inclusion of language that precluded external self-determination for Indigenous peoples.[40]

The classification of self-determination as a collective cultural right had the effect of side-lining the political aspirations of Indigenous peoples as sovereign peoples. Despite being a landmark instrument for including an explicit reference to the right to self-determination, among other rights, the vision of self-determination in UNDRIP thus still falls short of the aspirations of the Indigenous movements that led to its negotiation in the first place.[41]

Indeed, tying in Indigenous peoples' claims to the international human rights regime is fraught with difficulty. Using the terminology of Lillian A Miranda, Indigenous peoples have been successful in 'uploading' Indigenous concepts of collective ownership, land tenure, and spiritual relationships to the Inter-American system's human rights regime through strategic

[38] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007.

[39] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social, and Cultural Rights (ICESCR) as seen in Article 3 of the 1993 draft, which reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

[40] Engle, 'On Fragile Architecture' (n 34) 143–150.

[41] Ibid.

litigation on the basis of the human right to property.[42] While strategic litigation has impacted the content of human rights law, it has not challenged the state's status as the primary subject of international law, including human rights law. Pursuing Indigenous claims within the regime of international human rights law makes it difficult for Indigenous peoples to assert their rights because human rights law leaves the implementation of human rights protection and fulfilment in the hands of states themselves. States can neglect or violate these rights because Indigenous peoples are within their power as jurisdictional constituents. States can also interfere with these rights without violating them in the eyes of the court under the guise of pursuing other obligations and prerogatives such as the 'public interest' or 'national development goals'.[43]

In other words, the international legal regime leaves Indigenous peoples at the mercy of states at every turn, and seeking relief under international law perpetuates this dependency. Even when Indigenous peoples contest international law by engaging with its institutions, their 'wins' run the risk of being constrained by international law's commitment to the sovereignty of states and their territorial integrity. The UNDRIP's framing of Indigenous peoples' self-determination illustrates how the prevailing state-centric modern international law limits the extent to which Indigenous peoples can find purchase for, and integrate their ways of being, thinking, and seeing into the broader legal discourse.[44] Because engagements such as

[42] Lillian Aponte Miranda, 'Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America' (2008) 10(2) Oregon Review of International Law 419, 423.

[43] ibid; Lillian Aponte Miranda, 'Indigenous Peoples as International Lawmakers' (2010) 32(1) University of Pennsylvania Journal of International Law 203.

[44] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007.

these fail to compel fundamental structural change in international law, they are unable to put an end to its epistemic violence.

V. The Limits of Resistance and Refusal

International law's core commitment to state sovereignty forces projects of resistance, such as strategic human rights litigation and the international campaign for Indigenous people's self-determination, to conform to the existing logics and structures of an international legal system that privileges states. Indigenous conceptions of sovereignty and state sovereignty are incompatible with each other, leading Indigenous peoples to surrender their Indigenous sovereignty to accept the state's full authority in what Simpson describes as political and legal effacement.[45]

One problem with participating in international legal processes in acts of resistance is that such acts of resistance, rather than chipping away at the state's power, can paradoxically over-inscribe the state and its power to determine what matters. The stance of resistance treats domination as an all-encompassing frame for action, such that acts of resistance derive their meaning from the very object of their opposition. Due to the conceptual and practical limits of resistance, scholars and activists increasingly look to refusal as a counterhegemonic tactic.[46] While resistance takes the stance of 'I oppose you', refusal asserts that 'Your power has no authority over me'.[47] Refusal tactics emphasise survival, internal solidarity, and a strategy for enduring prevailing unjust and dominant systems. Acts of refusal are perceived as calculated passivity aimed at avoiding any form of entrapment by the state.[48] Simpson gives the example of Mohawks who refuse to obtain passports, social assistance, and medical coverage and likewise refuse to vote and pay

[45] Simpson, 'On Ethnographic Refusal' (n 7)
[46] Audra Simpson, 'Consent's Revenge' (2016) 31(3) Cultural Anthropology 326.
[47] Elliott Prasse-Freeman, 'Resistance/Refusal: Politics of Manoeuvre under Diffuse Regimes of Governmentality' (2022) 22(1) Anthropological Theory 102, 103-107.
[48] ibid, 114.

taxes as they do not recognise the state's sovereign authority and endeavour to preserve their language and political identity as Iroquois.

While resistance can be described as opposition to direct domination with the objective of compelling change, refusal concerns efforts towards constructing a "plane of equivalence"[49] that stands parallel to prevailing and dominant legal and political structures. Refusal serves as a powerful counterpoint to resistance. It is more consistent with the assertion that Indigenous sovereignty is independent of the state, meaning that the existence and validity of Indigenous sovereignty is not dependent on the very colonial structures that profit from Indigenous peoples' subalternity. Refusal highlights Indigenous ways of being that exist independently of international law and its structures, thereby shifting the focus away from the seemingly all-encompassing claims of states and their institutions. By employing refusal tactics, Indigenous peoples shed light on states' continued assertion of their validity as against pre-existing, long-standing Indigenous sovereign peoples. After all, as Moreton-Robinson said,

> […] I asked the question: if Indigenous sovereignty does not exist, why does it require refusing by state sovereignty? […] We have gone to war, we have refused, and we have used political and legal mechanisms to challenge the legitimacy of Canada, Australia, the United States, New Zealand, Hawai'i states and their sovereign claims to exclusive possession of our lands. We do this because every day our sovereignties exist and are operating despite these claims.[50]

Indeed, Indigenous peoples do not need permission to exist. They persist despite the relentless violence of colonialism and international law. Nevertheless, states' own belief in their sovereign authority, as legitimised by international law and supported by multiple layers of international and domestic institutions, enforces through brute force what Indigenous peoples refuse – state control over Indigenous lands and their very persons.

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[49] ibid, 113.

[50] Moreton-Robinson (n 23).

VI. Conclusion: Making Space for Fourth World Approaches to International Law

Fourth World scholars view the relegation of Indigenous peoples to the status of dependent minorities within states as unjust, oppressive, and exploitative. Ultimately, they hope to see an international community where Indigenous peoples have regained control over their lands and are free to exercise their Indigenous sovereignty without state opposition or control. To this end, Manuel argues that Indigenous peoples should have the freedom to negotiate their political relationships with states, bringing an end both to their subordinate status in relation to states and to the invisibility of Indigenous knowledge systems in prevailing laws and legal systems.[51]

But how can the silenced negotiate? As Spivak argues, the subaltern cannot speak because the prevailing legal and political systems do not have the infrastructure to recognise their speech as speech. In effect, the subaltern is so othered as to render their speech utterly impotent. The prevailing systems hinder Indigenous peoples' speech from being heard; access to international legal institutions and other institutions of power is denied to most Indigenous peoples. Moreover, the prevailing systems impede Indigenous peoples' meaning from being understood – in the international legal system, meaning is filtered through particular imaginaries that privilege the state. Indigenous peoples' demands can only be accommodated once sanitised through representation by states and a re-presentation through international and domestic law-making. One must question whether Indigenous sovereignty can coexist with the current design of an all-encompassing state sovereignty, with its impulse to dominate, extract, and profit. Would states ever opt to relinquish their claims to Indigenous lands when international and state laws offer ample legal cover for their confiscation?

Ruth Buchanan wrote that the critical or Third World international legal scholar finds herself being suspended between 'two equally necessary

[51] Manuel and Posluns (n 19) 214–266.

answers to the question: "what is the responsibility or the task of the jurist in revolutionary times, or perhaps these revolutionary times?"' The same could be said for lawyers who profess a commitment to justice for Indigenous peoples. Do we heed Hans Morgenthau's warning that struggling for absolute justice would cost us both relative justice and peace? Or do we accept China Mieville's challenge to,

> abandon law and become a revolutionary, because 'the violence and power politics that the progressive jurist decries are inescapably the violence and power politics of juridical forms'?[52]

Considering the centrality of states and state sovereignty in international law and in the international legal system, efforts to navigate, evade, and even confront international law's violence against Indigenous peoples have done little towards restoring Indigenous peoples' political autonomy and their right to control their lands in a way that is consistent with their place-based identities, spiritual traditions, and long-term survival. Both resistance and refusal, which Elliott Prasse-Freeman describes as the quasi-dialectic tactics of direct confrontation and evasion/endurance,[53] can only exert a limited challenge against the might of the entire machinery of the international legal system and its member states. The epistemic violence of international law is an existential threat to Indigenous peoples, yet its violence is taken as a given, and Indigenous peoples are expected to obtain what little relief they can within its self-preserving limitations.

Addressing the ongoing injustice against Indigenous peoples requires a radical reimagining of what it means to be in an international community. Uncomfortably for international lawyers, this goes beyond acts of resistance and pleas for reform within the rules and mechanisms for engagement that

[52] Ruth Buchanan, 'Writing Resistance Into International Law' (2008) 10(4) International Community Law Review 445 *citing* "Roundtable: War, Force and Revolution" chaired by Anne Orford, ASIL Proceedings 2006 and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001).

[53] Prasse-Freeman (n 43).

international law has already sanctioned. Correcting the injustice against Indigenous peoples requires the breaking of our idols – international law's most sacrosanct ideas about the power, prerogatives, and temporal reach of states. If the international legal system itself silences Indigenous peoples, we must question our continuing commitment to it as it stands, and our acceptance of its limited promise for Indigenous peoples. As Mieville argued, since law is an expression of violence, 'the human necessity of revolution might mean the end of law'[54] – or at least the end of international law as we know it.

[54] Buchanan (n 47).