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Commentary on *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*

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Dalee Sambo Dorough, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*, 2 J. L. PROP. & SOC'Y 71 (2016), http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Dorough.pdf.

This commentary is in a series on the Indigenous Peoples Movement. See the introduction to this series and links to its other articles: http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-HardinAskew.pdf.

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Dalee Sambo Dorough's paper nicely describes the development of the rights of indigenous peoples under international human rights law. Rather than quibble with her descriptive account, I want to focus on the tensions that underlie it. I encourage her to explore these tensions because doing so should illuminate how human rights law does or does not help protect indigenous peoples.

Three tensions are evident in the paper and worth addressing. The first is between the practical and the expressive effects of human rights law. This tension permeates the paper. For example, the paper underscores that indigenous peoples worked hard to establish a right to self-determination. States initially resisted this right because of its potential implications within national legal systems. The fact that it appears in the UN Declaration on the Rights of Indigenous Peoples thus is a victory. The paper might examine, however, why and how this counts as a victory. Is it mostly a symbolic victory or does it also offer something more? And how much symbolic value does it really have?

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[*] Dalee Sambo Dorough, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*, 2 J. L. PROP. & SOC'Y 71 (2016), http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Dorough.pdf.

[**] Monica Hakimi, Associate Dean for Academic Programming and Professor of Law at the University of Michigan, invites Professor Dorough to explore the tensions in her account of the human rights law on indigenous peoples.

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These questions are pressing because the right to self-determination is notoriously malleable. It does not necessarily entitle indigenous peoples to land, resources, or enhanced participation in domestic political processes. Indeed, Dorough recognizes that, as a matter of strategy, focusing so intently on this right might have overshadowed the realization of important practical goals—like indigenous peoples control over or benefit from their own cultures and resources. Why should we care, then, that the Declaration recognizes the right to self-determination? To be clear, I am not suggesting that we should not care. I am simply inviting Dorough to explain why we should.

Here is another example: the paper asserts that "the task before the world community . . . is to arrive at language that does in fact uphold the rights of Indigenous peoples and maintains the solemn obligations of states in relation to the distinct status and human rights of Indigenous peoples." With that text, the paper suggests an expressive goal—that we just need to get the proper language in an international instrument. But the paper ends by underscoring that the rights of indigenous peoples must actually be satisfied—that they must have some practical effect. Thus, although the paper itself focuses on the expressive, it recognizes that much of the law's relevance lies in its practical implementation. The paper never explains, however, how one moves from the expressive to the practical. The question is important because the mechanisms for achieving a symbolic or expressive victory differ significantly from the mechanisms for achieving an operative victory. How does focusing on the former help us attain the latter?

This brings me to a second tension in the paper: on the relationship between law and politics. The paper assesses human rights law through two different and, at times, incompatible lenses. When describing the movement to recognize the rights of indigenous peoples,

the paper analyzes human rights law as part of a political struggle. Yet when examining the resultant norms, the paper treats these rights as settled law—as if the political contestation is largely over and the outstanding questions are mostly technical or relate only to issues of implementation. In fact, human rights norms remain highly contentious, even after they appear in legally binding instruments. Most are codified at high levels of abstraction that preserve considerable space for competing interpretations. This is not necessarily a criticism; the same might be said of many U.S. constitutional rights. Still, the paper might engage with the social and political dynamics that affect not only the initial generation of the norms relating to indigenous peoples but also the content and application of those norms over time.

Finally, the paper alternates between a vision of indigenous peoples as active political agents and a vision of them as largely disempowered by stronger governmental or market forces. On the one hand, the paper nicely describes how indigenous peoples mobilized for change at the United Nations. On the other hand, it suggests that indigenous peoples face a steep uphill battle when competing with other interests. This tension raises an interesting follow-up question: why aren't the factors that have empowered indigenous peoples to mobilize for their human rights also empowering them to fight those competing forces? I have already hinted at one possible answer: perhaps indigenous peoples more effectively participate in some mechanisms, like the UN human rights apparatus, than in others. Or perhaps indigenous peoples themselves have divergent interests; some might want to tap into governmental or market structures of power, while others might not. Again, my suggestion is not that Dorough try to resolve this tension—just that she explore it so as to better guide us in explaining human rights law's relevance to and possibilities for indigenous peoples.