Incorporating indigenous rights in the CBD

A theoretical model that should inform implementation

Federica Cittadino 2020-06-30T09:00:25

Let me start by thanking the symposium's editors and the three researchers that have accepted to review my work for their thoughtful comments and for sparking a lively discussion. In my book, I argue for the harmonisation of a too often fragmented international legal system: Indigenous peoples' rights and biodiversity law. The main purpose though is not only to ensure theoretical consistency, but also to suggest avenues for a mutually reinforcing implementation of the Convention on Biological Diversity (CBD) and the body of Indigenous rights protected under human rights law. For this symposium, it is particularly fortunate that scholars with a broad range of research interests and backgrounds have accepted to debate my work, as my ambition is to combine different sub-disciplines of international law and to strengthen their mutual supportiveness and coherence. In the following, I want to respond to the most pressing points raised by the reviewers.

Both *Giada Giacomini* and *Mauro Barelli* pick up on the argument that the theoretical approach proposed in the book should inform the concrete and harmonious implementation of the regimes analysed. In particular, *Giacomini* correctly points out that the mere incorporation of indigenous rights in the CBD, as well as the mere recognition of legal pluralism are not necessarily a guarantee for the harmonious implementation of the two regimes since a "broad manoeuvring space" is "left to States". Although acknowledging this potential barrier to the correct integration of Indigenous rights within the CBD, I see a sound doctrinal analysis as the necessary precondition for the implementation of the CBD framework in combination with Indigenous rights on the ground. Therefore, as theorists and scholars, we should make as many efforts as possible to propose legally sound arguments as to why Indigenous peoples' rights have to be fully realised while implementing the CBD regime. The more we do that, the more chances Indigenous peoples will have to appropriate those arguments when defending their unique cosmovisions and non-Westernised legal systems on the ground.

Of course, good implementation needs not only the contribution of legal experts but also other expertise, including anthropologists and political scientists that may help adapt abstract legal terms into a language that is meaningful for the concerned stakeholders. Most importantly, as I try to show in my book, Indigenous peoples must be the protagonists of this implementation, both because the intent of the CBD and the Nagoya Protocol is otherwise flawed and to ensure that their rights are respected to the fullest. Realising participation is by no means a straightforward task,

as argued by Giacomini, and I agree with her, more research must be carried out on the constitutional and practical implications of recognising Indigenous "living law" in positivistic legal systems. However, while it is risky to crystallize the living law of Indigenous peoples, it is equally risky not to recognise Indigenous rights in national legal systems. For instance, as fluid as the concept of traditional knowledge might be, failure to acknowledge Indigenous peoples' ownership of traditional knowledge in national legal systems may lead to misappropriation and the violation of Indigenous rights.

In this sense, a reflection on the implications of some terms used in the CBD regime, such as customary law, is certainly urgent. It helps us remembering that these terms are not neutral but have colonial connotations and therefore preserve some unbalanced power relations between Indigenous peoples and States. A failure to do so in my book for the term 'customary law', however, does not result from a rigid legalistic vision of the problems as *Giacomini* suggests in her post. On the contrary, one of the concerns that I explicitly embrace is that law is not something static, but it is rather a pool of binding norms that may evolve over time in response to pressures from different legal fields, actors and soft law instruments (see p. 5-6 in the book). In my view, law is not a water-tight system distanced from social reality but is entangled in various ways with social reality. Therefore, I propose that different disciplines cooperate to make sure that both law-making and implementation are attuned to social reality.

Lucas Lixinski and *Mauro Barelli*'s comments both focus on the harmonisation purposes of my book as well as on the use of the interpretative approach. In particular, *Lixinski* describes my work as "utopian" as it "imagines what international law can be". Rather than that, I would say my book describes international law as it should be. When I analyse the World Heritage Convention (WHC) (which represents a relatively small part of my analysis), I am not blind to the fact that practice in the inscription and management of World Heritage sites is much gloomier than the theoretical model that I propose in my book. The point I strive to make is that both the WHC and the practice resulting from its implementation must be revised to incorporate Indigenous rights in the WHC context. This is again linked to the point made above that a sound theoretical framework is crucial for the correct implementation of the regimes considered. Indigenous peoples' rights are binding on WHC Parties even when they operate in a seemingly separated regime. Therefore, States have to consider and apply these rights in the context of the WHC.

My purpose is thus to show that international law is not made by water-tight, independent compartments. On the contrary, human rights need to apply consistently throughout different sectoral regimes, whenever the law or its application has an impact on them. In this sense, I do not intend to show that "sustainability is a precondition" for Indigenous peoples' rights, although in some cases it may be, but rather that Indigenous rights are not necessarily to capitulate against sustainability considerations and biodiversity protection. This point is kindly also stressed by *Barelli*, who agrees with my theoretical ambition to offer a joint reading of the CBD and Indigenous peoples' rights as having important practical relevance. Inter alia, through this joint reading, I suggest practical ways of

implementing the rights of Indigenous peoples enshrined in the UN Declaration on the Rights of Indigenous Peoples outside the human rights realm.

In addition, *Barelli* emphasises a point that is raised by all commentators, i.e. the CBD regime may ensure the protection of Indigenous rights in ways that are more advanced than under international human rights law. Important aspects are the explicit protection of traditional knowledge under the CBD, the fact that benefit-sharing might be required even when Indigenous rights are not restricted, and the possibility under the Nagoya Protocol to implement participation as consent even when survival is not at stake.

In more general terms, my book highlights the role of Indigenous peoples, and thus of non-state actors, in the making of public international law. Indigenous peoples have heavily influenced the evolution of the CBD by participating as observers in the meetings of the COP and of the Working group that elaborated the Nagoya Protocol. Their influence is then reflected in the consistent recognition of Indigenous rights within the CBD regime as described in my book. This *modus operandi* tells us a lot about the fact that, although legal sources are rigidly governed by States, international law-making is increasingly contaminated by societal needs, for instance through the use of soft-law instruments and non-binding decision making processes. This change is certainly linked to the challenge that international law does not regulate exclusively the relations among States anymore, but it has also important intra-State effects on groups, persons, and stakeholders.

It is fair to expect that Indigenous peoples will continue to play a strong role in the evolution of the CBD regime. It is equally important to be aware of the ways in which this will happen. I hope my work contributes to ensure that Indigenous peoples' rights play in future a stronger role in the creation, interpretation and implementation of other sectoral international law regimes that have an impact on Indigenous peoples.

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