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SYMPOSIUM ON THE IMPACT OF INDIGENOUS PEOPLES ON INTERNATIONAL LAW

THE POTENTIAL IMPACT OF INDIGENOUS RIGHTS ON THE INTERNATIONAL LAW OF NATIONALITY

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International law has long recognized that the power of a state to identify its nationals is a central attribute of sovereignty and firmly within the purview of domestic law. Yet these boundaries may be shifting, in part due to the effect of international human rights norms. In 2011, citizenship scholar Peter Spiro asked, "[w]ill international law colonize th[is] last bastion of sovereign discretion?"[1] Ten years later, this essay reframes the question, asking whether the international law of Indigenous Peoples' rights will "decolonize" the discretion, by encouraging its exercise in ways that respect and enable Indigenous connections to their traditional land. It considers this possibility in light of two recent cases decided by courts in Australia and Canada, both of which ascribe a distinctive legal status to non-citizen Indigenous persons: *Love v. Commonwealth, Thoms v Commonwealth*[2] ("*Love-Thoms,*" Australian High Court) and *R. v. Desautel*[3] *("Desautel,"* British Columbia Court of Appeal, currently on appeal before the Supreme Court of Canada). In each case, the court in question recognized that some Indigenous non-citizens have constitutional rights to remain within the state's territory (and perhaps also a correlative right to enter it), by virtue of their pre-contact ancestral ties to land within the state's borders.

This essay argues that international jurisprudence on the rights of Indigenous Peoples to their traditional lands has facilitated the emergence of a distinctive status for non-citizen Indigenous persons. This body of jurisprudence has emphasized that the relationship Indigenous Peoples have with their land is not merely proprietary, but rather is a reciprocal spiritual connection that can survive the dislocation of the group from its territory and the dissolution of the group as a polity. *Love-Thoms* and *Desautel* extend this idea by establishing that the relevant connection can endure across state boundaries irrespective of state law and international law on nationality, as a constitutional right vested in Indigenous non-citizens. This suggests that the cross-border effects of Indigenous connections to land could supply an Indigenous-specific dimension to international law concepts of nationality and rights of return.

The Cases: Extraterritorial Implications of Indigenous Connections to Traditional Land

In the 2020 Australian High Court case of *Love-Thoms*, the federal government's constitutional power to deal with "aliens" was held not to extend to members of Aboriginal and Torres Strait Islander communities. The power

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[1] Peter J. Spiro, *A New International Law of Citizenship*, 105 AJIL 694 (2011).

[2] *Love v. Commonwealth, Thoms v. Commonwealth* [2020] HCA 3 (Austl.).

[3] *R. v. Desautel* [2019] BCCA 151 (Can. BC).

could not be used to deport two non-citizen Indigenous men who had been convicted of crimes committed in Australia. The majority opinions reasoned that the depth and longevity of the connection that Indigenous persons have to Australian land and waters was such they could never plausibly fall within the constitutional category of "alien." In the 2019 Canadian case of *Desautel*, the British Columbian Court of Appeal found that a non-citizen Indigenous man was entitled to exercise hunting and fishing rights on the traditional territory of his ancestors in British Columbia, Canada. Despite being a U.S. citizen and resident, his ancestral ties to a pre-contact Canadian Aboriginal community enabled him to exercise constitutionally protected Aboriginal rights. In both cases, the individual's relationship to land connects them to a pre-contact Indigenous community and does not depend on the nationality, citizenship, or (at least in the Canadian case) residency of that person or their parents. As explained in *Love-Thoms*, the relevant connection is a form of belonging that is "older and deeper than the Constitution,"[4] because: "[s]ince settlement, Aboriginal people have been inseparably tied to the land of Australia generally, and thus to the political community of Australia, with metaphysical bonds that are far stronger than those forged by the happenstance of birth on Australian land or the nationality of parentage."[5] The relevant connection is not a species of *jus soli* or *jus sanguinis* rules, nor is it proprietary. It is something more profound.

In *Love-Thoms,* for example, the relevant connection to land or territory was characterized as a "unique," "spiritual," and "metaphysical" relationship. In *Desautel* the connection was drawn in the more precise terms demanded by section 35 of the Canadian Constitution, which protects Aboriginal rights.[6] While Richard Desautel was an enrolled member of the U.S. Lakes Tribe of the Colville Confederated Tribes in Washington State, he, like a sizable number of other members of that tribe, is a descendant of the Sinixt people of British Columbia. Many Sinixt moved south from their traditional land after the establishment of the U.S.-Canadian border in that region in 1846, and some joined the Lakes Tribe. The Sinixt people were declared "extinct" in Canada in 1956. But their descendants, now living in the United States, continued to hunt and fish on their traditional land in British Columbia with sufficient regularity to satisfy the court that these practices had been followed continuously since "pre-contact times," as is required to prove that those practices are constitutionally protected as Aboriginal rights. Significantly, the *Desautel* court explained that this continuity test has never required that rights holders *occupy* the same territory as their ancestral community. Accordingly, a crucial feature of both cases is that the relevant connection to traditional land survives material dispossession. This conception of Indigenous Peoples' relationships to land is one that has been developed in the human rights jurisprudence of UN and Organization of American States treaty bodies.

Despite the constitutional rights accorded to them, in neither *Love-Thoms* or *Desautel* are the applicants "nationals" of the state in question. Importantly, however, they are not described as "aliens." The distinctive status ascribed to the applicants in each case indicates that the state-based domestic and international law concepts of nationality, citizenship, and permanent residency do not exhaust the range of legal statuses or attributes that entitle people to remain within or return to a state.

The International Context: Do These Cases Reflect the Content of International Indigenous Rights?

Is there any evidence that the *general* international law of nationality is moving towards recognition of the distinctive status of Indigenous non-citizens? So far the answer seems to be no. However, while the distinctive features of Indigenous relationships to land have not yet appeared in the general international law on nationality, I contend that they may yet influence that body of law.

[4] *Love v. Commonwealth, Thoms v. Commonwealth* [2020] HCA 3, 124 (Austl.) per Gordon J.

[5] *Id.* at 133 per Edelman J.

[6] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35.

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The *Love-Thoms* and *Desautel* cases take their place alongside findings of international human rights bodies, centrally the Inter-American Court of Human Rights (IACtHR), on Indigenous Peoples' rights to their traditional land. The existence of a legally salient Indigenous ancestral connection to land, that is not dependent on continuous or current occupation, or on state-recognized property rights, is an established part of the IACtHR's jurisprudence on the property protections of the American Convention on Human Rights (especially Article 21).[7] Since 2001, the court has effectively expanded the range of rights protected by Article 21 to include the spiritual and cultural relationship of Indigenous Peoples to their traditional lands.[8] Significantly, for the purposes of this essay, it has found that the Convention protects this relationship even where the Indigenous community no longer possesses or has access to their traditional territory. In the course of so doing, the court has recognized that Indigenous Peoples have a right to return to their ancestral lands, as an expression of their right to freedom of movement and residence.[9]

In linking the spiritual connection of Indigenous Peoples and their ancestral lands with a right to return to that land, the IACtHR drew on the *UN Guiding Principles on Internal Displacement* which specify that "[s]tates are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."[10] It has also made clear that the protected connection and correlative right of return persist indefinitely, for as long as the "spiritual and material" relationship to land "continues to exist,"[11] as evidenced by "spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture."[12] Could such an intergenerational Indigenous right to return to traditional lands have cross-border effect? Could it provide a basis for a right, protected in international law, of Indigenous "aliens" to return to ancestral lands within the territory of states to which they are not otherwise connected by nationality or citizenship? Perhaps so, if the rights discussed by the IACtHR can be drawn into relation with the human right to return to one's country, a possibility that is discussed below.

Potential Impact on International Norms on Nationality via the "Right to Enter One's Own Country"

What might we say about the impact on general international law of the IACtHR's jurisprudence on Indigenous rights to traditional territory? The power to determine nationality and citizenship is a matter of discretion for states that is regarded as very close to the heart of sovereignty. This discretion is conditioned to some extent by norms housed in international human rights instruments, largely requiring that nationality not be withheld or revoked in ways that are discriminatory. Nonetheless the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Law* states the default proposition starkly in its opening article: "It is for each State to determine under its own law who are its nationals."[13]

That said, in situations where a state asserts the right to extend diplomatic protection to a person they claim as a national, and that right is denied by a second state, international law has developed criteria with which to assess the

[7] American Convention on Human Rights ("Pact of San Jose, Costa Rica"), Nov. 22, 1969, 1144 UNTS 123.

[8] *See, e.g.*, Yakye Axa Indigenous Cmty. v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 76 (June 17, 2005).

[9] Moiwana Village v. Suriname, Inter-Am. Ct. H.R. (set. C) No. 124, 1 (June 15, 2005).

[10] Guiding Principles on Internal Displacement, U.N. ESCOR, Comm'n on Human Rights, 54th Sess., Agenda Item 9(d), 1 9, UN Doc. E/CN.4/1998/53/Add.2 (1998).

[11] *Id.* at 130.

[12] Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 120 (Mar. 29, 2006).

[13] Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April. 1930, 179 L.N.T.S. 89 (LoN-4137) (entered into force 1 July 1937), 130–131.

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merits of the claim. The famous *Nottebohm* case involved such a situation.[14] In that case, the ICJ expressed the general principle that diplomatic protection, and thus nationality, could only be extended to persons who have maintained a "genuine link" with that state. The ICJ's "genuine link" dicta is commonly understood to express a fundamental limit on a state's obligations to recognize another state's assertion of nationality.

The indicia of a "genuine link" in international law are primarily social and cultural, and place a strong emphasis on residence. As the court explains in *Nottebohm*: "the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[15]

A distinctive status for Indigenous non-citizens in nationality law, one that may entitle them to remain within a state's boundaries in order to maintain a connection to their traditional land, by virtue of holding a human right to return to that land, would likely not be *primarily* premised on current social or familial ties to human communities. Nor would it be derived from habitual residence. In the terms in which the connection has been described by the IACtHR and by the domestic courts in Australia and Canada, the link is more likely to be framed as an inherited, intergenerational attachment to *land itself*. What difference might a "genuine link" of this kind make to the general law of nationality?

A glimpse of one possible site of confluence can be found in the jurisprudence and guidance of the Human Rights Committee (HRC) on Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR).[16] This article provides that "no-one shall be arbitrarily deprived of the right to enter his own country." The correlative protection in Article 22 of the American Convention was pivotal in the IACtHR's finding, in *Moiwana Village v. Suriname,* that displaced Indigenous Peoples have an "internal" right to return to their traditional lands from other parts of the state's territory.[17] No mention was made in that case to the cross-border impact of Article 22, nor to the subparts of the provision that deal specifically with rights of entry to states and protections against expulsion (Articles 22(5) and (6) respectively). This case did not require reference to the nationality of the persons holding the right. In contrast, in its jurisprudence on ICCPR Article 12(4), the HRC has developed an understanding of "his own country" that extends beyond "nationality in a formal sense." In the HRC's jurisprudence, persons other than nationals could exercise the right to return to their country, if they have sufficiently strong "connections" to that country. In its *General Comment on Freedom of Movement*,[18] for example, the Committee has found that the meaning of "his own country" in the ICCPR is broader than "country of his nationality," because "there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality."[19]

These principles, drawing attention to the rights of return held by non-nationals, have been applied by the HRC in Optional Protocol communications, to assess a state's capacity to remove an alien (typically for criminal conduct) against the impact of the deportation on the individual concerned (e.g., *Stewart v. Canada*,[20] *Warsame v. Canada*,[21] and *Nystrom v. Australia*[22]). In the words of the HRC, the right to return to one's own country embraces

[14] Nottebohm (Liech. v. Guat.), 2d Phase Judgment, 1955 ICJ Rep. 4 (Apr. 6).

[15] *Id.* at 22.

[16] International Covenant on Civil and Political Rights, Dec. 16, 1966 999 UNTS 17.

[17] Moiwana Village v. Suriname, Inter-Am. Ct. H.R. (set. C) No. 124, 1 (June 15, 2005).

[18] Human Rights Committee, General Comment 27, Art. 12, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999).

[19] *Id.* at 5–6. Compare Art. 22(5) of the American Charter on Human Rights and Art. 3(2) of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (limiting the scope of the right to return).

[20] Human Rights Comm., Stewart v. Can., Communication No. 538/1993, UN Doc. CCPR/C/58/D/538/1993 (1996).

[21] Human Rights Comm., Warsame v. Can., Communication No. 1959/2010, UN Doc. CCPR/C/102/D/1959/2010 (2011).

[22] Human Rights Comm., Nystrom v. Austl., Communication No. 1557/2007, UN Doc. CCPR/C/102/D/1557/2007 (2011).

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"at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."[23] Non-citizen, non-national Indigenous persons seeking to remain within a state in order to exercise their rights to return to traditional land seem to be excellent candidates for such a status, and the domestic law expressed in the cases of *Love-Thoms* and *Desautel* seems to put this distinctive status into practice. The cases do not refer to the IACtHR jurisprudence, but the resonance between the approaches is striking.

Concluding Thoughts

Perhaps the most interesting implication of the cases discussed above is the implicit acceptance that *Indigenous law* can be understood as a limitation on the sovereign power of a state to identify its nationals. Indigenous law determines the membership of the rights-holding community, as well as the quality and nature of that group's relationship to land. International human rights law recognizes Indigenous connections to land even when these are denied in the legal system of the state, and the two domestic cases place constitutional limits on the power of the state to remove Indigenous non-nationals. Taken together, these limitations show the persistent normative power of Indigenous law and Indigenous boundaries (human and territorial), notwithstanding the superimposition of the international order of states across them. This may reflect an implicit acknowledgement that the international law of states and state territories, and the global movement of people among them (including the disruptions and dispossessions of colonialism), have not supplanted the older connection of Indigenous nations to their ancestral lands. Perhaps this collection of norms, not yet unified by a single theory, could represent a step towards the recognition, in international law itself, of an underlying and pre-existing international order of Indigenous Peoples. This original international order remains visible beneath the overlay of states, and the Indigenous nationality law that determines membership in those communities is legally cognizable in the law of states, but not wholly determined by that law. So much is suggested by the fact that the distinctive status of non-citizen Indigenous persons recognized in each of the cases discussed above is not defined and regulated by state law (or international law), but rather exempted from the general operation of those bodies of law. One way of reading these developments is as evidence of a conceptual shift that moves us closer to a vision of an international legal order that is only contingently constructed by states and state boundaries. It may be part of an evolving understanding that is, to borrow from S. James Anaya's account, attentive to: "'peoples' in the ordinary sense of the term—throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries."[24]

[23] Human Rights Committee, General Comment 27, Art. 12, UN Doc. CCPR/C/21/Rev.1/Add.9, at 5–6 (1999).

[24] S. James Anaya, Indigenous Peoples in International Law 79 (1996).

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