The UN Declaration on the Rights of Indigenous Peoples: A Commentary. Edited by Jessie Hohmann & Marc Weller. Oxford: Oxford University Press, 2018. 611 + xlii pages.

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The new Oxford Commentary on the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), edited by Jessie Hohmann and Marc Weller, has been awaited for some time, with the book beset by several years of delays *en route* to publication. That said, it has still been released just a dozen years after the United Nations General Assembly's fall 2007 adoption of the *UNDRIP*,[1] which is still a rapid release compared to some other Oxford Commentaries.[2] Indeed, the closeness in time to the *UNDRIP*'s adoption arguably gives rise to a certain tentative quality in so far as the Commentary analyzes the *UNDRIP* when there is both judicial engagement and further scholarship still to come.

Organized into nineteen chapters, the Commentary is structured around themes rather than proceeding article by article. In taking this approach, the book brings together some two dozen authors whose contributions engage with particular issues arising in the international law of Indigenous rights in light of the *UNDRIP*. The book is a significant work and of enormous assistance to all working in this area of law by offering both important source material and legal analysis. However, given the nature of such a collection, it naturally has variability across chapters. That variability is also larger than it might be in some more settled areas of law for several reasons that emerge gradually within the work, including implicit differences in interpretive approach as between contributing authors and more explicit differences in the degree of critical engagement with emerging legal norms in this field.

These differences, to be examined further in the course of this review, also overlay another collection of differences that may have emerged simply from a complex course of movement towards publication, with some authors completing initial versions of their chapters years before others and then taking somewhat varying approaches to the task of updating to take account of subsequent developments. One of the more significant examples is the 2016 adoption of the *American Declaration on the Rights of Indigenous Peoples* (*ADRIP*) by the Organization of American States (OAS) — albeit over opposition from the United States, a non-position from Canada,

[1] GA Res 61/295, UN Doc A/RES/61/295 (2007), reprinted in UNGAOR, 61st Sess, Supp No 49, vol III, UN Doc A/61/49 (vol III) (2008) at 15–25.

[2] For example, compare the timeline to that of Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford: Oxford University Press, 2019), released thirty-eight years after the adoption of the *African Charter* and thirty-three years after its entry into force.

and a complex set of reservations from Colombia.[3] The *ADRIP* receives attention in some chapters, such as the penultimate chapter from Willem van Genugten and Federico Lenzirini on implementation-related issues, but, surprisingly, it does not feature in any of the first four chapters, which discuss the relationship of the *UNDRIP* to other parts of international law.

On this last point, the *ADRIP* is an omission of note, given its significance in relation to questions about the complexities of the *UNDRIP* serving as a landmark universal instrument in light of the need for further regional instruments and the need for issues to be addressed that the *UNDRIP* did not. The *ADRIP* text, notably, deals with a number of issues that the *UNDRIP* did not address and deals with some issues differently. As such, it would have been appropriate in a book published three years after the *ADRIP*'s adoption to include further references to it and for it to appear in the book's table of legal instruments, although this latter omission was no doubt an editorial indexing error rather than an error of substance.

In the organization of the work into themes, it also bears noting that the Commentary covers some issues not addressed by the *UNDRIP* itself and simultaneously misses some important issues that are. For example, the book includes an insightful chapter on the definition of Indigenous peoples by Joshua Castellino and Cathal Doyle. This chapter is both welcome and necessary given that the *UNDRIP* does not include such a definition, although the fact that the issue is left to operate outside the *UNDRIP* text properly leads Castellino and Doyle to situate the issues much more broadly within discussions about definitions of other minority populations. On the other side of the claim, there are aspects of the *UNDRIP*, such as the provisions of Article 46 concerning limits on Indigenous rights, receiving almost no attention in the book, with only the chapter by Martin Scheinin and Mattias Åhrén on broader relationships to human rights engaging in a meaningful way with the meaning of Article 46, but still doing so only partially. How limits on Indigenous rights are to be understood will of course be a crucial question for many parties in potential future litigation that references the *UNDRIP* as a pertinent legal source and in the context of discussions with domestic governments about implementation.

In respect of domestic governments, it also bears noting that the work's engagement with the various interpretive statements offered by states at the time of the *UNDRIP*'s adoption is very limited. Indeed, while there is some reference to the later shifts in the position of the four states that voted against the *UNDRIP*,[4] there is very little discussion of the significance

[3] Doc AG/RES.2888 (XLVI-O/16) (15 June 2016), online: <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

[4] Recorded as Australia, Canada, New Zealand, and the United States in UN Doc A/61/PV.107 (2007) at 19.

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of the numerous interpretive statements read into the record on its adoption.[5] To some extent, that choice by the authors no doubt reflects a deliberate view that states are not to keep delimiting the rights of Indigenous peoples — an important goal for the *UNDRIP* itself. But it also marks a likely awkward interaction with those who are confronted with questions of what to do with the *UNDRIP* in international law arguments. While it would have repeated overtrodden debates to spend much time on the legal status of the *UNDRIP*, something that has been covered well in other works,[6] pertinent material on the interpretation of the instrument would have warranted more discussion in a book seeking to set out the meaning of that instrument.

With those more prefatory comments made, I note that the contents of the book cover an impressive range of topics. The first four chapters engage with the *UNDRIP*'s relationship to other parts of international law and include the two chapters mentioned above as well as a chapter by James Anaya and Luis Rodríguez Piñero on the development of the *UNDRIP* and a timely chapter by Christina Binder on the *UNDRIP*'s relationship to international investment law. There are some complex unresolved tensions in so far as Anaya and Piñero conceptualize the *UNDRIP* as part of modern human rights law (or, perhaps, as providing an interpretive lens on human rights commitments), whereas Scheinin and Åhrén use their chapter, in part, to raise potentially discomforting critical questions about whether the *UNDRIP* should have contained more safeguards for individual human rights that might be restricted by Indigenous peoples. Both of these chapters are strong contributions, but their contrasting approaches as to their readiness to engage critically with aspects of the *UNDRIP* highlight some unresolved tensions in the aims of the collection.

In broad terms, the next five chapters consider issues of group identity and self-determination. Several of these chapters engage in some detail with matters of drafting history, notably those from Marc Weller on self-determination, Jessie Hohmann on cultural integrity, and Shin Imai and Kathryn Gunn on membership issues. They do not always apply it to every question of interpretation, and Imai and Gunn, for example, make some interpretive leaps on the Article 35 abilities of Indigenous peoples to define members' responsibilities that they do not explain and that stand in contrast to the normative claims of Scheinin and Åhrén found in the earlier part of the Commentary. But these chapters do all mention drafting

[5] See notably the numerous statements delivered both before and after the vote recorded in the official transcript of the United Nations General Assembly meeting in UN Doc A/61/PV.107 (2007) at 10–28.

[6] See especially the multiple chapters on the issue in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart, 2011).

history alongside text. The same is true of Kirsty Gover's excellent chapter on the novel aspects of the *UNDRIP* on equality and non-discrimination, although more of her chapter is on the complexities of the interrelationship of *UNDRIP* concepts with traditional approaches in liberal democratic states.

However, also within this part is Mauro Barelli's rich chapter on free, prior, and informed consent (FPIC). While the drafting history would show a movement away from the clear commitments to FPIC found in earlier draft versions of the *UNDRIP*, Barelli emphasizes more structural and purposive arguments to suggest that the more ambiguous final text ought still to be read to support relatively stringent versions of state obligations because only such a reading will realize the underlying purposes of the *UNDRIP* generally.

Some of the divergence of method within the Commentary, and, indeed, within a single part of the book, illustrates the potentially challenging questions to be faced about interpretations of the *UNDRIP*. For example, are the methods simply subjectively chosen, are there principled reasons for the different approaches to different articles, or are there unresolved tensions? Here, too, the lack of engagement with Article 46, which purports to set out the relevant interpretive principles — although very possibly in so abstract and multifaceted a form as not to be helpful — is notable. It would have been helpful to see it covered within a discussion of the entirety of the *UNDRIP*.

Part 3 consists of five chapters on cultural themes. Of note is the chapter by Alexandra Xanthaki, which engages in sophisticated ways with cultural and religious rights, with Tobias Stoll offering a detailed engagement with intellectual property issues. Daniel Joyce provides an interesting contribution on Indigenous media, while Lorie Graham and Amy Van Zyl-Chavarro powerfully contextualize Indigenous education rights, with this last chapter providing yet another distinct lens on interpretive method.

Yet another approach receives emphasis in the opening chapter of Part 4 on land and resource rights, in which Claire Charters engages in a close textual analysis of some of the land rights provisions of the *UNDRIP*, including linguistic matters such as verb tense. While some parts of her analysis do use purpose and drafting history, the textualist approaches employed implicitly rest on certain assumptions about the character of the final *UNDRIP* text that have not always been respected in the versions of the *UNDRIP* in other languages. To take just one directly pertinent example, there are inconsistencies in the verb tenses used in the English and French versions respectively of the land rights provisions of Articles 25–28. This is a problem that Charters does not reference in the textualist dimension of her argument but that may one day pose significant problems in an English–French bilingual state like Canada.

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Charters does engage with Canada's domestic jurisprudence to some degree, referencing the Supreme Court of Canada's 2014 *Tsilhqot'in* decision as illustrating a potentially loosened approach to the legal tests for title that she urges adopting.[7] But she might wish to reconsider her praise for Canadian approaches. The Court's *Ktunaxa* decision was probably genuinely too late for her to mention, but it illustrates particularly challenging prospects for litigation in the Canadian courts at the intersection of land claims and religious claims.[8] One distinctive aspect found within Charters's chapter is its powerful engagement with Article 25 of the *UNDRIP*, which connects Indigenous land rights to spiritual relationships to land, and the Canadian courts would do well to learn from this dimension of her analysis.

The last chapters continue to illustrate the variation in subject matters for discussion. Stefania Errico's discussion of resource rights and environmental protection also illustrates some of the timeline problems the collection ultimately confronted. In what is still a very worthwhile chapter, Errico ends up engaging with the draft version of the *ADRIP* and does not mention the final version adopted in 2016. After a further part on social and economic rights, with chapters by Lee Swepston on labour rights and Camilo Pérez-Bustillo and Jessie Hohmann writing together on other socio-economic rights, the Commentary closes with a focus on implementation and remedies, with Willem van Genugten and Federico Lenzirini writing together on implementation and Lenzirini writing on his own on remedies. These last two chapters do engage with some of the types of material that other chapters tend not to use, including the final text of the *ADRIP*, some of the interpretive statements made by states in 2007, and some detailed arguments on state practice and *opinio juris* concerning particular articles and their potential reflection of customary international law.

There are no doubt some pedantic aspects to my honing in on what could appear to be both natural and slight variations in the approaches and materials of different authors within a collection of such broad scope. Getting a diverse set of top-notch authors to approach matters in a more cohesive way would have been a challenging endeavour indeed, and one can certainly feel empathy for the editors on such matters. But, to the extent that the differences reflect different approaches to interpretation that could yield different results if applied to articles covered by other authors, as well as different materials that could bring different perspectives to some articles, they are nonetheless significant. They also raise the question

[7] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

[8] *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

of whether the final product is "a Commentary" or, more accurately, a set of commentaries.

If the Oxford Commentary on the *UNDRIP* remains in effect a collection of somewhat differing views capturing part of the range of opinion on the *UNDRIP*, it is still a useful work. At the same time, this state of affairs speaks to a field still in development and a Commentary grappling with that situation. It remains a significant scholarly contribution, but one that could not yet attain a more complete cohesiveness. Although there are not at present rapid new developments in international Indigenous rights law, there is nonetheless significant need for ongoing scholarly work. Each work will make its own contributions, with Hohmann and Weller's Oxford Commentary certainly welcome and worthwhile.

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The Law of Maritime Blockade: Past, Present, and Future. By Phillip Drew. Oxford: Oxford University Press, 2017. 173 + xvii pages.

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Phillip Drew's book offers a compact, and highly readable, treatment of an important issue: the law applicable to belligerent action at sea during an armed conflict to prevent shipping, including neutral shipping, entering or leaving enemy ports. The law of maritime blockade has been neglected for some time and is a field crying out for a comprehensive and current monograph.[1] Indeed, there has not been a significant monograph on the

[1] Most studies in the field have been either historic or focused on Israel's blockade of Gaza. On the latter, see James Farrant, "The Gaza Flotilla Incident and the Modern Law of Blockade" (2013) 66:3 Naval War Col Rev 81; Russell Buchan, "The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara" (2011) 58 Neth Intl L Rev 209; Andrew Sanger, "The Contemporary Law of Blockade and the Gaza Freedom Flotilla" (2010) 13 YB Intl Human L 397; James Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?" (2010) 13 YB Intl Human L 367; Douglas Guilfoyle, "The Mavi Marmara Incident and Blockade in Armed Conflict" (2010) 81 Brit YB Intl L 171; Wolff Heintschel von Heinegg, "Naval Blockade" in Michael N Schmitt, ed, *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green*, International Law Studies Series, vol 75 (Newport: US Naval War College, 2000) 203.