

'Indigenous Peoples' Rights in the Context of Borders, Migration and Displacement': A UN Study on Indigenous Migration

ANNE-CÉCILE LEYVRAZ

In July 2019, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) issued a study on Indigenous Peoples' rights in the context of borders, migration, and displacement. This study addresses important contemporary challenges that Indigenous Peoples face throughout the world, such as forced displacement, discrimination, non-recognition, and restricted transnational mobilities, and contests the presumption of Indigenous Peoples as static and embedded groups. The content of the study and its analysis of the applicable legal framework deserves scholarly attention and could lead to increasing policy awareness on this underexplored area in migration research. Their mobilities raises conceptual and practical questions for forced — as well as voluntary — migration. As indigenous migration challenges the very dichotomy between international/national migration, it questions current legal categorisation and calls for different approaches to apprehend the existing legal framework. The present contribution discusses the legal framework applicable to indigenous migration, as developed in the EMRIP study, and pinpoints areas that still require further investigation.

Introduction

'It is important to note that many of these children speak indigenous languages (...) We are caging indigenous people', tweeted a congresswoman from the United States of America after visiting detention centres for immigrants during the summer 2019.¹ A few weeks later, the murder of Emyra Waiãpi, an indigenous leader from Brazil, and the subsequent flight of the community from their ancestral land due to a lack of security sparked international indignation (IWGIA 2019). These two examples describe different contexts but portray the topicality, diversity, and challenges surrounding recognition of indigenous migration. Despite this topicality, only limited research has been undertaken since Yesca's (2008) report for the International Organization for Migration, which tackled the causes and modalities of indigenous migration, and, importantly, challenged the portrayal of Indigenous Peoples as immobile

communities. More recently, however, the United Nations Expert Mechanism on the Right of Indigenous Peoples (the EMRIP) undertook a study on migration and Indigenous Peoples ('the study' or 'the EMRIP study'), titled 'Indigenous peoples' rights in the context of borders, migration and displacement'. While indigenous migration assumes different forms and precedes both colonisation and the creation of states, contemporary indigenous migration is relevant to forced migration studies.

In this contribution, I first address how the EMRIP and its work fit within the UN human rights system and then present different forms of indigenous forced migration. Following this contextualisation, I discuss the content of the study and underline that the legal framework addresses the specificity and commonness of indigenous migration.²

¹ Twitter account of Alexandria Ocasio-Cortez (consulted in July 2019).

² This contribution stems from an ongoing research project titled, 'Asylum and Indigeneity in the Context of Ongoing Displacement on the Ecuadorian and Colombian Border: a Legal and Anthropological Analysis'. The project is conducted by Anne Lavanchy (HES-SO HETS Geneva), Johannes Waldmüller (UDLA Quito), Camilo Eduardo Umaña Hernández (UEXternado, Bogotá) and Anne-Cécile Leyvraz (HES-SO HETSL Lausanne). The views expressed in this article are solely those of the author.

However, I contend firstly that it merely lists applicable rights and does not sufficiently describe how they would apply in the context of indigenous migration; secondly that it does not explicitly differentiate binding from non-binding international norms; and finally, that it should have considered legal developments arising from outside the UN system. Alongside existing initiatives to ensure respect for the UN Declaration for the Rights of Indigenous Peoples, my article seeks to contribute to discussions of the legal framework on indigenous migration by identifying features that need further improvement and proposes possible measures to that end.

Flagging the migration - Indigenous Peoples nexus

Created in 2007 following the adoption of the UN Declaration on the Rights of Indigenous Peoples, the EMRIP provides expertise and advice to the Human Rights Council on matters related to Indigenous Peoples' rights. The study was issued during the 2019 summer session and was developed initially as part of the Mechanism's amended mandate, which requires the subsidiary body to '[p]repare an annual study on the status of the rights of indigenous peoples worldwide in the achievement of the ends of the Declaration' (Human Rights Council 2016: para. 2 (a)). The decision to address migration and displacement in the context of border control was made at the 2018 session, held in July in Geneva. The Mechanism then organised a two-day seminar in November 2018 in Thailand for member States, Indigenous Peoples, national human rights institutions, and scholars. The study emphasises the causes of migration, legal considerations of trans-border movement of Indigenous Peoples, internal migration, and calls for specific attention to be paid to

indigenous individuals in vulnerable situations (Expert Mechanism on the Rights of Indigenous Peoples 2018). Involuntary mobility presents itself as a frequent feature in the context of indigenous migration.

The multiple root causes of forced indigenous migration

Poverty,³ structural discrimination, inequalities, and human rights violations are powerful factors for forced indigenous migration (Berger 2019). An underlying cause lies in the difficulty for Indigenous Peoples to secure legal, social and/or political recognition, and territorial sovereignty at the state level (Bellier and Pr  aud 2011). They endure threats, violence, and murder that may lead to the displacement of the entire community from their land (Berger 2019). This may result from predatory behaviour on indigenous land by private companies working with or without government approval, and is also related to criminality of private groups (Watts 2017). While development is responsible for mass forced displacement, eco-tourism also leads to expulsions and forced removal in different parts of the world, such as Brazil, Mexico, Tanzania, and Mexico (Human Rights Council 2019). Conflicts, forced evictions and criminalisation of indigenous human rights defenders add to the list of causes. The forced displacement of indigenous populations creates an additional layer of vulnerability and difficulty to secure human rights. Yet, the study by the Expert Mechanism does not provide sufficient legal analysis on the parameters of indigenous rights and protection mechanisms in situations of forced displacement.

³ As stated under paragraph 20 of the EMRIP study, 'they make up 5 per cent of the world's population but account for 15 per cent of the poorest'.

The legal framework: a mixed result

International migration law “is sometimes described as [...] a ‘giant unassembled juridical jigsaw puzzle, [in which] the number of pieces is uncertain and the grand design is still emerging’” (Lillich 1984, cited in Chetail 2017). The metaphor refers to scattered and disseminated norms and principles. The legal framework on indigenous migration presented in the EMRIP study also is a puzzle of sorts. While ambitious in scope, it refers to a range of relevant human rights treaties, soft-law instruments, and documents adopted by UN agencies, and only provides for an unsystematised fragment of the ‘grand design’.

The commonness and distinctiveness of indigenous migration

The study accurately recalls that the existence of collective rights does not preclude the validity of traditional individualised human rights, as enshrined in international and regional treaties. Just as is the case for non-indigenous migrants, indigenous migrants have the right to seek asylum and receive refugee status. They should be protected from forced arbitrary displacement, should not be subjected to torture or inhuman treatment, and children should not be detained for reasons related to their parents’ migratory status. These examples shed light on shared experiences of violence against indigenous and non-indigenous migrants during the migratory process, and recalls that the 2007 Declaration on the Rights of Indigenous Peoples should be interpreted in the light of international human rights standards. As for the distinctiveness, the study highlights the ‘particularly vulnerable situation’ indigenous migrants face due to the ‘current context of migration involving a global pushback against human rights, political instability, weak democracies and military use’ (Human

Rights Council 2019: para. 6). Yet, the call for a human rights-based approach resonates beyond indigenous migration to encompass all forms of migration among all peoples.

Additionally, States have an obligation to uphold collective rights, such as self-determination, enshrined in the 2007 Declaration on the Rights of Indigenous Peoples, as well as in the 1966 International Covenants. Self-determination is a ‘foundational right upon which all other rights of Indigenous Peoples are dependent’, an affirmation valid beyond a migratory context (Human Rights Council 2019: para. 10; Weller 2018).

Shortcomings and oversights of the study

The legal framework presented in the EMRIP study suffers three major weaknesses. In a way or another, they each hinder the significance, legal clarity, and practicality of the study. First, while accurate and conforming with the definition provided by the International Organization for Migration,⁴ the working definition of ‘migration’ referred to in the study is broad and encompasses various manifestations of this phenomenon.⁵ Keeping up with this breadth, the study tackles situations of voluntary return, forced displacement—which can be induced by events such as climate-change or armed conflict—eviction from home, and labour migration. Attempts to encompass the diversity of indigenous migration should be welcomed, however, it comes

⁴ The definition provided on the website of the IOM reads as follow: ‘Migration - The movement of persons away from their place of usual residence, either across an international border or within a State’. International Organization for Migration, Key Migration Terms. Available from: <https://www.iom.int/key-migration-terms> (consulted on November 8th 2019)

⁵ The definition reads as follow: ‘In the context of the present study: the term “migration” refers to all movements of indigenous peoples, internal and across international borders’ (Human Rights Council 2019, n. 2).

with a drawback: the legal analysis is vague and superficial. For example, the study mentions the International Convention on the Protection of the Rights of All Migrant Workers when addressing labour migration, but fails to explain how it applies in the context of indigenous migration, nor does it explicitly state that other instruments, such as the Convention n°169, are equally relevant for labour migration of indigenous individuals (Human Rights Council 2019: para. 15). Adopted in 1989 under the ambit of the International Labour Organization, the 'Indigenous and Tribal Convention' enshrines labour rights applicable to Indigenous Peoples, whether migrants or nationals. Instead, the study mentions Convention n°169 to address cross-border migration and relocation (Human Rights Council 2019: para. 16).

Secondly, the legal framework depicted in the EMRIP study emerges as a kind of patchwork, that refers to both binding and non-binding instruments. Treaties, such as the Indigenous and Tribal Convention n°169 or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, are presented

alongside Guiding Principles on Internal Displacement and Comments from UN Special Rapporteurs. These instruments are not all legally binding, as the last two are soft in their form. Customary norms can be enshrined in non-binding instruments, and soft-law instruments can restate existing rights. It is the case of some articles of the 2007 Declaration on the Rights of Indigenous Peoples, such as norms preventing discrimination or securing land rights (Åhrén 2014; Rodríguez-Piñero Royo 2014). This should not, however, have prevented an explicit distinction between binding and non-binding instruments in order to systematize which instruments are mandatory and which instruments have a different function in the international legal order. It is not to say that soft law instruments should be discarded. On the contrary, as is the case with other human rights related topics, they cannot be disregarded as they provide practical guidance, for example through interpretative work (Chetail 2014; Saroléa 2006; Blake 2008).

Finally, the legal framework presented in the study fails to pay sufficient consideration to the rich case law of the Inter-American Court of Human Rights,



EMRIP forum held once a year in Geneva.
EMRIP (2019)

a Court which has been deciding on cases related to forced displacements of Indigenous Peoples on the continent for years. It has decided on disputes involving forcibly displaced indigenous communities and also had the opportunity to tackle the presence of non-community members transiting and settling on indigenous territory. The same criticism can be made with respect to decisions adopted by the African Commission on Human and Peoples' Rights. While case-law is only mandatory for the parties to the dispute, it nevertheless gives meaning to international norms (Daillier and Pellet 2002).

Conclusion

This contribution has discussed a recent study on indigenous migration from a legal perspective and underlined strengths and weaknesses of the legal framework presented in the study. Indigenous migration should not be conceptually and analytically disconnected from commonly understood definitions of migration, but the specificities of Indigenous Peoples cannot be disregarded. Additional legal research is still necessary to further contribute to the understanding and implementation of the UN Declaration on the Rights of Indigenous Peoples in the context of migration. Future research should also pay due consideration to existing decisions adopted by regional judicial bodies. And as research moves forward, it should also consider how indigenous migration challenges current approach to migration and mobilities and build on a legal framework that complies with their own ontologies.

The author

Anne-Cécile Leyvraz holds a PhD in international law from the Graduate Institute of International and Development Studies in Geneva. She currently works as a research fellow at the University of Applied Sciences and Arts Western Switzerland – Lausanne (HES-SO) on a project entitled 'asylum and indigeneity in the context of ongoing displacement at the Ecuadorian and Colombian border: a juridical and anthropological analysis'. This exploratory project aims at mapping mobilities in the border area between Colombia and Ecuador and looking at the impact on indigenous territories and legalities.

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