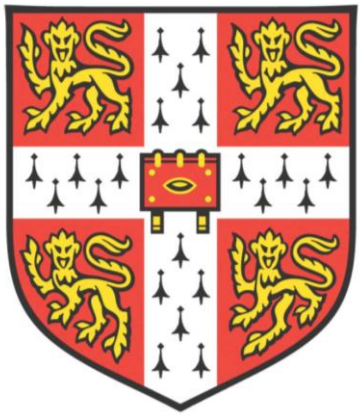
Towards a Right of Peoples to Participation in Global Governance



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Summary

This thesis develops an account of the right of peoples to participate in global governance affecting them. It starts by exploring at a conceptual level the principle of self-determination in international law and its associated rights, showing that the law of self-determination has evolved in a remedial and relational way to address situations of the dominance of peoples by states. The thesis outlines the rise of international organizations and global governance and the accompanying shift of regulatory authority from the national to the global level, and demonstrates that the activities of international organizations can profoundly affect peoples' rights and interests. On this basis, it argues that a new remedy is required: a right of peoples to participate in global governance activities affecting them, with correlative obligations held by states and international organizations. The thesis explores the scope and limitations of the proposed right.

The thesis shows that, doctrinally speaking, positive international law lends some, limited support to the existence of the proposed right, but that, ultimately, a right of peoples to participate in global governance is not (yet) part of positive international law. The thesis draws on empirical research regarding the practice of international organizations and states to assess the extent to which the proposed right constrains the behaviour of international organizations and states acting through them, creating an extensive map of practice. It explores a myriad of instances of mechanisms, policies, and practices adopted by international organizations enabling peoples to be heard in processes affecting them, suggesting that there is an emerging standard of conduct corresponding to the proposed right and obligations. It will suggest that this practice is in part motivated by a belief that the participation of peoples in matters concerning them enables international organizations to more effectively carry out their functions and fulfil their mandates.

Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in this Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length.

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Abbreviations and Acronyms

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CBD	Convention on Biological Diversity
CIL	customary international law
COP	Conference of the Parties
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
ECA	UN Economic Commission for Africa
ECOSOC	UN Economic and Social Council
ECLAC	UN Economic Commission for Latin America and the Caribbean
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EU	European Union
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FILAC	Fund for the Development of Indigenous Peoples of Latin America and the Caribbean
FPIC	free, prior and informed consent
GA	UN General Assembly
GCF	Green Climate Fund
GEF	Global Environment Facility
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTs	international courts and tribunals
ICSID	International Centre for Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IGC	Intergovernmental Committee on Intellectual Property and Resources, Traditional Knowledge and Folklore
IGO	intergovernmental organisation

IIPFWH	International Indigenous Peoples' Forum on World Heritage
ILC	International Law Commission
ILO	International Labour Organization
ILRM	International League for the Rights of Man
IMO	International Maritime Organization
IO	international organisation
IPAF	Indigenous Peoples Assistance Fund
IPAG	Indigenous Peoples Advisory Group
ISA	International Seabed Authority
ISDS	investor-state dispute settlement
NAFTA	North American Free Trade Agreement
NGO	non-governmental organisation
NYUJILP	New York University Journal of International Law and Politics
PLO	Palestine Liberation Organization
REDD	Reducing Emissions through Reducing Deforestation and Forest Degradation
SBI	Subsidiary Body on Implementation
SBSTA	Subsidiary Body on Scientific and Technical Advice
SC	UN Security Council
SWANUF	South West Africa National United Front
UK	United Kingdom
UN	United Nations
UN-REDD	UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
UNDP	UN Development Programme
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UNFCCC	UN Framework Convention on Climate Change
UNCITRAL	UN Commission on International Trade Law
UNIDO	UN Industrial Development Organization
UNIPP	UN Indigenous Peoples Assistance Fund
UNPFII	UN Permanent Forum on Indigenous Issues
USA	United States of America

WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations
WHC	World Heritage Committee
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

The Right of Peoples to Participation in Global Governance

'I am going to Geneva, and I suppose many stones have been placed in my path.'
- Levi General ("Deskaheh"), 'I Am Going to Geneva' (1923) 48

'I think that we've got to see that a riot is the language of the unheard.'

- Martin Luther King, Jr (1966)

INTRODUCTION

1. The Main Claims of the Thesis

Self-determination is a foundational principle of the international legal order. It is also highly controversial and heavily contested: debates abound as to its legal status, content, and scope. This work bypasses many of the classic debates: whether the right to self-determination applies internally or externally, whether it supports remedial secession, the definition of a "people". Rather, this study takes as its starting point a claim that self-determination grounds a right of peoples to participation in the international legal order on matters affecting them. Frequently asserted by the global indigenous peoples' movement, as well as by scholars writing about indigenous peoples and international law, this claim has not yet been subjected to full study. This thesis, therefore, aims to test the claim.

This thesis will argue that, in theory, there are grounds for the existence of a collective right of peoples to participate in global governance, derived from the right of self-determination. Through an assessment of the practice of states and international organizations ("IOs"), it will suggest that while this right cannot yet be said to have hardened into a rule of customary international law ("CIL"), there is a widespread practice forming a norm by which peoples have a legitimate expectation to participate in intergovernmental and global processes concerning them.

The thesis will conceptualise the law of self-determination as dynamic, multi-faceted, relational, and remedial in nature. It will develop a theoretical construction of the proposed right and corresponding obligations of states and IOs. It will suggest this conception is justified by a structural relationship between IOs and states, on one hand, and peoples, on the other, whereby IOs and states acting through them exercise public authority over peoples in a way that can affect a people's ability to self-determine. It will outline the scope, implementation, and limitations of the proposed right. It will show how, doctrinally speaking, positive international law lends some, limited support to the existence of the proposed right, but that, ultimately, that a right of peoples to participate in global governance is not (yet) part of positive international law.

The thesis will draw on empirical research regarding the practice of IOs and states to assess the extent to which the proposed right constrains the behaviour of IOs and states acting through them, creating an extensive map of practice. It will explore a myriad of instances of mechanisms, policies, and practices adopted by IOs enabling peoples to be heard in processes affecting them, suggesting that there is an emerging standard of conduct corresponding to the proposed right and obligations. It will suggest that this myriad practice is in part motivated by a belief that the participation of peoples in matters concerning them enables IOs to more effectively carry out their functions and fulfil their mandates.

The original contribution of this thesis is to provide a new perspective on the participatory facet of the law of self-determination. While it is not the first piece of work to suggest that peoples have a right to participate in the international legal order, it extends the scope of the claim beyond indigenous peoples to all peoples with a right to self-determination, and is the first to provide a rigorous theoretical justification. It bypasses the standard dichotomy of internal and external self-determination to shed light on the right as it applies between peoples and IOs. The thesis identifies a new right that attaches to the principle of self-determination, beyond the internal-external axis: the right to participate in global governance. The thesis also makes a novel contribution by collecting and analysing the existing practice with regard to the participation of peoples in global governance. Until now it has not been understood to what extent the practice of the international community aligns with the claimed right to participate. In the context of ongoing efforts by indigenous peoples for enhanced participatory status at the United Nations ("UN") and beyond, this study sheds light on the legal foundations of the claim, as well as the extent to which it already shapes practice.

2. Methodology

The thesis employs a tripartite methodology. The first two chapters are predominantly theoretical, drawing on the theory behind the law of self-determination as well as political philosophy, for '[i]t is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about…normative views about the principles of justice which should govern international conduct'.[1] It is grounded in an ethical perspective regarding procedural justice, the protection of minority rights, and the limitations of classical liberalism.[2]

Chapter Three takes a doctrinal approach. I consider it important to "reality-check" the theoretical construction against the extent which it is supported in the positive international law; put in another way, doctrine is the language that most international lawyers speak, and so if the proposed right is to have effect, it must be able to be expressed in these terms. As Will Kymlicka put it, in the context of the protection of indigenous peoples' rights, '[f]or better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can understand'.[3]

Chapters Four, Five, Six and Seven are empirical in nature. In part, this approach flows from the doctrinal framework expressed in Chapter 3: an examination of practice, and whether that practice is accepted as law, is relevant for the purposes of determining whether a rule of CIL exists. In addition, these chapters draw broader insights from the available data, for this is another sense in which the proposed right may be tested against reality: to what extent does it affect or constrain the conduct of

[1] Koskenniemi (2005) 1.
[2] See Chapter 2, 3.2.
[3] Kymlicka (1989) 154.

IOs and states, in reality? To what extent does it correspond to a standard of behaviour? These questions are explored through an assessment of the available information.

3. Clarifying the Scope of the Thesis

Before commencing the substantive analysis, it is necessary to clarify exactly what this thesis is, and is not, attempting to achieve. First, it concerns the rights of peoples, rather than the rights of minorities or other groups.[4] It does not attempt a rigorous definition of the term "peoples", a matter which it approaches in a spirit of constructivism.[5] Nor does it purport to make claims about the participation of individuals, civil society, or non-governmental organisations in global governance; it does not, for example, suggest that the participation of peoples should, morally or legally speaking, take priority over the participation of others. By framing the study through the lens of the self-determination of peoples, it situates the study apart from the literature on non-state actor participation.

While the choices made in the presentation of the empirical work will be explained more in the introduction to Chapter 4, at the outset it should be noted that the study does not purport to exhaustively include all instances of the participation of peoples in affairs concerning them at the international level. The ambition is more restricted: to demonstrate that sufficient practice exists to establish a pattern such that peoples can be said to have a legitimate expectation regarding participation.

4. The Structure of the Thesis

The thesis proceeds in seven chapters. Chapter One develops an account of the law of self-determination as dynamic, multifaceted, relational and remedial. Self-determination is a principle that, over time, has provided a foundation for the development of various legal rules concerning the relations between peoples and states; those rules have tended to emerge in a remedial manner. By dynamic and multifaceted, it is mean that self-determination is an ongoing process, and while the core meaning of self-determination has endured—that all peoples should be able to control their own destinies under conditions of equality—a variety of legal rules have come to be associated with the umbrella principle. By relational, it will be argued that self-determination has concerned the relations between self-determining peoples and states—specifically, relations of domination or subjugation by states of peoples. By remedial, the chapter will advance the argument that in the ongoing process of self-determination, specific rules have emerged to remedy *sui generis* violations of the principle. "Remedial" is not used here in the sense of "remedial secession"—that is, the idea that a state's failure to allow a people to exercise internal self-determination justifies secession. Rather, under a remedial account, just as decolonization procedures were not the substance of the right, but rather

[4] Although the proposed right may have relevance for minorities to the extent that they can be included within the scope of the rights-holders: see Chapter 2, 4.2.
[5] See Chapter 2, 4.2.

measures to remedy what the international community had come to recognise as a violation of the rights of colonised peoples, so too are more recently emergent rules regarding the self-determination of indigenous peoples. The implication is that if relations change or new relations emerge in a manner affecting the ability of peoples to self-determine, this would justify a remedy in the form of the addition of a new rule to the existing bundle.

Building on this account, Chapter Two contends that it is not only peoples' relations with states that are relevant to the law and exercise of self-determination. In addition, the relationships between peoples and IOs, states acting collectively through such organizations, and other global governance bodies are at play. Such global actors can occupy a position of dominance over peoples, in a way that poses both radical emancipatory potential, and the risk of adversely affecting peoples' ability to self-determine. The chapter outlines the rise of IOs, the expansion of their powers, and the shift in public authority from the national to the international level. It explores the structural relation between IOs and peoples by reference to activities of IOs that adversely affect peoples, drawing on the notion of dominance as the power of the former to interfere with the latter without regard to their interests or views. Chapter Two then assesses the extent to which existing forms of internal self-determination, as well as civil society participation, assist in remedying the problem, finding them lacking. Although an ability to participate at the domestic level can sometimes mean that a state can effectively represent the interests of an affected people at the international level, that is not necessarily the case. Nor do individual rights to participate in global governance, or the law of the participation of civil society, assist. Although individual and civil society participation serves a number of broader intrinsic and instrumental aims, an emphasis on individual rights tends to obscure the valid claims of groups—so if there is only an individual right to participate, the interests of peoples will be systematically sidelined. Moreover, peoples are often not structured as civil society organisations and may find it difficult to participate through mechanisms designed for the latter.

Chapter Two proposes that in order to remedy the threat to the ongoing exercise of self-determination posed by the structural dominance of IOs, and states acting through such organisations and global governance bodies, over peoples, the law of self-determination should develop to add a further legal rule to the bundle. In other words, the law of self-determination justifies a right of peoples to participate in global governance. In one sense, this could be regarded as the external dimension of the right of peoples to participate in political decision-making at the national level. However, it is distinct from "external self-determination" in the sense of territorial measures such as secession and other forms of autonomy, and indeed in another sense bypasses the internal-external dichotomy altogether as it is concerned with the relations between peoples and IOs, rather than peoples and states, although states may play an intermediary role. The chapter then explores the identity of the rights-holders, as well as the question of who may represent the rights-holders. Drawing on the notion of rights and obligations as correlative, it proposes that both states and IOs hold obligations correlative to the right

to participate: obligations to promote and enable participation, respectively. It examines the implementation of the right, including justified limitations upon its scope, arguing that the level of participation required depends on factors such as the extent to which a people's fundamental rights and interests are affected by a given matter, and whether other third parties have a legitimate interest in the matter.

In contrast to Chapter Two, which focuses on the law as it ought to be, and in this sense suggests a direction in which the law might evolve, Chapter Three turns to the law as it is, exploring whether and to what extent doctrinal support exists for such a right. It tests the theoretical construction against doctrinal reality through the canon of international instruments and jurisprudence on self-determination, the practice of treaty bodies and regional human rights courts, and instruments on indigenous peoples' rights including on free, prior and informed consent. It finds that there is considerable support for a participatory aspect of self-determination, and some support in soft law for a right to participate at the international level, particularly for indigenous peoples. However, it cannot be said that there is clear or unequivocal support for the right as proposed. In addition, it is difficult to find a basis for imposing an obligation on IOs. The chapter explores the law of *jus cogens*, which may in theory ground such an obligation, but finds that it is unlikely that the right of self-determination is *jus cogens* in all its aspects. Rules of CIL can also, in theory, form the basis for an obligation of IOs, and this chapter argues that in addition to being bound by custom, IOs can contribute to its formation. It sets out the relevant considerations for determining whether the right of peoples to participate in global governance has crystallised into a rule of custom.

Chapters Four, Five, Six and Seven turn to examine the practice of IOs with regard to the participation of peoples in matters affecting them. Collectively, they argue that while it is unlikely that a rule of CIL has formed, there is nonetheless a norm corresponding to the proposed right. "Norm" is meant here not in the sense of a *legal* norm or rule strictly speaking, but rather in the constructivist sense of a standard of conduct adhered to by a community of actors creating a shared expectation about appropriate behaviour.[6] There is widespread practice whereby states and IOs promote and enable peoples to participate in matters concerning them, through policies and mechanisms established for the purpose as well as in *ad hoc* instances. The practice is not uniform or universal; negative examples where no participation occurs in a situation that would justify it, or where the level of participation is lower than that suggested by the theory, serve to highlight the norm's existence. Although the practice is largely unaccompanied by the *opinio juris* necessary to establish a rule of customary law, these chapters argue that an extensive pattern of practice has formed a norm. These chapters also reveal that in many cases, the motivation for the practice is that the participation of peoples is perceived to assist IOs in carrying out their functions and fulfilling their mandates. Chapter Four concerns the

[6] Finnemore (1996) 22-23. See also Finnemore and Sikkink (1998) 891-892. Similarly, see Florini (1996) 364-365. The definition of "norm" will be elaborated upon further in Chapter 4, section 1.

participation of peoples in standard-setting activities affecting them carried out by and through IOs and other intergovernmental fora. It assesses the participation of peoples in the process towards the adoption of the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") and in standard-setting in and under the World Intellectual Property Organization ("WIPO"), the UN Framework Convention on Climate Change ("UNFCCC"), the Convention on Biological Diversity ("CBD"), the Food and Agriculture Organization ("FAO"), the UN Educational, Scientific and Cultural Organization ("UNESCO"), the International Seabed Authority ("ISA") and the International Maritime Organization ("IMO").

Chapter Five turns to participation in decision-making of international financial institutions, IOs carrying out field projects, and other organizations making decisions impacting on peoples. It finds that there is a widespread pattern whereby IOs solicit the free, prior and informed consent ("FPIC") of indigenous peoples before making decisions regarding investment or development projects potentially affecting them, in a manner corresponding to the FPIC standard canvassed in Chapter 3. It considers FPIC policies of the World Bank, the International Fund for Agricultural Development ("IFAD"), the Global Environment Facility ("GEF"), the Green Climate Fund ("GCF"), the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries ("UN-REDD Programme"), the European Union ("EU"), the UN Development Programme ("UNDP"), the UN Environment Programme ("UNEP"), the UN Industrial Development Organization ("UNIDO"), the FAO, and the UNESCO World Heritage Committee ("WHC"). It goes on to find that in parallel to FPIC requirements, many organizations that make decisions relevant to indigenous peoples include indigenous peoples' representatives on, or establish indigenous peoples' advisory groups to, decision-making committees, examining in addition to some of the aforementioned organizations the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean ("FILAC") and the UN Indigenous Peoples Partnership ("UNIPP").

Chapter Six considers general forms of participation of peoples in IOs. Rather than focusing on specific instances of decision-making or standard-setting, it includes practices such as the establishment of observer or permanent participant statuses, as well as subsidiary bodies, by which peoples can participate in IOs. It examines the participation of non-self-governing territories and national liberation movements, including through associate member status in UN agencies and commissions. It then turns to the participation of indigenous peoples in the UN system, including through the UN Permanent Forum on Indigenous Issues ("UNPFII"), the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"), and the prospects for a separate status for indigenous peoples. Chapter Six also discusses the practice of the Arctic Council.

Finally, Chapter Seven turns to the practice of international courts and tribunals. Focusing on the International Court of Justice ("ICJ"), investor-state dispute settlement ("ISDS") tribunals and the

panels and Appellate Body of the World Trade Organization ("WTO"), it finds that while the ICJ has increasingly enabled the participation of peoples in proceedings affecting them in innovative ways, the same cannot be said for the WTO and ISDS tribunals. The chapter examines *amicus curiae* participation in WTO and ISDS proceedings, including cases where indigenous peoples have participated via such means, but finds that the *amicus* mechanism does not fulfil the right of peoples to participate.

Taken together, Chapters Four, Five, Six and Seven carry out a "birds-eye assessment", connecting the dots to reveal a wider picture. On the basis of the evidence canvassed in these chapters, it will be argued that the participation of peoples in global governance affecting them is a norm, in the constructivist sense. While it is unlikely that this norm has hardened into a rule of CIL, peoples affected by global governance activities have a legitimate expectation that they will be able to participate in such processes. The thesis suggests a direction in which CIL may in future evolve.

CHAPTER ONE: Self-Determination as Dynamic, Multifaceted, Relational and Remedial

1. Introduction

Self-determination is a foundational principle of the international legal order. It is situated at the centre of the UN system, forming part of the organisation's purposes.[1] The International Court of Justice ("ICJ") has described it as 'one of the essential principles of contemporary international law'[2] and a rule of customary international law[3] and *erga omnes* character.[4] Certain aspects of self-determination may even hold peremptory status.[5]

Yet despite its primacy, the principle of self-determination has been marked by ambiguity, inconsistency and uncertainty in its application.[6] Of enduring relevance is the characterisation made by the Åland Islands Commission of Rapporteurs in 1921 that self-determination is 'a principle…expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion'.[7] The better part of a century later, James Crawford described it as *lex obscura*—law undefined or unclear as to its contents.[8] While the lack of clarity of the principle can be perceived negatively, its corollary is self-determination's flexibility and openness to interpretation, which can be seen as a strength[9] in that 'it permits a broad range of plausible interpretations and is therefore able to accommodate unforeseen circumstances' and changing political priorities.[10]

A further corollary of the ambiguity and openness to interpretation of the law of self-determination is contestation. In particular, substantial controversy persists as the idea of self-determination as justifying secession—that is, 'the creation of a new state upon territory previously forming part of, or being a colonial entity of, an existing state'.[11] Since Woodrow Wilson first brandished self-

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[1] Charter of the United Nations, Articles 1(2) and 55.
[2] *Case Concerning East Timor (Portugal v Australia)* ("*East Timor*") (Judgment) [1995] ICJ Rep 90, [29]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Wall AO*") (Advisory Opinion) [2004] ICJ Rep 136 [88].
[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ("*Namibia AO"*) (Advisory Opinion) [1971] ICJ Rep 16, 31; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 31-33; *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* (Judgment) [1986] ICJ Rep 554, 566-567; *East Timor*, 102; *Wall AO*, 182-183.
[4] *East Timor*, 102; *Wall AO*, 171-172. On obligations *erga omnes*, see *Case Concerning Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)* ("*Barcelona Traction*") (Judgment) [1971] ICJ Rep 3, 32.
[5] Although this is widely debated. See infra Chapter 2, section 4.
[6] Dugard (1987) 160. See also Stavenhagen (1996) 2; Kingsbury (2001) 217; Koskenniemi (1994) 249.
[7] *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs* (April 1921) League of Nations Doc. B7 [C] 21/68/106, 27.
[8] Crawford (2001) 38.
[9] Summers (2014) 39.
[10] Saul (2011) 610, 621.
[11] Radan (2008) 18.

determination as a political principle in 1917, many have feared its use to justify the fragmentation of existing states, potentially plunging the international order into chaos.[12] Such fears are not unfounded, as the volume of conflicts caused by self-determination claims can attest.[13] The ongoing spectre of secession, coupled with a tendency in the literature to equate self-determination with secession, is intimately linked with other key debates: whether self-determination applies in the post-colonial context;[14] whether an internal dimension of self-determination exists, or indeed whether self-determination can be separated into internal and external dimensions;[15] whether groups within states, such as indigenous peoples, are "peoples" entitled to self-determination or, stated differently, whose claims to self-determination are "legitimate";[16] and whether, or to what extent, self-determination is a peremptory norm.[17]

This thesis leaves these long-standing debates to one side. Rather, it takes as a starting point claims that self-determination supports a right of peoples to participate in the international legal order in matters affecting them. The idea that peoples should have a voice in the international system is not novel; nor are peoples' attempts to engage. As early as 1923, Levi General ("Deskaheh"), on behalf of the Iroquois Six Nations Confederacy, petitioned the League of Nations for membership as an independent state and relief in respect of Canada's violations of the Six Nations' sovereign rights:[18] although some states supported the Iroquois' case, Britain insisted that the issue was a domestic matter.[19] Similarly, a petition made by the Māori faith leader Tahupōtiki Wiremu Rātana was also turned away by the League,[20] and in the late 1940s the Herero people of the land that is now Namibia faced their own uphill battle to be heard in the UN and at the ICJ.[21] Decades on, the burgeoning international indigenous peoples' movement of the 1970s and 1980s found the doors of the UN finally ajar in the process that eventually led to the adoption of the 2007 Declaration on the Rights of Indigenous Peoples ("UNDRIP").[22] These days, indigenous peoples regularly assert their entitlement to be present and participate in the affairs of the UN as well as other IOs which affect their interests.[23]

[12] See e.g. US Secretary of State Robert Lansing's criticism of President Woodrow Wilson's conception of self-determination, Lansing (1921) 97-98, 104; Shehadi (1993) 8; Weller (2009) 1; Chopra (1994) 37; Kimminich (1993) 95.
[13] Coleman (2013) 3-6.
[14] See e.g. Hannum (1996) 46; Weller (2008) 59; Crawford (2007) 389.
[15] Arguing to refocus attention towards internal self-determination, see e.g. Cassese (1995) 248-359. Arguing against internal self-determination, see e.g. Alfredsson (1993) 45.
[16] Coleman (2013) ch 1; Mégret (2016).
[17] In accordance with the Vienna Convention on the Law of Treaties ("VCLT"), Article 53. See the arguments referred to in Chapter 3, section 4.
[18] General (1923); General (2015) 45; Niezen (2003) 31-36; Sanders (1998) 73-88.
[19] Hauptman (2008) 137-140; Minde (1996) 102-104; Anaya (2004) 57; Woo (2003).
[20] Thornberry (2002) 82; Lightfoot (2016) 36.
[21] See infra Chapter 7, 3.1.
[22] See infra Chapter 4, section 2.
[23] See e.g. the ongoing process in the UN, see below Chapter 6, section 3.

In the past two decades, several scholars have suggested that indigenous peoples, beyond merely a political claim, have a legal right to participate in international law-making and/or in global governance, derived from the right to self-determination.[24] Koivurova and Heinämäki wrote in 2006 that it seems 'self-evident that the more rights of self-governance indigenous peoples possess, the more influence they should have in international treaty making'.[25] In 2010, Charters proposed that the right of indigenous peoples to self-determination included a right to participate in international law and policy making.[26] In 2018 Dorothee Cambou, similarly, argued that indigenous peoples have the right to participate in intergovernmental decision-making processes affecting them on the basis of their right to self-determination.[27] Rather than "self-evident", however, such statements raise further questions: how does the law of self-determination justify a right to participate internationally? Is there a basis for such a right in the doctrine? In exploring these questions, we can bypass many of the classic questions: it is not necessary to take a stance on issues such as secession and the internal-external dichotomy, although if the international community were to recognise a right of peoples to participate in the international legal order this could well have flow-on implications for other debates.[28]

In evaluating the extent to which the claim that peoples have the right to participate in global governance is justified in international law, the thesis will aim to construct a plausible account in theory of how this could be the case, and critically assess that account by reference to doctrine and empirical practice. While the claims have been made in respect of indigenous peoples, this thesis extends its scope to all peoples. Although "indigenous peoples" and other "peoples" entitled to self-determination can be distinguished in important respects, including the manner in which they are entitled to exercise self-determination, this thesis broadly agrees with the accepted position that indigenous peoples are "peoples" with the right to self-determination.[29] In constructing the theoretical account of the right, it is possible to make some generalisations about "peoples", in the sense of both indigenous and non-indigenous groups—although when appropriate the differences between indigenous peoples and other peoples will be dwelled upon further.

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[24] Anaya (1993) 157; Young (2000) 275; Knop (2002) 13; Anaya (2004) 153; Anaya (2004b), Boyle and Chinkin (2007) 50; Charters (2010); Åhren (2016) 132; D Cambou (2018) 26; Koivurova and Heinämäki (2006) 101-102; Heinämäki (2011) 223; Loukacheva (2009) 52-53. Cf Hofbauer (2017) 71.

[25] Koivurova and Heinämäki (2006) 102. In 2011, Heinämäki followed this up by proposing that the internal right to self-determination of indigenous peoples should include the representation of indigenous peoples in international norm-making: Heinämäki (2011) 223.

[26] Charters (2010).

[27] Cambou (2018).

[28] For instance, Coleman suggests that one reason why self-determination (secession) claims become violent is that 'the international system provides minimal opportunities for a people to make their claim peacefully', as their ability to participate in the formulation of rules and to participate 'at a broader level in international relations, in the UN' is minimised: Coleman (2013) 10. Also see Avebury (1996) 221-222.

[29] Scheinin and Åhren (2016) 72; Anaya and Rodríguez-Piñero (2018) 61; Weller (2018) 146.

To construct the theoretical account, it is first necessary to revisit the principle of self-determination itself. This will not be a comprehensive treatment of self-determination, which has been done elsewhere;[30] rather, salient aspects will be highlighted. This chapter briefly reviews its development and makes four preliminary observations on self-determination in international law. In particular, it is submitted that self-determination is dynamic, multifaceted, relational and remedial in its operation. It is a principle that, over time, has provided a foundation for the development of various legal rules concerning the relations between peoples and states; those rules have tended to emerge in a remedial manner. These assertions have each been made before. However, taken together they underpin what is to follow.

By *dynamic*, it is submitted that the meaning of self-determination has changed over time, from before its Wilsonian conception through the decolonisation period until the present day. While the core meaning of self-determination has become solidified and entrenched—that all peoples should be able to control their own destinies under conditions of equality[31]—the ongoing nature of self-determination means that the principle has supported various specific legal rules. Relatedly, the *multifaceted* nature of self-determination means that it has multiple expressions: its application is context-dependent. Third, self-determination is *relational*: it has concerned the relations between self-determining peoples and others—specifically, relations of domination, subjugation and oppression. The final aspect brought out in this account is the *remedial* nature of the specific legal rules which have developed under the umbrella of self-determination. I do not use "remedial" in the sense of "remedial secession"—that is, the idea that a state's failure to allow a people to exercise internal self-determination may justify secession from the state. Rather, "remedial" is used to indicate that specific legal rules have emerged to remedy *sui generis* violations of the right to self-determination. As a consequence of these four features of the law on self-determination, in theory it can be said that if new or different relations of domination were to emerge so as to contravene a people's ability to self-determine, a new rule can and should be created under the auspices of the principle of self-determination to remedy the violation.

2. Self-determination as dynamic

Self-determination has evolved considerably over the last century, including from a political principle to a legal principle, from a legal principle to a legal right, from being exclusively concerned with decolonization to also applying in other situations of alien subjugation and foreign domination, from

[30] See e.g. Cassese (1995); Summers (2014).
[31] Adopted from Anaya (2004) 74. This was chosen from the multiplicity of formulations in the literature as it seems to accurately capture the intent and spirit of the law; the choice is to some extent arbitrary as there are many similar formulations. For other formulations, see e.g. Saul (2011) 613 ('the core meaning of the legal right to self-determination centres on the idea of freedom from subjugation'); Macklem (2015) 95 ('The right of self-determination has become an instrument whose purpose is to promote a just distribution of sovereign power in the international legal order').

an external right to independence to also encompassing an internal element, and from a right of the aggregate populations of territorial units to a right of indigenous peoples. This section will explore these developments in order to establish the changeable, fluid nature of the law of self-determination. This account is by no means exhaustive; it glosses over many debates. But the notion that self-determination itself has evolved can hardly be disputed. The intention here is to indicate, in a broad-brush manner, the nature of such developments.

The most basic development is the principle's shift in status from a political principle into one of law. From the eighteenth century onwards, self-determination was promulgated as a political principle with a variety of meanings.[32] Although in the post-war settlements the application of self-determination was limited,[33] and it was not considered a legal principle, it was nonetheless 'crucial for the legitimacy of states and their boundaries', and thus 'shaped the content of the law'.[34] The opinions of the two international commissions on the *Åland Islands* dispute of 1920-21 affirmed that the principle was not part of international law.[35] Its transformation into a principle of law occurred only with the adoption of the UN Charter in 1945.[36]

The legal principle of self-determination was not initially accompanied by rights or obligations: it was an aspirational goal rather than an operative principle.[37] The Charter primarily envisaged self-determination as contributing to one aim of the UN, and did not impose related obligations on member states.[38] Indeed, many states stressed, in the debates preceding its adoption, that the inclusion of self-determination in the Charter was not to be construed as a right of a minority, ethnic or national group to secession, a right of a colonial people to independence, nor a right of the people of a sovereign state to democracy.[39]

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[32] Including by Woodrow Wilson and Vladimir Lenin: Cassese (1995) 14-23; Summers (2014) 175-179; Yusuf (2012) 376; Miller (2003) 612-617; Castellino (2000) 13; Hofbauer (2017) 64. On self-determination's historical origins, see Rigo Sureda (1973) 17; Cassese (1995) 11-13, 32; Castellino (2000) 11; Summers (2014) 132-173.

[33] Cassese (1995) 33; Summers (2014) 178-187; Coleman (2013) 44.

[34] Summers (2014) 179.

[35] *Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations Official Journal, Special Supplement No. 3 (October 1920) 5; *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7 [C] 21/68/106, (April 1921) 27. On the case generally, see Crawford (2001) 13-14; Fromherz (2008) 1355-1356; Coleman (2013) 45-47.

[36] Article 1(2) of the Charter states that it is one of the purposes of the UN 'to develop friendly relations among nations based on respect for *the principle of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace' Also see Article 55.

[37] Daes (1996); Rosas (1993) 225.

[38] Cassese (1995) 43; Rensmann (2012) 42.

[39] Cassese (1995) 42; Alston (2005) 260-261; Crawford (2007) 112-114; Summers (2014) 198-199.

Self-determination came to be associated with a legal right in the political and historical context of decolonisation.[40] The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[41] ("the Colonial Declaration") framed self-determination in universal language as a right of 'all peoples', while specifically qualifying that the populations of trust and non-self-governing territories 'or all other territories which have not yet attained independence' were entitled to 'complete independence.[42] The UN General Assembly ("GA") soon afterward clarified, in Resolution 1541, the basic colonial unit and the non-self-governing territory entitled to independence, as well as the means by which those territories could attain self-government.[43] The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States ("Friendly Relations Declaration") further reinforced the nature of the right and the associated duties of states.[44] By the end of the decolonisation period, then, the principle of self-determination, then, had become associated with a right of peoples subjected to colonial rule to freely determine their international status. [45]

A further evolution is evident in terms of self-determination's status as a human right. Common Article 1 of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic and Social Rights ("ICESCR") not only reinforce self-determination as a legal right, but "build a bridge" between it and international human rights law.[46] Some publicists, as well as the Human Rights Committee, even situate self-determination as a necessary precondition for, and means to, the realisation of all other human rights.[47]

Common Article 1 represented several further developments in the meaning of self-determination. Article 1(2) provided for a new dimension of self-determination: the right to control natural wealth and resources.[48] The term "freely" in Article 1(1) arguably implies freedom from foreign interference, meaning that external self-determination no longer meant only independence of colonies, but also non-interference between states in general.[49] In addition, according to some, Article 1(1) entails that the people of a state have the right to freely choose their rulers.[50]

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[40] Cassese (1995) 71-74; Macklem (2016) 99-104. For differing early views on whether self-determination was a legal right, see e.g. Higgins (1963) 101-106; Emerson (1971) 464-465; Pomerance (1982) 70-71.
[41] GA res 1514 (XV).
[42] Ibid, [4], [5].
[43] GA res 1541.
[44] GA res 2625.
[45] *South West Africa AO*; *Western Sahara* [55], [59].
[46] International Covenant on Civil and Political Rights ("ICCPR"); International Covenant on Economic, Social and Cultural Rights ("ICESCR"). See Higgins (1995) 114; McCorquodale (1994). See e.g. Human Rights Committee ("HRC"), 'CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-Determination of Peoples' (13 March 1984). See also African Charter on Human and Peoples' Rights, Article 20.
[47] HRC (ibid) 142-143; McCorquodale (1994) 872.
[48] See Cassese (1995) 55-56.
[49] Cassese (1995) 55.
[50] Cassese (1995) 52-55.

Indeed, this latter development heralded the development of what many have called the internal dimension of self-determination, the migration of the right 'from the international to the domestic realm'.[51] Internal self-determination is the right of peoples to enjoy the freedom of authentic self-government, which may entail autonomy vis-à-vis other entities in the state.[52] The internal dimension encompasses a right to equitable representation in legislative, executive and judicial institutions,[53] and is also said to enable peoples to freely choose their political and economic regimes and enjoy related rights, such as the right to vote, the right of peaceful assembly, and the freedom of expression.[54] While the expansion from external to internal did not necessarily exclude the continued application of external aspects of self-determination, it evidences the flexibility and dynamism of the principle and its ability to adapt to respond to new situations as they occur.

Another broad shift in the law of self-determination has been the gradual expansion in the identity of the holders of the right, from the aggregate populations of states, to the peoples of colonised territories, to peoples under occupation and other forms of alien domination, to indigenous peoples. The reference to the self-determination of "peoples" in the UN Charter was apparently not intended to be understood as conferring rights to minorities or peoples in any ethno-cultural meaning of the term, nor to colonised peoples: "peoples" were to be regarded as the entire populations of states rather than sub-segments of a state, and as such the principle pertained only to relationships between states.[55]

In the decolonisation period, as outlined above, it became clear that colonised peoples were entitled to self-determination, but territorial considerations proved paramount in limiting who could hold the right.[56] Self-determination attached to the entire populations of colonial territories, rather than peoples within a colonised territory, even though the artificially created colonial territories tended to contain several cultural and ethnic groups.[57]

Although states did not widely contemplate that peoples would continue to have a right to self-determination after the completion of decolonisation, applying self-determination only to the colonial

[51] Macklem (2016) 108. On internal self-determination generally, see e.g. Rosas (1993); Salmon (1993).
[52] Pomerance (1982) 37; Cassese (1995) 101; Seymour (2011) 386; Franck (1992).
[53] *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Supreme Court of Canada, 20 August 1998, 115 ILR 536 (*Re Secession of Quebec*) [136].
[54] Crawford (2001) 25.
[55] Åhren (2016) 28-29; Cassese (1995) 39-43; Alston (2005) 260-261; Crawford (2007) 112-114; Young (2004) 177.
[56] There is a scholarly consensus that colonial peoples have the right to self-determination: Summers (2014) 45-436; Cassese (1995) 71; Crawford (2007) 127; Rigo Sureda (1973) 226; Knop (2002) 51; Kirgis (1994) 307; Quane (1998) 558; White (1981) 150; Musgrave (1997) 178; Anghie (1993) 466; de George (1991) 2; Michalska (1991) 78; Alfredsson (1994) 61. On territorial interpretations, see Resolution 1541, Principles IV and V.
[57] Michalska (1991) 82; Åhren (2016) 31, 35; Knop (2002) 56-57; Raič (2002) 242-243; Cassese (1995) 141-146; Summers (2014) 305. See e.g. *Frontier Dispute (Burkina Faso v. Mali)* [1986] ICJ Rep 554, 555. Also see the Conference on Yugoslavia, Arbitration Commission, Opinion No. 2 (11 January 1992) 31 ILM 1497, 92 ILR 167, 168.

context created arbitrary distinctions between very similar situations of alien domination.[58] With references in the 1960 Colonial Declaration and the 1970 Friendly Relations Declaration to 'peoples under alien subjugation, domination and exploitation',[59] it became arguable that self-determination extended beyond the overseas colonialism of Western states to, for instance, peoples under racist regimes, occupied peoples, and the people of Palestine.[60]

With the adoption of the UNDRIP,[61] it became clear that indigenous peoples were also "peoples" entitled to self-determination.[62] The 2007 Declaration, as the first widespread recognition by states that self-determination was not confined to colonial peoples, represents 'one of the most significant stages in the development of the right to self-determination since decolonisation'.[63] Although indigenous peoples inherently have a strong connection to land and place, not all have a fixed or exclusive territory; they may be geographically dispersed in the manner of a minority group throughout a more diverse population.[64] Indeed, they are more similar in many ways to "minorities", traditionally considered outside the realm of self-determination, than what many had previously thought of as a "people".[65] Previously, peoples had been exclusively understood as aggregate populations of states or territories; the decolonisation regime had bypassed indigenous peoples, who merely 'became the subjects of new forms of colonization'.[66] That peoples can now 'in addition be defined in terms of common ethnicity and culture is at least arguably a new feature in international law'.[67]

In summary, self-determination is dynamic. In a century of its prominence in the international sphere, it has transformed from a political principle to a human right in international law; from providing a legal grounding to the right to independence of colonial peoples, to justifying a much wider variety of rights, accruing to a broader range of "peoples"; from accruing only to territorial units, to groups with a common ethnicity or culture. Its evolution has been intertwined with political developments, and has been made possible by the very uncertainty and vagueness that some consider intolerable. More broadly, there is nothing to suggest that the law of self-determination will not continue evolving well into the future.

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[58] Franck (1990) 152-174; Koskenniemi (1994) 241.
[59] Also see the Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/CONF.157/23.
[60] On peoples under racist regimes, see SC res 581 [7]. On occupation, see e.g. SC res 384; *East Timor* [90]; Summers (2014) 536-537; GA res 42/15. On Palestine, see e.g. *Wall AO* [118]; *Wall AO,* Separate Opinion of Judge Higgins [29]-[30]; GA res 3236 (XXIX); Quigley (2011) 224; Summers (2014) 540-541; Macklem (2016) 105.
[61] GA res 61/295 ("UNDRIP"). The legal status of the Declaration will be considered in Chapter 3.
[62] Anaya (2009) 185; Stavenhagen (2011) 162; Weller (2018) 146; Barelli (2016) 23.
[63] Quane (2011) 260.
[64] Castellino and Doyle (2018); 32-36.
[65] Kymlicka (2011) 184; SJ Anaya (2004b) 21; Thornberry (2002) 54.
[66] Åhren (2016) 35.
[67] Scheinin and Åhren (2018) 63. Some have noted that this could set a precedent for the claims of minorities and other subaltern groups to self-determination: see e.g. Allen (2006) 335-336, 338; Kymlicka (2018).

3. Self-determination as multifaceted

The above account of the evolution of self-determination reveals that it has not been a singular legal rule throughout its history: 'in different situations self-determination has had different meanings'.[68] Indeed, at present the principle of self-determination supports or grounds a number of rights. In this sense, self-determination may be said to be 'multifaceted'[69] or have 'multiple expressions'.[70]

Here, reliance is placed upon Antonio Cassese's account of self-determination as a general principle alongside a number of customary rules.[71] The principle, Cassese elaborated, 'enshrines the quintessence of self-determination': that is, the 'need to pay regard to the freely expressed will of peoples' when the fate of peoples is at issue.[72] The principle 'sets out a general and fundamental standard of behaviour' that 'governments must not decide the life and future of peoples at their discretion'; rather, peoples 'must be enabled freely to express their wishes in matters concerning their condition'.[73] Like any principle, self-determination is 'general, loose and multifaceted', lending itself to 'various and even contradictory applications', and with 'great normative potential and dynamic force'.[74] From the broad principle, Cassese continued, one can deduce specific individual customary rules, which 'cover specific areas where a broader measure of agreement has emerged among States as to…proper conduct'.[75] The relationship between the principle and the rules, as Cassese saw it, is threefold: the principle indicates the method of exercising self-determination, that is, by the free and genuine expression of the will and wishes of the people concerned; can act as a standard of interpretation where a customary rule is unclear or ambiguous; and can be useful in cases not covered by specific rules.[76]

As examples of such rules, Cassese listed the external self-determination of colonial peoples and peoples under foreign military occupation, in the sense of independence and other end-states arising from a people's free choice of status.[77] To this list could be added a variety of others: the right of peoples to exercise control over natural resources;[78] the right of indigenous peoples to free, prior and informed consent;[79] the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs;[80] and, more controversially, the remedial secession of a

[68] Foster (2001) 143.
[69] Tomaselli (2017) 403-404.
[70] Seshagiri (2010) 560.
[71] Cassese (1995) 126-127.
[72] *Western Sahara* [59].
[73] Cassese (1995) 128.
[74] Cassese (1995) 128-129.
[75] Cassese (1995) 129.
[76] Cassese (1995) 131.
[77] Cassese (1995) 129.
[78] ICCPR and ICESCR, Common Article 1(2).
[79] UNDRIP, Articles 19, 28, 29, 32.
[80] UNDRIP, Article 4.

people which has been denied meaningful access to government to pursue its political, economic, social and cultural development.[81] Granted, not all of these rights are necessarily customary in nature, with some deriving from treaty provisions or soft law instruments; nor are they necessarily uncontroversially accepted by all. Individual rules may also be contingent, and subject to limitations. The crucial point is that the principle of self-determination is not singular.

In summary, self-determination is not only dynamic but also multifaceted. The parallel existence of different manifestations of self-determination applicable in different circumstances lends credence to the idea that in a new set of circumstances, a new rule could become recognised under the auspices of the broad principle.

4. Self-determination as relational

Self-determination concerns relationships. It fundamentally involves the relations between a people and others: states, empires, governments, and other peoples.[82] It is these relations—specifically, relations of dominance, subjugation or exploitation of a people by another—that both give rise to exercises of self-determination, and constitute such exercises: all peoples that exercise their right to self-determination do so in relation to another unit—typically a state—while in the course of the exercise, that unit holds reciprocal obligations in relation to the people.

This point can be illuminated by examining the language used in key international instruments. The Colonial Declaration condemns '[t]he subjection of peoples to alien subjugation, domination and exploitation',[83] which raises the question: subjugation *by who*? Domination *by who*? To speak of 'dependent peoples' fundamentally assumes a relationship between the people subjected to subjugation, domination and exploitation, and the entity that is doing the subjecting—in this case, colonising states. The Declaration further states that 'armed action or repressive measures of all kinds directed against dependent peoples shall cease',[84] again presupposing the existence of a relationship of a certain kind between a dependent people and the entity applying armed force or repressive measures. The Declaration goes on to prescribe the future nature of the relationship: '[i]mmediate steps shall be taken' by the colonial states 'to transfer all powers' to the dependent peoples 'in accordance with their freely expressed will and desire'.[85] A similar perspective reveals that all of the

[81] *Re Secession of Quebec* [138]; *Kosovo AO*, Separate Opinion of Judge Yusuf [9]. Also see *Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question* (1920) League of Nations Official Journal, Special Supplement No. 3, 28. Also see the debates as to the interpretation of paragraph 7 of the 1970 Friendly Relations Declaration, which some have argued to establish a right of secession from oppressive states: Cassese (1995) 109-125; McCorquodale (1994) 879-880. Cf Tomuschat (1993) 9-10; Horowitz (2003) 60-68. See further Crawford (2007) 118-121; Pentassuglia (2002) 311; Summers (2014) 230-239.
[82] Kingsbury (2001) 223; Young (2000b) 161.
[83] Colonial Declaration [1].
[84] Colonial Declaration [4].
[85] Colonial Declaration [5].

key international instruments, likewise, are predicated upon a relationship of domination of a people by another entity—usually a state—and are prescriptive of that relationship to the extent that they impose obligations upon the dominating entity. In addition, judicial decisions on the *erga omnes* nature of self-determination assume a relation between a people and all other states.

Moreover, the relational nature of self-determination can be understood by examining the division between internal and external dimensions of self-determination. This dichotomy is widely supported by commentators,[86] and has been relied upon by judges of the ICJ[87] and the Canadian Supreme Court,[88] as well as the Committee on the Elimination of Racial Discrimination.[89] In this conception, "external" and "internal" are defined by reference to a state within which a people entitled to self-determination is situated. This mirrors the traditional distinction between internal and external sovereignty,[90] in which the former is equated with a state's internal self-government,[91] while the latter refers to independence and the external relations of states.[92] As outlined by Thornberry:[93]

> The external dimension or aspect defines the status of a people in relation to another people, State or Empire, whereas the democratic or internal dimension should concern the relationship between a people and 'its own' State or government.

The internal-external dichotomy thus brings into sharp focus the relations between states and peoples in the exercise of self-determination. Under this formulation, it is the relationship between a state and a people—a relationship of colonial power and dependence, or of alien domination, foreign oppression or subjugation—that gives rise to and determines an exercise of self-determination, and creates correlative rights and obligations of the people and state respectively. Although the right is held by peoples, 'determining their political status and economic, social and cultural development typically involves the structure and behaviour of states and their institutions.'[94] In the decolonisation context, for instance, it is the relationship between the state and the colonial people that is central to the exercise of self-determination. The colonial relationship of control and oppression both led to the

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[86] Barelli (2016) 22; H Johnson, *Self-Determination within the Community of Nations* (AW Sijthoff 1967) 28; Cassese (1995) 5; Raič (2002) 226-307; Pomerance (1982) 37-42; McCorquodale (1994) 863; Umozurike (1972) 1; Henrard (2000) 281; Quane (2000); Trifunovska (1997); Kirgis (1994) 307; Kiss (1986); Kooijmans (1996); Hannum (1996b).
[87] E.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 ("*Kosovo AO*"), Separate Opinion of Judge Cancado Trindade [184], Separate Opinion of Judge Yusuf [9]-[10].
[88] *Re Secession of Quebec* [126].
[89] Committee on the Elimination of Racial Discrimination, General Recommendation XXI (48) UN Doc CERD/C/365/Rev.1 (2000) 16, [4].
[90] See e.g. Wheaton (1866) 31; Butler and MacCoby (1928) 8; Biersteker and Weber (1996) 2; Ilgen, (2003) 7.
[91] See e.g. Lowe (2007) 18.
[92] See e.g. *Austro-German Customs Union Case* [1931] PCIJ Series A/B, No. 41, 57 ('the State has over it no other authority than that of international law'). See also international instruments on non-intervention, e.g. Final Act of the Conference on Security and Co-Operation in Europe (1 August 1975) 14 ILM 1292 ("Helsinki Final Act"), Principle IV; Friendly Relations Declaration, Principle 3.
[93] Thornberry (1993) 101.
[94] Summers (2013) 232.

establishment of the legal right of the peoples of colonised territories to determine their own political status, and defined the consequent obligations of the coloniser state. Those duties were primarily procedural in nature, 'encompassing rather modest preparations of the territory for possible independence, the negotiated establishment of an environment and framework for a legitimate act of self-determination, the proper conduct of a referendum, and the orderly transfer of power'.[95] Likewise, any right to remedial secession would implicate the relations between the state and people concerned: for such an exercise to occur, the state would have had to deny the people its exercise of internal self-determination, and the right of the people to secede would imply corresponding obligations for the state. Arrangements for the autonomy of a territorial unit within a state also involve an ongoing relationship between the state and people concerned. Autonomy 'is not simply freedom, it is a relationship': complex governance frameworks are required for such arrangements to work.[96]

While the dichotomy is 'an effective way of presenting self-determination from a certain perspective',[97] it is limited in that it covers only the relations between peoples and state—rather than those with other actors like other peoples within the same state.[98] Notwithstanding this, what the internal-external dichotomy reveals is the law's preoccupation with the state-people relationship. In summary, the law of self-determination is predicated upon a relationship between a people and another—specifically, a relationship of domination. As Summers recognises, 'the process of self-determination involves a number of actors, typically peoples and states, but also others…. There may be more than one perspective on the dimensions of self-determination'.[99] This point is examined further below.

5. Self-determination as remedial

We have seen that self-determination is a principle attached to which are a number of legal rights and correlative obligations, developed over time. Peoples self-determine in relation to others: the exercise of a right requires that other entities, typically states, meet a correlative obligation, and indeed presupposes a certain kind of relationship between a people and another—one of domination. Building on this discussion, this section will suggest that the specific rules have developed over time, under the broad umbrella of self-determination, in a remedial manner, so as to provide redress for ongoing situations of domination, subjugation or exploitation. Self-determination is a continuous process whereby the law form new remedies when so required. This will be illustrated by reference to

[95] Kingsbury (2001) 221.
[96] Kingsbury (2001) 225.
[97] Summers (2013) 231.
[98] See e.g. *Sudan Human Rights Organisation and the Sudan Centre on Housing Rights and Evictions v Sudan*, ACHPR Communications 279/03 and 296/05 [223].
[99] Summers (2013) 231.

the development of the rules on decolonization, as well as the rules on the self-determination of indigenous peoples.

This point can be illustrated by reference to two specific episodes in the development of the law, the first of which is the right of colonised peoples to freely choose their own political status. The colonisation process and the international law that accompanied and justified it denied countless non-European peoples recognition and the ability to determine their own futures. The preamble and content of the 1960 Colonial Declaration, adopted in the midst of the burgeoning decolonisation movement,[100] placed it squarely in this context, offering the rules that it contained as a remedy. The preamble, recognising 'the passionate yearning for freedom in all dependent peoples' and noting that 'the continued existence of colonialism…impedes the social, cultural and economic development of dependent peoples', proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'.[101] It was against this background that the GA adopted the Colonial Declaration, which 'treats the right of self-determination as an instrument that addresses international law's complicity with colonialism'.[102] The right of colonial peoples to determine their own territorial status, then, did not emerge in isolation—rather, it was the response of the expanding international community to a specific relationship between colonial powers and colonised peoples that had come to be recognised as undermining self-determination. The principle of self-determination was the entry point and legal catalyst, but although the right of colonised peoples and nations to independence was regarded at the time as synonymous with the right of self-determination,[103] decolonisation procedures 'did not of themselves embody the substance of the right…rather, they were measures to remedy a *sui generis* violation of the right that existed in the prior condition of colonialism'.[104]

Similarly, the international law on the rights, including self-determination, of indigenous peoples can also be viewed as a remedy for a *sui generis* violation of self-determination. From the earliest beginnings of international law, shaped in the course of colonialism and imperial expansion in the writings of 16th and 17th-century jurists such as Francisco de Vitoria and Hugo Grotius, indigenous peoples were not viewed as full sovereigns.[105] Under the influential theory of sovereignty promulgated by Emmerich de Vattel, writing a century later, non-European peoples' societies were viewed as uncivilised, and thus could not qualify as sovereign states.[106] The imperatives of colonisation and empire acted so as to reinforce this political and jurisprudential tendency to deny

[100] Summers (2014) 203, 209. Also see Kay (1967) 789; Emerson (1965) 493.
[101] Third, seventh and twelfth recitals.
[102] Macklem (2016) 100.
[103] Summers (2014) 205 note 64.
[104] Anaya (2009) 189.
[105] Åhren (2016) 8-10; Anghie (2004) 13-29.
[106] Åhren (2016) 13; Anaya (2004) 22-23.

indigenous peoples status, exemplified in the positivist school of the late 19th and early 20th centuries. The major premises of positivism ensured that international law 'would become a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples'.[107] Prominent publicists considered indigenous peoples to be incapable of enjoying sovereign status or personality in international law;[108] sovereignty was 'essentially a European feature'.[109] Under the doctrine of *terra nullius* indigenous lands prior to any colonial presence were considered unoccupied, providing the legal justification for the mass appropriation of land.[110] Thus indigenous peoples were left outside the international legal system.

International law's exclusion of indigenous peoples continued well into the 20th century. While nominally recognising indigenous peoples, the earliest legal instrument addressing their situation ultimately perpetuated their exclusion in the international legal system.[111] Indigenous peoples were also, crucially, excluded from the decolonisation processes of the mid-20th century. The "salt water" doctrine in Resolution 1541 formally linked the right of colonised peoples to independence to Western overseas colonial dominions, which implied 'the exclusion of Indigenous peoples clustered within independent States' boundaries from the scope of application of the principle of self-determination'.[112] In addition, the doctrine of *uti possidetis* preserved the former colonial boundaries, meaning that indigenous peoples within a former colony that had gained independence experienced only a change in ruler.[113] Thereby indigenous peoples were continually excluded from determining their own destiny.

This continued exclusion 'lies at the heart of Indigenous peoples' expression of their demands in terms of self-determination'.[114] Indigenous peoples hold that they were prior sovereigns,[115] and that the lack of recognition of this sovereignty during colonial expansion, along with the missed opportunity for statehood during decolonisation, is a wrong which must be remedied.[116] This "lost statehood" or "missed sovereignty" argument underpins indigenous peoples' demands for self-determination.

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[107] Anaya (2004) 26. See generally Koskenniemi (2001) 72-75, 113-115, 126-168.
[108] Anaya (2004) 26-29; Åhren (2016) 14; Anghie (2004) 32-33, 43, 48-49, 53, 61-62.
[109] Åhren (2016) 14.
[110] Anaya (2004) 29-30; Anghie (2004) 83-84, 111-112; Åhren (2016) 16-18, 23-26; Gilbert (2006) 26-27; A Fitzmaurice (2012) 9-11.
[111] The International Labour Organization ("ILO") Convention concerning the Protection and Integration of Indigenous and other, Tribal and Semi-Tribal Populations in Independent Countries ("ILO No 107") of 1957 was premised on the assimilation or integration of indigenous peoples within national society, and as such was inconsistent with indigenous self-determination. See Anaya and Rodríguez-Piñero (2018) 41-42; Erueti (2011) 93. See generally Rodríguez-Piñero (2005).
[112] Anaya and Rodríguez-Piñero (2018) 40.
[113] Anaya (2004) 54; Åhren (2016) 19; Weller (2018) 118-119.
[114] Anaya and Rodríguez-Piñero (2018) 40.
[115] Bennett (2005) 102; P Macklem (1993) 1333-1334.
[116] Charters (2010) 228.

In the late 20th century global indigenous peoples' activism resulted in the international community's recognition of the problems that the exclusion of indigenous peoples had led to. In 1971, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities was authorised by the UN Economic and Social Council ("ECOSOC") to conduct a study on the problem of discrimination against indigenous populations.[117] This process provided a focus for the global indigenous peoples' movement, which from its beginnings at Standing Rock in 1974 quickly spread worldwide.[118] The resulting Martínez Cobo report,[119] which compiled a large among of data on indigenous peoples worldwide and presented a set of findings and recommendations on how the UN could begin to seriously address the situation, catalysed the creation of the Working Group on Indigenous Populations which ultimately led to the development and adoption of the UNDRIP.[120]

Viewed in this light, the UNDRIP is 'essentially a remedial instrument' based on the identification of a long-standing *sui generis* violation of self-determination.[121] It was needed to remedy the systemic inequality and injustice arising from international law's failure to recognise indigenous peoples' historical sovereignty and self-determination over centuries.[122] Brought about in the context of indigenous peoples' growing demands for recognition, the identification in the Martinez Cobo report of a violation of the self-determination of indigenous peoples, and subsequent work on the part of states in partnership with indigenous peoples to address the violation, the Declaration represents a step towards rectifying 'the adverse consequences of how international law validate[d] morally suspect colonization projects that participated in the production of the existing distribution of sovereign power'.[123]

Under a remedial account, then, 'the law of self-determination is the law of remedies for serious deficiencies of freedom and equality'.[124] Self-determination is a continuous, ongoing process—a 'constant entitlement'[125]—in which new remedies come to be required by law.[126] Just as decolonization procedures were not the substance of the right, but rather measures to remedy what the international community had come to recognise as a violation of the rights of colonised peoples, the rules on the self-determination of indigenous peoples reflected in the UNDRIP are also remedial measures for a *sui generis* violation of self-determination. As a third example, the international law of

[117] ECOSOC res 1589(L).
[118] Lightfoot (2016) 34-38, 43.
[119] Known after the special rapporteur, José Martínez Cobo. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (1986) UN Doc E/CN.4/Sub.2/1986/7 & Adds.1-4 ("Martínez Cobo report").
[120] On the Martínez Cobo report, see Lightfoot (2016) 43-45; Anaya (2004) 62.
[121] Anaya (2009) 190.
[122] Charters (2010) 228.
[123] Macklem (2008) 179. Also see Macklem (2016) 119.
[124] Kingsbury (2001) 232.
[125] Higgins (1995) 120.
[126] On self-determination as an ongoing process, see e.g. Mégret (2016) 59-60; Higgins (1995) 120.

minority rights may be viewed as a remedy for the exclusion of minority groups by the international legal rules determining 'which collectivities are entitled to exercise sovereign authority and over which territory and people such authority operates'. In other words, because minorities are not entitled to exercise external self-determination in the sense of secession, it can be argued that minority rights are a kind of compensation provided by international law.[127] Viewed in combination with the other characteristics of self-determination discussed above, this remedial account coupled with the relational account offers an explanation as to how new rules have been formed under the heading of self-determination, and provides clues for how they may be so formed in the future as the process of self-determination further unfolds.

6. Conclusion

In this chapter it has been argued that the law of self-determination consists of an umbrella principle accompanied by multiple legal rules. The rules have emerged to remedy specific situations, or categories of situations, of the violation of the freedom and equality of peoples, involving a relationship of dominance of a people by another. This account has implications for this project. If self-determination is understood as multifaceted and dynamic—rather than as synonymous with secession or internal self-determination—this raises the possibility that another legal rule could come to be associated with the existing bundle. As Anaya puts it:[128]

> Other forms of violation of self-determination may be identified, and the remedies forthcoming need not necessarily entail the emergence of new states. Substantive self-determination may be achieved from a range of possibilities of institutional reordering other than the creation of new states. What is important is that the remedy be appropriate to the particular circumstances and that it genuinely reflect the will of the people, or peoples, concerned.

If relations change, or if relations with other entities emerge, so as to undermine the exercise of the right to self-determination in a *sui generis* manner not addressed by the existing law, the situation should be remedied in the form of a new legal rule.

[127] Macklem (2008b) 548-550; see also Macklem (2015) 103-131.
[128] Anaya (2009) 189.

CHAPTER TWO: Self-Determination as a Right to Participate in Global Governance

1. Introduction

Building on the account developed in Chapter One, this chapter outlines a wider perspective on peoples' relations with others. Self-determination is not only affected by a people's relationship with a colonial or occupying state; relations between peoples and IOs, as well as states acting collectively through IOs and other intergovernmental fora, are also at play. Section 2 of this chapter canvasses the rise of IOs and the expansion of their powers, the increased law-making and regulatory activity in intergovernmental fora, and the responses of international law to these shifts. It outlines the ways in which IOs, and states acting collectively through them, exercise public authority or power, including over peoples. This can be characterised as a structural relationship between IOs and states acting through them, on the one hand, and peoples on the other—a relationship in which the former exercise dominance, in a manner that undermines the latter's realisation of self-determination.

Section 3 then explores existing measures, finding that they do not provide an adequate remedy. Forms of internal self-determination do not assist. Although a state can sometimes effectively represent the interests of an affected people at the international level, that is not always the case. In addition, sometimes the state which contains a people affected by an action taken by an IO will not be a member of that organisation. For a people to be self-determining—to control its own destiny—it is not sufficient that it holds rights as against the state in which it is located. Nor does the participation of civil society assist. Not all non-state actors are alike, yet standardised rules for civil society observers in IOs tend not to account for this diversity. It may be difficult for peoples to qualify for observer status, and such status in turn may not provide for the level of participation required in order to protect a people's ability to determine its own destiny. Similarly, proposals regarding individual rights to participation in IOs are not sufficient. An emphasis on individual rights tends to obscure the valid claims of groups—so if there is only an individual right to participate, the interests of peoples will be systematically sidelined.

In Section 4, it is proposed that in order to remedy this violation of the right to self-determination, the international community should recognise an additional specific rule attaching to the principle of self-determination: that a people has the right to participate in global governance on matters affecting them. This section will explore the nature and scope of the right's correlative obligations, held by states and IOs. Aspects relating to the implementation of the right will be examined, including the degree of participation necessary to fulfil the right by reference to Arnstein's ladder of participation. A right to participation does not generally entail a veto over any decision at the international level that would negatively impact upon a people, nor would it entitle a people to have a say in each and every

organisation upon each and every issue. The international legal order entails a necessary balancing of interests. However, the right would enable a people to have heard on matters affecting it, in such a way as to enable it to self-determine.

2. The structural relation between peoples and international organizations

This section aims to demonstrate that relations exist between peoples and IOs, and between peoples and states collectively acting through IOs and other intergovernmental fora, of the kind that justifies a remedy under the law of self-determination. The term "international organization" is here used to mean a formal intergovernmental organization ("IGO"), defined by the International Law Commission ("ILC") as 'an organization established by treaty or other instrument governed by international law and possessing its own international legal personality', having as its members states 'as well as other entities'.[1] Here I also consider more informal organisations, which I refer to as "global governance bodies". In addition, I refer to "intergovernmental fora" to mean, for instance, inter-state negotiation processes. This section first considers the rise of IOs, the growth in their powers and the privatisation and informalisation of global governance, along with the attitudes taken by international law in respect of IOs. It discusses the exercise of public authority by IOs, and the turn in IOs scholarship to accountability. Building on this, it examines the relationship between peoples and IOs, discussing the ways in which the activities of the latter affect the former, as well as the structural relationship between the two. On this basis, it argues that the relationship between peoples and IOs, and states acting through IOs and other intergovernmental fora, is one of domination or, alternatively framed, a threat to self-determination.

2.1 The rise of global governance

IOs have proliferated in the course of the last century,[2] growing in a 'highly contested, always provisional and never-ending process'.[3] The earliest IOs emerged in the nineteenth century,[4] and the creation of the League of Nations in 1919 represented the birth of the modern international institution.[5] But the period starting after World War II and throughout recent decades has seen several waves of IO growth, including the UN and its specialised agencies, regional commissions and functional commissions, as well as international financial institutions and regional organizations.[6]

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[1] ILC, Draft Articles on the Responsibility of International Organizations (3 June 2011) UN Doc A/CN.4/L.778, Article 2(a).
[2] Kingsbury, Krisch and Stewart (2005) 18-20; Benvenisti (2014) 25-69.
[3] Sinclair (2015) 447.
[4] Reinalda (2009) 17-50; Lyons (1963); Herren (2016) 91-101.
[5] Kennedy (1987) 842. On the League of Nations, see FP Walters (1952); Anghie (2004) ch 3.
[6] Chimni (2016) 116. See e.g. Constitution of the United Nations Educational, Scientific and Cultural Organisation; Constitution of the United Nations Food and Agriculture Organization; Articles of Agreement of the International Bank for Reconstruction and Development; Charter of the Organization of African Unity; Constitutive Act of the African Union; Charter of the Organization of American States; Marrakesh Agreement establishing the World Trade Organization.

Today hundreds of IOs exist and operate in every functional area imaginable, including trade, development, health, environment, peace and security, and human rights.

In addition to their numerical growth, IOs have, over time, come to exercise expansive powers, including powers 'that were neither specifically contemplated at the time of their creation nor explicitly mandated in their founding treaties – through informal processes of discourse, practice and (re)interpretation'.[7] This mission expansion has been attributed to several factors, including the role of member states in delegating to an IO new functions which are likely to serve states' strategic objectives,[8] the role of organizations' secretariats who 'continuously strive to expand the remit of their functions and budgets' which is variously attributed to power-seeking behaviour or seeking to perform their existing functions,[9] and the emergence of new global problems which require IOs to exercise new powers.[10] Scholars have developed a nuanced understanding of how mission expansion has occurred in many institutions.[11] Legally, this mission expansion has been facilitated by the doctrine of implied powers, under which IOs are held to have, in addition to the powers explicitly granted by member states through their constituent treaties,[12] the powers necessary for their effective functioning.[13] Through these political and legal processes, IOs have come to exercise extensive powers with far-reaching impacts on individuals, communities and domestic societies,[14] through their ability to make laws,[15] set standards,[16] make decisions and recommendations,[17] and disseminate information.[18]

IOs are not the only entities exercising regulatory authority at the global level. The informalisation and privatisation of global governance, particularly since the 1990s, is another dynamic at play.[19]

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[7] Sinclair (2015) 446.
[8] Piiparinen (2016) 847.
[9] Ibid 848. For the former account, see e.g. Niskanen (1971). On the latter, see e.g. Barnett and Finnemore (2004) 72.
[10] Piiparinen (2016) 849.
[11] E.g. the Security Council: Kirgis (1995); the International Monetary Fund: Piiparinen (2016) 847-848; and the UN in general: Piiparinen (2016) 848-849.
[12] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ("*WHO AO*") [1996] ICJ Rep 64 [25]. See generally Sarooshi (2005) 18-27.
[13] *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ("*Reparations*") [1948] ICJ Rep 174, 179, 182-183; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter*) (Advisory Opinion) [1962] ICJ Rep 151;.*Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) *(Nuclear Weapons AO*) [1996] ICJ Rep 66, 78-79; *Interpretation of the Greco-Turkish Agreement of 1 December 1926* (Advisory Opinion) [1928] PCIJ Series B, No. 16; *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* [1926] PCIJ Series B, No. 13.
[14] von Bogdandy, Goldmann and Venzke (2017) 116. See also Sinclair (2015) 446.
[15] Alvarez (2006). See e.g. Mengie (2016) 328-329; Stewart and Sanchez Badin (2011) 557.
[16] Davis et al (2012); Friedrich (2010); Afonso Pereira (2010).
[17] See e.g. Smrkolj (2010); Kaiser (2010); Feinäugle (2010); Seiler and Madir (2012); Boisson de Chazournes and Fromageau (2012).
[18] See e.g. Schöndorf-Haubold (2010); de Wet (2010).
[19] On informal global governance, see Pauwelyn, Wouters and Wessel (2012).

Informal bodies such as the G20 and G8 'wield considerable political clout'.[20] Hybrid public-private organizations, private entities, and intergovernmental networks of domestic regulators exercise public authority: they issue regulatory rules, standards and decisions; may adjudicate on particular matters; engage in consultations and deliberations; and often promote, monitor and supervise the implementation of regulatory norms.[21] For instance, the Internet Corporation for Assigned Names and Numbers, in which the principal participants are private corporations and states play only an advisory role, sets standards necessary for the operation of, and administers access to, the Internet.[22] Its decisions can affect sub-state peoples, as in the case of its decisions whether to grant top level domain names to Palestine and Catalonia.[23]

To a certain extent IOs may be said to exercise broad powers in their own right, but in addition to some extent the exercise of public authority by an organization may be attributed to the collective state members of an organization.[24] In addition, states may collectively exercise broad powers in making international law through other intergovernmental fora, for instance in multilateral free trade agreements concluded outside the auspices of an IO.[25]

2.2 The attitude of international law

Despite these far-reaching powers, the international community historically displayed deference towards IOs and complacency regarding their rise.[26] International law, heralding IOs as 'harbingers of international happiness',[27] developed a functional approach which insulated IOs 'from any external legal discipline or judicial accountability'.[28]

Functionalism, itself born out of an encounter with colonial administration,[29] broadly holds that the functions assigned to an organization by its member states both enable and limit the organization's activity,[30] and presents IOs as 'neutral and a-political, solely functional entities…[which] can serve the interests of all precisely by focusing on a specific function'.[31] Functionalism envisages IOs as agents acting on behalf of a principal[32]—a relationship also known as "vertical"—from which it

[20] von Bogdandy, Dann and Goldmann (2010) 15.
[21] Stewart (2014) 217.
[22] Hartwig (2010) 576.
[23] Ibid 579-580.
[24] For more discussion of the dual nature of international organizations, see below Section 2.2.
[25] On 'megaregional' economic agreements, see Kingsbury et al (2019). On the potential impacts of free trade agreements on indigenous peoples, see e.g. Haugen (2014).
[26] Benvenisti (2018) 10-12, 16-30.
[27] Klabbers (2001) 288.
[28] Benvenisti (2018) 18. On functionalism, see generally Klabbers (2015); Benvenisti (2018) 18-30; Peters, (2016) 34-43.
[29] Klabbers (2014).
[30] Klabbers (2015) 22-23.
[31] Ibid 18.
[32] Klabbers (2005) 183; Trachtman (2014); Guzman (2013).

followed, for some, that IOs fundamentally depend on initial and ongoing state consent,[33] and that IOs do not seriously challenge the position of states as the central actors on the global stage.[34] The limitations of this approach, which is linked to orthodox positivist approaches to state consent, and mirroring schools in international relations such as realism (in brief, the view that states will pursue their own interests) and functionalism (states will cooperate to solve joint problems),[35] are said to include that it does not adequately explain IOs in which decisions can be taken without unanimous state consent, nor relationships between IOs and other actors, and also fails to account for the separate existence, independent will (*volont'e distincte*) and international legal personality of IOs.[36] However, in orthodox thought this "principal-agent" view has often prevailed, as states have been reluctant to regard IOs as independent entities rather than mere collective undertakings.[37]

Yet in the years following the end of the Cold War, the attitude of the international community began to shift. It became apparent that IOs are not just the vehicles through which states act: they are autonomous global actors in their own right.[38] Moreover, in addition to instances of mismanagement of IOs,[39] it became clear that their activities were having substantial negative effects on states, individuals and communities.[40] Furthermore, IOs were often steered by powerful states and special interests,[41] and had 'often ended up promoting forms of institutional intervention that look a lot like the extension of deep-rooted forms of colonial domination'.[42] IOs are today recognised, at least by the critical schools, as 'not, as some liberals would have us believe, neutral arenas for the solution of common problems but rather sites of power, even of dominance.[43]

Hence, international legal scholarship on IOs has shifted focus from a narrow functional approach to critiquing IOs and studying ways in which they can be held to account.[44] It is recognised in the

[33] Roberts and Sivakumaran (2012) 117-118.
[34] Hannikainen (2006) 130.
[35] On these approaches in international relations theory, see Oestreich (2012) 5-8; Klabbers (2005b) 28-31.
[36] Klabbers (2005) 184; Klabbers (2017) 988.
[37] Reinisch (2015) 283.
[38] Daugirdas (2016) 327-328; Klabbers (2017) 988; Barnett and Finnemore (1999); Kratochwil and Ruggie (1986); Klabbers (2005) 184; Venzke (2010).
[39] See e.g. the Tin Council case: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*, Decision on Appeal, [1989] 3 WLR 969, [1990] 2 AC 418, [1989] 3 All ER 523, (1990) 81 ILR 670, 26 October 1989 (UKHL).
[40] Peet (2009); Mégret and F Hoffman (2003); Verdirame (2010).
[41] Benvenisti (1999); Lohmann (1998); Grossman and Helpman (2001).
[42] Sinclair (2015) 446-447; Pahuja (2011) 39-42; Anghie (2004); Chimni (2004); Chimni (2010) 31; Chimni (2012).
[43] Hurrell (2005) 56.
[44] Reinisch (2001); Wellens (2002); Wouters et al (2010); Collins and White (2010); Klabbers (2015); Hovell (2016).

literature that IOs and other global governance bodies exercise public authority,[45] impacting in meaningful ways the living conditions and opportunities of ordinary people:[46]

> The growing exercise of public authority by international organizations and the consequent intrusion in matters previously considered as exclusive spheres of states has transformed the dimensions of accountability in these organizations.

Many have accordingly pointed out a lack of accountability, democracy and legitimacy in global governance.[47] While in many domestic societies, national governments are to a greater or a lesser extent accountable for their policies and decisions to those whom they affect, the same is not true at the global level, where individuals are remote strangers lacking a direct connection to IOs or other global governance bodies.[48]

Scholars of global administrative law scholarship know this as the problem of "disregard".[49] IOs and other global regulatory bodies systematically give greater regard to the interests and concerns of their core sponsors and constituencies, typically powerful states and well-organized economic actors, and tend to disregard other affected interests and concerns.[50] Disregard has both procedural and substantive elements, with the former tending to accompany the latter. Procedural disregard includes, for instance, a regulator's failure to gather information regarding the interests or concerns of affected groups and the resulting impacts, failure to provide access to relevant information, or failure to address such interests and concerns in giving reasons for decisions. The substantive element entails the adoption of decisions that unjustifiably harm or disadvantage those whose interests and concerns have been procedurally disregarded, where decisions have been adopted as a consequence of such disregard.[51] As Stewart puts it:[52]

> Many global regulatory authorities have been justly criticized for giving inadequate regard to the interests and concerns of vulnerable and politically weak groups, diffuse and less well-organized and resourced societal interests, and vulnerable individuals, which has resulted in decision making that causes unjustified harm or disadvantage.

Global administrative law's response to this problem has been to call for non-state actors affected by decisions of global regulatory regimes to be heard and allowed to participate in the decision-making

[45] Stewart and Sanchez Badin (2011) 557; Mengie (2016) 328. Some define an exercise of international public authority as 'the adoption of an act that affects the freedom of others in pursuance of a common interest': von Bogdandy, Goldmann and Venzke (2017) 117.
[46] Mengie (2016) 328.
[47] See e.g. Nanz and Steffek (2004).
[48] Woods and Narlikar (2001) 569.
[49] Stewart (2014).
[50] Ibid 212.
[51] Ibid 224.
[52] Ibid 221.

processes.[53] A central premise of global administrative law is that most issues of democratic legitimacy and the exercise of power on the global level are administrative in nature, and thus can be analysed with reference to values that include the rule of law, accountability, and participation.[54] Global administrative law extends concepts derived from the administrative law of the United States to global governance, taking an approach which identifies and maps global administration, asking where, how and with what effects power is exercised,[55] and is preoccupied with ensuring that 'the mechanisms, principle, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies…meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make'.[56] While this study, overall, does not apply a methodology of the type seen in the global administrative law literature, preferring to proceed along more traditional lines, it adopts as useful the notion of "disregard", and shares the normative position that an individual affected by an exercise of public authority or administrative power should have their interests represented in the decision-making process leading to that exercise.

In summary, IOs have proliferated and their powers have expanded to the point where they exercise public authority having direct and indirect impacts on individuals and communities, which raises troubling questions about organizations' lack of accountability to those whom they affect. They have 'disempowered disparate domestic electorates, who could not benefit from the traditional constitutional checks and balances found in many democracies intended to limit executive discretion'.[57] International lawyers are alive to these concerns and it is in the context of this literature that this work must be situated.

2.3 The influence of international organizations over peoples

As explored above, IOs, and states acting through them, exercise public authority in a way that affects not only member states but also others. In particular, for the purposes of this work, they can affect peoples, including their self-determination. The relationship between IOs and their member states on the one hand, and peoples on the other, is structural, arising from the regulatory authority situated in IOs. In the language of self-determination, an IO, or a group of states acting collectively, can "dominate" a people, interfering with its ability to determine its own destiny. Under Philip Pettit's definition of domination, developed further by Iris Marion Young, an agent dominates another 'when the agent has power over that other and is thus able to interfere with the other *arbitrarily*';

[53] Kingsbury, Krisch and Stewart (2005) 23-25; Kingsbury, Donaldson and Vallejo (2016) 534.
[54] Kingsbury (2009) 34-41.
[55] Kingsbury, Donaldson and Vallejo (2016) 527, 529.
[56] Kingsbury, Krisch and Stewart (2005) 177. On global administrative law, see also Kingsbury, Krisch and Stewart (2005); Cassese (2005); Krisch and Kingsbury (2006); Kingsbury (2009); Kingsbury and Casini (2009); Kingsbury, Donaldson and Vallejo (2016).
[57] Benvenisti (2018) 13.

interference is when 'one agent blocks or redirects the action of another in a way that worsens that agent's choice situation by changing the range of options', and it is "arbitrary" 'when it is chosen or rejected without consideration of the interests or opinions of those affected.[58] An entity may therefore dominate another without ever actually interfering with it; domination 'consists in standing in a set of relations which makes an agent *able* to interfere arbitrarily with the actions of others'.[59] IOs are, as explored in the previous section, able to interfere with other agents; they wield public authority in a way that can directly or indirectly change the range of options available to individuals or other entities. It is this structural possibility of interference—which may be positive or negative—that constitutes domination.

The remainder of this section will illustrate this point by reference to actual examples of domination and interference, in the sense meant by Pettit and Young, in several categories of activity. First, IOs and states acting collectively through them, as well as in other fora, carry out standard-setting and policy-making activities that affect peoples. Secondly, IOs and international courts and tribunals make decisions affecting peoples. Third, the UN occasionally exercises domination over a people by way of international territorial administration. Finally, IOs may act as corrective mechanisms that can effectively exercise a power of review over the actions and decisions of states, thereby potentially remedying violations of peoples' rights. While not exhaustive, this section is intended to contain sufficient detail to demonstrate that IOs, and states acting collectively, have exercised power through the making of decisions, standards, and policies affecting peoples in myriad fields of activity.

A conceptual distinction should be drawn between a matter affecting a specific people, and a matter affecting a class of peoples. By the former, I mean a decision, policy or law made by an IO that by dint of its topic, scope, content, objective, or application impacts upon a people. For instance, the decisions of the EU to ratify agreements with Morocco on trade and fisheries, and to implicitly accept their application to Western Sahara, specifically affect the Sahrawi people of Western Sahara.[60] The advisory proceedings of the ICJ on *Kosovo* had a bearing on the self-determination of the people of Kosovo.[61] A decision of a multilateral development bank to fund a project in a given location might affect a particular indigenous group occupying or with traditional ties to the area.[62] By the latter, I mean an activity of an IO affecting, for instance, indigenous peoples *in general*. Examples include the

[58] Young (2000) 258, citing Pettit (1997).
[59] Young (2000) 258-259.
[60] E.g. Euro-Mediterranean Agreement between the European Communities and their Member States and the Kingdom of Morocco (adopted 26 February 1996) OJ 2000 L 70. See Case T-512/12, *Front Polisario v Council of the European Union* (Judgment of the General Court, Eighth Chamber) ECLI:EU:T:2015:953.
[61] *Kosovo*.
[62] For examples, see Hunter (2003) 201. On the impact of extraction projects funded by multilateral development banks, see Munarriz (2008).

negotiation and adoption of the UNDRIP and other instruments setting out the rights of indigenous peoples in international law.[63]

2.3.1 Standard-setting and policy-making activities of international organizations

IOs and other bodies are frequently used as fora for the setting of standards that would affect indigenous peoples. This is most evident with regard to the process of the development of the UNDRIP and its adoption by the GA. This instrument goes to the heart of indigenous peoples' affairs and concerns, and its development by states and UN bodies clearly demonstrates the power exercised by the latter over indigenous peoples.[64] Other instruments on indigenous peoples' rights developed in international fora include the American Declaration on the Rights of Indigenous Peoples, the ILO Convention No. 169, and the draft Nordic Sámi Convention.[65]

WIPO, a 'central institution of global economic governance'[66] that among other things develops laws and policies relating to intellectual property,[67] carries out standard-setting activities affecting indigenous peoples in respect of their traditional knowledge. The intellectual property framework developed under WIPO's auspices is broadly incompatible with indigenous understandings of traditional knowledge and traditional cultural expression: intellectual property rights are time-limited, designed to provide a temporary monopoly to incentivise and compensate innovation; to gain protection, an idea or work must be novel, have an identifiable inventor or creator, and have been invented or created by a specific act.[68] Traditional knowledge, by contrast, is 'a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity'.[69] Ideas are not commodities but are collectively held, and some stewards of knowledge may never be authorised to share that knowledge.[70] The WIPO framework is therefore unable to provide protection to many forms of traditional knowledge, which is left vulnerable to misappropriation and "biopiracy".[71] Recognition of this led to the establishment in 2000 of the WIPO Intergovernmental Committee on Intellectual

[63] See Chapter 4, section 2.
[64] Of course, the Declaration was developed with high levels of participation by indigenous peoples themselves, as will be discussed later in the thesis. This is merely to demonstrate the potential for international organizations and states acting through them to exercise power over indigenous peoples by defining their fundamental rights.
[65] American Declaration on the Rights of Indigenous Peoples (15 June 2016) OAS Doc AG/RES.2888 (XLVI-O/16) ("American DRIP"); Convention concerning Indigenous and Tribal Peoples in Independent Countries ("ILO No 169"); for the draft of the Nordic Saami Convention in English, see https://sametinget.se/105173.
[66] Boehme et al (2018) 29.
[67] Convention Establishing the World Intellectual Property Organization, Articles 3 and 4. It is linked to the UN by the Agreement between the United Nations and the World Intellectual Property Organization, Annex.
[68] Described as trying to put "round pegs into square holes": Solomon (2017) 219. See generally Daes (2001); Brown (2002) 242-245; Haight Farley (1997).
[69] WIPO, *Intellectual Property Needs and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (WIPO 2015) 13. On traditional knowledge generally, see e.g. Oguamanam (2006) 20-26; Hughes (2012); Dutfield (2001).
[70] Solomon (2017) 219.
[71] On misappropriation, see e.g. Munzer and Raustiala (2009) 39; Subbiah (2004).

Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"),[72] which is undertaking textual negotiations on draft instruments related to traditional knowledge, traditional cultural expressions, and genetic resources.[73] It has produced Draft Articles on the Protection of Traditional Knowledge, the Protection of Traditional Cultural Expressions, and a consolidated document relating to intellectual property and genetic resources.[74] There is a great deal at stake for indigenous peoples in these negotiations: '[f]or a people whose relationship of dependence with their ecosystem is first nature and a basis for their knowledge and socioeconomic and cultural life…intellectual property's role in knowledge enclosure is a fundamental human rights issue bordering on life and survival'.[75] The IGC process has the potential to address indigenous peoples' 'claims for cultural recognition' and 'significantly accommodat[e] an alternative indigenous understanding of knowledge'.[76] The conclusion of international agreements on genetic resources, traditional knowledge and traditional cultural expressions 'would be a landmark in international law and in IP law, and could potentially contribute to the prevention of their misappropriation'.[77]

The traditional knowledge of indigenous peoples is also implicated in activities under the Convention on Biological Diversity ("CBD").[78] The Convention itself recognises 'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources',[79] and its Article 8(j) provides that states parties shall, subject to national legislation:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Another article of particular relevance to indigenous peoples is Article 8, providing for the establishment by states of protected areas: such mechanisms have historically served as an instrument, whether intentional or not, for the exclusion of indigenous peoples from their traditional lands and

[72] Established in 2000 by the WIPO General Assembly: WIPO, 'WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, Geneva, September 25 to October 3, 2000, Report' (3 October 2000) WIPO Doc. WO/GA/26/10 [71].
[73] WIPO, 'Assemblies of the Member States of WIPO, Fifty-Seventh Series of Meetings, October 2 to 11, 2017, Summary Report, Addendum, Item 18 of the Consolidated Agenda (11 October 2017) WIPO Doc A/57/11/Add.6.
[74] For the most up-to-date versions of these drafts, see http://www.wipo.int.
[75] Oguamanam (2012) 81.
[76] Boehme et al (2018) 30.
[77] Robinson, Roffe and Abdel-Latif (2017) 3.
[78] The objectives of the CBD are the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources: Convention on Biological Diversity ("CBD"), Article 1.
[79] CBD, Preamble, twelfth recital.

territories.[80] The Convention did not provide for the free, prior and informed consent of indigenous peoples to the establishment of protected areas. In addition, the Nagoya Protocol on Access and Benefit Sharing, developed under the Convention's auspices, has implications for the protection of indigenous traditional knowledge, innovations and practices associated with genetic resources.[81]

Further examples of IOs affecting indigenous peoples include the FAO which through its Committee on Food Security develops policy recommendations and guidance on food security and nutrition;[82] indigenous peoples are, among others, affected by food insecurity and thus recommendations and guidance emanating from the Committee will have effects on indigenous peoples. UNESCO has a broad mandate to set standards in the fields of education, culture, science, and communication and information,[83] which as the organization recognises may 'provide opportunities and have significant impacts for' indigenous peoples[84] as it 'addresses key concerns of indigenous peoples such as endangered languages, mother tongue education, education for sustainable development, indigenous knowledge in scientific and environmental decision-making, and building knowledge societies'.[85] The IMO is a specialized agency of the UN through which states set standards in maritime safety, the efficiency of navigation, and the prevention and control of marine pollution from ships,[86] including of particular relevance to indigenous peoples, rules on heavy fuel oil, the avoidance of marine mammals, greenhouse gases and black carbon, underwater noise, sewage and greywater discharge, and invasive species through the IMO's Marine Environmental Protection Committee and its Sub-Committee on Pollution Prevention and Response.[87]

The ISA makes rules, regulations and procedures relating to prospecting, exploration and exploitation of mineral resources in the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction.[88] Indigenous peoples living traditional lifestyles on coasts and islands are likely to be

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[80] West, Igoe and Brockington (2006) 258. Although protected areas can also be a tool by which indigenous peoples can protect their traditional territories from development: West and Brockington (2006) 612.
[81] See generally Morgera, Buck and Tsioumani (2012); Morgera, Buck and Tsioumani (2014).
[82] FAO Constitution, Article IV.9; General Rules of the Organization, FAO Basic Texts, Rule XXXIII.
[83] UNESCO Constitution, Article I.2. In practice, UNESCO engages in considerable standard-setting activity, having to its name some 30 treaties, 34 recommendations and 14 declarations. The full lists of conventions, recommendations and declarations can be viewed at UNESCO, 'Standard-Setting Instruments', http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[84] UNESCO, 'UNESCO Policy on Engaging with Indigenous Peoples' https://en.unesco.org/indigenous-peoples/policy.
[85] UNESCO Policy on Engaging with Indigenous Peoples (9 August 2017) UNESCO Doc No 202 EX/9 [15].
[86] Convention on the International Maritime Organization, Article 1. In total it has overseen the adoption of more than 50 conventions and protocols, and has adopted more than 1000 codes and recommendations: IMO, *IMO: What it is* (IMO 2013) 4.
[87] See IMO, 'Marine Environment Protection Committee, 70th session, Agenda Item 17, Any other business, Arctic indigenous food security and shipping, submitted by FOEI, WWF and Pacific Environment' (19 August 2016) IMO Doc MEPC 70/17/10 [3]-[14].
[88] UN Convention on the Law of the Sea, Articles 156, 157, 158(1) and (4), 159(1) and (2), 160(1) and (2)(f), 161, 162(1) and (2)(o), 163(1)-(3), 165(2). See e.g. Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area (1 March 2013) ISA Doc. ISBA/19/LTC/8; Regulations on Prospecting and Exploration for Polymetallic Nodules

disproportionately affected by mining in the Area.[89] Relying on the oceans and the seabed for food, health, cultural practices and livelihoods, indigenous peoples will face the adverse consequences of any negative effects on the marine environment.[90] Indeed, deep sea exploration has already had adverse impacts on the livelihoods of indigenous peoples in the Pacific, including in Tonga and Papua New Guinea, due to disturbances of fish populations and negative effects on water quality.[91] The development of policies and regulations related to deep sea mining, especially with regard to environmental protection, is therefore of great concern to coastal and island indigenous peoples.

States acting collectively by way of negotiation and adoption of international agreements on environmental matters can also affect peoples. In addition to the CBD, noted above, indigenous peoples have been particularly affected (in a positive way) by the development of the Stockholm Convention on Persistent Organic Pollutants, which sets out a range of control measures to eliminate the production and use of specified persistent organic pollutants, eliminate trade in specified persistent organic pollutants, minimise emissions of those that cannot be eliminated, and avoid the production and use of new persistent organic pollutants.[92] Persistent organic pollutants such as heavy metals, pesticides, industrial chemicals and pharmaceuticals disproportionately affect indigenous peoples in the Arctic,[93] as they are transported through atmospheric and oceanic currents and ingested by wildlife; they are found in the fatty tissues of animals, increasing in concentration at higher levels of the food chain.[94] Northern indigenous peoples, due to their diets that include animals at the top level of Arctic food chains, are thereby exposed to high levels of persistent organic pollutants, resulting in adverse effects on health.

In addition to standard-setting, IOs may make policies affecting specific peoples. One instance of this is the effect of EU legislation on Arctic indigenous peoples' communities.[95] European Directive 83/129/EEC of 1982 prohibited the importation into the European Economic Community of skins and other products derived from seal pups.[96] While the makers of the directive did not appear to expect any adverse effects on indigenous peoples, and indeed the directive in its preamble recalled that

in the Area (22 July 2013) ISA Doc ISBA/19/C/17; Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (7 May 2010) ISA Doc ISBA/16/A/12/Rev.1; Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (27 July 2012), ISA Doc ISBA/18/A/11. On the ISA generally, see Nelson (2005); Jaeckel (2017).

[89] Hunter, Singh and Aguon (2018).

[90] UNPFII, 'Study on the relationship between indigenous peoples and the Pacific Ocean' (19 February 2016) E/C.19/2016/3 [4].

[91] Hunter, Singh and Aguon (2018).

[92] Stockholm Convention on Persistent Organic Pollutants.

[93] Johansen (2002); Kuhnlein et al (2003).

[94] Dewailly and Furgal (2003) 4.

[95] See generally Scarpa (2014).

[96] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ L 286/36 (31 October 2009); Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules of the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ L 216/1 (17 August 2010).

traditionally practiced hunting does not harm seal pups and is 'a natural and legitimate occupation, conducted with due respect for the balance of nature, and part of indigenous peoples' traditional way of life and economy', the ban in fact triggered the collapse of the EU market for seal furs.[97] In turn, this affected the Inuit economy, which depended on the cash income from the fur market.[98] Although a later version of the directive made an exception for Inuit hunting, Canadian Inuit were still disproportionately affected, and in any case the market had long since collapsed.[99] This example shows that the regulatory acts of IOs may affect not only peoples within their member states, but also peoples who are "distant strangers" or "global others" due to being located in a state, or states, that are not members of the organization.[100]

2.3.2 Decision-making activities of international organizations

In addition to standards, IOs can make specific decisions which affect peoples. This can be seen, for example, in decisions to finance development projects. Development projects financed by IOs can have significant adverse impacts on indigenous peoples, who 'tend to be the most negatively affected by development projects that have an impact on land tenure or use, due to their strong cultural attachment and economic dependence to the land they traditionally occupy'.[101] Conversely, development financing has the potential to safeguard indigenous peoples' rights and help them to realise self-determination, if done at indigenous peoples' own initiatives and in accordance with their wishes.

For instance, the International Fund for Agricultural Development ("IFAD") is an international financial institution and specialized agency of the UN focusing on agriculture and rural development, established in 1977 with the objective of mobilising resources for agricultural development in developing countries.[102] Given that it is an under-studied IO,[103] a short explanation of its mandate and functions is in order. IFAD provides loans, grants and a debt sustainability mechanism to developing countries, particularly the 'poorest food deficit countries', for projects and programmes to increase food production and improve the nutritional level of the poorest populations.[104] In fulfilling its objective, it is mandated to provide financing:[105]

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[97] Scarpa (2014) 428.
[98] Ibid 429.
[99] This will be discussed in more detail in Chapter 7, section 2, in the context of the related WTO Appellate Body proceedings.
[100] On the accountability of states to "strangers", see Agon and Benvenisti (2018). See also Peters (2016) 46.
[101] Brunori (2019) 512.
[102] Agreement Establishing the International Fund for Agricultural Development ("IFAD Agreement"), Article 2.
[103] As of August 2019, the literature on international organizations contains only one article focusing on IFAD.
[104] IFAD Agreement, Article 7.1 and 7.2.
[105] Ibid Article 2.

> primarily for projects and programmes specifically designed to introduce, expand or improve food production systems and to strengthen related policies and institutions within the framework of national priorities and strategies, taking into consideration: the need to increase food production in the poorest deficit countries; the potential for increasing food production in other developing countries; and the importance of improving the nutritional level of the poorest populations in developing countries and the conditions of their lives.

It sources finance by soliciting contributions from member states, as well as from non-member states and other sources, in periodic replenishment cycles.[106] Its three most recent replenishment cycles have each raised over US$1 billion from member states,[107] and in 2019 IFAD expects to approve US$1.7 billion in loans and grants.[108] In total, as of January 2019 IFAD had disbursed US$20.9 billion in loans and grants, and mobilised a further $28.6 billion from other sources.[109] IFAD's activities affect indigenous peoples: its interventions have the potential to support indigenous peoples' self-determination and development, but conversely could have adverse effects. As indigenous peoples account for a disproportionate proportion of the global rural poor,[110] IFAD has identified indigenous peoples living in rural areas of developing countries as 'an important target group' of the projects and programmes that it supports.[111] It has supported many rural development programmes where indigenous peoples are the major beneficiaries.[112] As a corollary, if one of its interventions goes wrong, such a programme could adversely affect indigenous communities. Indeed, IFAD found of its own work that 'in many cases positive impact on indigenous peoples has been limited' because indigenous peoples were not sufficiently considered in the planning process.[113]

In addition to funding decisions, decisions of IOs regarding field programme and projects may also affect specific indigenous peoples. For instance, the UNDP, UNEP, UNIDO and FAO all carry out field programmes and projects which, if poorly designed or implemented, may impact on indigenous peoples' lands, resources and livelihoods.

More specific decisions affecting indigenous peoples are those of the ISA regarding licenses to explore and extract mineral resources, as referred to above, as well as decisions of the UNESCO World Heritage Committee ("WHC") regarding the protection of natural and cultural heritage. Regarding the latter, a significant number of the properties designated as World Heritage Sites by UNESCO's WHC under the 1972 World Heritage Convention[114] are located in the territories of

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[106] Ibid Article 7. On sources of funds, see IFAD, *Corporate-Level Evaluation: IFAD's Financial Architecture* (IFAD 2018) 3.
[107] IFAD, *Corporate-Level Evaluation: IFAD's Financial Architecture* (IFAD 2018) xiv.
[108] IFAD, *IFAD Annual Report 2018* (IFAD 2019) 22.
[109] IFAD, *IFAD at a Glance* (IFAD 2019) 1.
[110] IFAD, *IFAD Policy on Engagement with Indigenous Peoples* (IFAD 2009) ("IFAD Policy"), 4.
[111] Ibid 4.
[112] Ibid 11.
[113] Ibid 11.
[114] Convention concerning the Protection of the World Cultural and Natural Heritage.

indigenous peoples.[115] According to the International Indigenous Peoples' Forum on World Heritage, over a third of sites designated for their significant "natural" heritage are home to indigenous peoples.[116] Such a designation as "natural" obscures the fact that for indigenous peoples, nature and culture and fundamentally entwined. [117] Moreover, a study by the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") found that the establishment of World Heritage Sites 'often have a negative impact on indigenous peoples because, often, their ancestral rights over their lands and territories are not respected or protected'.[118] In some World Heritage areas, indigenous peoples have been subject to restrictions and prohibitions of traditional land-use practices,[119] and in other cases have even been forcibly removed.[120] In this way, the activities of the WHC in implementing the World Heritage Convention can perpetuate 'the dynamics of colonialism'[121] and the denial of self-determination for indigenous peoples. In several cases human rights treaty bodies have expressed concerns about violations of indigenous rights in World Heritage areas.[122] Conversely, the inclusion of an indigenous site on the World Heritage List can positively benefit an indigenous people, including by giving it increased leverage in negotiations with a national government over a proposed development.[123] The number of indigenous sites designated as World Heritage sites is likely to increase in future since that the WHC actively encourages nominations from under-represented regions and of under-represented types of properties.[124]

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[115] Stefan Disko in 2010 estimated that there were 70-100 such sites: Disko (2010) 167.
[116] IIFPWH, 'Indigenous People's Involvement in World Heritage', https://iipfwh.org/indigenous-involvement-in-world-heritage/.
[117] Disko (2010) 167. See e.g. the inscription of the Wet Tropic Rainforest site in Australia, inhabited by Aboriginal peoples for at least 40,000 years, on the list for its "natural" significance: World Heritage Committee, 'Report of the World Heritage Committee' (11 October 1988) WHC Doc SC-88/CONF.001/9; World Heritage Committee, 'World Heritage Nomination—IUCN Summary: Wet Tropical Rainforests (North-East Australia)' (March 1988), http://whc.unesco.org/archive/advisory_body_evaluation/486.pdf.
[118] EMRIP, *Final report of the study on indigenous peoples and the right to participate in decision-making* (2011) UN Doc A/HRC/18/42, Annex [38]; EMRIP, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fifth session (Geneva, 9-13 July 2012)* (2012) UN Doc A/HRC/21/52, 7. For examples, see the case studies in Disko and Tugendhat (2014). See also UNPFII, *Report on the ninth session (19-30 April 2010)* (2010) UN Doc E/2010/43-E/C.19/2010/15 [131]; UNPFII, *Report on the tenth session (16-27 May 2011)* (2011) UN Doc. E/2011/42-E/C.19/2011/14 [40]-[42].
[119] See e.g. Olenasha (2014).
[120] See e.g Kidd (2014); Buhereko (2014); Abraham (2014).
[121] Vrdoljak (2018) 247.
[122] See e.g. CERD, Early Warning and Urgent Action Procedure: Letter to Thailand regarding Kaeng Krachan National Park (9 March 2012); HRC, 'Concluding observations of the Human Rights Committee: Kenya' (31 August 2012) UN Doc CCPR/C/KEN/CO/3 [24]; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Kenya' (2011) UN Doc CERD/C/KEN/CO/1-4 [17].
[123] See e.g. the experiences of the Mirarr aboriginal people in challenging a uranium mine development in the Kakadu National Park in Australia: World Heritage Committee, 'State of Conservation: Kakadu National Park (Australia)' (1998) Decision CONF 203 VII.28; World Heritage Committee, 'Report on the Mission to Kakadu National Park, Australia. Chair: Franscesco Francioni' (29 November 1998) UNESCO Doc WHC-98/CONF.203/INF.185.
[124] Disko (2010) 167.

2.3.3 Decisions of international courts and tribunals

The ICJ, as the pre-eminent international court, can through its decisions have profound effects on peoples. Two strands of its jurisprudence are particularly relevant. The first is its case law on self-determination. Considered in detail in Chapter 5, these cases generally deal with situations where a people has been denied its right to self-determination, often in the context of decolonization. In reaching findings on the rights of peoples, these ICJ decisions have the potential to fundamentally uplift a people's prospects, or, alternatively, dash hopes of emancipation. The *South West Africa* advisory opinion, which concerned South Africa's continued occupation of Namibia, affected the people of Namibia in a positive sense in that by finding that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately, the Court contributed to the eventual freedom of the people of Namibia from foreign domination.[125] In the *East Timor* decision, the right of the people of East Timor to permanent sovereignty over natural resources was at stake: Australia and Indonesia, which occupied East Timor, had set up a joint regime for exploiting the oil and gas reserves on the continental shelf off the coast of East Timor.[126] The *Wall* proceedings concerned Israel's construction of a wall which obstructed of the Palestinian people's ability to exercise its right to self-determination;[127] the *Kosovo* advisory opinion dealt with whether Kosovo's declaration of independence was adopted in violation of international law.[128] Most recently, the *Chagos* case concerned the separation of the Chagos Archipelago from Mauritius prior to the latter's independence, and the continued administration of the Archipelago by the United Kingdom; its outcome affects the self-determination of the people of Mauritius, as well as that of the Chagossian people.[129]

The second relevant strand of ICJ jurisprudence relates to border disputes. For instance, in the *Frontier Dispute (Burkina Faso/Niger)* proceedings,[130] the Court determined the course of the boundary between Burkina Faso and Niger. Recognising that doing so could affect the 'nomadic and semi-nomadic populations' along the border, the ICJ directed the parties to have due regard to their needs.[131] Other decisions regarding border disputes may also impact on peoples living in the vicinity of borders at issue. In summary, the ICJ, by its decisions, are capable of having real effects on peoples.

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[125] *South West Africa AO.*
[126] *East Timor*, Dissenting Opinion of Judge Weeramantry, 151.
[127] *Wall AO.*
[128] *Kosovo.*
[129] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, General List No. 169 ("*Chagos AO"*).
[130] *Frontier Dispute (Burkina Faso/Niger)* (Judgment) [2013] ICJ Rep 44 ("*Burkina Faso/Niger*").
[131] Ibid [112].

The decisions of other international courts and tribunals ("ICTs") may also affect peoples. For instance, the outcomes of proceedings in investor-state tribunals can affect indigenous peoples. According to the UN Special Rapporteur on the rights of indigenous peoples, this is partly down to the nature of international investment itself.[132] Investment agreements protect and regulate the property rights of investors related to the exploitation or use of land and resources, which can directly conflict with the 'pre-existing – but not necessarily formally recognized and titled' property rights of indigenous peoples under international human rights law.[133] Inadequate provision for indigenous peoples' rights in international investment agreements, as well as the actual or perceived threat of enforcement of investor protections under investor-state dispute settlement ("ISDS") and the associated regulatory chill, can have serious impacts on indigenous peoples' rights.[134] Down the line, approximately 30 percent of ISDS proceedings relate to the extractive or energy industries, where the majority of respondents are states with significant populations of indigenous peoples in whose territories the exploited resources are found.[135]

2.3.4 International administration

Another way in which IOs can dominate peoples is through international administration. The UN has on occasion assumed quasi-governmental powers over territories. The UN administration of East Timor between October 1999 and May 2002 exemplifies this. There, the UN Transitional Administration in East Timor ("UNTAET")[136] totally assumed the administrative functions of the state, becoming 'in every respect the formal government of the country'.[137] UNTAET had sovereign control over a territory: in effect, UNTAET was a trusteeship administration 'preparing a territory for independence'.[138] Legislative and executive powers were vested in the Special Representative of the Secretary-General and Transitional Administrator, a single individual who had the sole authority to issue regulations as national legislation.

The population of East Timor, meanwhile, were excluded from the transitional administration, both in its planning and operational phases.[139] The policies of UNTAET 'consistently…underemphasized local participation and capacity-building with the effect of compromising the strategic objectives of democracy, effective administration, and rule of law'.[140] The sole mechanism by which the people of

[132] Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples* (2015) UN Doc A/70/301 (2015); Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples* (2016) UN Doc A/HRC/33/42. See also Vadi (2011); Puig (2012) 1286-1287; Vadi (2018).
[133] Tauli-Corpuz (2016) [33].
[134] Ibid [5], [31], [35].
[135] Ibid [11].
[136] Authorised by SC res 1271.
[137] Chopra (1994) 984.
[138] Gorjão (2002) 314.
[139] Chopra (2002) 981.
[140] Beauvais (2001) 1106.

East Timor were able to participate in decision-making processes was through a non-elected body of 14 East Timorese representatives appointed and chaired by the Transitional Administrator.[141] The number of members was deliberately limited by UNTAET to facilitate swift decision-making.[142] From the perspective of the people of East Timor, however, this did not allow for the full and active participation of East Timorese that was required in order for the transition to independence to be effective.[143] The National Council for Timorese Resistance, a body broadly representative of the East Timorese people, proposed a dual political structure to implement decisions during the transitional period, but the UN 'ignored their aspirations'.[144]

The administration of East Timor, while extreme, is by no means the only example of international administration assuming *de facto* governmental authority: others include the UN Transitional Executive Authority in West Irian,[145] the UN Transitional Administration in Eastern Slavonia,[146] the UN Interim Administration in Kosovo,[147] and the Office of the High Representative in Bosnia.[148]

2.3.5 International organizations as corrective mechanisms

Some IOs are designed to, or in effect, review the actions of states so as to correct failures regarding the protection of the rights of peoples within their jurisdiction. States are not always capable of or willing to adequately protect marginalised or minority peoples. ICTs, as well as other IOs, can directly or indirectly exercise a form of review over states. An early example of this is the League of Nations' mandates and minority protection regimes, whereby inhabitants of a mandate territory could petition the League's Permanent Mandates Commission, and members of a minority group within certain states could petition the League's Minority Section, to report violations by the mandatory power or state of the mandate or minority rights, respectively.[149] Although in both systems the right of petition was held by individuals, rather than peoples as such, in practice petitions were sometimes made by representatives of peoples.[150] Under both systems, the power of the League was restricted,[151] but the petitions systems offered a voice, however limited, to peoples and minorities, serving as an early blueprint on which later efforts could build.

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[141] Chopra (1994) 984.
[142] Gorjão (2002) 318.
[143] Ibid 318-320.
[144] Ibid 318. On the (lack of) participation of the Timorese, see further Beauvais (2001) 1119-1130.
[145] See GA res 1752.
[146] SC res 1037.
[147] SC res 1244.
[148] Created under the General Framework Agreement for Peace in Bosnia and Herzegovina (signed 14 December 1995) 25 ILM 136 (1996). On the authority exercised by the Office of the High Representative, see Chandler (2006).
[149] See the discussion in Pedersen (2012); Wheatley (2017) 783-785; Spanu (2019) 17-18.
[150] See for instance the petition from 7,892 Samoans—roughly half the native adult population—purporting to be in the name of 'the new National movement (or "Mau") which embraces in both sexes at least 95% of the Native population of Western Samoa': discussed in Pedersen (2012) 231-232.
[151] Pedersen (2012) 232-235; Spanu (2019) 18-19.

The UN, too, has held emancipatory promise for many. From its early days, the peoples of non-self governing territories have attempted to access the Trusteeship Committee as well as other bodies to air grievances regarding violations of self-determination and gain relief from the international community.[152] From the 1980s, the Working Group on Indigenous Populations provided a vessel for indigenous peoples' representatives to draw attention to state violations of their rights;[153] a similar function is today held by the UNPFII. The Human Rights Committee hears complaints from members of indigenous peoples.[154] Other examples of IOs that can act so as to remedy state violations of peoples' rights include the European Court of Human Rights ("IACtHR"), the Inter-American Court of Human Rights and the UNESCO WHC.[155]

2.4 Conclusion

These examples demonstrate that IOs and their member states are capable of interfering, by virtue of the exercise of public authority, with peoples—the activities of the former can directly and negatively affect the rights and interests of the latter. In addition, IOs can positively affect peoples' rights, including by reviewing and remedying states' violations of peoples' rights. It is at once this possibility of interference coupled with the emancipatory potential that constitutes the structural position of domination that IOs and other intergovernmental fora occupy, by virtue of the location of public authority within them. Peoples have often been and continue to be dominated and exploited by other groups using state power to do so; it is argued that, in addition, the power of IOs can serve to threaten self-determination. As Sinclair states, '[t]he proliferation of IOs and the expansion of their legal powers' may in fact be 'indistinguishable from [international law's] originary "civilising mission"'.[156] Yet alongside such concerns, the emancipatory promise of IOs for peoples has never entirely been lost.

One objection could be that these examples in fact represent the activities of states impacting on peoples by acting through IOs, and so it is the states-peoples relationship that is at issue, rather than a direct relationship between peoples and IOs. The states-peoples relationship remains pertinent, of

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[152] For instance, in the case of the Herero people of South West Africa, discussed below in Chapter 7, section 3.1.

[153] Burger notes that at its 1992 meeting, the WGIP heard 120 separate oral presentations on the situations of indigenous peoples in different countries: Burger (1994) 91.

[154] See e.g. HRC, *Apirana Mahuika et al v New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000); *Länsman et al v Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994) ("*Länsman*"). Although the Committee does not hear complaints from indigenous peoples as collectives: *Mikmaq Tribal Society v Canada*, Communication No. 78/1980, UN Doc CCPR/C/22/D/78/1980 (1980).

[155] Regarding the latter, see cases where indigenous peoples have sought help from the World Heritage Committee regarding state mismanagement of protected sites, e.g.: WHC, 'East Rennell (Solomon Islands) (N 854)' (2018) Decision 42 COM 71.41; 'Kenya Lake System in the Great Rift Valley (Kenya) (N 1060rev)' (2015), Decision 39 COM 7B.5; 'Kaeng Krachan Forest Complex, Thailand' (2015) Decision 39 COM 8B.5; 'Wood Buffalo National Park (Canada) (N 256)' (2015) Decision 39 COM 7B.18.

[156] Sinclair (2015) 447.

course: states do remain central to formal IGOs, and actions taken by states could go some way to remedying the problem described above.[157] However, IOs are in both a horizontal and a vertical relationship with states.[158] Although in some ways they are the agents of states, they are also capable of exercising power autonomously in their own right.

3. Existing law does not provide an adequate remedy

It has been demonstrated that IOs and peoples exist in a structural relation of domination of the latter by the former. This has the ability to affect the self-determination of peoples, meaning that a remedy is called for in accordance with the law of self-determination. This section will examine the existing law on the internal self-determination of peoples, finding that it is not an adequate remedy. It then assesses emergent norms and practice regarding civil society participation, particularly through non-governmental organisations ("NGOs"), and finds that such rules are not an adequate remedy either.

3.1 Domestic political participation of peoples

As discussed in Chapter 1, the law on self-determination has developed so as to provide for an internal aspect of self-determination, one element of which is the right of a people to participate in the political affairs of the state in which it is located. The existence of such participatory rights at the national level raises the question: are these not sufficient to protect peoples' rights in the global sphere? If a people is well-represented in the relevant domestic government, so such an argument would go, additional rights at the international level are not necessary. Rather, it is for the state to balance competing domestic interests. Indeed, to enable peoples' voice at both domestic and international levels—"two bites of the apple"[159]—could give them *too* much influence over international regulation.[160]

It is true that in some cases a state may be able to represent a people at the international level so as to protect its right to self-determination. This will be so where the interests of the state and the people broadly overlap on a given issue. Moreover, a people might hold a dominant, rather than marginal place in domestic society, leading to its preferred position being adopted as a matter of foreign policy. In such situations, the people would almost certainly not require an additional voice on the global stage. In the case of indigenous peoples, which are almost without exception in a non-dominant position, Charters proposes that they would need to provide FPIC to their representation by the state,[161] which indeed seems to follow from the thrust of the law relating on FPIC.[162]

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[157] See further, Section 4 of this chapter.
[158] See Daugirdas (2016).
[159] The phrase "two bites of the apple" was used in the context of NGO participation by Reinisch and Irgel (2001) 132.
[160] Bluemel (2005) 75.
[161] Charters (2010) 231, 238.
[162] Discussed in detail in Chapter 3, section 2.

However, in most cases participatory rights at the domestic level are not enough. This is so for several reasons. First, often the interests of a people do not align with those of the relevant state, meaning that the state's position in an international forum will be at odds with the interests of the people, even taking into account the people's right to participate within the state.[163] This can be seen in practice. In the *Softwood Lumber* dispute the USA alleged that a lower-than-market-value timber harvesting fee paid by Canadian lumber producers to the Canadian government constituted a subsidy inconsistent with WTO law. The position taken by the Canadian government in the WTO proceedings conflicted with that of the Interior Alliance, a group of indigenous nations in the midst of a decades-long legal battle for recognition of aboriginal title, from whose unceded traditional territories the timber was being harvested. Canada, in arguing that no subsidy existed, stated that the stumpage fee was not a "financial contribution" because the Canadian lumber harvesting companies had a property right to exploit the timber by virtue of their land tenures or licenses—a position that the Interior Alliance opposed due to the implications such an argument would have for indigenous land title.[164]

Of course, for any position a government takes on the international stage, there will invariably be some group of people who do not agree. It is in the nature of a diverse democracy that competing domestic interests must be balanced.[165] But a people, by virtue of its right to self-determination, is different from other domestic actors: it is not equivalent to a trade union, or an interest group, or a political party. Of course, it is not suggested here that such interest-based constituencies should not have a voice, or should necessarily have a lesser voice than indigenous peoples; in many cases IOs do enable the participation of these others, to a greater or lesser degree.[166] This work remains neutral on such questions. The point is that the right to self-determination distinguishes a people from other domestic constituencies.[167] In addition to having a claim to participate by virtue of being affected by a matter, or having relevant expertise to contribute, as any individual or group may have,[168] a people also has the right to self-determination.

Second, in many states it is the executive branch of government, rather than the legislature, which determines foreign policy and represents a state in IOs. Although the legislature may have input on decisions of considerable domestic importance—such as regarding wars—for individual citizens, there is 'no chain of election and recall running from citizens through their governments to the state delegates which will take the political decisions in the various forums of the organizations'.[169]

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[163] Indigenous peoples have noted this, see e.g. Navajo Nation Council (2009) 22-23.
US—Preliminary Determinations with respect to Certain Softwood Lumber from Canada, WT/DS236/R, (Panel) 27 September 2002 [4.117]-[4.118]; Manuel and Schabus (2005) 247.
[165] Habermas (1994) 5.
[166] See Section 3.2 of this chapter.
[167] Koivurova and Heinämäki (2006) 102.
[168] On affectedness as a criterion for voice in international institutions, see Sändig, Von Bernstorff and Hasenclever (2018).
[169] Peters (2016) 46.

Although this executive-led approach has advantages, including that executives are not bound to make majoritarian decisions and therefore are in principle able to protect minority interests,[170] in practice the isolation of the conduct of international relations from accountability to minority groups can carry corresponding risks. Forms of internal self-determination which provide enhanced participation in the electoral process or a level of autonomy will not assist a people to participate in the formation of foreign policy in matters affecting it.

Third, in practice, in a democratic state, a people may not in fact be able to exercise its right to internal self-determination in the first place. In addition, not all states are democratic. In these cases, internal political participation cannot assist a people to exercise voice in IOs which affect them.

Fourth, a people can exist across state boundaries. For instance, the territory of the Kurds, an ethnic group who have asserted a right to self-determination, covers parts of Turkey, Iran, Iraq and Syria;[171] the Sámi live in Norway, Sweden, Finland and Russia;[172] and the territory of the Inuit encompasses part of Russia, the USA, Canada, and Denmark-Greenland.[173] In cases like these it is unlikely that any one state can effectively represent the interests of the transnational people at the international level. The people may not be able to exercise their right to internal self-determination within all of the relevant states, and it is even less likely that the interests of the people and all of the relevant states will coincide.[174]

Fifth, a number of different peoples, or a class of peoples, located in different states may share a common interest. In this situation, a domestic balancing of interests within each state will tend to mean that the shared interest is systematically obscured from view at the international level. For instance, indigenous peoples in all parts of the world share common interests, and have found it useful to unite in a global movement to advocate at the international level.[175] Until indigenous peoples did so, they were largely disregarded by IOs.[176]

Sixth, IOs themselves delegate authority to organs, such as executive boards or secretariats, in which not all member states are included, so that even if a state is a member of an organization, it does not have a voice in all activity of that organization. While such a delegation of powers can be practical,[177] it means that these organs, which 'act on behalf of the international entity, and are not to be equated with the (collectivity of) states',[178] are less accountable to states. Secretariats, generally speaking, are

[170] Keohane, Macedo and Moravcsik (2009).
[171] Bring (1992) 159.
[172] Koivurova (2010) 204.
[173] Ibid 204.
[174] This point was made with respect to transnational interests generally in Reinisch and Irgel (2001) 132; Van den Bossche (2008) 720.
[175] On the global indigenous movement, see Lightfoot (2016).
[176] Åhren (2016) 8-37.
[177] Schermers and Blokker (2011) 307-308.
[178] Wessel (2016) 804.

capable of exercising considerable bureaucratic power independently of their member states, for instance by steering or manipulating the decision-making of states through the management and organisation of information.[179] If a secretariat's activities affect a people, a state may not necessarily be able to represent that people, even if its position aligns with that of the people. A secretariat should, in theory, be accountable to member states, but in practice this may not happen.[180]

Similarly, boards can exercise executive functions, and even independent governing and legislative functions within an institution.[181] The activities of executive boards can impact upon strangers to the organization.[182] In addition, while the boards of some organizations are constituted of the representatives of several member states, other boards, such as the European Commission and the Executive Council of the African Union, hold responsibility for specific policy areas;[183] still others, such as the Executive Board of UNESCO, sit as individual experts rather than state representatives.[184] For a people affected by the activities of a board to have a voice only within its own state is manifestly inadequate.

For all these reasons, so-called "internal" self-determination in the sense of the participation of peoples in domestic public affairs is not an adequate remedy to the problem of the dominance of peoples by IOs.

3.2 Civil society participation in international organizations

Is civil society participation a potential remedy? Since the 1990s, civil society participation in IOs has proliferated.[185] The UN Economic and Social Council ("ECOSOC") has provided for consultative status since its inception,[186] but in the late 20th century the number of NGOs taking up that status vastly increased.[187] NGOs have played influential roles in a number of international lawmaking processes.[188] The importance of public participation in, *inter alia*, decision-making relating to the environment has been progressively recognised.[189] Even organizations that have been much criticised

[179] Piiparinen (2016) 839-840, 843; Barnett and Finnemore (2004) 29-33; Barnett and Finnemore (1999); Kanninen and Piiparinen (2014).
[180] See e.g. Heath (2012).
[181] Wessel (2016) 814-820.
[182] See e.g. the Executive Board of the World Health Organization: Deshman (2012); the European Commission: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community ("Treaty on the Functioning of the European Union"), Articles 106(3) and 45(3)(d); and the Security Council: UN Charter, Article 25; Talmon (2005).
[183] Treaty on European Union, Article 17(3); Constitutive Act of the African Union, Article 14.
[184] UNESCO Constitution, Article V(2).
[185] Otto (1996); Spiro (1996); Cullen and Morrow (2001); Willetts (2002); Pearson (2004).
[186] UN Charter, Article 71.
[187] Pearson (2006) 245.
[188] Pearson (2006); Anderson (2000); Price Cohen (1990); Clark, Friedman and Hochstetler (1998).
[189] World Commission on Environment and Development, *Our Common Future* (1987) [107]; Rio Declaration on Environment and Development (13 June 1992) UN Doc A/CONF.151/26, Principle 10; Agenda 21: Programme of Action for Sustainable Development (14 June 1992) UN Doc A/CONF.156/26 e.g. Chapter 23; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

for lack of transparency and public accountability, such as the WTO, have gradually opened the door to a measure of civil society participation.[190]

A considerable bulk of literature advances intrinsic and instrumental justifications for NGO participation in global governance.[191] Intrinsically speaking, it is argued that civil society participation contributes to combatting the democratic deficit in global governance and improving the legitimacy of IOs.[192] More instrumentally, it is argued that NGOs are positioned to provide unique technical and practical expertise and information which governments cannot deliver, thereby improving the quality of outcomes; that NGOs can facilitate positive outcomes at meetings by researching and proposing political options and acting as bridge builders between different national positions; and that NGOs can monitor and report on domestic implementation of the outcomes of intergovernmental processes, as well as build domestic public support for such policies.[193]

Legally, it has been proposed that participation in international lawmaking is an individual human right, derived from article 25 of the ICCPR—the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives'—and also potentially from an emerging principle of CIL, and that this right should in practice be exercised through NGO participation.[194]

Although the participation of civil society, and individual participatory rights, are certainly valuable, as well as legally justifiable for the reasons cited above, it is not sufficient to remedy the problem of the domination of peoples by IOs, nor to enable peoples the full exercise of self-determination. This can be understood by reference to the political theory underlying group rights, outlined in the following subsection.

3.2.2 Liberalism, multiculturalism, and peoples' rights

Within domestic, democratic societies, there is a well-documented structural bias against non-dominant societal groups: 'whenever minorities exist, democracy is prone to undermine their interests'.[195] In an electoral political system in which all individuals enjoy formal equality, groups which have distinct interests from, but are numerically outweighed by, the rest of the population are persistently outvoted and hence under-represented. They are 'in a very real sense political captives of

Environmental Matters; UNECE, Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums (20 June 2005) UN Doc ECE/MP.PP/2005/2/Add.5.

[190] Sapra (2009) 90, 95; Sjöstedt (2012). Though see the more critical perspective taken by Hannah, Scott and Wilkinson (2017).

[191] Here the terms "NGO" and "civil society" are used interchangeably, as in much of the literature, although the latter category is broader than the former. On the idea of civil society, see Walzer (1995); Ehrenberg (1999). Some use the phrase "transnational actors" in order to not perpetuate the dichotomy of state and other: Pearson (2006) 75.

[192] Bischel (1996). Dunoff (1998) 435; Van den Bossche (2008) 720; Guzman (2004) 336-339; Charnovitz (2002) 317-318; Charnovitz (2011) 894-895, 904ff.

[193] Raustiala (1997); Dunoff (1998) 435-436; Van den Bossche (2008) 720.

[194] Maisley (2017).

[195] Benvenisti (1999b) 849. See generally, Van Dyke (1995); Kymlicka (1995); Young (1990).

the majority', who may monopolise political power with barely more than half of the votes.[196] Cultural factors also come into play: members of the majority are generally disproportionately represented in cultural elites, [197] and the "cultural imperialism" exercised by members of a more materially privileged, dominant group often leads to the elevation of their particular experiences and perspectives within democratic processes, at the expense of others.[198] In addition, the majority may view a minority group with resentment, further diminishing their power.[199] Hence, where structural inequalities exist, 'formally democratic procedures are likely to reinforce them'. [200] The purported neutrality of the state is in fact 'an affirmation of one particular way of life'.[201]

National judicial processes may, furthermore, fail to protect non-dominant minority groups, as such processes tend to be dominated by judges belonging to dominant societal groups; in addition, "national interests", as defined by majority-controlled political and governmental institutions, often prevail, or are at least accorded significant weight, in the courtroom.[202] The indeterminacy of law itself creates space for judicial and other forms of official discretion, which may be used by those in power to oppress others in the name of higher values.[203] The rule of law does not assist here, as it reproduces prior power configurations which privilege some and oppress others, 'while masking this precisely by presenting itself as value neutral'.[204]

While scholars initially conceived of this problem as relating to classical ethnic, religious and national minorities[205]—those 'discrete and insular minorities' referred to by the US Supreme Court in *Carolene Products*[206]—it is equally applicable to peoples within states, including indigenous peoples. The caveat must be added that a group which is in the numerical minority is not *always* powerless or discriminated against; indeed, powerful minorities can sometimes successfully influence domestic law and policy-making.[207] Political interest groups are sometimes minority groups[208] and, further, in some cases ethnic or racial minorities have been the dominant societal group, such as European colonial peoples in many parts of the world, white Afrikaners and English in South Africa under apartheid, the Tutsi in post-1994 Rwanda, and the Fulani in Nigeria.[209] To clarify, a given group may have a certain

[196] Benvenisti (1999b) 848-849; Miller (2001).
[197] Åhren (2016) 44.
[198] Young (1990) 183-184.
[199] Benvenisti (1999b) 848.
[200] Young (2000) 34.
[201] Addis (1992) 644-645.
[202] Benvenisti (1999b) 848, 850. See also Cover (1982); Ackerman (1985).
[203] On the indeterminacy of law, see e.g. Dorf (2003); Singer (1982). On the indeterminacy of international law, see e.g. Kennedy (1987b); Koskenniemi (2005).
[204] Klabbers (2006) 200.
[205] Van Dyke (1995) 32; Kymlicka (1995) 52.
[206] *United States v Carolene Products Co*, 304 US 144, 154-52 n4 (1938).
[207] See the discussion in, for example, Moore (2002); Verbeeten (2006); Mearsheimer and Walt (2006).
[208] On interest groups generally, see Grant and Maloney (2007).
[209] On the Fulani, see Osaghae (1998) 6. On the Tutsi, see Lemarchand (1994) 583. On dominant minorities in general, see Kaufmann and Haklai (2008) 747-753.

status (high or low), power (dominant or subordinate), and number (majority or minority), but the problem concerns those groups which are of low status or subordinate power—these often correlate—while being either a majority or minority in numerical terms. This thesis does not intend to bolster the position of already dominant minorities. While all peoples inherently hold the right to self-determination, meaning that in principle peoples which are dominant or form a majority within a state have a right to self-determination, in practice the specific rights only arise when there is a relationship of domination or oppression as between the state and the people.[210] This is evident in Kymlicka's framing of the problem:[211]

> A multination state which accords universal rights to all its citizens, regardless of group membership, may appear to be neutral between various national groups. But in fact it can (and often does) systematically privilege the majority nation.… All of these decisions can dramatically reduce the political power and cultural viability of a national minority, while enhancing that of the majority culture.

Classical liberalism, the traditionally dominant school of thought in political theory, structurally underpins the problem of the disregard of minorities within states. Liberalism, which in broad terms is premised upon the polity as formed by a social contract created between a number of individuals, does not adequately account for the existence of minorities, nor for the structural discrimination they face. In its uncritical acceptance of the culturally homogenous nation-state, classical liberalism as exemplified in the works of philosophers such as Thomas Hobbes, John Locke, JS Mill and Jacques Rousseau does not consider the 'heterogeneity of [hu]mankind and of the population of virtually every existing state'.[212] While liberalism was cognisant of the problem of the "tyranny of the majority",[213] in that democratic majority rule was 'not the government of each by himself, but of each by all the rest…the will of the most numerous or the most active part of the people',[214] liberalism's responses to this issue were characteristic of its atomic individualism in that they focused on *individual* rights and liberties as a counterpoint to the tyranny of the majority. There was no recognition of *groups* or *collectives* of individuals existing at a level between that of the individual and that of the state; if individual rights were protected, liberals assumed, minorities did not require further protection.[215]

That polities are not universal and unified and that non-dominant groups face institutionalised domination and oppression led to the development of a different theory of justice, multiculturalism.

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[210] Summers (2014) 55-60.
[211] Kymlicka (1995) 52.
[212] Van Dyke (1995) 31.
[213] On the tyranny of the majority generally, see Mill (2007) ch 1; Adams (1788) 291; Hamilton, Madison and Jay (1961).
[214] Mill (2007) 65-66.
[215] Hannum (1996) 57; Kymlicka (2007) 29-30; Kymlicka (1995) 2-3.

Recognising that group membership and cultural background is important to individuals, [216] and that the state cannot be neutral in practice but rather 'tends to allow the values and practices of the majority culture to dominate',[217] multiculturalism asserts the necessity of group rights. As such, it better accounts for cultural diversity and the interests of minority groups, without sacrificing individual freedom.[218]

A multiculturalist approach is evident in the account of procedural justice developed by Iris Marion Young, building on the work of Jurgen Habermas and Agnes Heller.[219] This account is particularly relevant for refuting the notion that individual rights to participation at the international level are sufficient for the protection of the right of peoples to self-determination. For Young, justice requires that everyone who follows a norm 'must in principle have an effective voice in its consideration and be able to agree to it without coercion';[220] a democratic decision is legitimate 'only if all those affected by it are included in the process of discussion and decision-making'.[221] Stressing that the bias against non-dominant groups can be counteracted 'only by acknowledging and giving voice to the group differences' within a democratic society, Young asserts that procedural justice requires that 'a democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged'.[222]

Multiculturalism thus conceptually underpins substantive and procedural group rights, including the rights of minorities as well as the rights of peoples to internal self-determination.[223] In response to the problem thus identified, minority rights emerged in international law—albeit framed as individual rights applicable by virtue of membership of a collective—in legal instruments such as article 27 of the International Covenant on Civil and Political Rights (ICCPR),[224] the European Framework Convention on National Minorities,[225] the UN Minorities Declaration,[226] the Lund Recommendations on the Effective Participation of National Minorities in Public Life,[227] and the OSCE Copenhagen

[216] Young (1990) 42-48; Kymlicka (2002) 221-222, 336-347; Young (1995); Van Dyke (1995) 49; Spinner-Halev (2006).
[217] Åhren (2016) 50. See also Spinner-Halev (2006) 550; Donders (2002) 41; Kymlicka (2002) 343-347; Kymlicka (1995) 108-115, 126-130.
[218] Kymlicka, (2002) 284-287; May, Modood and Squires (2004) 4.
[219] Young contrasted procedural conceptions of justice to the "distributive paradigm" of justice: while the latter defines social justice as the 'morally proper distribution of social benefits and burdens' and tends to ignore 'the institutional context that determines material distributions' including decision-making structures, the former focuses on procedural issues of participation in deliberation and decisionmaking: (1990) 16-34.
[220] Ibid 34.
[221] Young (2000) 23.
[222] Young (1990) 184.
[223] On group rights in general, see Van Dyke (1974) and (1982); Jovanović (2012).
[224] ICCPR, Article 27.
[225] Framework Convention for the Protection of National Minorities ("FNCM").
[226] GA res 47/135 ("Minorities Declaration").
[227] OSCE High Commission on National Minorities, Lund Recommendations on the Effective Participation of National Minorities in Public Life (5 September 1999) ("Lund Recommendations").

Document.[228] These documents contain, alongside more substantive rights, the rights of members of minority groups to participate in public affairs at the domestic level.[229] Internal self-determination, too, is underpinned by multiculturalism's recognition of the value of the autonomy and political participation of groups.

Returning to the global level, liberalism, in addition to being the dominant tradition of political philosophy supporting the emergence of the state, was also fundamental to the advent of the international legal system in the aftermath of the Peace of Westphalia and strongly influential in its subsequent development.[230] Publicists such as Samuel Pufendorf, Christian Wolff, and most notably Emmerich de Vattel developed theories of international law as a discrete body of law between consenting sovereign states,[231] which assumes the individual-state dichotomy, the coinciding of the nation and the state, and thus the erasure of other groups. In turn, the positivists of the long nineteenth century[232] built on this tradition of liberal thought to elaborate foundational doctrines of international law which have had continuing effects on the contemporary legal system.[233] These basic positivist doctrines, in particular that of sovereignty, were forged out of, and complicit in, the colonial encounter: sovereignty adhered only to civilised states, excluding 'uncivilised' non-European societies, which operated so as to 'legally account for the expansion of Europe'.[234] In this way, liberal thought carried through international legal positivism worked so as to exclude and erase from legal subjectivity or personality not only less powerful nations and ethnic groups within European states, but non-European peoples in general.[235] Liberalism later underpinned the rise of individual human rights, as well as self-determination in the decolonization period, in that while the notion of who could be sovereign had expanded, a self-determining "people" was viewed as the aggregate population of a state or territory, and human rights were only enforceable by individuals as against states.[236]

Liberalism has failed to protect group rights both domestically and internationally. Individual rights to participate in global governance, exercised through civil society representation, are similarly inadequate. Individual rights must be supplemented by group rights, both in terms of procedural and substantive rights. Yet while the rights of peoples are recognised in relation to states, this is not the case with respect to IOs. Theories of the participation of civil society framed in terms of individual

[228] CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) ("Copenhagen Document").
[229] See e.g. FNCM, Article 15; Minorities Declaration, Article 2; Lund Recommendations; Copenhagen Document [35].
[230] See generally Koskenniemi (2005) ch 2; Åhren (2016) ch 2.
[231] On Vattel generally, see Koskenniemi (2005) 108-122; Anaya (2004) 19-31; Åhren (2016) 12-13.
[232] See e.g. Westlake (1894); Wheaton (1866); Lorimer (1883); Hall (1894); Lawrence (1895).
[233] Anghie (2004) ch 2.
[234] Ibid 65. Generally see Angie (2004) 52-90; Åhren (2016) 13-14; Koskenniemi (2001) 127-128.
[235] Angie (2004) 52-107.
[236] Åhren (2016) 26-37.

rights to participate and shaped by liberal democratic values, if they do not account for group rights, reproduce the structural inequalities inherent in classical liberalism at the international level.

Indeed, the idea that in theory a focus on individual and civil society participation tends to obscure prior power dynamics and reproduce existing oppressions, therefore damaging the interests of non-dominant groups, is supported by reference to observed practice. Just as surface neutrality, or formal equality means that participants from dominant groups in practice have more influence in local and national political participation as described above, the same dynamic occurs in global governance. In IOs that allow observer participation, many more NGOs from the Global North participate than NGOs from the Global South.[237] The former have much greater capacity and resources, and it is likely that their representatives would be taken more seriously by the delegates of powerful states due to identity factors similar to those which play a part at the local level.

In summary, the idea of an individual right to participate in the international legal order, exercised through NGO and civil society participation, is underpinned by liberalist political philosophy which has been shown to be inherently flawed with respect to the interests of non-dominant minority groups. To account for group interests, multiculturalism informs us, substantive and procedural group rights are required—in both domestic and global governance. The importance of individual participation in the international legal order, for other reasons, is certainly not disputed here. However, it should be supplemented by procedural rights for non-dominant minority groups.

3.2.3 Peoples are not equivalent to NGOs

In addition to the concerns drawn from political philosophy, there remains a fundamental distinction between self-determining peoples and the memberships of NGOs and other civil society groups. As Koivurova and Heinamaki write:[238]

> It would seem fair to distinguish between indigenous peoples and other groups when it comes to representation in international law: if nothing else, indigenous peoples' organisations represent peoples, not interest-based constituencies such as the members of environmental organisations.

International law has agreed that a "people" is a kind of group deserving of extra protection. While some may wonder at the underlying reason—why, after all, should international law care about groups,[239] let alone groups of this specific kind—the fact remains that a people entitled to self-determination is not equivalent to an NGO.[240] The rationale for NGO participation is often argued to

[237] Smith and West (2006).
[238] Koivurova and Heinämäki (2006) 102.
[239] Sands (2016) xxix ('Does it matter whether the law seeks to protect you because you are an individual or because of the group of which you happen to be a member? That question floated around the room, and it has remained with me ever since').
[240] Cambou (2018) 42; Human Rights Council, 'Ways and means of promoting participation at the United Nations of indigenous peoples' representatives on issues affecting them' (2012) UN Doc A/HRC/21/24

include their ability to provide expertise and knowledge not otherwise available to global governance bodies—such as environmental organisations holding specialised technical information. Such a rationale does not apply, at least in the same way, to peoples. Many indigenous peoples have a history of self-governance and of entering into relations with states as sovereign nations in their own right.[241] Furthermore, the representatives of indigenous peoples are generally accountable to the members of the indigenous people, who have elected or appointed them, unlike NGOs in general.[242] This is not to say that peoples should necessarily be entitled to a level of participation over and above that of NGOs, or that of other groups and individuals. It is merely to suggest that the underlying reasons justifying participation are different, and may therefore warrant different forms of participation in different circumstances. Unlike cases should not be treated as like.

In addition, observer mechanisms for NGOs are often not accessible to indigenous peoples, as discussed in Chapter 6. In brief, indigenous peoples are often not constituted as non-governmental organisations; indeed, many indigenous peoples' organisations can be said to be governmental in nature, so that indigenous peoples may be unwilling to seek observer accreditation even if they are technically eligible. They may not meet the requirements for accreditation, due to the poor fit between traditional organisational and governmental structures and the requirements designed for Western NGOs.

4. Relations between international organizations and peoples justify additional remedies

This chapter has so far demonstrated that public authority has shifted from the national level to the global level. IOs and other global governance bodies have accrued considerable public power, and their activities can directly affect peoples. There is a structural relation of the dominance of peoples by IOs and states acting collectively through them. In this light, internal self-determination in the sense of political participation in, or autonomy from, national governments is not sufficient to protect the right of peoples to self-determination. Nor is civil society participation in global governance an adequate means by which a people can self-determine.

A further evolution in the law of self-determination is therefore warranted. By reference to Chapter 1, the law of self-determination has proved its dynamism; it has expanded to encompass additional facets as required to remedy specific situations posing a threat to the ongoing process of self-determination. It is apparent that the state-people relationship is not the only relationship that is relevant to a people's exercise of its right to self-determination. Also pertinent is the relationship

("Human Rights Council, Participation Report") [9]; Navajo Nation Council (2009) 23; Grand Council of the Crees, Letter to Claire Charters (2012), accessible at https://ohchr.org, 1.
[241] See e.g. Navajo Nation Council (2009) 24-32.
[242] Cambou (2018) 42.

between peoples and IOs, as well as states acting through such organizations. This is a *sui generis* relation requiring a remedy, which the law of self-determination can and should evolve to provide.

4.1 A right of peoples to participate in global governance

As discussed in Section 3.2.1 above, the procedural rights of non-dominant peoples are necessary to protect their substantive rights. An individual right of members of peoples to participation is not sufficient. It is therefore submitted that the law of self-determination supports a right of peoples to participate in global governance. Alongside and in addition to rights to political participation in national governance, peoples should have, by virtue of the principle of self-determination, the right to participate internationally. The remainder of this chapter will discuss the scope of the right and its corresponding obligations, the question of who may exercise the right, as well as its implementation and limitations.

At the risk of introducing unnecessary confusion with existing terminology, this right can be viewed as the "external" aspect of self-determination's participatory element, by reference to the state. Just as peoples have the right to participate in national public affairs ("internal" to the state), this right would protect their participation externally, in global governance.[243] Similarly, some might choose to frame it as an element of "external self-determination" more broadly.[244] However one looks at it, the right is aimed at remedying the problem, identified and outlined above, of IOs' domination over, and disregard of, peoples.

Of course, such a right would not constitute the entire content of self-determination. As Xanthaki notes, states are 'eager to 'fill' the meaning of the right to self-determination with democracy and participation, as an attempt to set the external aspect of the right – and secession – aside'.[245] But as seen in Chapter 1, the law of self-determination is multifaceted; while a position is not taken in this work on whether a right to secession exists, the existence of a participatory element does not preclude the possibility, nor the existence of other political or economic rights that may fall under the broad umbrella of self-determination.

In many cases the right will require participation in a reactive sense: for instance, an IO in the process of making a decision will be obliged to give an affected people the opportunity to be heard. States carrying out intergovernmental negotiations on an issue of fundamental concern to indigenous peoples will be required to enable the participation of indigenous peoples' representatives. An international court making a decision affecting a people that is not a state will have a duty to ascertain that people's

[243] Cambou (2018) 27-28.
[244] van Walt van Praag and Seroos (1999) 29.
[245] Xanthaki (2007) 162.

views and wishes—which does not necessarily imply that the affected people require standing as parties.

But the right to participate may also require opportunities for proactive participation: the initiation by a people of their own participation. For instance, taking into account the potential for IOs to help peoples realise self-determination, peoples require a forum at the international level by which they may, upon their own initiative, raise concerns about violations of their rights by states. For international courts and tribunals, this means standing as a party able to initiate proceedings, rather than the ability to participate as an *amicus curiae* or intervener.

4.2 The identity of the right-holders

So far this work has deliberately left the term "peoples" unexplained. I do not intend to offer a definition; to fully explore the concept would require its own full-length study.[246] Although some would emphasise the necessity of defining the unit which is entitled to exercise a right in order to make that right operational,[247] in light of self-determination's evolving, remedial, process-oriented nature and the ways in which the "peoples" who can invoke it are an expanding category, the term's very uncertainty is necessary to its emancipatory potential. Rather, a constructivist approach is more appropriate. Such an approach recognises that a people is not an 'organic whole preceding its self-reflective and…political coming into being'.[248] The problem with such a 'primordialist or essentialist' approach is that simply because a group of people may share some characteristic, such as a shared territory, culture or language, they might not necessarily seek to self-determine.[249] In addition, in the words of Yael Tamir:[250]

> all attempts to single out a particular set of objective features – be it a common history, collective destiny, language, religion, territory, climate, race, ethnicity – as necessary and sufficient for the definition of a nation have ended in failure. Although all these features have been mentioned as characteristic of some nations, no nation will have all of them.

Rather, a constructivist approach, recognising that a nation is a construct existing 'when its members believe that it does',[251] holds that a people is constructed by its own members 'dialogically and politically', and 'is always the result of a political reinterpretation of [characteristics such as ethnicity] as founding a particular distinct collective that aspires to self-determine'.[252] As Frédéric Mégret puts it:[253]

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[246] For existing studies, see e.g. Summers (2014) 91-129; Cassese (1995) 141-146; Knop (2002) 51-65.
[247] See e.g. Lansing (1921b) 7; Jennings (1956) 55-56; Pomerance (1982) 311.
[248] Mégret (2016) 55.
[249] Ibid 55.
[250] Tamir (1995) 65.
[251] Miller (1993). Also see Anderson (2006); George (1996).
[252] Mégret (2016) 48, 56.
[253] Ibid 57.

> the existence of a people does not precede their political coming into being. The business of guaranteeing the right to self-determination cannot be first and foremost that of finding peoples so that they can be allowed to engage in a politics of their own. Rather, the concept of what constitutes a people is deeply enmeshed in the actual manifestation of self-determination by particular peoples, and the search for its political recognition.

The notion of a "people", therefore, is not 'sharply defined by universal applicable criteria', but embodies 'a continuous process in which claims and practice in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application'.[254]

It is worth noting in the case of indigenous peoples that although no universally accepted definition exists[255] and indigenous peoples themselves have resisted attempts to define them,[256] of assistance are the working definition in the Martínez-Cobo report[257] as well as the indicia laid out in the International Law Association's 2011 report[258] and the statement of coverage in ILO Convention No. 169.[259] It is a matter of consensus that indigenous peoples are "peoples" with the right to self-determination.[260]

A "firewall" between "peoples" and "minorities" has long existed in international law—the former entitled to self-determination and the latter merely entitled to minority rights[261]—largely motivated by fears regarding secession.[262] However, the distinction between peoples and minorities may be more illusory than real,[263] especially in light of the extension of self-determination to indigenous peoples,[264] and as demonstrated in recent research showing that minority rights and "internal self-determination"

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[254] Kingsbury (1998).
[255] The drafters of the UN Declaration on the Rights of Indigenous Peoples were unable to agree on a definition: on the drafting history of this issue, see Daes (2011) 11-24 and (2009) 54-55, 68; Henriksen (2009) 79-80. Note Castellino and Doyle propose that a clear idea of who is covered can be inferred from the substantive text: (2018) 30-36.
[256] Castellino and Doyle (2018) 28.
[257] Martínez Cobo report [379]-[382]. On the definition as forming part of international customary practice, see Castellino and Doyle (2018) 19. For criticism of the Cobo definition, see Kingsbury (1998) 420.
[258] International Law Association, *Sofia Conference: Rights of Indigenous Peoples: Final Report* (ILA 2012) 2.
[259] Article 1(1). Also see World Bank, *Operational Manual: OP 4.10 – Indigenous Peoples* (World Bank 2005) ("OP 4.10") [3]-[4] and World Bank, *The World Bank Environmental and Social Framework* (World Bank 2017), Environmental and Social Standard 7, ("ESS") [6], [8], [9].
[260] See e.g. Weller (2018).
[261] Hannum (1998) 774; Raday (2003); Franck (1993) 20; Higgins (1995) 124; Heraclides (1991) 27.
On the definition of a "minority", see Capotorti F, 'Study on the rights of persons belonging to ethnic, religious and linguistic minorities', UN Doc E/CN.4/Sub.3/384/Add.1-7 (1977) [568]. See also Deschênes J, 'Proposal concerning a definition of the term "minority"' (1985) UN Doc E/CN.4/Sub.2/1985/31 [181]; Commission on Human Rights, 'Compilation of proposals concerning the definition of the term "minority"' (1986) UN Doc. E/CN.4/1987/WG.5/WP.1.
[262] See e.g. in the context of the drafting of the Human Rights covenants: Thornberry (1989) 880.
[263] Thornberry (1989) 887; Wright (1999) 607; Senaratne (2013) 313; Sinha (1973) 272-273; Brownlie (1988).
[264] Thornberry (2002) 54; Hadden (2007) 296; A Eide and E-I Daes, 'Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples' (2002) UN Doc E/CN.4/Sub.2/2000/10; Allen (2006) 335-336, 338.

cover substantially the same ground.[265] Further support for this idea is found in the argument that minority rights are themselves justified as a compensation for the exclusion of some groups from being able to hold sovereign power by way of external self-determination.[266] Indeed, in the context of participatory rights, it is conceivable that the distinction could break down: a connection to territory is not needed, and so the right could potentially be exercised by classical minorities and other non-territorial groups.[267] However, for the purposes of this work it is not necessary to decide the point.

The distinction between indigenous peoples and other peoples entitled to self-determination is relevant for the exercise of the right. Under the accepted position in international law, the right of peoples—in the classical sense—to self-determination includes the right to external self-determination, which can be exercised by way of secession from a state.[268] By contrast, for indigenous peoples, the accepted position is that self-determination operates internally, and by way of rights related to lands, natural resources and culture.[269] These differences have implications for the matters in which participation is to be exercised. Below it will be argued that whether or not a people is affected by a given global governance process, and the degree to which they are affected, is one determinant of whether and how the right is to be implemented.[270] On this basis it can be said that, non-self-governing territories, for instance, have a strong claim to participate in UN processes regarding decolonization under the UN Charter, such as the proceedings of the Trusteeship Committee. Indigenous peoples will have a strong claim to participate in, among other things, standard-setting processes affecting the environment and natural resources. This thesis does not intend to "group together" indigenous and other peoples in respect of the implementation of the right.

4.3 Who represents the right-holder?

A related issue is, who is the proper representative to participate on behalf of a people in a global governance process, and who should determine such a question? The problem of who is representative of a given people may well be a fraught one characterised by internal politics: think of the competing peoples' organizations in South West Africa, for instance.[271] States have expressed a concern, in the context of peoples' participation in IOs, to ensure that peoples' representatives are legitimate representatives of the people.[272]

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[265] Barten (2015).
[266] Macklem (2008b) 548-550 and (2015) 103-131.
[267] Klabbers (2006) 202-203. On why the distinction should break down, see Kymlicka (2011) 199-207.
[268] At least in the case of non-self-governing territories.
[269] Among others. See further Chapter 3, Section 2.2.
[270] See section 4.5 below.
[271] Mentioned below in Chapter 7, Section 3.1.
[272] See e.g. in the context of the WIPO IGC: IGC, *Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (WIPO 2011), Comments of the Government of Mexico, 1-2.

It is for a people itself to determine who is representative of it.[273] In the domestic context, the dangers of allowing a state to decide who to "consult" are well recognised.[274] At the global level, therefore, it should be up to a people to decide who participates on its behalf in a matter affecting it. In general peoples have their own organizations and institutions with internal structures and mechanisms for ensuring accountability to their members, as well for electing leaders and deciding which individuals may represent the people externally. Some peoples' organizations, such as national liberation movements and indigenous peoples' organizations, are already well recognised by the international community, such as the Palestine Liberation Organization ("PLO") as representative of the Palestinian people, the Front Polisario for the Sahrawi people of Western Sahara, the Sámi Parliaments for the Sámi, the Inuit Circumpolar Council for the Inuit people, or the Confederation of the Six Nations for the Iroquois. Peoples' representative organizations, like any layer of government, may well face challenges in fairly representing all individuals and minorities within the group; the existence of an "official" representative voice may close off 'further, alternative or subaltern voices' that are silenced due to the idea of a singular, reified "people".[275] But this issue is common to all entities purporting to represent a large number of people, and is not a reason to differentiate peoples' participation from that of states. There may be hard cases where an IO is faced with two or more entities both purporting to represent the same people; in such a situation, if there is doubt as to who is the proper representative the answer could be "both". States and IOs should not use representativity concerns as a pretext for exclusion; this is an unavoidable risk.

The matter of representativity gains an additional dimension when an activity of an IO represents a class of peoples: when WIPO, for instance, is setting standards regarding the traditional knowledge of indigenous peoples, who is properly to represent the indigenous peoples of the world? This concerns a relation between states and an IO, on the one hand, and a class of peoples, on the other. Here, too, indigenous peoples should decide amongst themselves who is qualified to represent them: in cases like this, indigenous peoples have formed their own coalitions and caucuses with internal organizational structures to determine who is to participate on behalf of the global class.[276]

4.4 Obligations

Who holds correlative obligations? The existence of a collective right requires some person to be subject to a duty.[277] As noted by Judge Weeramantry in the *East Timor* opinion, the notion of duties corresponding to the right of self-determination 'has not received the same degree of analysis' as the right, even though '[t]he existence of a right is juristically incompatible with the absence of a

[273] See e.g. American DRIP, Article I.2. See also Castellino and Doyle (2018) 28, 34.
[274] Arnstein (1969) 220.
[275] Making this point in relation to citizen participation in government consultations is Morison (2017) 657-658.
[276] As will be discussed in Chapters 4, 5 and 6.
[277] See Raz (1988) 208; Jovanović (2012) 196. On the correlativity of rights and duties, see Hohfeld (1913) 33.

corresponding duty' and to argue otherwise is 'to empty the right of its essential content and, thereby, to contradict the existence of the right itself'.[278] The theory of IOs covered earlier in this chapter, by which they are both, to some extent, the agents of states, as well as autonomous actors in their own right, suggests that correlative obligations should be held by both states and IOs. This dual nature means that both states and IOs should hold obligations in order for the right to be effective. Each of these obligations will be explored in turn.

4.4.1 Obligations of states

As self-determination is a human right, it is appropriate to draw on international human rights law in discussing the scope of the obligations. It is commonly said that states are obliged to 'respect, protect and fulfil' human rights: the first entailing a negative obligation, the second an obligation to protect rights-holders from violations of the right by others, and the third an obligation to take positive steps to enable enjoyment of rights.[279] Of this triumvirate, the third element is most relevant for our purposes. As expressed by the Human Rights Committee, the obligation of states to respect the rights contained in the ICCPR and ensure them to all individuals in their territory and subject to their control contains, in addition to a negative element, a positive requirement to adopt 'legislative, judicial, administrative, educative and other appropriate measures to fulfil their legal obligations'.[280] Depending on the circumstances, this may require a state to fulfil its obligations on either or both of two levels: enabling a people to participate as part of the state's own delegation; and promoting the participation of peoples in IOs more generally.

For a state which has within its jurisdiction a people affected by the activities of a given IO, or by a matter under negotiation in an intergovernmental forum, fulfilling the right may require the state to include a representative of the affected people on its national delegation. In proceedings of an international court or tribunal affecting a people who are not entitled to standing as parties, fulfilling the right could require that a state, party to the case or with the ability to intervene, incorporates submissions made by a representative of the affected people into its own submissions. For example, as will be seen in Chapter 7, WTO dispute settlement panels, empirically speaking, only consider *amicus curiae* submissions when a state party appends them to its own submissions: in such circumstances, states parties have a duty to append *amicus* briefs of affected peoples or otherwise include them as an integral part of their own submissions.[281] A state may also discharge its obligation in international courts and tribunals by including peoples' representatives as speakers during oral proceedings.[282]

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[278] *East Timor*, Dissenting Opinion of Judge Weeramantry, 122-123.
[279] See e.g. Mégret (2010) 101-103.
[280] HRC, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [7]-[8].
[281] See below Chapter 7, section 2.
[282] See, for instance, the *Chagos* advisory proceedings, discussed below in Chapter 7, section 3.3.

The *erga omnes* nature of self-determination suggests that the right is not just opposable against the state or states in which a people finds itself. Rather, all states have an obligation to promote the creation of opportunities within IOs, other intergovernmental fora and global governance bodies for peoples to participate in matters affecting them. States collectively have substantial control over the functioning of IOs, and have it within their power to amend procedural rules, create new bodies and mechanisms, or take other actions as necessary to enable the participation of peoples in existing IOs. Of course, no one state can do this alone, so all states are obliged to constructively work towards the fulfilment of the right, for instance by making proposals, making submissions in support, voting, and taking other actions as appropriate. When creating a new IO, states would be obliged to provide for the participation of peoples on the activities of the organization affecting them within the relevant constitutional documents and rules of procedure.

4.4.2 Obligations of international organizations

The "respect, protect, fulfil" framework can be applied by analogy to IOs—albeit, as will be discussed in Chapter 3, it is difficult on a strictly doctrinal basis to assign obligations to IOs. In theoretical terms, the obligations of IOs will come into play in (at least) three scenarios. Firstly, when an IO by some activity is affecting a people which is not located within any of its member states. Secondly, when a subsidiary organ of an IO, the membership of which is not representative of all member states of the organization, affects a people. Thirdly, in a situation where a state has not heard or has not adequately represented an affected people. Additional situations may also exist. When one of these conditions is met, the IO has an obligation to enable the people to participate. Some considerations for how this obligation should be implemented are laid out in Section 4.5 below; in short, it depends on how seriously the people is affected.

4.4.3 Obligations of others

In theory, global governance bodies which do not qualify as formal IOs—private or informal entities—should also hold obligations. As a matter of doctrinal public international law, the existence of such obligations are even harder to ground than those of IOs, so the matter will not be dwelled upon here. The bulk of this study will focus on the right of peoples to self-determination as against IGOs, as well as corresponding obligations of those organizations. The following chapters will assess the extent of doctrinal support for the right of peoples to participate in global governance and the corresponding obligations of states and IOs, and survey the practice of states and IOs in this regard. In this latter exercise, the practice of informal organizations, such as the Arctic Council, will become relevant to the extent that it adds to evidence of an existing norm and provides a model for the direction in which the practice of, and CIL applying to, states and IOs might evolve.

4.5 Implementation and limitations

When considering the implementation of the right, two questions go hand in hand. First, what degree of participation is necessary to fulfil the right? Second, what limitations ought to apply to the exercise of the right? These questions will be examined in turn.

4.5.1 Level of participation required

It has rightly been pointed out that "participation" is an ambiguous term that 'can seem to mean everything and nothing'.[283] In the context of the right above outlined, what does participation entail? What degree of participation is required for the exercise of the right? One could draw an analogy with international instruments on the participatory rights of indigenous peoples to say that participation must be "full and effective",[284] but to do so simply raises the question of what constitutes "full" and "effective". A better approach is to return to the theory of self-determination. By its logic, and at the risk of sounding circular, the answer is: that which enables the people concerned to self-determine. This will vary according to the situation, and can be expressed as what Claire Charters calls a "contextual-participation approach" which she defines as a 'scale of participation ranging from the high-end, full participation, like that of states, with indigenous peoples' consent sought, to lower-end participation, such as formal avenues for input'.[285] The extent to which a people are affected by the matter at hand in a given governance process will affect the degree of participation required to implement the right: if the matter affects the core of a people's ability to determine their own destiny, a greater degree of participation will be required for states and IOs to discharge their duty; on the other hand, if peoples' issues are 'only one of many concerns, and, for example, do not impinge directly on their right to self-determination', lower levels of participation are appropriate.[286] For indigenous peoples, at least for profound violations of their rights, their free, prior and informed consent may be the level of participation that is appropriate.[287]

Further light can be shed on the standard of participation required to fulfil the right by reference to Sherry Arnstein's typology of participation,[288] which although first articulated in 1969 'retains considerable contemporary relevance' in the social sciences.[289] Arnstein's theory, while developed in the context of the participation of citizens in local government, is readily adaptable to the global

[283] Croft and Beresford (1992-1993) 20.
[284] E.g. Article 19 UNDRIP. Such instruments are discussed further in Chapter 3.
[285] Charters (2010) 222-223.
[286] Charters (2010) 222.
[287] See Chapter 3, Section 2 below on free, prior and informed consent.
[288] Arnstein (1969).
[289] Cornwall (2008). Arnstein's typology is widely used in current social science literature, see e.g. Hurlbert and Gupta (2015). For criticism of Arnstein's typology, see e.g. Tritter and McCallum (2006); Collins and Ison (2006).

governance context.[290] The typology is laid out as a ladder, each rung representing a level of participation. In order from lowest to highest, the rungs are "manipulation", "therapy", informing", "consultation", "placation", "partnership", "delegated power", and "control".[291] Arnstein defines participation as 'the redistribution of power' that allows those marginalised to be included in determining policies and decisions.[292] The lowest rungs of the ladder—"manipulation" and "therapy"—do not meet this definition. By the former, Arnstein means participation enabled by the decision-makers or power-holders for the sole purpose of engineering support—participation as a vehicle for public relations.[293] By "therapy", Arnstein means "clinical group therapy" to "cure" citizens of their ills; a useful analogy at the global level is a policy of "engagement with" indigenous peoples that is in fact a policy of integration and assimilation.[294] Adapting this typology to the context of the right to participate in global governance, then, indicates that the right to participate requires a level of participation that is higher than manipulation or assimilation. If, for instance, an IO sets up an advisory committee with the sole purpose of manipulating support for a decision or policy that has already been made, and with no other power than to "rubber-stamp" the outcome,[295] it is highly unlikely that the organization could be regarded as having discharged its obligation.

The middle rungs of the ladder, according to Arnstein, represent 'degrees of tokenism'.[296] "Informing" entails a one-way flow of information between the IO and an affected people.[297] While information disclosure is often necessary for effective participation, alone it will hardly ever meet the minimum standard of participation required to fulfil the right. Just higher on the ladder are "consultation" and "placation", and here is where I differ from Arnstein. She suggests that consultation, i.e. the invitation of views, is a mere 'window-dressing ritual' offering 'no assurance that views will be taken into account' and in which participants 'are primarily perceived as statistical abstractions'.[298] Placation, similarly, for Arnstein consists in a few "hand-picked" participants being placed on a public body: if such participants are unaccountable to a constituency and if the usual players hold the majority of seats, the participation will not be effective.[299]

By reference to the discussion of "affectedness" above and below, I suggest that consultation in some circumstances may suffice to fulfil the right—for instance, where a people is only one of several

[290] I surveyed the literature on participation and considered a range of typologies, see e.g. Pretty (1995); White (1996); Farrington (1998); Goetz and Gaventa (2001); Lawrence (2006). Arnstein's typology was chosen as it is the most relevant to participation in governance processes, as opposed to, for instance, participation in community development, and therefore is the most useful for this study.
[291] Arnstein (1969) 217.
[292] Ibid 216.
[293] Ibid 218.
[294] For an example of an integrationist instrument, see ILO No 107.
[295] Arnstein 218.
[296] Ibid 217.
[297] Ibid 219.
[298] Ibid 219. See also Cornwall (2008) 270.
[299] Ibid 220.

affected groups, or where a people is only indirectly or mildly affected by the outcome of the process. Where a people is individually and fundamentally impacted by the matter at hand, conversely, consultation would likely be insufficient. Similarly, while having one or two representatives on a decision-making committee may not guarantee a people affected by its decisions control over the outcome, it is equally not appropriate for the people to have a majority of seats where, for instance, the people is only affected by one out of a number of matters considered by the committee, or where the people is one of a number of affected groups.

The top three categories of Arnstein's typology are "partnership", "delegated power" and "control". Partnership refers to participatory mechanisms by which an IO or states agree to share decision-making responsibilities so that a people can 'negotiate and engage in tradeoffs with' states and other power holders.[300] Delegated power consists in a people holding 'dominant decision-making authority' over a matter, for instance through holding a majority of seats on a decision-making board, or a separate and parallel body with veto power over another.[301] Control, Arnstein says, is even more extensive: 'full control guaranteeing that participants can govern an institution' and be in full charge of its policy and management.[302] Evidently, full control by a people over an IO making decisions relevant to them will be warranted only in extremely rare situations. Delegated power, too, will be appropriate in a limited range of circumstances where a people (or a class of peoples) is the only entity substantially affected by the decisions of a body. One such circumstance is in regard to a subsidiary body of an international financial institution that is tasked with making decisions on allocating funding specifically to indigenous peoples as the recipients. In that situation, the right to participate would be fulfilled if representatives of indigenous peoples held a majority of seats on the decision-making committee. A level of participation corresponding to Arnstein's notion of partnership will more often be required to fulfil the right, although by no means in all circumstances.

The question of what form and level of participation will be sufficient to fulfil the right will ultimately fall to be determined on a case-by-case basis. The categories adapted from Arnstein are neither precise nor mutually exclusive; however, they are useful in drawing attention to the 'critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process'.[303]

4.5.2 Limitations

Self-determination and its derivative right to participate are human rights, and therefore subject to limitations. Although the right to self-determination is often framed in absolute language or limited

[300] Ibid 221.
[301] Ibid 222.
[302] Ibid 223.
[303] Ibid 216.

only by the territorial integrity of states,[304] it is not an absolute right since it does not have the purpose of protecting the personal or physical integrity of the group.[305] Therefore, in recognition that peoples do not exist in a vacuum but consist of, and are part of a broader society of, individuals and other groups, limitations on the right to participate are justified in order to protect the rights of others or the general interests of society.[306] For instance, the exercise of the right may be limited to allow other individuals or entities to also exercise participatory rights: for instance, if many different individuals and groups are potentially affected by a standard-setting exercise of an IO, such as the general standard-setting activities of the FAO, it would be appropriate for affected peoples to exercise a level of participation similar to others who are affected.

The level of affectedness as discussed in the preceding section may, conceptualised in another way, also be framed as a limitation on the scope of the right, in accordance with the need to protect the general interests of society. That is, if a people is not at all affected by the activities of a given organisation, or in a given matter, their right to participate will be limited accordingly. I frame the issue of affectedness as a limitation to the right as opposed to a core qualification—stated in another way, I formulate the right as one to "participation in global governance" rather than a qualified right to "participate in matters affecting them"—because of the notion of dominance held by Young and Pettit under which positive interference is not required for a relationship of domination to exist. In other words, it is not required that an IO be carrying out an activity that affects peoples. Peoples have an inherent right to participate by virtue of the structural relation of domination, regardless of the degree of actual interference. However, the exercise of the right is constrained by reference to the protection of the rights of others and the general societal interest.

A second limitation evidently applies in respect of peoples who are well-represented by states. If, as discussed above in Section 3.1, a people is fully represented by a state in a global governance process which affects the people—and, in the case of an indigenous people, the people have given free, prior and informed consent to their representation by the state—this will be a limitation upon the right. Put another way, only if a people has gone unheard at the domestic level on a given matter will the right to participate in global governance become operative.

4.6 Rights to transparency and access to justice

In addition to participatory rights, other rights also logically flow from the right of peoples to self-determine in relation to IOs. The right to transparency—or access to information—is one.

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[304] See e.g. common Article 1 of the Human Rights Covenants; Friendly Relations Declaration; UNDRIP, Articles 3 and 46.
[305] Absolute human rights—such as the right of freedom from torture and cruel, inhuman or degrading treatment, and the prohibition on genocide—have this characteristic in common. McCorquodale (1994) 874-875.
[306] McCorquodale (1994) 875-878.

Participation is so entwined with transparency and access to information that it is difficult to unpick one from the other: for the former to be effective, the latter is nearly always required. The right of access to justice is another.[307] Together, participation, transparency and access to justice form a "procedural triad", any element of which is difficult to disentangle from the others.[308] This study focuses the right to participation, and in the following chapters it will proceed to assess the extent of doctrinal support for this right, as well as the extent to which it is reflected in the practice of IOs. Accordingly, there is not the scope nor the space to do the same for transparency and access to justice. This could be an appropriate subject for future work.

4.7 Addressing concerns

Concerns and potential dangers should be addressed at this stage.

The first is practical. The cost and delay incurred by states and IOs in the course of enabling participation is not to be dismissed out of hand. Certainly, participation carries a cost, for instance in terms of funding attendance of peoples' representatives at meetings. Hearing additional voices may well mean that policy and decision processes take longer than they otherwise would. The effective exercise of the right may even oblige states and IOs to engage in building the capacity of would-be participants to enable them to navigate the complexity of global governance processes, adding further cost. However, on balance this concern is outweighed by the intrinsic importance of self-determination, as well as the likelihood that the quality of the decisions reached will be higher.[309] In addition, in practice costs may be kept to a minimum by the use of procedural rules surrounding matters like speaking times, submission lengths, and the like. States may also find that the information

[307] For an example of where a people may be able to access justice as against an international organization, see cases where indigenous peoples have attempted to gain standing in the courts of the European Union in order to annul EU decisions adversely affecting them: Case T-18/10, *Inuit Tapiriit Kanatami v European Parliament*, (Judgment of the General Court), 6 September 2011, OJ C 319; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, (Judgment of the Court, Grand Chamber), 3 October 2013, ECLI:EU:C:2013:625; Case T-526/10, *Inuit Tapiriit Kanatami v European Parliament*, Judgment of the General Court, 25 April 2013, EU:T:2013:215; Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v European Commission* (Judgment of the Court, Fifth Chamber), 3 September 2015, EU:C:2015:535; Case T-512/12, *Front Polisario v Council of the European Union* (Judgment of the General Court, Eighth Chamber), 10 December 2015, ECLI:EU:T:2015:953; Case C-104/16 P, *Council of the European Union v Front Polisario* (Judgment of the Court, Grand Chamber), 21 December 2016, ECLI:EU:C:2016:973; Case T-180/14, *Front Polisario v Council of the European Union*, (Order of the General Court, Fifth Chamber), 19 July 2018, ECLI:EU:T:2018:496; Case T-275/18, Action brought on 24 April 2018 – Front Polisario v Council, OJ 2018/C 268/47; Case T-376/18, *Front Polisario v Council of the European Union* (Order of the Tribunal, Fifth Chamber), 8 February 2019, ECLI:EU:T:2019:77; Case T-279/19, Action brought on 27 April 2019 – Front Polisario v Council, OJ 2019/C 220/52; Case T-344/19, Action brought on 10 June 2019 – Polisario Front v Council, OJ 2019/C 270/35; Case T-356/19, Action brought on 12 June 2019 – Polisario Front v Council, 2019/C 270/36.

[308] Peters (2016).

[309] In a different yet relevant context, an empirical analysis of environmental decision-making found that the participation of stakeholders increases the quality of the decisions: Beierle (2002).

and expertise provided by an affected people enables a decision to be made faster than otherwise would be possible.

The second point regards the potential danger of resentment, backlash and reprisal by states against peoples that participate in global governance. In the League of Nations context, the minorities regime that enabled certain minorities to petition the League regarding state misconduct engendered the resentment of the regime by states, and in fact led to the intimidation of minorities and even harsher violations of their rights.[310] However, nowadays it has become more accepted by states that sub-state groups can appeal to IOs and ICTs, for instance the European Court of Human Rights and human rights treaty bodies. While it is impossible to remove any risk of reprisals, that risk is certainly lower than in the time of the League. In addition, the context is different: the League of Nations minority regime only applied to certain new states, while the right of peoples to participate would formally apply to all peoples and involve obligations for all states on the same footing.

The final concern regards unintended consequences and structural inequality. One could argue that the participation of peoples might, in effect, further disenfranchise states that are already marginalised in the international community: least developed countries, for example, face enough challenges to effectively protect their interests in intergovernmental law-making and standard-setting processes without competing with, for instance, indigenous peoples. In addition, the pattern of participation by indigenous peoples to an extent mirrors wider geopolitical divides: for instance gaps persist in terms of the attendance of indigenous peoples' organizations at international conferences as well as the capacity and experience of peoples' representative organizations.[311] In response to this concern, it should be noted that the increased participation of indigenous peoples on matters affecting them should not, and does not necessarily, mean that the participation of disadvantaged states will suffer. As for the disparities between indigenous groups, this is a valid concern that needs to be addressed at a practical level by indigenous peoples, states and IOs, but does not undermine the argument for the right to participate.

5. Conclusion

In summary, this chapter has argued that the rise of IOs and other global governance entities and the expansion of their powers, resulting in the exercise by IOs of public power affecting peoples, has led to a structural relationship of the domination of peoples by IOs. This affects the right of peoples to self-determination. IOs hold both a potential to negatively impact on peoples, but also emancipatory possibility. By reference to the theoretical account of self-determination developed in Chapter 1, this chapter has proposed that the law of self-determination should evolve to remedy this deficiency. The addition of a specific rule under the broad umbrella of self-determination is justified. This can be

[310] Mazower (2012) 161; Fink (1995) 203.
[311] Charters (2010) 239.

conceptualised as a right of peoples to participate in the activities of IOs, other global governance bodies and intergovernmental fora which affect them. Corresponding obligations are held by states and IOs. The right is not absolute, and is accordingly subject to limitations including where peoples are well-represented by states, are only one among a number of affected third parties, or are not affected by a given matter. This chapter suggests a direction in which CIL might evolve.

CHAPTER THREE: Doctrinal Support for a Participatory Right

1. Introduction

Up until this point, the thesis has taken as its starting point a claim that there exists a right of (indigenous) peoples to participate in global governance affecting them, grounded in the principle of self-determination. For the purpose of determining whether this claim is justified, it has constructed a theoretical argument, building on an account of the law of self-determination to hold that the relationship of domination exercised over peoples by IOs and other global governance bodies, and by states acting collectively through such entities, justifies in theory the alleged right along with correlative obligations held by states and IOs.

Does the theoretical construction find support in positive international law? This is the question examined in this chapter. A doctrinal method is used to assess the extent to which the right of peoples to participate in global governance is consistent with, and supported by, the positive law in the form of international instruments, the decisions of international courts and tribunals, and the statements of treaty bodies. The law of *jus cogens* is examined to see whether it could provide positive grounding for the right. In addition, the elements of CIL applicable to states and IOs are explored, to provide a foundation for the inquiry carried out in the following chapters.[1]

The chapter is laid out as follows. Section 2 examines international agreements and other legal instruments, along with the decisions of treaty bodies and international courts and tribunals. It begins by arguing that there is a degree of support for a participatory element of self-determination, found in general instruments and judicial decisions, although it finds no express support for a right to participate in global governance. The chapter then turns to look at the law on indigenous peoples' participation rights, as found in the UNDRIP, the ILO Convention 169, and the decisions of international courts and treaty bodies. It finds that in this context participation is evidently a core element of the right to self-determination. Moreover, the law on indigenous peoples' consultation and FPIC provides analogous support for the notion that there is a spectrum of participation whereby the level of participation required to fulfil the right is higher when the matter is one that has a more significant adverse impact on a people. Further, the chapter finds that there is some, albeit limited support in indigenous peoples' instruments for a right of indigenous peoples to participate in matters affecting them at the international level. However, all of the law on indigenous peoples' rights is limited, from a positive law standpoint, in terms of which states may be said to bear obligations as a result.

[1] This chapter relies on the classical sources of international law as contained in the Statute of the International Court of Justice ("ICJ Statute"), Article 38.

Moreover, it becomes clear that it is difficult to find, in the instruments and decisions, a basis for imposing a correlative obligation on IOs. With the exception of one, ambiguously worded sentence in the UNDRIP, the black letter law is silent on this matter, and IOs are not party to relevant treaties. The chapter therefore goes on to consider two alternative bases for assigning an obligation to IOs to respect, protect and fulfil the right of peoples to participate in matters affecting them. The first, discussed in Section 3, is the law of *jus cogens*. While this initially may appear a promising avenue for imposing an obligation upon IOs, as IOs are bound by peremptory norms of law, upon closer examination it becomes less attractive, as it is unlikely that the right can be considered peremptory in nature.

The other avenue that may provide a basis for assigning duties to IOs is CIL. Custom also seems the most promising basis in positive law for the proposed right and obligations in general, given that other positive sources of law contain only limited support. Section 4 will assess the theoretical basis for the argument that IOs may be, in certain cases, both creators and subjects of CIL. In addition, it will lay out the methodological factors, with respect to both states and IOs, that the following chapters will take into account in considering, among other questions, whether the proposed right has attained the status of a rule of custom. Section 5 concludes.

2. Treaties, international legal instruments, and decisions of judicial and quasi-judicial bodies

In assessing support for the proposed right, it is first necessary to turn to legal instruments and decisions on self-determination in general, before examining the more specific legal regime on the rights of indigenous peoples.

2.1 A participatory aspect of self-determination

The doctrinal canon of treaties, international legal instruments and decisions on self-determination provide a modicum of support for a participatory element. Classic statements on self-determination, such as those contained in the UN Charter,[2] common Article 1(1) of the Human Rights Covenants,[3] the Friendly Relations Declaration, and the Helsinki Final Act,[4] contain open formulations that, while not precluding participation, merely offer an umbrella under which a 'broad range of international legal understandings about self-determination take shelter'.[5] However, to the extent that they can be interpreted to provide for internal self-determination, that is, representative government, they can be said to support, under the broad umbrella, a right to participation at the state level. Representative

[2] Articles 1(2) and 55.
[3] Also see Article 20(1) of the African Charter on Human and Peoples' Rights.
[4] Helsinki Final Act, Principle VIII.
[5] Foster (2001) 144.

government 'by definition requires effective avenues for political participation by all individuals and groups subject to a particular government'.[6]

In relation to common Article 1, as Caroline Foster highlights, an examination of negotiators' discussions in the development of the Covenants reveals an interpretation of the article concerned with internal governance.[7] Several countries including the US, the US, Greece, Denmark, New Zealand, and a number of developing countries proposed that self-determination should include a right to be free from an authoritarian regime, and Western states also argued for rights of political participation and representative government.[8]

The Human Rights Committee has subsequently interpreted self-determination in Article 1 as requiring participation of peoples on matters affecting them at the national level. For instance, in its conclusions on Australia, the Committee has called on the country to allow indigenous peoples a stronger role in decision-making over their traditional lands and natural resources.[9] Similarly, with respect to Sweden, the Committee expressed concern that the country does not allow the Sámi people a significant role in decision-making processes that affect their traditional lands and economic activities.[10] It recommended that Morocco should enhance meaningful consultation with the people of Western Sahara with a view to securing their free, prior and informed consent for development projects and resource extraction operations affecting them.[11] With regard to Mexico, it urged the state to take appropriate measures to ensure indigenous communities' participation in the country's institutions.[12] The Committee welcomed developments in Norway to ensure 'full consultation' with the Sámi in matters affecting their traditional livelihoods,[13] in 2006 welcomed an agreement between Norway and the Norwegian Sámi Parliament setting out procedures for consultation between the central government and the Sámi Parliament, which it noted was in furtherance of Article 1 of the Covenant,[14] and in 2018 called for the state to ensure meaningful consultation with the Sámi in practice.[15] The Committee, in relation to Honduras, expressed concern that a draft law on indigenous peoples' rights had not been developed with the participation of indigenous peoples.[16]

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[6] Foster (2001) 151. See also Fox (1992) 606.
[7] Foster (2001) 146.
[8] Ibid 146. This should be viewed in the context of Cold War politics.
[9] HRC, 'Report of the Human Rights Committee, Volume I' (2000) UN Doc A/55/40, 498-528.
[10] HRC, 'Concluding observations: Sweden' (24 April 2002) UN Doc CCPR/CO/74/SWE 15.
[11] HRC, 'Concluding observations on the sixth periodic report of Morocco' (1 December 2016) UN Doc CCPR/C/MAR/CO/6 [10].
[12] HRC, 'Concluding observations: Mexico' (27 July 1999) UN Doc CCPR/C/79/Add.109 [19].
[13] HRC, 'Concluding Observations: Norway' (1 November 1999) UN Doc CCPR/C/79/Add.112 [10].
[14] HRC, 'Concluding Observations: Norway' (25 April 2006) UN Doc CCPR/C/NOR/CO/5 [5].
[15] HRC, 'Concluding observations on the seventh periodic report of Norway' (25 April 2018) UN Doc CCPR/C/NOR/CO/7 [37(b)].
[16] HRC, 'Concluding observations on the second periodic report of Honduras' (24 July 2017) UN Doc CCPR/C/HND/CO/2 [46].

The Committee on Economic, Social and Cultural Rights has also interpreted common Article 1 as requiring the participation of peoples on matters affecting them. For example, it expressed concern about the failure by Costa Rica to consistently consult indigenous peoples with a view to obtaining their free, prior and informed consent in respect of decision-making processes affecting their ability to exercise their rights.[17] In relation to Honduras it has recommended that the state involve indigenous peoples in the preparation of its draft law on indigenous peoples' rights.[18] The Committee on the Elimination of Racial Discrimination in its general recommendation on the right to self-determination considered that the right has an internal aspect linked with the right of every citizen to take part in the conduct of public affairs,[19] thereby clearly supporting an interpretation of Article 1 that has a participatory element.

The "safeguard" clause of the 1970 Friendly Relations Declaration, by which it attaches importance to 'representative government as an indicator of compliance with the principle of self-determination',[20] also lends some support to the idea of self-determination requiring representative government.[21]

Judicial opinions also contribute some grounding. Statements made by judges of the ICJ lend support to the idea that self-determination can be construed as a participatory right of peoples. In the *Western Sahara* advisory opinion, although the Court did not have to decide matters of substance relating to self-determination, it defined self-determination as 'the need to pay regard to the freely expressed will of peoples'.[22] This constitutes evidence pointing to the participatory content of the right.[23] In the Court's formulation, some entity—left undefined by the Court, presumably states—needs 'to pay regard to' the will of peoples, freely expressed. In other words, the will of a people on matters relating to its self-determination must be heard. The other side of the coin of "paying regard to" the freely expressed will of peoples is the participation of peoples.

Judge Yusuf, in his separate opinion in the *Kosovo* proceedings, considered that self-determination chiefly operates internally, to entitle the population of a state 'to determine its own political, economic and social destiny and to choose a representative government' and also to entitle 'a defined part of the population…to participate in the political life of the State, to be represented in its government and not to be discriminated against'.[24]

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[17] Committee on Economic, Social and Cultural Rights ("CESCR"), 'Concluding observations on the fifth periodic report of Costa Rica' (21 October 2016) UN Doc E/C.12/CRI/CO/5 [8].
[18] CESCR, 'Concluding observations on the second periodic report of Honduras' (11 July 2016) UN Doc E/C.12/HND/CO/2 [12].
[19] Committee on the Elimination of Racial Discrimination, General Recommendation 21: The right to self-determination (1996) UN Doc A/52/18, Annex VIII at 125 [4].
[20] Foster (2001) 147.
[21] Friendly Relations Declaration; Vienna Declaration and Programme of Action.
[22] *Western Sahara* [59], [162].
[23] Klabbers (2006) 194-195.
[24] *Kosovo*, Separate Opinion of Judge Yusuf [9].

Separate opinions in the *Chagos* advisory proceedings are also relevant.[25] Judge Gaja pointed out that the Chagossians 'were never consulted or even represented' in the process that led to the separation of the Chagos Archipelago from Mauritius, nor were the people of Mauritius 'given an opportunity to express their views'. In part because '[t]he will of the peoples belonging to the non-self-governing territory did not play any significant role in the process', the decolonization process had not been lawfully completed.[26] Further, the compensation that the Chagossians received for their displacement did not 'make their will insignificant' under the perspective of self-determination'.[27] Similarly, Judge Abraham declared that if the British authorities had consulted the Chagossian people, and if the Chagossians 'had expressed their free and informed will' not to be integrated into Mauritius, the 'parameters of the question submitted to the Court would…have been substantially different', and self-determination may require the freely expressed will of the different components of a population of a territory to be taken into account 'even if that leads to partition as a solution'.[28] Judge Abraham here implicitly recognised that the Chagossians ought to have been consulted.

The African Commission on Human and Peoples' Rights ("ACHPR") in its decision on the *Katanga* case also supports a view of self-determination as participation, finding that:[29]

> [i]n the absence of concrete evidence of violations of human rights…and in the absence of evidence that the people of Katanga are *denied the right to participation in government*…the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

This statement implies that the right to participation is a necessary element of self-determination, failing which Katanga may be able to exercise remedial self-determination. Further, in the case of *Kevin Mgwanga Gunme v Cameroon*, the Commission held that the people of southern Cameroon were not entitled to secede from the state in part because they were represented in the national assembly.[30]

2.1.1 The *East Timor* opinions: 'There is another "third party" in this case'

Special attention should be paid to the separate opinions in the *East Timor* case, which evidence judges' awareness of the need to hear affected peoples in both ICJ proceedings and intergovernmental negotiations.[31] While these statements do not go so far as to expressly hold that peoples have a right to participate in international matters concerning them, they demonstrate an increasing acceptance that

[25] Further on the background to the case, see Chapter 7, Section 3.2.
[26] *Chagos AO*, Separate Opinion of Judge Gaja [1]-[2].
[27] Ibid [6].
[28] *Chagos AO*, Declaration of Judge Abraham, 2.
[29] *Katangese Peoples' Congress v Zaire* (Merits), ACHPR (1995) Communication No 75/92, 1.
[30] *Kevin Mgwanga Gunme v Cameroon* (Merits), ACHPR (2009) Communication No 266/2003 [190].
[31] *East Timor*.

affected peoples should be heard in relevant proceedings at the Court as well as in intergovernmental negotiations.

The background was that East Timor had been a colony of Portugal from the sixteenth century until 1975, when the Portuguese administration withdrew. Three months later, a local group declared independence, upon which Indonesia staged a military intervention. Since 1975, East Timor had remained under Indonesia's occupation and effective control.[32] Several GA and SC resolutions had denounced the military intervention and called upon states to respect East Timor's territorial integrity and the right of its people to self-determination,[33] and East Timor was on the list of non-self-governing territories within the meaning of Chapter XI of the UN Charter, although Portugal remained its administering Power.[34] Against this background, Australia and Indonesia entered into an agreement (the Timor Gap Treaty) on the delimitation of the continental shelf between East Timor and northern Australia and a joint regime for exploiting the area's oil reserves,[35] estimated at between 500 million and 5,000 million barrels.[36]

Among Portugal's claims was that Australia had infringed the right of the people of East Timor to self-determination, to territorial integrity and unity, and to permanent sovereignty over its national wealth and resources, had infringed the rights of Portugal as the administering Power, and had contravened Security Council resolutions 384 and 389.[37] It alleged that by entering into negotiations with Indonesia and concluding and implementing the resulting agreement, Australia had signalled its recognition of the Indonesian incorporation of East Timor.[38] Indonesia had not accepted the ICJ's compulsory jurisdiction and therefore could not be subject to proceedings.[39] The majority held that the ICJ lacked jurisdiction to consider the claim, as to do so would require ruling upon the lawfulness of Indonesia's entry into and continued presence in East Timor; following the *Monetary Gold* rule, Indonesia's rights and obligations would 'thus constitute the very subject-matter of such a judgment made in the absence of that State's consent'.[40]

By all accounts, the interests of the East Timorese people were vitally affected by the matter at hand. As Judge Weeramantry noted, the oil and gas potential of the area formed 'in all probability the

[32] Ibid [11]-[13]; Dissenting Opinion of Judge Weeramantry 144.
[33] See e.g. GA res 3485; SC res 384; SC res 389.
[34] *East Timor* [16].
[35] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia (signed 11 December 1989, entered into force 9 February 1991) 1001 Australian Treaty Series 9, preamble.
[36] Dissenting Opinion of Judge Weeramantry 147.
[37] *East Timor* [10] and [19].
[38] Ibid [17].
[39] Ibid [21].
[40] Ibid [33]-[34]. Cf Dissenting Opinion of Judge Skubiszewski, Dissenting Opinion of Judge Weeramantry. For the *Monetary Gold* principle, see *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and USA)* (Preliminary Question) [1954] ICJ Rep 19, 32-33.

principal economic asset of the East Timorese people, awaiting them at such time as they achieve self-determination'.[41] As the East Timorese people were non-self-governing, they had the right to permanent sovereignty over natural resources. Further, Judge Weeramantry stated, if a substantial time was to elapse before East Timor achieved independence, and if the Timor Gap Treaty was to be in full operation in the meantime, 'a substantial segment' of these resources might well be lost to East Timor 'for all time'.[42] The Treaty, by dividing these resources between Australia and Indonesia without the consent of the East Timorese people, and with no indication that the benefits of resource exploitation would be directed back to East Timor, thus had a substantial impact on their right to self-determination.

Judge Vereshchetin, in his separate opinion, held that Indonesia's lack of consent was only one reason for lack of jurisdiction. The other reason, 'no less important' in his view, was 'the lack of any evidence as to the views of the people of East Timor', on whose behalf the application was filed.[43] In a clear recognition of the fact that the people of East Timor were voiceless in the ICJ, he wrote:[44]

> Besides Indonesia, in the absence of whose consent the Court is prevented from exercising its jurisdiction over the Application, there is another "third party" in this case, whose consent was sought neither by Portugal before filing the Application with the Court, nor by Australia before concluding the Timor Gap Treaty. Nevertheless, the Applicant State has acted in this Court in the name of this "third party" and the Treaty has allegedly jeopardized its natural resources. The "third party" at issue is the people of East Timor.
>
> Since the Judgement is silent on this matter, one might wrongly conclude that the people, whose right to self-determination lies at the core of the whole case, have no role to play in the proceedings. This is not to suggest that the Court could have placed the States Parties to the case and the people of East Timor on the same level procedurally. Clearly, only States may be parties in cases before the Court…. This is merely to say that the right of a people to self-determination, by definition, requires that the wishes of the people concerned at least be ascertained and taken into account by the Court.

Judge Vereschetin does not go so far as to say that self-determination requires the participation of a people in relevant proceedings. He stops short of suggesting any procedural reform to allow a people to participate directly. Indeed, he suggests that to do so would be to place "peoples" on the same procedural level as states and would directly contradict of Article 34 of the ICJ statute, under which only states may be parties in ICJ proceedings. Nor does he identify other procedural means by which the Court may ascertain and take into account the wishes of the people concerned. However, his opinion indicates clear awareness that there was another affected party—a people—who went unheard in proceedings, concern that the Court had not heard evidence of the people's views, and implicitly

[41] Dissenting Opinion of Judge Weeramantry 151.
[42] Ibid 198.
[43] Separate Opinion of Judge Vereshchetin 138.
[44] Ibid 135.

'created the possibility of a colonial people's indirect participation before the court in a case concerning their right to self-determination'.[45]

Judge Vereschetin considered that the Court should have had reliable evidence on the extent to which Portugal's application was supported by the people of East Timor – especially because Portugal had not had effective control of East Timor for 20 years. As such, the Court could not, without clear evidence to the contrary, easily dismiss the contention that Portugal was 'not in a position to act in the Court with full knowledge of the wishes and views of the majority of the East Timorese people'.[46] Portugal did not provide any evidence of the people's wishes and views, however.[47] Nor did Australia provide such evidence, although Australia also sought to argue that its side benefited the East Timorese people.[48] He held that Portugal had a duty 'to consult the leaders or representatives of the people before submitting the case to the Court on their behalf', noting that the Secretary-General had been holding consultations on the future of East Timor with a broad cross-section of East Timorese people representing various trends of opinion, as well as the governments of Indonesia and Portugal.[49] In this way, in the consultations 'the East Timorese people [was] considered as a distinct party "directly concerned", which [could] speak for itself through its representatives'.[50] Portugal's status as the administering Power did not automatically confer on Portugal 'general power to take action on behalf of the people concerned, irrespective of any concrete circumstances'.[51]

The dissenting opinions of Judge Skubiszewski and Judge Weeramantry, while not going as far as the separate opinion of Judge Vereshchetin, also reveal an awareness that an affected party was going unheard and indicate a participatory element of self-determination. Judge Skubiszewski noted that although 'both Parties invoked the interests of the East Timorese people', they 'presented [the court] with little or no evidence of what the actual wishes of that people were'.[52] Nonetheless, and noting that 'East Timor [had] not been well served by the traditional interests and sovereignties of the strong',[53] he went on to make 'certain elementary assumptions': that the people's interests would lie in peaceful mechanisms, rather than military intervention; 'free choice', rather than incorporation into another State via the use of force; and, most interestingly, 'when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with the exclusion of the people and/or the United Nations Member who accepted "the sacred trust" under Chapter XI of the Charter'.[54] By this latter statement, Judge Skubiszewski seemed to refer to the lack of participation

[45] Knop (2002) 207.
[46] Separate Opinion of Judge Vereshchetin 135.
[47] Ibid 136.
[48] Ibid 136.
[49] GA res 37/30.
[50] Separate Opinion of Judge Vereshchetin 137.
[51] Ibid 138.
[52] Dissenting Opinion of Judge Skubiszewski 136.
[53] Ibid [45].
[54] Ibid [52].

of the East Timor people in the treaty negotiations between Australia and Indonesia. Judge Weeramantry, too, recognised that the people of East Timor were not themselves participants in proceedings, characterizing East Timor as 'a territory not in a position to speak for itself'.[55] In considering the *locus standi* of Portugal, however, he came to a different view than that of Judge Vereshchetin: Portugal could represent the people of East Timor, as any other view 'would result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenceless and voiceless precisely when those rights are sought to be threatened or violated.[56]Indeed, he considered, the fact that Portugal had a 'direct nexus' with East Timor, and was the administering Power recognised by the UN, strengthened Portugal's claim to speak on behalf of East Timor.

The *East Timor* decision, then, marked a turning point in terms of a recognition by members of the Court that a people was going unheard in proceedings regarding its self-determination, as well as in intergovernmental treaty negotiations affecting it, and that the Court ought to find some means to allow the people to express its views and wishes. While this stops short of expressly recognising a right to participate, it is submitted that these statements hold persuasive weight.

2.2 Indigenous peoples' participation, consultation and free, prior and informed consent

The international law on indigenous peoples' rights contains, as a central element of self-determination, rules relating to the full and effective participation of indigenous peoples as well as their consultation and FPIC on matters affecting them. The UNDRIP and the ILO Convention No 169 are the main sources of law here, along with decisions of regional courts and human rights treaty bodies. In some cases, the relevant provisions are phrased in an open manner, leaving it open to interpretation as to whether the right of indigenous peoples to participate in decision-making affecting them applies only at the state level or also internationally.

The second part of the section turns to the law on FPIC. Although FPIC—which conceptually fits within participation and derives from self-determination—in positive terms relates to obligations held by states with respect to indigenous peoples, and therefore cannot be read to expressly support the theoretical formulation of the right to participate in global governance, it sheds light on what level of participation is required in a way that is consistent with the theoretical framework in Chapter 2. The law on FPIC has developed a continuum or spectrum: where fundamental rights of indigenous peoples would be substantially impacted, the consent of the affected peoples is required, whereas less impactful actions require mere consultation. What is required for the right to participation to be fulfilled is a function of the level of affectedness.

[55] Dissenting Opinion of Judge Weeramantry 181.
[56] Ibid.

The final part of this section turns to specific provisions of international legal instruments that support, to a limited extent, a right of indigenous peoples to participate in the international legal order. Before turning to the content of the law, we will address a preliminary question regarding the status of the UNDRIP.

2.2.1 The legal status of the UN Declaration on the Rights of Indigenous Peoples

The legal status of the Declaration—an instrument hailed upon its adoption as 'the beginning of the realisation of the vision, aspirations and basic rights of indigenous peoples living in all parts of the globe'[57]—affects the significance one can assign to its provisions in assessing the extent to which international law supports the existence of a right of peoples to participate in global governance. The Declaration is not a legally binding international agreement, but rather a GA declaration, meaning that it is *prima facie* to be regarded as "soft law".[58] Notwithstanding this, it holds substantial persuasive authority by reason of its format, support, drafting history, subsequent treatment, and the degree to which it aligns with previously existing law.

The first factor pointing to the significance of the Declaration is its format:[59] it is not merely a resolution of the GA, but a declaration, a format restricted to 'formal and solemn' instruments on 'rare occasions when principles of great and lasting importance are being enunciated'.[60] Like the 1970 Friendly Relations Declaration or the 1960 Colonial Declaration, neither of which are strictly binding international agreements but which have been generally accepted and regularly relied on in legal argumentation, there is 'a strong expectation that members of the international community will abide by' the UNDRIP.[61]

Second, the Declaration was adopted with overwhelming support from every corner of the globe, evidencing general acceptance of its principles and bestowing it with particular authority.[62] 143 states voted in favour, with four opposed, 11 abstaining and 34 absent; the opposers have all subsequently reversed their position to support the Declaration.[63] GA declarations adopted with such a level of support are often indicative of CIL.[64] At the very least, this level of consensus evidences 'the special legitimacy and authoritativeness' of the instrument.[65]

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[57] Daes (2011) 11. See also Allen and Xanthaki (2011) 1.
[58] On soft law generally, see Chinkin (1989); Boyle (2014); Lagoutte, Gammeltoft-Hansen and Cerone (2016).
[59] Barelli (2009) 971; Åhren (2016) 103.
[60] Commission on Human Rights, 'Report of the Eighteenth Session' (1962) UN Doc E/CN.4/832/Rev.1 [105].
[61] Ibid.
[62] Anaya and Rodríguez-Piñero (2018) 62; Åhren (2016) 103-104; Fromherz (2008) 1367; Baldwin and Morel (2011) 123-124.
[63] Australia, US, Canada, and New Zealand. On the latter change of heart, see Toki (2010).
[64] ILC, 'Report of the International Law Commission, Seventieth Session' (2018) UN Doc A/73/10, Chapter V, Identification of Customary International Law, Text of the draft conclusions on identification of customary international law ("ILC Draft Conclusions"), Draft Conclusion 12, commentary [6].
[65] Barelli (2009) 969-970.

Third, the Declaration has an extensive drafting history, to which states put in a considerable amount of effort.[66] It was discussed and negotiated for nearly 30 years, and some suggest that the fact that the states who opposed its adoption 'appeared to do so through fear that by accepting, they would be accepting some form of legal commitment' lends additional support to the view that the Declaration holds legal significance.[67]

Fourth, an examination of the way in which the Declaration has been received reveals that many domestic and international actors have treated it as a source of law, and used it for guidance in interpreting other relevant laws.[68] For instance, the IACtHR used the Declaration in interpreting the law on free, prior and informed consent in its *Saramaka* decision,[69] and the ACHPR has also used the Declaration in deciding cases as well as issuing an advisory opinion on it.[70] The domestic courts of several countries have relied upon it.[71]

Lastly, the content of the Declaration is strongly related to previously existing law—its provisions refer to rights and principles which were either already recognised, or were emerging, in international human rights law.[72] It aligns with the practice of human rights treaty bodies, and some of its provisions directly mirror existing international instruments.[73] In this way, it can be said to constitute an agreed interpretation of pre-existing international legal sources.[74]

In this light, some are of the view that the Declaration, or at least many of its provisions, represent existing CIL,[75] while others are more cautious, expressing the view that it may become CIL over time.[76] At the very least, the Declaration has significant persuasive weight, and many of the factors

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[66] Baldwin and Morel (2011) 124; Barelli (2016) 47-49.
[67] Baldwin and Morel (2011) 124; Åhren (2016) 104.
[68] Baldwin and Morel (2011) 124.
[69] *Saramaka People v Suriname*, Judgment of 28 November 2007 (Judgment on Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 172 ("*Saramaka*").
[70] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya* (Merits), ACHPR Communication 276/03 ("*Endorois*"); *Centre for Minority Rights Development (Kenya), Minority Rights Group International & Ogiek Peoples Development Programme (On Behalf of the Ogiek Community) v Kenya* (Merits), ACHPR, Communication 381/09; *Advisory Opinion of the African Commission of Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples* (2007). On the ACHPR's approach, see Claridge (2019).
[71] *Roy Sesana & Ors v Attorney General of Botswana*, [2006] Botswana Law Reports 1, High Court of Botswana, 2 January 2006; *Constitution of Kenya, Re, Lemeiguran v Attorney General and ors, First instance (by way of Originating Summons)*, Misc Civil App No 305 of 2004 (2006) eKLR, ILDC 698 (KE 2006), High Court of Kenya, 18 December 2006; *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize, and Manuel Coy and Maya Village of Conejo v Attorney General of Belize* (Consolidated) Claims Nos 171 & 172, Supreme Court of Belize, 18 October 2007; *Hamilton Health Sciences Corp v DH* [2015] ONCJ 229, Ontario Court of Justice, 24 April 2015; *R v Francis-Simms*, [2017] ONCJ 402, Ontario Court of Justice, 14 June 2017.
[72] Barelli (2009) 972-977 and (2016) 53-55.
[73] Barelli (2009) 972-977.
[74] Xanthaki (2009) 36; Anaya and Rodríguez-Piñero (2018) 62.
[75] Wiessner (1999) and (2008); Anaya (2004) 65-71; Rehman (2011); Anaya and Rodríguez-Piñero (2018) 62; Åhren (2016) 106-107.
[76] Stavenhagen (2011) 152; Barelli (2009) 967.

that make this so also weigh in support of a reading of the Declaration as CIL. In addition, it has a high degree of legitimacy, as assessed by reference to its procedural legitimacy, the fairness and justice reflected in its content, and the extent to which international actors engage with it.[77]

With this understanding of the Declaration as a highly influential international legal instrument carrying a high level of weight, let us turn to its content as well as that of other sources.

2.2.2 Participation in matters affecting them

The right of indigenous peoples to participate in matters affecting them is found in the earliest international legal instrument on indigenous peoples' rights. Participation is a pillar of ILO Convention No 169,[78] which albeit only ratified by 23 countries has had an outsize influence on subsequent international legal instruments and standards.[79] Article 6.1 of the Convention imposes an obligation on states to establish means by which indigenous peoples can freely participate 'at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them'.[80]

The equivalent provision in the UNDRIP is framed in terms of a right rather than an obligation. Article 18 states that:[81]

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

This provision does not clearly define the scope of the right: does 'matters which would affect their rights' refer solely to decision-making at the national level, or also at the international and global level? On its face, the text can be read broadly to include participation in all levels of governance.[82] Indeed, the version of this article in the 1994 Draft Declaration originally stipulated that 'indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights',[83] which could arguably indicate that the drafters originally intended to specify that the right to participation included participation in the international legal order.[84]

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[77] Charters (2009) 280.
[78] ILO No 169.
[79] For the status of ratifications see ILO, 'Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.
[80] ILO no 169, Article 6.1(b).
[81] Also see the equivalent Articles 21.2 and 23.1 of the American DRIP.
[82] Cambou (2018) 34; Anaya (2004b) 53
[83] Working Group on Indigenous Populations, Draft Declaration on the Rights of Indigenous Peoples (1994) UN Doc E/CN.4/Sub.2/1994/2/Add.1 ("1994 Draft Declaration"), Article 19.
[84] Cambou (2018) 35.

The right of indigenous peoples to decide their own priorities for development and participate in the formulation and implementation of development plans and programmes is also provided for in both the ILO Convention and the UNDRIP.[85] Article 7.1 of ILO 169 provides that indigenous peoples have the right to 'decide their own priorities' for development 'as it affects their lives, beliefs, institutions and spiritual well-being and…lands', and to 'exercise control, to the extent possible, over their own economic, social and cultural development'. Further, they 'shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.'

The UNDRIP contains a similar formulation. Article 23, stating that indigenous peoples 'have the right to determine and develop priorities and strategies for exercising their right to development', stipulates that they 'have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them'. While potentially different in scope—health, housing and other economic and social programmes could be interpreted both more narrowly or alternatively more broadly than "development plans and programmes"—these two provisions could both be read broadly so as to include participation at the global level in developing plans and programmes affecting them.

The UNDRIP articles on participation clearly derive from the right to self-determination contained in the same instrument. Self-determination is regarded as a 'foundational right'[86] which grounds many of the other rights in the Declaration. Article 3, mirroring common article 1 of the Covenants, provides that indigenous peoples 'have the right to self-determination', by virtue of which 'they freely determine their political status and freely pursue their economic, social and cultural development'.[87] The condition on which states were able to agree to this provision, which entailed considerable difficulty,[88] was the inclusion of Article 46(1) stipulating that nothing in the Declaration can be interpreted as implying 'any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[89]

It is thus clear that under the Article 3 right to self-determination, indigenous peoples do not have the right to become independent from existing states. Article 3, rather, is interpreted by many as entailing internal self-determination in the sense of self-government, autonomy, and political participation in state affairs.[90] The drafting history of Article 3 shows that for several states, self-determination meant

[85] ILO No 169, Article 7. Also see American DRIP, Article 29.3.
[86] Weller (2018) 115, 124.
[87] Also see the equivalent Article 3 of the American DRIP.
[88] Henriksen (2009) 79-80; Castellino and Doyle (2018) 26-29.
[89] Also see the equivalent Article 4 of the American DRIP.
[90] Quane (2011) 271; Cambou (2018) 32.

the right of indigenous peoples to participate fully in decisions affecting them.[91] For instance, Australia 'recognize[d] that the intention of Article 3 is to enunciate…the legitimate aspirations of indigenous peoples to enjoy more direct and meaningful participation in decision-making and political processes and greater autonomy over their own affairs'.[92] Canada stated that 'self-determination is now seen by many as a right which can continue to be enjoyed in a functioning democracy in which citizens participate in the political system and have the opportunity to have input in the political processes that affect them'.[93] Norway, similarly, opined that 'the right to self-determination includes the right of indigenous peoples to participate at all levels of decision-making in legislative and administrative matters and the maintenance and development of their political and economic systems'.[94]

Article 4 reinforces the notion that self-determination for indigenous peoples is to be exercised by "internal" means, providing that indigenous peoples, 'in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.[95] Autonomy is also related to participation: it 'may be seen as a way of increasing participation in public life in much the same way as devolution or other autonomy arrangements have tried to do so in non-indigenous contexts'.[96] Moreover, Article 5 provides that indigenous peoples have the right to maintain and strengthen their own distinct institutions while retaining their right to participate fully in the life of the State. It can thus be seen that self-determination for indigenous peoples, under the Declaration, manifests in 'on the one hand, autonomous governance and, on the other, participatory engagement'.[97]

Against this background, the provisions of the UNDRIP on participation and FPIC have been viewed by some states,[98] as well as scholars,[99] as an expression of, or part of the substance of, the right to self-determination.

In summary, participation is a core element of indigenous peoples' right to self-determination. The relevant provisions in the UNDRIP are framed in an open way that would allow for a reading that indigenous peoples have the right to participate in matters concerning them at the global level. This point will be returned to in Section 2.3.

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[91] Quane (2011) 271.
[92] Referred to in Foster (2001) 152.
[93] Ibid 151.
[94] Ibid 151.
[95] Also see equivalent Article 21.1 of the American DRIP.
[96] Quane (2011) 273. See also Article 20 UNDRIP.
[97] Anaya (2009) 193.
[98] Quane (2011) 271.
[99] Ibid 263, 276-277. See also Foster (2001) 151.

2.2.3 Consultation and free, prior and informed consent

Further clarity on what participation requires is found in the law of consultation and FPIC. The obligation of states to consult indigenous peoples in relation to decisions affecting them is arguably a general principle of law, as it is found in international instruments, the decisions of international judicial and quasi-judicial bodies, and the decisions of national courts.[100] Consultations must be genuine and meaningful. In addition, there is a high level of agreement that the principle of FPIC governs the manner in which the process of consultation should take place.[101] The UNDRIP, the ILO Convention and international courts and treaty bodies are clear that while FPIC does not confer a right of veto with regard to decisions affecting them, in some cases, the right to participate requires more than consultation: decisions substantially affecting their fundamental rights may require consent. That is, 'the degree of participation of Indigenous peoples in decision-making processes depends on the nature and implications of the proposed measures'.[102] Free, prior and informed consent is 'premised on and essential for the operationalisation of the right to self-determination', as it allows a people to exercise control over their destiny.[103] This section elaborates on the law by reference to international instruments and judicial decisions.

Under ILO Convention 169, states are obliged to seek indigenous peoples' consent through consultations on legislative or administrative measures affecting them. According to its Article 6.1, states must 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions', whenever consideration is being given to legislative or administrative measures which may affect them directly'. Such consultations are to be carried out in good faith and in a form appropriate to the circumstances, 'with the objective of achieving agreement or consent' to the proposed measures.[104] Several other provisions of the Convention stress the need for participation of affected peoples in the development of government policy.[105]

The "soft" requirement of consultation with the objective of obtaining consent hardens into the need for consent in cases of the relocation of indigenous peoples.[106] Article 16.2 provides that relocation shall take place only with the 'free and informed' consent of the relevant indigenous peoples.[107]

The UNDRIP further developed the law on FPIC, requiring it not only in the case of relocation, but also before decisions are made regarding the disposal or storage of hazardous materials in indigenous

[100] Barelli (2018) 268.
[101] Ibid.
[102] Ibid 269.
[103] Gilbert and Doyle (2011) 310. See also Ward (2011) 55, 58; Clavero (2005) 42.
[104] Article 6.2.
[105] See e.g. Articles 2, 5, 27, 28.
[106] Articles 15 (exploration or exploitation of natural resources) and 17 (alienation of land rights) are even softer, merely providing for consultation of indigenous peoples on these matters.
[107] Although it provides for an exception where consent cannot be obtained.

peoples' lands and territories.[108] However, before adopting and implementing legislative or administrative measures 'that may affect' indigenous peoples, states are merely required to 'consult and cooperate in good faith' with them 'in order to obtain' their FPIC.[109] The same is the case with regard to the approval of any project affecting indigenous peoples' lands, territories and other resources.[110] While some argue that these latter articles impose an absolute obligation to obtain consent, the statements of a number of states following the adoption of the Declaration, as well as a comparison with previous drafts of the articles, suggest that the more restrictive interpretation is justified.[111]

The IACtHR has also confirmed the duty of states to consult indigenous peoples on matters affecting them.[112] In *Saramaka People v Suriname* the Court held that states must ensure the effective participation of the members of an indigenous community on any development or investment taking place within their territory for any measure that would amount to a restriction of indigenous peoples' rights to their land and natural resources.[113] Effective participation requires that the state must consult with the indigenous peoples concerned in good faith, provide them sufficient information, and respect their customs and traditions; the objective of the consultation should be the reaching of an agreement among the parties.[114] The Court further clarified, in *Kichwa v Ecuador*, that the information provided must be in clear and accessible language and be complete enough to guarantee that if consent is given, it has been given free from manipulation, and that consultation entails the right to play a real role in the decision-making process.[115]

The Court took a sliding scale approach to the question of when consent is required: for small-scale development projects mere consultation suffices, but FPIC is required for large-scale development projects or investments that would have a major impact within indigenous peoples' territories, or where the cumulative effects of a number of small-scale projects would resemble that of a large-scale project.[116] The Inter-American Court thus 'drew a continuum' between consultation and consent in which the latter is required where the impacts are greater.[117]

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[108] Articles 10 and 29(2).
[109] Article 19. Also see the equivalent Article 23.2 of the American DRIP.
[110] Article 32(2). Also see the equivalent Article 29.4 of the American DRIP.
[111] See the 1994 Draft Declaration. Barelli (2018) 253-254 suggests that the expression 'consult in order to obtain consent' still requires more than mere consultation, and should be approached with a degree of flexibility in such a way that guarantees the effective protection of indigenous peoples' fundamental rights.
[112] *Saramaka*; *Kichwa People of Sarayaku v Ecuador*, Judgment of 27 June 2012 (Judgments on Merits, Reparations, and Costs) IACtHR Series C No 245 ("*Kichwa*"); *Case of the Comunidad Garifuna Triunfo de la Cruz y Sus Miembros v Hondras*, Judgment of 8 October 2015 (Merits, Reparations and Costs) IACtHR Series C No 305.
[113] Along with other requirements. *Saramaka* [126]-[129].
[114] *Saramaka* [133]; *Kichwa* [180]-[211].
[115] *Kichwa* [167].
[116] *Saramaka* [134]; *Saramaka People v Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series G No 185 [41].
[117] Rodríguez-Piñero (2011) 473.

The ACHPR has also taken the stance that on development or investment projects that would have a major impact within the territories of indigenous peoples, the state is required not only to consult, but to obtain their FPIC.[118]

The decisions of human rights treaty bodies further reinforce the idea that where the impacts are greater, the FPIC of the affected peoples is required rather than their mere consultation. In *Länsman v Finland*, the Human Rights Committee held that the decision of the Finnish authorities to allow stone quarrying in a reindeer-herding area did not violate the right of the Sámi in the area to enjoy their culture, because the relevant communities had been consulted and the quarrying activities had only a limited impact on their way of life and did not amount to a denial of their rights.[119] This second part of the Committee's reasoning suggests that if the impacts had been more significant, mere consultation would not have been enough.[120] The Committee later held that measures which did substantially compromise or interfere with the culture of indigenous peoples required the FPIC of those peoples, rather than consultation.[121] The Committee on Economic, Social and Cultural Rights has held that when the preservation of indigenous peoples' cultural resources, 'especially those associated with their way of life and cultural expression', are at risk, then states should obtain the affected peoples' FPIC.[122] In the same comment, the Committee stated that the development of laws and policies that affect indigenous peoples merely required participation—suggesting that the Committee is making a distinction between the former and the latter in terms of severity.

The argument that the right to participate requires in situations of serious impacts the consent of the affected indigenous people is supported by statements of the UN Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"). The Special Rapporteur stated that while FPIC requirements in the UNDRIP should not be read as conferring a general right to veto, merely that consultations must be held in good faith and with the objective of reaching agreement.[123] However, the Special Rapporteur found, 'the strength or importance of the objective of achieving consent [should vary] according to the circumstances and the indigenous interests involved'; in cases of a 'direct impact on indigenous peoples' lives or territories' there is a 'strong presumption' that consent is required, and 'in certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent'.[124] Likewise, the EMRIP has found that under the UNDRIP, FPIC must be obtained in matters of fundamental

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[118] *Endorois* [291].
[119] *Länsman* [9.5]- [9.8].
[120] Barelli (2018) 259.
[121] *Angela Poma Poma v Peru*, Communication No 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (2009) [7.6].
[122] CESCR, 'General Comment no. 21, Right of everyone to take part in cultural life' (21 December 2009) UN Doc E/C.12/GC/21 [37].
[123] Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya' (15 July 2009) UN Doc A/HRC/12/34 [47].
[124] Ibid.

importance for the rights, survival, dignity and well-being of indigenous peoples; in assessing whether a matter is of such fundamental importance, the views of the affected peoples should be prioritised, while other decisive criteria include the nature of the proposed plan or activity and its impact on the peoples.[125]

In summary, the sources on the FPIC of indigenous peoples situate it as a key element of self-determination. The general understanding of FPIC entails that consultations are conducted in the absence of coercion or pressure, before taking the relevant decision or undertaking the relevant activity, and with sufficient information provided to the affected indigenous peoples.[126] The principle of FPIC entails that while states may implement development projects or other measures without indigenous peoples' consent provided that doing so will not substantially interfere with the enjoyment of their fundamental rights, consent is required when a project is likely to produce a major negative impact on indigenous peoples' lands, livelihoods and cultures.[127] This understanding corresponds with the theoretical notion that the degree of participation of peoples in matters affecting them should be higher when the potential impacts are greater.

2.3 Peoples' participation in the international legal community

Two instruments on indigenous peoples' rights provide express grounding for the right of peoples to participate in the international legal community. The first is the UNDRIP. The second is the regionally specific draft Nordic Saami Convention.

Firstly, shedding some light on the correct interpretation of Articles 18 and 23 of the UNDRIP is its Article 41, which provides:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. *Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.* (emphasis added)

The second sentence of Article 41 is ambiguous as to who is to establish the ways and means of ensuring indigenous peoples' participation. It is also not clear on its face as to the level at which it requires participation (at the state level, or in IOs. Both of these matters can be resolved by reading the second sentence in the light of the first, so that UN agencies and organs and other IGOs are required to establish ways and means of ensuring participation of indigenous peoples in their processes on issues affecting them.

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[125] EMRIP, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making' (17 August 2011) UN Doc A/HRC/18/42, Annex: Expert Mechanism Advice No. 2 (2011): Peoples and the Right to Participate in Decision-Making [22].
[126] Barelli (2018) 250.
[127] Ibid 269.

Read in the light of Article 41, other provisions such as Articles 18 and 23, which were on their face ambiguous, would seem to apply to the participation of peoples in IOs.[128] In its own right, Article 41 creates a strong expectation that indigenous peoples will be enabled to participate on issues affecting them in UN processes. The Human Rights Council took this view, stating that Articles 18 and 41 constitute a basis for the promotion of the participation of indigenous peoples at the UN level.[129] The EMRIP has also taken a supportive position, highlighting that the enhanced participatory status of indigenous peoples' organisations in UN processes would be in line with Article 18.[130] Denmark also supports this interpretation.[131]

A more regionally specialised legal instrument which, although still in draft form, is nonetheless relevant to this study is the Nordic Saami Convention. Originally proposed by the Sámi Council in the mid-1980s[132] and released as a draft in 2005[133] by an expert commission composed of representatives of Finland, Norway, Sweden, and each of the three Sámi parliaments in the three states,[134] the convention has the objective of affirming and strengthening the rights of the Sámi people necessary to secure and develop its language, culture, livelihoods and society, with the smallest possible interference from national borders.[135] It contains various obligations for the Nordic states regarding culture, land, natural resources, and so on.[136] Article 19 of the draft Convention provides that:[137]

> the Saami parliament shall represent the Saami in intergovernmental matters. The States shall promote Saami representation in international institutions and Saami participation in international meetings.

This provision, upon ratification of the Convention, would impose an obligation on Norway, Sweden and Finland to promote the representation of Sámi in international institutions and their participation in international meetings. It directly goes to the existence of a right of peoples to participation in global governance and the corresponding obligations of states as outlined in Chapter 2, albeit in a specific regional context. The members of the Expert Committee who drafted the article described it as expressing the external aspect of self-determination in a milder form than that of secession.[138] The Commentary to the Draft Convention also makes it clear that Sámi have the right to be represented in

[128] Notable too is Article 36, providing for the right of indigenous peoples to maintain and develop contacts, relations and cooperation with other peoples across borders.
[129] Human Rights Council, Participation Report [2]-[3].
[130] Human Rights Council, 'Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session' (19 August 2011) A/HRC/18/43, proposal 3.
[131] UNESCO, 'Consultation on a UNESCO Policy on Engaging with Indigenous Peoples, Comments' (UNESCO 2017), Contribution from Denmark, 12.
[132] Bankes and Koivurova (2013) 2; Madsen (1988).
[133] Finnish Ministry of Justice (2005).
[134] On the Sámi parliaments, see Myntti (2000).
[135] Translation by Koivurova (2006) 112.
[136] For a comprehensive discussion, see Bankes and Koivurova (2013).
[137] Translation by Cambou (2018) 38-39 note 39.
[138] Koivurova (2006) 110, 111, 120.

intergovernmental matters when they concern the interests of the Sámi.[139] Although it has not yet been formally adopted by the states and the Sámi parliaments—and in light of the protracted process until this point,[140] it may be some time before it is—when it is so adopted, it could be relevant to the determination of CIL.

2.4 Obligations of international organizations under international legal instruments

One difficulty with matching the theory with doctrinal reality as discussed in the above instruments and decisions is that obligations of IOs cannot readily be inferred. Common Article 1(3) creates a broad duty of states to 'promote the realization of' and respect the right of self-determination, under which the specific duties outlined in Chapter 2 could fit:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

ILO Convention 169 also creates obligations for states regarding the participation of affected peoples in decision-making—although these are even more limited as they do not obviously pertain to participation in international decision-making, and only a small number of states are party to the Convention.

However, neither the Covenants nor any of the other international instruments or decisions discussed above establish corresponding obligations for IOs. The ICCPR and ICESCR limit membership to states, restricting IOs from becoming parties,[141] and even where membership is not *prima facie* constrained it can be difficult in practice for IOs to become members of treaties.[142] With a few exceptions,[143] IOs are not parties to key human rights conventions.[144] Indeed, the question of under what circumstances IOs hold obligations is notoriously uncertain.[145] Falling logically prior to the issue of responsibility, as the existence of an obligation is a precondition for responsibility for breach,[146] the matter of obligations of IOs is much less developed than that of their responsibility. According to the

[139] Koivurova (2006) 120.
[140] On the process, see Koivurova (2013) 122.
[141] ICCPR, Article 48(1); ICESCR, Article 26(1).
[142] See e.g. the EU's proposed accession to the ECHR: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2016 Report on the Application of the EU Charter of Fundamental Rights' (18 May 2017), SWD(2017) 162 final, 8.
[143] Shelton (2015) 50.
[144] Shelton (2015) 46; Reinisch (2017) 1015.
[145] Klabbers (2017) 989; Klabbers (2015) 325; Daugirdas (2016).
[146] Draft Articles on the Responsibility of International Organizations, Draft Article 3, 4 and 10(1). The Draft Articles are thus largely unhelpful for the purposes of the present study, as they do not address the basis, sources or scope of international organizations' obligations.

advisory opinion of the ICJ in *WHO-Egypt*, in theory IOs can hold obligations under treaties to which they are parties:[147]

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

As a corollary, IOs are *not* bound by treaties to which they are *not* parties.[148] While some argue that, to the contrary, IOs can be bound by treaties to which they are not parties, as to hold otherwise would allow member states to frustrate or avoid their obligations by acting through an IO,[149] this argument encounters significant obstacles: there may not be much overlap in the obligations held by all member states of an organization; to hold an IO to an obligation held by not all member states would violate the *pacta tertiis* rule; and if the common treaty obligations were to automatically bind an IO upon its establishment, this would diminish the wide discretion of member states to modify their treaty obligations under the VCLT.[150]

A possible exception is the UNDRIP, but such an argument encounters difficulties. The final sentence of Article 41 neglects to mention who "shall establish" the ways and means of ensuring participation of indigenous peoples on issues affecting them. The first sentence creates an obligation—at least in soft law—applying to UN organs and specialised agencies as well as other IGOs, so read in this light the second sentence could be considered to, similarly, apply to these UN entities. However, this cannot be said to be a legally binding obligation. In addition, the other articles regarding participation cannot be said to create obligations for IOs. Regardless, the UNDRIP, while constituting evidence of self-determination as a participatory right and of an emerging right of indigenous peoples to participate on issues affecting them in IOs, does not completely fill the gap between the *lex lata* and the *lex ferenda*.

3. Jus Cogens

So far, it has been seen that while international legal instruments and judicial decisions provide some support for the proposed right and the obligations of states, it is more difficult to find a doctrinal grounding for the obligation of IOs.

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[147] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (1980) ICJ Rep 73 [37]. On the international legal personality of international organizations, see *Reparations*, 178.
[148] Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Article 34. The VCLT-IO remains contested and has not attracted enough ratifications to enter into force, so while it may be treated as persuasive on this point, it is not definitive.
[149] See e.g. Mégret and Hoffman (2003) 318.
[150] Daugirdas (2016) 350-351.

The law of *jus cogens*, at first glance, could provide a basis for an obligation of IOs to hear an affected people, as scholars are widely of the view that peremptory norms bind IOs;[151] under the VCLT, states cannot by treaty establish organizations able to violate *jus cogens* norms,[152] which exist to protect the fundamental values of the international community, and are therefore non-derogable in effect.[153] Some have argued that self-determination is a norm of peremptory status, for instance on the basis of statements made by Ammoun J in his separate opinion on the *Barcelona Traction* case,[154] the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities,[155] some members of the ILC,[156] and some states during deliberations on the VCLT and the Friendly Relations Declaration and in submissions to the ICJ.[157] If it was accepted that the principle of self-determination is peremptory in nature, this could provide a doctrinal basis for the duty of IOs to enable an affected people to participate.

However, such a proposition is widely contested.[158] Even if it is accepted that a certain set of rules attaching to the principle of self-determination, such as the law on decolonization, are *jus cogens*, it cannot easily be argued that self-determination is *jus cogens* in all its manifestations. While some hold that self-determination as a whole is peremptory as specific rules such as permanent sovereignty over natural resources are 'integral element[s]' of the general principle[159] and that it would be 'artificial and improper to attribute a different legal force' to each,[160] this view relies on a values-based approach to *jus cogens*, rather than the more generally accepted consent-based approach.[161] From the perspective of state consent, it is troubling if new rules emerging under the umbrella norm of self-determination can be fast-tracked to peremptory status without first being accepted by states as such.[162]

It is therefore difficult to argue that the peremptory nature of self-determination (which is, in any case, contested) means that the right of peoples to participate in global governance is also *jus cogens* by

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[151] Daugirdas (2016) 346; Klabbers (2017) 1001.
[152] VCLT Article 53, Article 64.
[153] VCLT, Article 53. See e.g. ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' (2017) UN Doc A/CN.4/706, 10-11; Orekhelashvili (2006) 62.
[154] *Barcelona Traction*, Separate Opinion of Judge Ammoun, 304.
[155] 1978, report to the UN Human Rights Council, UN Doc CN.4/SR 1431, 3 [6].
[156] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) Yearbook of the International Law Commission, vol II, 187, 248.
[157] See Cassese (1995) 137-140, 170-172.
[158] Scholars who say that self-determination is *jus cogens* include Orakhelashvili (2008) 511, 582; Castellino (2000) 99; Raič (2002) 298; Thornberry (1991) 14; Kiss (1986) 174; Dugard (1987) 160; For the contrary view, see e.g. Crawford (2007) 81.
[159] Orakhelashvili (2006) 51.
[160] Cassese (1995) 140.
[161] On the difference between consent-based and values-based approaches generally, see ILC, 'First Report on *jus cogens* by Dire Tladi, Special Rapporteur' (2016) UN Doc A/CN.4/693, 30. For consent-based approaches, see e.g. Akehurst (1974-1975) 284-285; Hannikainen (1988). For values-based approaches, see e.g. Dubois (2009) 134; O'Connell (2011); Orakhelashvili (2006).
[162] Saul (2011) 636.

virtue of its grounding in the principle of self-determination, and that in turn a corresponding obligation is held by IOs as a matter of positive law.

4. Customary international law

The final source of international law considered here is custom. In addition to the support for the proposed right found in international legal instruments and decisions, the existence of a general practice accepted as law may also provide a foundation for the existence of a rule in positive international law. Moreover, as will be seen, CIL can bind IOs as well as states, and therefore holds the potential to overcome the difficulty of assigning an obligation to IOs. This section lays out the general considerations to be applied when determining whether the proposed rule has emerged in CIL. Considerations relating to states will be addressed, and then those relating to IOs.

4.1 State practice and *opinio juris* in the formation of custom

This work adopts an uncontroversial approach to CIL in respect of states. Here is not the place for a lengthy exposition regarding 'international custom, as evidence of a general practice accepted as law',[163] which has been the subject of many studies[164] as well as the recent six-year study of the International Law Commission ("ILC").[165] In assessing whether the right of peoples to participate in global governance and the corresponding obligations of states has been accepted into the corpus of international custom, it will be necessary to consider whether the two constituent elements of custom are both present: a general practice, and acceptance of that practice as law (*opinio juris*).[166] While a separate inquiry must be carried out in respect of each, the same material may go to evidence both.[167] The type of material that is relevant will be informed by the circumstances and context.[168] The practice may take a wide range of forms, including physical and verbal acts, diplomatic acts and correspondence, conduct in connection with resolutions adopted by an IO or at an intergovernmental conference, conduct in connection with treaties, executive conduct, legislative and administrative acts, and decisions of national courts.[169] For a rule of CIL to be established, the practice must be general,

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[163] ICJ Statute, Article 38.
[164] See e.g. Byers (1999); Bederman (2010); Lepard (2010); Bradley (2016); Beham (2018); Staubach (2018).
[165] See ILC Draft Conclusions.
[166] See e.g. *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3 [77]; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99 ("*Jurisdictional Immunities*") [55]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13 [27]; *Colombian-Peruvian asylum case* (Judgment) [1950] ICJ Rep 266, 277; *Case concerning Right of Passage over Indian Territory* (Merits, Judgment of 12 April 1960) [1960] ICJ Rep 6, 40-43; *WHO AO* [73]. Also see ILC Draft Conclusions, Conclusion 2.
[167] ILC Draft Conclusions, Conclusion 3.2 and Commentary [6]-[8]. On what constitutes conduct of the state, see ILC Conclusion 5 and commentary thereto. On forms of practice, see ILC Conclusion 6 and commentary thereto.
[168] Ibid, Conclusion 3.1 and Commentary [1]-[5]. *North Sea Continental Shelf*, dissenting opinion of Judge Tanaka, 175. For examples of this approach see *Jurisdictional Immunities* [55], [57]; *Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 ("*Navigational Rights*") [141].
[169] ILC Draft Conclusions, Conclusion 6.

that is, 'sufficiently widespread and representative, as well as consistent'.[170] As the commentary to the ILC conclusions explains, the practice 'should be of such a character as to make it possible to discern a virtually uniform usage', although the exact extent depends on the rule in question and universal or uniform practice is not required.[171] The requirement of *opinio juris* entails that the practice must be undertaken with a sense of legal right or obligation, as opposed to mere usage or habit.[172] Broad and representative acceptance is required.[173] Forms of evidence of *opinio juris* include public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, and conduct in connection with resolutions adopted by an IO or at an intergovernmental conference.[174]

In the present instance, the proposed obligations of states as framed in Chapter 2 are two-tiered: first, a duty to enable the voice of affected peoples in IOs and other international fora by including peoples' representatives on their national delegations; and second, a duty to promote the creation of mechanisms for the participation of affected peoples in IOs and other global governance bodies. In respect of the first obligation, the relevant evidence would include material such as: domestic legislation regarding the inclusion of peoples' representatives on state delegations (practice and *opinio juris*); the practice of states in respect of the same, as ascertained according to lists of participants in international fora (practice); statements made by states in international fora (*opinio juris*); and any other relevant statements or practice. In terms of the second obligation, the evidence will include proposals and statements advanced by states in IOs and other international fora (practice and *opinio juris*); and decisions of bodies of IOs that are representative of member states with regard to the participation of peoples, as such documents evidence the collective practice and will of states (practice and *opinio juris*). In addition, some of the material covered in other sections of this chapter will also be relevant to the question of custom: GA resolutions, for instance, can provide evidence as to the practice and *opinio juris* of states.[175]

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[170] Ibid, Conclusion 8. *North Sea Continental Shelf* [74], [77] (the practice must be 'both extensive and virtually uniform', it must be a 'settled practice').
[171] ILC Draft Conclusions, Commentary to Conclusion 8, [2]-[3], [7]. Also see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment of 27 June 1986) [1986] ICJ Rep 14 ("*Nicaragua*") [186] ('The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules…').
[172] ILC Draft Conclusions, Conclusion 9. *North Sea Continental Shelf* [77] ('…they must…be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it').
[173] ILC Draft Conclusions, Commentary to Conclusion 9; *WHO AO* [67].
[174] ILC Draft Conclusions, Conclusion 10.
[175] Ibid, Conclusion 12 and commentary thereto.

4.2 Customary international law and international organizations

Two preliminary points need to be established: that IOs can be bound by CIL, and that they can contribute to its formation.

On the first, the phrase in the *WHO-Egypt* opinion—'obligations incumbent upon [IOs] under general rules of international law'—has been much debated in the literature. The term 'general rules of international law' is rightly criticised as a 'monument to indeterminacy';[176] it has been used inconsistently by the ICJ at different times to variously mean rules of custom, rules of custom and general principles, or something else entirely.[177] But while some construe the ICJ's statement as excluding the application of rules of CIL to IOs,[178] the more generally accepted view seems to be that IOs can be subject to CIL.[179]

Of course, IOs will not be affected by all existing rules of CIL. Many rules simply do not apply to their activities: rules on state responsibility, self-defence in armed conflict, or territory.[180] Other rules may apply to IOs as well as to states: custom relating to human rights, for instance. On the other hand, some rules are primarily applicable to IOs: rules on their responsibility, for instance. Thus it is conceptually possible for IOs to be bound by a mixture of the same and different obligations than those applicable to states. The ICJ's statement in the *Reparations* advisory opinion supports this notion:[181]

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.

As the ILC phrased it in its Commentary to the ARIO, IOs are 'quite different from States and in addition present great diversity among themselves'. Unlike states, they 'do not possess and general competence and have been established in order to exercise specific functions'.[182] In its commentary to the Draft Conclusions on the Identification of Customary International Law, the ILC further emphasized that IOs are 'not states' and 'may have their own rights and obligations under international law'.[183]

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[176] Klabbers (2017) 989.
[177] Danilenko (1993) 9-10; Weil (1983) 436-437.
[178] Benvenisti (2018) 22-23; Alvarez (2016) 8-9; Klabbers (2017) 997-998.
[179] See e.g. Reinisch (2001) 136; Wood (2013); Wood (2016); Wood (2015) 619; Shelton (2015) 46; Blokker (2017) 1-10; Daugirdas (2016) 342-348; Reinisch (2017) 1010.
[180] Pacholska (2019) 338, noting the exception where an international organization operates as a quasi-sovereign functional equivalent of a state.
[181] *Reparations*, 178. Also see Klabbers (2015) 42.
[182] Draft Articles on the Law of Treaties with Commentaries [7].
[183] ILC Draft Conclusions, 88-89.

On the second point, it has long been recognised that IOs play a role in the formation of custom as fora in which States develop a general practice accepted as law:[184] they can be vehicles through which states act as well as catalysts of state practice.[185]

More recently, it has been acknowledged that the practice of IOs themselves can contribute to the establishment of CIL. Some are of the view that IOs do not have a role in the creation of custom but can nonetheless be bound by it.[186] However, other commentators as well as the ILC are of a different opinion.[187] Conclusion 4 of the 2018 ILC Conclusions provides that, in addition to the practice of states, which is primary:[188]

> 2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

The Commentary to the Conclusions makes clear that it is referring to the practice of IOs themselves, as opposed to the practice of states acting within or through such organizations.[189] By reference to the theory of IOs explored in Chapter 2, this seems correct.[190] The Commentary states that the practice of IOs may be particularly relevant 'with rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties'.[191]

The Commentary further provides for two cases where such practice is relevant: where member states have transferred exclusive competences to the IO, such as in the case of the EU; and where member states have conferred on the organization powers functionally equivalent to those exercised by states, such as when organizations are 'concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials'.[192] These ostensibly exclusive cases are rightly criticised as 'elusive' and 'ill-defined',[193] leaving many unanswered questions, as well as 'overly formalistic' with regard to the role of IOs in international relations.[194]

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[184] ILC Draft Conclusions, Conclusion 12; *Barcelona Traction*, Separate Opinion of Judge Ammoun, 303; Fry (2015); ILC, 'Third report on identification of customary international law, Michael Wood' (2015) UN Doc A/CN.4/682 [74]-[77] ("CIL Third Report"); Mathias (2016) 24.
[185] Droubi (2017).
[186] Lepard (2010) 186; Shraga (2013) 201-210.
[187] E.g. Akehurst (1974-1975) 11; Gunning (1991) 212-213; Meijers (2003) 80, 125; Arajärvi (2010) 23; Danilenko (1993) 82-83; Bokor-Szego (1978) 51; Brölmann (2019).
[188] ILC Draft Conclusions, Conclusion 4. Commentary to Conclusion 4, [2].
[189] Ibid, Commentary to Conclusion 4, [3]; CIL Third Report, 48-49. Also see Wood (2015) 614. This distinction is also highlighted by commentators including DeBartolo (2014) 174.
[190] On this point, see Akehurst (1974-1975) 11.
[191] ILC Draft Conclusions, Commentary to Conclusion 4, [7].
[192] Ibid, Commentary to Conclusion 4, [6].
[193] E.g. Blokker (2017) 6, 9; Pacholska (2019) 336.
[194] Deplano (2017) 228-229.

A helpful analytical distinction is made by Magdalena Pacholska, between rules applicable only to states, rules applicable to both states and IOs, and rules applicable only to IOs.[195] It seems 'self-evident' that IOs should be able to participate in the formation of the latter two kinds of rules.[196] This notion is supported by the views of states[197] and IOs,[198] and is generally supported by the theory of particular custom.[199] However, to counter the risk that 'IOs might over time be capable of imposing customary rules on States against their will',[200] it is appropriate that the practice of an IO may only contribute to the creation of CIL binding states if it 'has been generally accepted over time by the organization's member States'.[201]

Regarding the weight to be attributed to the practice of IOs, the Commentary notes that the practice of IOs carries greater weight the more directly it is carried out on behalf of its member states or endorsed by them, and the larger the number of the member states.[202] Thus, for instance, a practice of the UN mandated by a GA resolution would hold great weight. Other factors relevant in weighing the practice include the organization's nature, the nature of the relevant organ, whether the conduct is *ultra vires*, and whether the conduct is 'consonant with that of the member States of the organization'.[203] Otherwise, it is intuitive that similar considerations in assessing the practice and *opinio juris* of states apply to that of IOs.

The right of peoples to participate in global governance, if it exists, would entail obligations for both states and IOs. Hence, in accordance with Pacholska's suggestion, the practice and *opinio juris* of IOs themselves, as well as that of states, is relevant for ascertaining whether the right is a rule of CIL. The distinction between the practice of IOs themselves, as opposed to the practice of states acting within IOs, is not necessarily easy to make.[204] More likely to show evidence of the former are the acts of bodies or officers of IOs that are not representative of the organization's membership, and the public statements of officers of IOs. More likely to go towards the latter are decisions of representative

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[195] Pacholska (2019) 338. Also referred to above.
[196] Ibid 339. See also Blokker (2017) 10; Brolmann (2019) 16-19.
[197] ILC, 'Report of the International Law Commission on the work of its sixty-third session (2011): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat' (2012) UN Doc A/CN.4/650/Add.1, 5-7.
[198] ILC, 'Responsibility of international organizations, Comments and observations received from international organizations' (2011) UN Doc A/CN.4/637, 7-14.
[199] On particular custom, see D'Amato (1969) 212-213; *Colombian-Peruvian asylum case*, 276-277; *Case concerning rights of nationals of the United States of America in Morocco* [1952] ICJ Rep 176, 200; *Case concerning Rights of Passage over Indian Territory*, 39-40; *Nicaragua* [199]; *Frontier Dispute (Burkina Faso v. Mali)* [21]; *Navigational Rights* [34], [36]; *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3, 79, 94, Separate Opinion of Judge de Castro; *North Sea Continental Shelf*, Separate Opinion of President Bustamante y Rivero, 62; *Barcelona Traction*, Separate Opinion of Judge Ammoun, 290-291. Also see ILC Draft Conclusions, Draft Conclusion 16 and commentary thereto.
[200] Pacholska (2019) 340.
[201] 2018 States observations on CIL, 18 (New Zealand); discussed ibid 337, 340-341.
[202] ILC Draft Conclusions, Commentary to Conclusion 4, [7].
[203] Ibid.
[204] CIL Third Report, 48-49.

bodies of IOs. The distinction between the two is not overly important in this study, as the proposed rule applies to both IOs and states.

5. Conclusion

This chapter has uncovered the limitations of international legal instruments such as the Human Rights Covenants and the UNDRIP, as well as judicial decisions, in respect of doctrinal support for the proposed right of peoples to participate in matters affecting them in global governance. There is a modicum of support for a participatory element of self-determination as between a people and the state, as well as some suggestion in soft (albeit persuasive) law that indigenous peoples are entitled to participate in the affairs of IOs that concern them, and the potential for hard law to similar effect in respect of the Nordic states. Moreover, the international legal regime on indigenous peoples' consultation and FPIC aligns with the notion that to fulfil the proposed right requires a higher level of participation the more affected the relevant people is.

Although the proposed right is not inconsistent with the positive law on the reading developed here, the extent of doctrinal support is restricted. While it can be argued that there is a doctrinal foundation for an obligation of states, found in common Article 1(3) of the Covenants, the only potential textual basis for an obligation of international instruments exists only in soft law and applies only to indigenous peoples rather than to peoples more generally; the law of *jus cogens* does not assist. In addition, explicit backing for a right to participate in international and global affairs concerning them, as opposed to local and national matters, is extremely limited.

In this light, further work is warranted to determine whether the proposed right has formed, or is in the process of forming, a rule of CIL. This chapter has set out the grounds for holding that the practice and *opinio juris* of IOs, as well as that of states, can be relevant in such an assessment. Further, it has set out the relevant factors to be taken into account in considering whether the proposed right has become a rule of custom. The empirical analysis in the following chapters in part draws upon this framework to determine whether the proposed right has become a rule of CIL.

CHAPTER FOUR: Participation in Standard-Setting

1. Introduction

The next four chapters will canvas a large amount of practice of IOs and states with regard to peoples' participation in matters affecting them at the international level. An examination of this practice will reveal four main insights.

First, it is unlikely that a rule of CIL has formed, by reference to the considerations set out in the preceding chapter. While practice is widespread, it is not necessarily consistent, and is rarely accompanied by the requisite *opinio juris*. Some theories of custom would not require *opinio juris*, or would hold that a rule of custom can be formed with only a few instances of practice accompanied by *opinio juris*.[1] But by the more standard, accepted view, it is difficult to argue that custom has emerged. In the assessment, accordingly, instances of *opinio juris* will be highlighted where they can be found, but the matter will not be dwelled upon in every case. While there is considerable evidence that IOs and states consider the practice to be aligned with or required by the UNDRIP, because many states do not consider the UNDRIP to be international law—only soft law—it is difficult to confidently state that this constitutes *opinio*.

Regardless of the existence of a rule of custom, a widespread practice exists whereby states and IOs have created mechanisms and policies to enable peoples to participate in global governance on matters concerning them. These chapters aim to draw many instances of practice together, connecting the dots to reveal the wider picture. They will assess the practice by reference to the level of participation required under the framework adopted from Arnstein. In addition, with regard to the question of who is entitled to represent a people, the thesis will identify a general practice whereby IOs allow peoples themselves to determine who will represent them.

The third finding that these chapters will reveal is an insight as to the motivations of states and IOs for adopting the practice of enabling peoples to be heard in global governance matters affecting them. If not because of a belief that it is required by law, why do IOs do this? First, it will be seen that many organizations believe that the participation of peoples in matters affecting them is intrinsically important. Second, it will be seen that in many cases the explicit or implicit motivation, evident in the statements of IOs and states, is that enabling affected peoples to participate allows an organization to better carry out its functions and fulfil its mandate, or to more effectively achieve the objectives of a treaty. IOs can better fulfil their objectives by enabling peoples to participate in matters affecting them, because doing so can yield information that would not otherwise be available to policy- and decision-making processes, add to the perceived legitimacy of the outcomes, and improve the

[1] See e.g. D'Amato (1998) 1; Kopelmanas (1937) 129-130; Mendelson (1998) 188.

implementation of and compliance to policies and decisions due to increased buy-in of affected peoples. In this way the imperatives of functionalism can result in inclusion.

On this basis, the thesis will argue that there is a norm, in the social constructivist sense found in international relations literature whereby "norms" are 'shared expectations about appropriate behaviour held by a community of actors' that 'create patterns of behaviour in accordance with their prescriptions'.[2] A "norm" has a 'prescriptive (or evaluative) quality of "oughtness"' and 'shared moral assessment'.[3] The existence of a "norm" correlates with the reactions of others: behaviour which conforms with the norm generates praise or a neutral reaction, whereas conduct which violates the norm results in disapproval or stigma.[4] A norm has emerged and has been accepted by a critical mass of IOs.[5] Peoples affected by global governance activities have a legitimate expectation that they will be able to participate in the relevant processes.

The final thread leads to a question. It will be seen that some instances of practice, while appearing to meet the standard required to fulfil the right on paper, in reality work such that participation is nominal, rendering the appearance of voice illusory. Due to a lack of secondary literature on how participation takes place "on the ground" in many of the IOs studied, however, it is difficult to assess the extent to which such problems occur. This is an area where other research methods, such as interview-based or ethnographic, could be applied to answer the question of whether participation is in fact meaningful.

This "birds-eye assessment" will reveal a complex picture whereby the existence of a norm (in the social constructivist sense) throws into sharp relief cases where that norm is violated. By no means do all IOs consult or include peoples consulted or included on decisions that affect them. Even where there is nominal participation, it may not be full and effective. There is much more to be done to fulfil the right in all cases. However, the large number of cases where there is full and effective participation demonstrates the acceptance of the norm. Statements attributable to IOs, as well as those of states, evidence the perceived benefits of this norm: it is said to, instrumentally speaking, enable IOs to better achieve their mandated objectives and fulfil their functions, due to the improved quality of information to be used in policy- and decision-making, as well as greater buy-in to and ownership over outcomes by affected peoples. While it is unlikely that this norm has crystallised into a rule of CIL, it forms a legitimate expectation for affected peoples and a blueprint by which a rule of custom may in future emerge.

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[2] Finnemore (1996) 22-23. See also Finnemore and Sikkink (1998) 891-892. Similarly, see Florini (1996) 364-365.
[3] Finnemore and Sikkink (1998) 891-892.
[4] Ibid 891-892.
[5] On norm emergence and norm acceptance, see ibid 895-901. The "norm entrepreneurs", who have attempted to convince a critical mass of IOs and states to embrace the new norm, are peoples who have been affected by global governance processes.

These chapters are laid out as follows. This chapter concerns the participation of indigenous peoples in standard-setting activities of IOs and states acting collectively in intergovernmental fora. Chapter 5 concerns the participation of peoples in decision-making affecting them, focusing on that of international financial institutions and UN field programmes. Chapter 6 concerns general mechanisms for the participation of peoples in IOs, including associate member status, advisory or subsidiary bodies, permanent participant status, and the special case of Palestine. Chapter 7 discusses the participation of peoples at international courts and tribunals, focusing on the ICJ, ISDS tribunals, and WTO dispute settlement. To some extent this division is arbitrary; other ways of categorising the practice into manageable servings could have been chosen, including by area of mandate or type of participation. The categories overlap to a certain degree. In addition, the thesis does not include some kinds of practice, such as the participation of peoples in peace negotiations, international administration, and some IOs that act as corrective mechanisms for state violations of peoples rights, such as the human rights treaty bodies and regional human rights courts. While these fields contain relevant material, the scope of this study is necessarily limited by available space: in the case of the latter, the workings of human rights treaty bodies and regional human rights courts are relatively well understood, whereas this thesis prefers to give space to practice that has not yet been explored in the literature. These chapters also largely leave aside practice relating to the obligation of states to include peoples' representatives on national delegations; this would require its own substantial study.

This chapter first considers standard-setting on the rights of indigenous peoples. It outlines the participation of indigenous peoples in the development of the UNDRIP and the ILO Convention 169. Then, the chapter turns to other standard-setting activities affecting peoples' rights, considering practice under the WIPO, UNFCCC, CBD, FAO, and UNESCO. It examines the ISA and IMO as negative examples where the relevant practice does not exist.

2. Standard-setting on the rights of indigenous peoples: the process leading to the adoption of the UN Declaration on the Rights of Indigenous Peoples

In the past few decades significant advances have been made regarding the adoption of international instruments on the rights of indigenous peoples. By definition, these instruments fundamentally concern indigenous peoples, and so it is an area in which a high level of participation is required to fulfil the right. The process leading to the adoption of the UNDRIP was one such. The development of regional instruments on indigenous peoples' rights has also seen a high level of participation of indigenous peoples.[6] While these processes can be contrasted with the creation of the ILO Convention

[6] These processes will not be discussed here due to lack of space. On the process of drafting the American DRIP, see Organization of American States, 'Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples' http://www.oas.org/consejo/CAJP/Indigenous.asp. On the process of drafting the Nordic Saami Convention, in which Nordic states and Nordic Sámi were equally represented, see Koivurova (2006) 105-107.

No. 169 on indigenous peoples, which was developed in a much quicker procedure with much less space for the participation of indigenous people,[7] it is evident that in the vast majority of cases of standard-setting on indigenous peoples' rights there is a sense of the intrinsic importance of indigenous peoples' participation. In addition, there is a recognition that indigenous peoples' involvement is necessary to reach the objective of formulating an instrument on their rights.

The process of the development of the UNDRIP was characterised by an 'extraordinarily liberal, transparent and democratic procedure'[8] and high levels of participation of indigenous peoples themselves, in a way that has subsequently been characterised as a "best practice". It took place in a subsidiary body and then a working group, both established under UN auspices, before the eventual debate and adoption of the instrument in the GA.

2.1 Working Group on Indigenous Populations

The Working Group on Indigenous Populations ("WGIP") was established by ECOSOC in 1982 as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.[9] Meeting in annual sessions, it was composed of five members of the Sub-Commission, who were independent human rights experts.[10] The WGIP's mandate was to review developments concerning the promotion and protection of the rights of indigenous peoples, and to elaborate standards concerning their rights.[11] From 1985, the latter part of this mandate chiefly related to the development of a declaration on the rights of indigenous peoples, an initiative of the WGIP itself which was subsequently authorised by the Sub-Commission.[12]

The WGIP supported the broad participation of indigenous peoples in its activities. In addition to states, and NGOs with consultative status at the ECOSOC, the WGIP decided that indigenous peoples' organizations without consultative status with the ECOSOC should be able to participate as observers.[13] Indigenous peoples were thus placed on the same footing as states in the WGIP's proceedings. These representatives of indigenous peoples were permitted to speak, prepare working

[7] Anaya (2004) 58-61; Rodríguez-Piñero (2005) 291-331; Anaya and Rodríguez-Piñero (2018) 44.
[8] Daes (2009) 74.
[9] ECOSOC res 1982/34. Also see Human Rights Committee res 1982/19 of 10 March 1982.
[10] ECOSOC res 1982/34 [1]. For a detailed account of the WGIP's proceedings, see Daes (2009).
[11] ECOSOC res 1982/34 [1]-[2]. The WGIP's mandate was later extended to the preparation of studies on, respectively, the cultural and intellectual property of indigenous peoples, and treaties between states and indigenous peoples: ECOSOC decision 1992/256 (20 July 1992); ECOSOC decision 1988/134 (27 May 1988); ECOSOC res 1989/77.
[12] Sub-Commission on Prevention of Discrimination and Protection of Minorities res 1985/22 of 29 August 1985, UN Doc E/CN.4/Sub.2/1985/22.
[13] The barriers faced by indigenous peoples in accessing ECOSOC observer status will be canvassed below in Chapter 6, section 3. This decision, which in Stamatopolou's opinion was taken in response to the informal presence of indigenous representatives as members of the public at the first and second meetings of the WGIP, was never formalised in writing: Stamatopolou (1994) 68 note 30. On the rules of participation, see Cambou (2018) 40; Sanders (1989) 408.

papers, and make proposals.[14] Particularly notable is the role of one staff member of the Sub-Commission, Augusto Willemsen Diaz, in promoting this mode of participation.[15] In his own words, Willemsen Diaz 'sought ways of opening [the WGIP] up to the involvement of indigenous peoples' as he was 'concerned about the restrictive effect' of the requirement for ECOSOC consultative status and 'felt it absurd, and contradictory in the extreme, to create a working group to listen to indigenous organisations' representatives and then to demand that they have consultative status before they could participate in its sessions', likening it to 'destroying with one hand what you had just finished building with the other'.[16]

In practice, indigenous peoples' representatives took advantage of this status to both make formal presentations and informally lobby WGIP members and state delegates.[17] The participation of indigenous peoples was assisted by the 1985 establishment of the Voluntary Fund for Indigenous Populations, administered by the Secretary-General on the advice of a five-person board of which one member must be a representative of an indigenous peoples' organization.[18] This participatory practice may be attributed both to the WGIP itself as an organ of the UN, and to states: although it first began on the initiative of the WGIP, the establishment of the Voluntary Fund by member states acting through the GA can be seen to have implicitly acknowledged and authorised the practice.

Despite modest levels of attendance at first,[19] in practice the WGIP played host to the participation of large numbers of indigenous representatives: in 1988, for instance, ten indigenous NGOs and 76 other indigenous organizations participated,[20] while in 1992 there were around a thousand participants, representing hundreds of groups.[21] In addition, the WGIP saw state practice with respect to the inclusion of indigenous representatives on their delegations, including by Australia, Norway and Sweden.[22]

While some have described indigenous peoples' participation at the WGIP as 'performance' and 'social drama',[23] others highlight that their views were 'increasingly taken into account':[24] the first complete draft of the declaration, produced in 1988, 'substantially reflected proposals submitted by

[14] Eide (2009) 34, 36. Willemsen Diaz explains the process of how this decision was arrived at, on a proposal of Asbjörn Eide, the then Chair of the WGIP: Willemsen Diaz (2009) 27.
[15] Willemsen Diaz (2009).
[16] Willemsen Diaz (2009) 26.
[17] Alfredsson (1989) 24.
[18] GA res 40/131. According to a 2010 report of the UNHCHR, 'in practice, indigenous persons have been regularly appointed as members of the Board': A/HRC/15/38. In practice at times the board has been 100% indigenous: Willemsen Diaz (2009) 29.
[19] Muelebach (2001) 420.
[20] Sanders (1989) 410.
[21] Willemsen Diaz (2009) 27.
[22] Alfredsson (1986) 25.
[23] Thornberry (2002) 22.
[24] Eide (2009) 36.

indigenous peoples' representatives'.[25] The WGIP was an 'important platform for the dissemination of information and exchange of views' among indigenous peoples, states and NGOs, and the process of drafting the declaration was 'an important means for indigenous peoples to promote their own conceptions about their rights'.[26]

Following a process of revision, in which indigenous peoples along with states and others were consulted,[27] the WGIP completed its final draft text in 1993,[28] which was adopted by the Sub-Commission in 1994 and forwarded to the Commission on Human Rights.[29]

The WGIP's procedures can be seen as 'both dramatic and modest', as even though it was the first time indigenous peoples had an institutional voice at the UN, the WGIP was 'at the lowest level in the system':[30] its recommendations would have to go through the Sub-Commission, the Commission on Human Rights, the ECOSOC, the Third Committee, and the GA before being approved. It did not have policy-making or adjudicatory powers. As such, indigenous peoples perceived that they were still being 'treated as second-class citizens' at the UN.[31]

In addition, the practice of the WGIP cannot be said to have been accompanied by *opinio juris*. There is no evidence to suggest that the participation of indigenous peoples was regarded by the Working Group or UN member states as required by law; rather, it seems to have been done in response to increased demands by indigenous peoples, as well as to enable the WGIP to fulfil its mandate.[32] Hence, while the WGIP served as a way for indigenous peoples to 'make place' for themselves within the UN,[33] strengthen their own identity and sense of solidarity,[34] and participate 'fully and very actively as proponents and direct drafters' in the making of their rights under international law,[35] it cannot be seen as supporting the formation of CIL.

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[25] Anaya (2004) 63; see Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Universal Declaration on Indigenous Rights: A Set of Preambular Paragraphs and Principles' (1988) UN Doc. E/CN.4/Sub.2/1988/25. See also Alfredsson (1989) 24 ('There is no question that [indigenous peoples'] views have had a significant impact on the content of resolutions adopted and on the current preliminary draft principles').
[26] Anaya (2004) 63-64.
[27] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples' (1989) UN Doc E/CN.4/Sub.2/1989/33; Anaya (2004) 84 note 90; Working Group on Indigenous Populations, 'Annotations to the Provisional Agenda' (8 June 1994) UN Doc E/CN.4/Sub.2/AC.4/1994/1/Add.1 [5]-[7].
[28] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report of the Working Group on Indigenous Populations on Its Eleventh Session' (1993) UN Doc E/CN.4/Sub.2/1993/29, Annex I.
[29] Sub-Commission on Prevention of Discrimination and Protection of Minorities, res 1994/45 of 26 August 1994, 'Draft United Nations declaration on the rights of indigenous peoples'; Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report on its 46th session' (1994) UN Doc E/CN.4/Sub.2/1994/5. Commission on Human Rights res 1995/32 of 3 March 1995.
[30] Sanders (1989) 407.
[31] Burger (1994) 92.
[32] Willemsen Diaz (2009) 26; Eide (2009) 34.
[33] Muelenbach (2001) 440.
[34] Stamatopoulou (1994) 69.
[35] Willemsen Diaz (2009) 28.

2.2 Open-ended Intersessional Working Group on the Draft Declaration, 1995-2006

As the WGIP's work on the draft Declaration came to an end, the Commission on Human Rights established an intersessional working group with the sole purpose of developing a draft Declaration on the Rights of Indigenous Peoples ("WGDD"), taking into account the WGIP's draft.[36]

Following the successful participation of indigenous peoples in the WGIP, the ECOSOC authorised observer participation of indigenous peoples' organizations not in consultative status with ECOSOC for the sessions of the WGDD in recognition that they had 'special knowledge and understanding of the current situation of the world's indigenous people and their human rights needs'.[37] The meetings of the WGDD were declared to be informal—thus avoiding stringent rules of procedure—and states and indigenous peoples had equal rights to make oral interventions and submit written proposals; in addition, it was agreed that any consensus on the draft text would need to include both states and indigenous peoples.[38] Although this arrangement was 'formally less open'[39] than the WGIP as it required the accreditation of organisations without consultative status and in principle the state concerned could object to accreditation, it nonetheless represented the positive recognition and endorsement by the international community of the importance of indigenous peoples' participation in the making of their own rights. In practice, states rarely objected.[40] In addition, states such as Denmark and Norway included indigenous representatives on their delegations.[41]

It has been noted that indigenous peoples' representatives had a 'significant' level of participation and succeeded in 'gaining significant substantive influence' over the outcome in the draft declaration as finalised by the WGDD.[42] This arrangement is widely considered to be "best practice" with respect to the participation of indigenous peoples,[43] as well as more generally 'a good example of an inclusive and participatory UN process that contributed to the legitimacy of its outcome'.[44] However, for the purposes of this study it too lacks any evidence that the practice was accepted as law.

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[36] Commission on Human Rights res 1995/32. For detailed accounts of the discussions at the WGDD, see Henriksen (2009); Chávez (2009) 96.
[37] ECOSOC res 1995/32 [4], [7]; Commission on Human Rights resolution 1995/32. The accreditation procedure for such organizations was set out in the Annex to resolution 1995/32.
[38] Henriksen (2009) 79.
[39] Willemsen Diaz (2009) 28.
[40] Human Rights Council, Participation Report [27].
[41] Henriksen (2009) 81.
[42] Ibid 79.
[43] See e.g. Grand Council of the Crees, Letter to Claire Charters (2012), accessible at https://www.ohchr.org/EN/Issues/IPeoples/Pages/ConsultationonIPparticipationintheUN.aspx.
[44] WIPO IGC, 'Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', WIPO Doc WIPO/GRTKF/IC/20/7, Annex [11].

2.3 Adoption of the Declaration at the General Assembly

The WGDD process concluded with the referral by the Sub-Commission and the subsequent adoption by the Human Rights Council of a draft declaration.[45] Upon the transferral of the draft declaration to the GA, indigenous peoples' representatives who had participated vigorously in the proceedings of the WGIP and WGDD for more than 20 years found themselves with a 'greatly diminished voice'.[46] Owing to the strict rules of procedure applicable to the GA and its Third Committee, indigenous peoples could not participate in the discussion. They remained on the sidelines as disagreements over self-determination, the definition of indigenous peoples, and state sovereignty resulted in the process temporarily stalling.[47] While indigenous peoples were informed about a final set of changes made by states a week before the UNDRIP's adoption in 2007,[48] it does not appear that they were able to exercise any influence over the alterations. This case demonstrates that participation may ultimately be limited by entrenched procedural rules that maintain the centrality of states in IOs.

Notwithstanding the limitations of the GA, 'no other UN human rights instrument ha[d] ever been elaborated with so much direct involvement and active participation on the part of its intended beneficiaries'.[49] The great majority of the process had taken place by way of direct negotiations between indigenous peoples and states. The process leading to the adoption of the UNDRIP can be characterised as a partnership, in Arnstein's terminology, whereby power was shared between states and the peoples concerned. This level of participation was undoubtedly necessary for the legitimacy and effectiveness of the resulting instrument.

3. Standard-setting affecting indigenous peoples' rights

This section considers the practice of the WIPO, the UNFCCC, the CBD, the FAO, UNESCO, the ISA and the IMO. In each case, the relevant practice will be explored, followed by a consideration of the motivations for the practice and the question of *opinio juris*. In the WIPO, UNFCCC and CBD the practice takes the form of participation of indigenous peoples in subsidiary organs dealing with matters specifically affecting them. In the FAO the practice consists of enhanced participation, along with other affected groups. These organizations also provide for a lower level of participation in their wider affairs. UNESCO and FAO also have policies regarding the participation of indigenous peoples in matters affecting them.

[45] The Council had recently replaced the Commission. Human Rights Council res 2006/2.
[46] Carmen (2009) 98.
[47] See Castellino and Doyle (2018) 28; Eide (2009) 38-40.
[48] Carmen (2009) 98.
[49] Daes (2009) 74.

3.1 The World Intellectual Property Organization Intergovernmental Committee on Traditional Knowledge

As outlined in Chapter 2, WIPO's standard-setting activities affect indigenous peoples, particularly the process underway in its IGC. In this body, WIPO has instituted *sui generis* rules of procedure to enable indigenous peoples' participation.

The WIPO Rules of Procedure do not provide for the participation of indigenous peoples, or indeed of anyone but member states and observer states and IGOs.[50] However, even before the establishment of the IGC, from the earliest stages of WIPO's consideration of traditional knowledge there was a recognition within the organisation that it should reach out 'to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations'.[51]

At the IGC's first meeting, a fast-track accreditation procedure for *ad hoc* observers was established to allow indigenous communities (and other entities) without permanent observer status at WIPO to participate in the IGC's meetings.[52] Indigenous peoples, along with all other participants, are allowed to speak at the beginning of the IGC sessions, and are also permitted some speaking time during the sessions.[53] In practice, the Chair of the IGC has allowed observers to intervene on any agenda item, and to make drafting proposals on negotiating texts and other working documents for consideration by member states; such proposals are incorporated in the text if supported by at least one member state and are reflected in the reports of the sessions.[54] On occasion, indigenous peoples' representatives have served as rapporteurs for contact drafting groups.[55] In addition, in 2013 an IGC meeting included an Indigenous Expert Workshop as part of its proceedings,[56] and another will be held during 2020-2021.[57] This is a markedly higher level of participation than permitted in other organs of WIPO, and gives indigenous peoples the ability to make meaningful inputs into the standard-setting process. Under Arnstein's typology it falls at a level between consultation and partnership. If and when

[50] WIPO, General Rules of Procedure, No 399 (FE) Rev. 3, 1998. (Adopted 28 September 1970; amended 27 November 1973, 5 October 1976, and 2 October 1979), Rules 7 and 8.
[51] WIPO Budget Committee, 'Draft Program and Budget 1998-1999' (1998) WIPO Doc WO/BC/18/2—A/32/2 107. See IGC, 'Participation of Local and Indigenous Communities in the Work of the Committee' (2002) WIPO Doc WIPO/GRTKF/IC/4/12 [3]-[8].
[52] IGC, 'Rules of Procedure' (2001) WIPO Doc WIPO/GRTKF/IC/1/2 [6], [8]; IGC, 'Report on the First Session' (2001) WIPO Doc WIPO/GRTKF/IC/1/13 [17]-[18].
[53] IGC, 'Report on the Seventh Session' (2005) WIPO Doc WIPO/GRTKF/IC/7/15 [63].
[54] IGC, 'Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', WIPO Doc WIPO/GRTKF/IC/20/7, Annex [24].
[55] IGC, 'Intersessional Working Group (IWG) 2, March 2011' (2011) WIPO Doc WIPO/GRTKF/IWG/2/3.
[56] IGC, 'Report of the Indigenous Expert Workshop', WIPO Doc WIPO/GRTKF/IC/25/INF/9.
[57] IGC, 'Decisions of the Fortieth Session of the Committee' (21 June 2019) WIPO Doc WIPO/GRRTKF/IC/40/DECISIONS 2-3.

negotiations result in legal instruments on traditional knowledge and cultural expression, the contents of such instruments will have been greatly influenced by indigenous peoples.

In addition to their participation in the substantive negotiations, since 2005, pursuant to a proposal made by New Zealand,[58] the sessions of the IGC have been opened by panels of representatives of indigenous and traditional communities presenting on their concerns and experiences.[59] According to the WIPO Secretariat, these panels are 'a rich source of information on the experiences, concerns and aspirations of indigenous and local communities concerning the protection, promotion and preservation of traditional knowledge, traditional cultural expressions and genetic resources'.[60] Summaries of their proceedings are recorded in WIPO's reports of the IGC meetings,[61] and presentations made by panel participants are made available on the IGC website.[62] While the panels could be argued to heighten the visibility of indigenous peoples and increase awareness of their concerns and experiences, in practice they may not add much to, and may even detract from, indigenous peoples' substantive influence. State representatives often leave the room during the presentations,[63] and there is no formal mechanism by which they feed into the process. This is an ineffective variety of consultation, under Arnstein's typology. The panels have thus been rightly criticised as increasing 'apparent participation while not improving their influence' and sidelining indigenous peoples' views.[64]

WIPO provides some practical support for the participation of indigenous peoples. The Secretariat facilitates preparatory consultative arrangements for indigenous representatives through an Indigenous Consultative Forum before each IGC meeting, and provides a dedicated room for indigenous peoples and local communities' representatives to hold consultations throughout the meetings,[65] as well as a 'fully equipped office with multilingual secretarial support'.[66] In addition, WIPO nominally funds, with member states' contributions, the participation of accredited indigenous and local communities through the WIPO Voluntary Fund.[67] However, the fund is frequently depleted, and in reality finances

[58] IGC, 'New Zealand Proposal—Practical Participation of Indigenous and Local Communities' (2005) WIPO Doc WIPO/GRTKF/IC/7/14.
[59] IGC, 'Report on the Seventh Session', [63(iv)].
[60] WIPO, 'Presentations on Indigenous and Local Community Experiences', https://www.wipo.int/tk/en/igc/panels.html, accessed 5 August 2019.
[61] IGC, 'Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', Annex [37].
[62] WIPO, 'Intergovernmental Committee IGC' https://wipo.int/tk/en/igc/.
[63] Gordon (2014) 655.
[64] Ibid 655.
[65] IGC, 'Practical Guide for Observers', 4, https://www.wipo.int/export/sites/www/tk/en/igc/pdf/observers_practical_guide.pdf.
[66] Ibid.
[67] WIPO, 'Establishment of the WIPO Voluntary Fund for Accredited Indigenous and Local Communities' (2005) WIPO Doc WO/GA/32/6, Annex.

the attendance of only a few representatives;[68] in addition, states have opposed the funding of indigenous peoples' participation from WIPO's core budget.[69] This experience demonstrates that mechanisms for enabling indigenous peoples' participation may be rendered illusory if not materially supported.[70]

It has been pointed out by indigenous peoples and international legal scholars that while the level of participation is more than nothing, it does not place indigenous peoples on the same footing as states.[71] While indigenous peoples may make textual proposals and amendments, these require the support of at least one state in order to be reflected in the text.[72] Proposals made by states, of course, encounter no such gatekeeping. Indigenous peoples cannot vote in the IGC, unlike states, nor will they be able to vote on the adoption of any eventual instrument in the WIPO General Assembly.[73] Moreover, accreditation of indigenous peoples' organisations under the "fast track" procedure in practice still takes up to a year, and member states can block organisations from participating.[74] In addition, indigenous peoples' representatives have the same level of participation as other non-state actors such as NGOs and industry observers. Hence some have argued that the IGC is still premised on a 'statist franchise' in which the participation of indigenous peoples is 'marginal and mediated through the prism of the state'.[75] Indigenous peoples' participation does not meet the level of partnership in which power is distributed.

Such criticisms led indigenous peoples' representatives at the IGC's 20th meeting in 2012 to withdraw from active participation, calling on states to acknowledge that the process 'should include Indigenous Peoples on equal terms with the States since the work will directly impact' their lives, lands, territories and resources, and saying they would not participate again until the rules of procedure were changed 'to permit [their] full and equitable participation at all levels of the IGC'.[76] They requested 'full and effective participation' in 'all relevant negotiations and decision-making processes, including all regular and special sessions of the IGC, the General Assembly, diplomatic conferences and any other related meetings regarding the proposed instruments'; the ability to make proposals without

[68] See e.g. IGC, 'Report of the Thirty-Sixth Session' (2018) WIPO Doc WIPO/GRTKF/IC/36/11 [31]; 'Report on the Thirty-Fifth Session' (2018) WIPO Doc WIPO/GRTKF/IC/35/10 [36]. See also Gordon (2014) 655.
[69] IGC, 'Report on the Twenty-Eight Session' (2014) WIPO Doc WIPO/GRTKF/IC/28 [34].
[70] Solomon (2017) 227.
[71] See e.g. Gordon (2014); Lawson, Bikundo and Tranter (2019); Solomon (2017); Boehme (2018).
[72] Gordon (2014) 632.
[73] Lawson, Bikundo and Tranter (2019) 307, 309.
[74] Gordon (2014) 654.
[75] Lawson, Bikundo and Tranter (2019) 307, 310.
[76] International Indigenous Forum, 'Final Statement of the International Indigenous Forum' (2012) www.iwgia.org/en/news-alerts/archive/283-english/news-archive/1544-indigenous-peoples-withdraws-from-participation-in.

requiring immediate state support; and consultation on 'all proposals, deletions and amendments of all text in a collaborative manner'.[77]

These protests did not ultimately result in change. In response to the immediate situation, the IGC "took note" of the statements and stated that the requests might be considered at future meetings. Subsequently, pursuant to a request by the WIPO General Assembly,[78] the WIPO Secretariat proposed several options to enhance observer participation in the IGC.[79] It suggested, *inter alia*: drawing a distinction between observer organizations that represent and are accountable to indigenous peoples and local communities, and NGOs that work for or with indigenous peoples and local communities;[80] inviting indigenous peoples' representatives to nominate representatives to form part of "Friends of the Chair" groups, or co-chair or co-facilitate sub-working groups;[81] and bringing the panel discussions formally into the IGC's proceedings by using them to provide the IGC with information and advice on a specific theme identified by the IGC at a previous session.[82] The IGC went as far as carrying out a consideration of the practical, procedural and budgetary implications of these actions.[83] But at its following meeting the IGC merely "took note of and exchanged views" on the matter, without altering its procedure.[84]

Linked to these frustrations, the IGC process has also been criticised for an 'appalling lack of progress' due to 'stonewalling' by developed countries seeking to 'protect their commercial investments'.[85] Negotiations have been protracted: the IGC's mandate to produce a negotiated text was originally set to expire at the end of 2011,[86] but it has had to be extended several times due to entrenched disagreement stemming from deep-seated political differences. As such, the IGC process may be losing its legitimacy in the eyes of indigenous peoples. Only four indigenous representatives attended the 30th meeting of the IGC in 2016;[87] around eight attended in 2019.[88] As Aroha Te Pareake, a keynote speaker at the 30th meeting, put it: 'this surely represents a low point in this IGC process, a warning signal that the IGC may have lost credibility with many indigenous peoples because of the

[77] 'Statement of Indigenous Peoples and Local Communities at WIPO IGC 19', accessed at http://ip-watch.org/weblog/wp-content/uploads/2011/07/Indigenous-Peoples-Statement-IGC19.
[78] WIPO, 'Matters concerning the IGC' (2011) WIPO Doc WO/GA/40/7 [16].
[79] IGC, 'Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (2012) WIPO Doc WIPO/GRTKF/IC/20/7 and Annex.
[80] Ibid [6]-[7], Annex [15]-[17].
[81] Ibid [8], Annex [26]-[27].
[82] Ibid, Annex [38].
[83] IGC, 'Draft Report on the Twenty-First Session' (2012) WIPO Doc WIPO/GRTKF/IC/21/7 Prov2 [618].
[84] IGC, 'Draft Report on the Twenty-Second Session' (2012) WIPO Doc WIPO/GRTKF/IC/22/6 Prov2 [514].
[85] Solomon (2017) 225-226.
[86] WIPO General Assembly, 'Report on the Thirty-Eighth Session' (2009) WIPO Doc WO/GA/38/20 [217]; see also IGC, Report on the Fifteenth Session (2009) WIPO/GRTKF/IC/15/7 [79], [125] and [140].
[87] Solomon (2017) 226.
[88] IGC, 'Second Provisional List of Participants' (20 March 2019) WIPO Doc. WIPO/GRTKF/IC/39/INF/1 Prov. 2.

impasse and blockage that has occurred here and the lack of certainty over the recognition of indigenous peoples as rights holders'.[89] It is unlikely, however, that greater participation in the process could assist with this. Indigenous peoples, even if granted the ability to co-chair negotiations and make proposals directly on the draft text without the endorsement of a state, cannot force states to come to an agreement.

3.1.1 Motivations

Statements made by both states and WIPO organs evidence recognition that indigenous peoples ought to be able to participate in matters affecting them at the international level.

The IGC decided in 2005 that 'there was a unanimous view that the participation of local and indigenous communities was of great importance' for its work.[90] The WIPO General Assembly has repeatedly 'recogniz[ed] the importance of the participation of Indigenous peoples and local communities in the work of the IGC' in the context of encouraging member states to contribute to the WIPO Voluntary Fund.[91] In addition, the WIPO General Assembly decided in 2002 that states should 'be encouraged to include representatives of indigenous and local communities on their delegations' to the IGC.[92] The IGC itself considered in 2005 that states 'should make every effort' to include such representatives in their delegations.[93]

Individual states, too, have repeatedly expressed the importance of indigenous peoples' participation. According to New Zealand's 2004 proposal, 'the subject matter' meant that 'indigenous and local communities have a very high stake in the outcomes of its deliberations.'[94] The submissions of member states to a 2011 consultation on observer participation also 'underscored the vital importance of guaranteeing…the participation of indigenous peoples and local communities, as the holders of traditional knowledge…and traditional cultural expressions'.[95] For instance, Colombia stated that the representation of indigenous peoples and local communities was 'fundamental';[96] Pakistan encouraged 'strengthening the capacity' of observers to contribute to the process, citing their

[89] Quoted in Solomon (2017) 226.
[90] IGC, 'Report on the Fifth Session' (2003) WIPO Doc WIPO/GRTKF/IC/5/15 [206].
[91] See e.g. WIPO, 'Assemblies of the Member States of WIPO, Fifty-Eighth Series of Meetings, Summary Report' (2018) WIPO Doc A/58/10 [43].
[92] WIPO, 'Assemblies of the Member States of WIPO, Thirty-Seventh Series of Meetings, General Report' (2002) WIPO Doc A/37/14 [290(ii)].
[93] IGC, 'Report on the Fifth Session', [206].
[94] IGC, 'New Zealand Proposal', Annex, [1].
[95] 'Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', Annex [3]. The submissions of states came from Colombia, Kazakhstan, Mexico, Pakistan, Russia, and the United States. Access to the original submissions is not available.
[96] WIPO Secretariat, 'Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (10 October 2011), Annex, Republic of Colombia, 'Comments on mechanisms for participation of observers in the Twentieth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', 1.

'valuable inputs';[97] Russia expressed 'strong support to all mechanisms for participation of observers';[98] and even the United States, while not countenancing indigenous peoples' participation in negotiations, acknowledged the panel presentations as a 'vital resource'.[99] States have also made their support for indigenous peoples' participation known in the course of IGC meetings. At the 35th meeting Switzerland, delivering a statement on behalf of Group B,[100] acknowledged the 'valuable and essential role' of indigenous peoples for the work of the IGC.[101] At the 36th meeting, Lithuania speaking for Central European and Baltic States commended the active and valuable contribution of indigenous peoples.[102] At the 37th meeting, Brazil said that it would 'not be desirable to continue without' indigenous peoples' participation, and South Africa stated that it was committed to increasing indigenous peoples' participation.[103] At the 38th meeting, Morocco stated for the African Group that the participation of indigenous peoples was important in legitimising the IGC's work; El Salvador for the Group of Latin American and Caribbean States stressed that indigenous peoples' contributions were important for sharing information about their experiences and points of view; and Canada for Group B welcomed their engagement.[104]

3.1.2 *Opinio juris*?

One statement of the WIPO Secretariat may suggest that it accepts the participation of indigenous peoples as being required by international law. A 'Practical Guide for Observers' in the IGC published on the WIPO Secretariat website states:[105]

> Indigenous peoples and local communities in particular need to be able to participate, express their views and have their voices heard in the IGC decision-making process, in accordance with the 2007 UN Declaration on the Rights of Indigenous Peoples, as the outcome of the IGC negotiations will affect their rights.

This statement suggests that WIPO views the participation of indigenous peoples in the IGC as required by the UNDRIP. However, the question of whether this amounts to *opinio juris* depends to some extent on whether or not WIPO views UNDRIP as international law. As it is considered soft law by many states, it cannot be confidently concluded that reference to the UNDRIP is firm evidence of *opinio juris*. At minimum, it is acknowledgement that the participation of peoples is in line with persuasive authority.

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[97] Ibid, Comments of the Intellectual Property Organisation of Pakistan, 1.
[98] Ibid, Comments of the Russian Federation, 1.
[99] Ibid, Comments of the United States, 1.
[100] Group B consists of industrialised countries.
[101] IGC, 'Report on the Thirty-Fifth Session' [20].
[102] IGC, 'Report on the Thirty-Sixth Session' [20].
[103] IGC, 'Report on the Thirty-Seventh Session' (2019) WIPO Doc WIPO/GRTKF/IC/37/17 [35], [36].
[104] IGC, 'Report on the Thirty-Eighth Session' (2019) WIPO Doc WIPO/GRTKF/IC/38/16 [14], [15], [17]. Also see IGC, 'Report on the Thirty-Ninth Session' (2019) WIPO Doc WIPO/GRTKF/IC/39/18 [15], [17].
[105] WIPO IGC, 'Practical Guide for Observers', 1.

The practice of WIPO is emblematic of the complex picture that these empirical chapters aim to sketch. On one level, it contributes to evidencing the existence of the norm: the organization has altered its rules to allow the participation of indigenous peoples in a standard-setting process of great concern to them, over and above the default level of participation allowed in the organization as a whole. Submissions of states, as well as statements attributable to the organization, reveal that this practice is considered intrinsically important. However, the practice also reveals that states are unwilling to distribute power to affected indigenous over the outcomes, tightly circumscribing their role and voice. This can be seen in the limited funding arrangements: while WIPO created a mechanism to provide for the financing of participation, necessary for the right to be made effective, in reality states have been reluctant to contribute to the Voluntary Fund. The indigenous peoples panels at the beginning of IGC sessions further serve to placate and distract. While indigenous peoples can provide inputs into the process, states have not ultimately distributed power.

3.2 UN Framework Convention on Climate Change

Indigenous peoples are particularly vulnerable to the impacts of climate change, despite having contributed very little to the problem: their lives and livelihoods are closely linked with lands and resources, they often live in regions particularly prone to the effects of climatic change, and they are systematically marginalised due to the ongoing processes and effects of colonisation.[106] Climate change has already had, and will continue to have, extensive adverse impacts on indigenous peoples' food systems, water, health, culture, and economies.[107] Indigenous peoples are not only victims, however: their traditional knowledge, it is increasingly recognised, is useful for developing effective climate change mitigation and adaptation strategies, and they play an important role in the protection of forests and other carbon sinks.[108]

The UNFCCC is the central institution in the global climate governance regime complex.[109] Activities carried out under its auspices, aimed at fulfilling its objective of avoiding dangerous global warming,[110] inherently affect indigenous peoples. However, for much of the UNFCCC's history the formal participation of indigenous peoples has been extremely limited. Non-state actors can participate as observers in the UNFCCC through nine "constituencies", informal voluntary groups of organisations representing various categories of stakeholders.[111] Indigenous Peoples are one such constituency, participating on the same basis as NGOs and other civil society organisations: each

[106] Ramos-Castillo, Castellanos, and Galloway McLean (2017) 2.
[107] There is an extensive literature. For illustrative examples, see: Ford (2012); Maldonado, Colombi and Pandya (2013); Houser et al (2001); Lynn et al (2013).
[108] See e.g. Parlee and Caine (2018); Maldonado (2016); Cochran et al (2013); Nakashima et al (2012); Green and Raygorodetsky (2010).
[109] UN Framework Convention on Climate Change ("UNFCCC"); see also Paris Agreement. On the climate change regime complex, see: Keohane and Victor (2011); Betsill et al (2015).
[110] UNFCCC, Article 2.
[111] Depledge (2005) 214-216.

constituency is allocated a limited time (usually two minutes) to make formal interventions after the closure of a plenary session, and can provide written input into the negotiations process upon invitation by the Secretariat. Notwithstanding informal ways of influencing the process, such as lobbying state delegates and disseminating information, this level of participation is very limited, even tokenistic. There is no formal means by which observers can participate during meetings, and many state delegates leave the room after the closure of a session and before observer statements.[112] Beyond the case of indigenous peoples, then, the UNFCCC can be criticised for its lack of provision for those most directly affected by climate impacts of an active voice in decision-making: the observer constituencies do not necessarily correspond with those most affected, the process of gaining observer accreditation takes years, observer participation is in any case extremely limited, at least in a formal sense, and affected communities are not necessarily represented by their respective states.[113]

The UNPFII has repeatedly called on the UNFCCC to 'guarantee the full and effective participation of indigenous peoples',[114] establish a working group on indigenous peoples to study and propose solutions to the 'urgent situations caused by climate change' that they face,[115] and develop mechanisms for indigenous peoples' participation in 'all aspects of the international dialogue on climate change'.[116] However, until recently the response of the UNFCCC has been limited. At its 20th session, the Subsidiary Body on Implementation ("SBI"), the organ tasked with managing the implementation of the Framework Convention,[117] considered the UNPFII's recommendations but held that full and effective participation of indigenous peoples could already be achieved through the existing observer mechanism,[118] and 'encouraged' indigenous peoples' organisations to 'make full use of' existing opportunities.[119] While it acknowledged 'the importance of an enhanced participation by indigenous peoples' organizations in the Convention process',[120] the SBI merely invited states parties to 'consider' drawing on indigenous peoples' organizations' expertise when discussing matters of concern to them,[121] encouraged parties to consider ways of enhancing the participation of indigenous peoples' organizations in the UNFCCC,[122] and invited the UNFCCC Secretariat and the chairs of relevant UNFCCC bodies to facilitate such participation to the extent possible.[123] Although the SBI and the Conference of the Parties ("COP") have more recently recognized that the effective

[112] Thew (2018) 379.
[113] Toussaint (2018) 770-771, 776.
[114] UNPFII, 'Report of the second session' (2003) UN Doc E/C.19/2003/22 [61].
[115] Ibid [47]; UNPFII, 'Report of the third session' (2004) UN Doc E/C.19/2004/23 [78].
[116] UNPFII, 'Report of the seventh session' (2008) UN Doc E/C.19/2008/13 [21], [30].
[117] UNFCCC, Article 10. All states parties are represented in the SBI and decisions are taken by consensus. Observer modalities are the same as for the COP.
[118] SBI, 'Report of the Subsidiary Body for Implementation on its twentieth session' (2004) UNFCCC Doc FCCC/SBI/2004/10 [109].
[119] Ibid [106].
[120] Ibid [108].
[121] Ibid [107].
[122] Ibid [107].
[123] Ibid [108].

participation of indigenous peoples is 'important for effective action on all aspects of climate change',[124] and the COP has requested the Secretariat to provide 'meaningful and regular opportunities for the effective engagement of' indigenous peoples,[125] such sentiments have not been borne out in practice.

3.2.1 UNFCCC Local Communities and Indigenous Peoples Platform

One recently created mechanism, however, is of interest for the purposes of this study: the Local Communities and Indigenous Peoples Platform ("LCIPP", or the "Platform"), which aims 'to facilitate full and effective participation of [indigenous peoples and local communities] in the UNFCCC process to help accelerate the global effort to mitigate and adapt to climate change in an integrated and holistic manner'.[126] In 2015, in its decision accompanying the Paris Agreement, the COP '[r]ecognize[d] the need to strengthen knowledge, technologies, practices and efforts of local communities and Indigenous Peoples related to addressing and responding to climate change', and to this end established 'a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner'. [127] As the COP did not further specify the Platform's mandate or form, it fell to successive sessions of the Subsidiary Body for Scientific and Technological Advice ("SBSTA"), the organ established by states parties to provide advice on scientific and technological matters,[128] to operationalise the Platform.

Indigenous peoples were involved at every step of the process of deciding how the Platform would work. Following informal consultations at COP 22 in 2016, in which some states included indigenous peoples' representatives on their delegations,[129] an open multi-stakeholder dialogue was convened during the 46th session of the SBSTA in May 2017, co-moderated by a representative of indigenous peoples' organizations and a state party, to discuss the LCIPP's functions, and possible ways and modalities of fulfilling those functions, in an inclusive discussion among states parties, indigenous

[124] SBI, 'Report of the Subsidiary Body for Implementation on its thirty-fourth session' (2011) UNFCCC Doc FCCC/SBI/2011/7/Add.1 [170]; UNFCCC, 'The Cancun Agreements', Decision 1/CP.16 (2010) UNFCCC Doc FCCC/CP/2010/7/Add.1 [7].
[125] UNFCCC, 'Lima Call for Climate Action', Decision 1/CP.20 (2014) UNFCCC Doc FCCC CP/2014/10/Add.1 [19].
[126] The term "local communities" is used here and by other organizations due to a political unwillingness on behalf of some states to accept the existence of indigenous peoples within their borders. This thesis will refer to "indigenous peoples" for brevity.
[127] UNFCCC, '2019 report to the UNPFII', 3, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/Questionnaire-to-Agencies-Nov-2018_UNFCCC-input-v-8-Jan.pdf.
[128] UNFCCC, Article 9. Like the SBI, decisions in the SBSTA are taken by consensus among all states parties. Observer modalities are the same as for the COP.
[129] Canada, first submission, Local Communities and Indigenous Peoples' Platform (April 2017) 1. All submissions can be found at UNFCCC, 'Submission Portal', https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.

peoples' representatives and others.[130] Subsequently, submissions were sought from states, indigenous peoples' organizations, IGOs and other observers.[131]

As a result of this process, in 2017 the COP decided at its 23rd meeting that the LCIPP would have a three-fold purpose:[132]

> to strengthen the knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, to facilitate the exchange of experience and the sharing of best practices and lessons learned related to mitigation and adaptation in a holistic and integrated manner, and to enhance the engagement of local communities and indigenous peoples in the UNFCCC process.

Pursuant to these purposes, the COP decided that the Platform would have three functions: knowledge sharing, capacity building, and with respect to climate policy and actions.[133] On the first function, the COP decided that the Platform:[134]

> should promote the exchange of experience and best practices with a view to applying, strengthening, protecting and preserving traditional knowledge, knowledge of indigenous peoples and local knowledge systems, as well as technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, taking into account the free, prior and informed consent of the holders of such knowledge, innovations and practices.

Regarding the second function, the LCIPP should:[135]

> build the capacity of indigenous peoples and local communities to enable their engagement in the UNFCCC process and the capacity of Parties and other relevant stakeholders to engage with the platform and with local communities and indigenous peoples, including in the context of the implementation of the Paris Agreement and other climate change related processes.

In terms of the third, the Platform should:[136]

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[130] COP 22 requested that the Chair of the SBSTA convene the dialogue: SBI, 'Report of the Subsidiary Body for Implementation on its forty-fifth session' (2017) UNFCCC Doc FCCC/CP/2016/20 [167(b)], and prepare a report on the dialogue for consideration at SBSTA 47 ([167(c) and (d)]. The dialogue is noted in the report of SBSTA 46: UNFCCC, 'Report of the Subsidiary Body for Scientific and Technological Advice on its forty-sixth session' (30 June 2017) UNFCCC Doc FCCC/SBSTA/2017/4 [8].
[131] All submissions can be found at UNFCCC, 'Submission Portal', https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx. Also see SBSTA, 'Local communities and indigenous peoples platform: proposals on operationalization based on the open multi-stakeholder dialogue and submissions: Report by the secretariat' (2017) UNFCCC Doc FCCC/SBSTA/2017/6.
[132] UNFCCC, 'Report of the Conference of the Parties on its twenty-third session, held in Bonn from 6 to 18 November 2017, Addendum: Decisions adopted by the Conference of the Parties' (8 February 2018) UNFCCC Doc FCCC/CP/2017/11/Add.1, Decision 2/CP.23, 'Local communities and indigenous peoples platform' [5].
[133] Ibid [6].
[134] Ibid [6(a)].
[135] Ibid [6(b)].
[136] Ibid [6(c)].

> facilitate the integration of diverse knowledge systems, practices and innovations in designing and implementing international and national actions, programmes and policies in a manner that respects and promotes the rights and interests of local communities and indigenous peoples. The platform should also facilitate the undertaking of stronger and more ambitious climate action by indigenous peoples and local communities that could contribute to the achievement of the nationally determined contributions of the Parties concerned.

This mandate downplays any role for the Platform to give advice to or feed into other policy- or decision-making processes under the UNFCCC, contrary to the suggestions made by indigenous peoples' organisations during the consultations on the Platform's operationalization.[137] The third purpose (enhancing the engagement of indigenous peoples in the UNFCCC) and the first part of the third function (facilitating the integration of indigenous knowledge in designing and implementing international and national climate policy) comes closest to providing for this. But the LCIPP's mandate focuses on the softer functions of exchanging experiences and best practices, building the capacity of indigenous peoples to engage in the UNFCCC, and promoting climate action by indigenous peoples themselves so as to contribute to states achieving their national climate goals. While these are worthy goals, and although the Platform could subsequently be steered so as to advocate for stronger forms of participation in the UNFCCC process, the extent to which it can do so remains to be seen.

Notwithstanding this, the notable feature of the Platform is the *sui generis* mechanism it provides for the participation of indigenous peoples' representatives. The decision of COP 23 provided that the operationalisation of and processes under the Platform should take into account the full and effective participation of indigenous peoples, the equal status of indigenous peoples and states parties, 'including in leadership roles', the self-selection of indigenous peoples' representatives in accordance with their own procedures, and the need for adequate funding from the UNFCCC Secretariat and states parties.[138] In December 2018, the COP took a further decision to establish a Facilitative Working Group for the LCIPP, with the objective of further operationalizing the Platform and facilitating the implementation of its functions'.[139] The Facilitative Working Group is composed of 14 individuals: seven representatives of states parties, and seven representatives of indigenous peoples' organizations, appointed by indigenous peoples through their focal points.[140] The roles of the Co-

[137] The Assembly of First Nations proposed that indigenous peoples be granted permanent participant status at the UNFCCC, like in the Arctic Council (discussed below in Chapter 6): Assembly of First Nations, 'Submission of the Assembly of First Nations (AFN) on the Purpose, Content and Structure for the Indigenous Peoples' traditional knowledge platform', 5.
[138] Decision 2/CP.23, [8].
[139] UNFCCC, 'Local Communities and Indigenous Peoples Platform: Draft conclusions proposed by the Chair' (7 December 2018) UNFCCC Doc FCCC/SBSTA/2018/L.18, Decision 2/CP.24 [1]-[2]. See also Decision 2/CP.23 [5].
[140] Decision 2/CP.24 [3], [6]. The number seven was chosen to enable representation of the seven socio-cultural regions of the world's indigenous peoples.

Chairs and Vice Co-Chairs of the group are, similarly, equally split between states and indigenous peoples.[141] Meeting twice a year and making decisions by consensus, the sessions of the Working Group are open to states parties and observers, but not to indigenous peoples' organizations and representatives that do not qualify, or have not qualified, for admission as observers.[142]

At its first meeting in June 2019 alongside the 50th meeting of the SBSTA, the Working Group discussed its plans for activities during 2020 and 2021.[143] At SBSTA 50 three activities also took place under the LCIPP: an informal dialogue on the development of a web portal dedicated to the Platform; a partnership-building dialogue on work relevant to the LCIPP taking place outside of the UNFCCC; and an informal open dialogue between representatives of constituted bodies under the UNFCCC on the three functions of the Platform.[144] The Working Group is due in November 2019 to propose a two-year workplan for implementing the functions of the LCIPP.[145] Its mandate initially lasts for three years and will be reviewed in 2021.[146]

The LCIPP, then, has engendered unprecedented space for indigenous peoples within UNFCCC processes. It represents a partnership whereby power is distributed between states and indigenous peoples. In light of the Platform's limited mandate, it remains to be seen to what extent it allows indigenous peoples to participate in processes affecting them elsewhere in the UNFCCC. If the Platform does become a way in which indigenous peoples can have voice in wider UNFCCC processes, it is likely that this would meet the level of participation required to fulfil the right: indigenous peoples are far from the only ones affected by climate change impacts. Marginalised people everywhere are more prone to suffer the first and worst consequences. While there could be a case for enhanced participation of all those particularly affected by climate change impacts in, for instance, discussions on loss and damage,[147] it is not obvious that indigenous peoples ought to have a greater role than that of other affected individuals and groups.[148] Thus, while the LCIPP could be criticised as a way for states to compartmentalise indigenous peoples' participation in the UNFCCC

[141] Decision 2/CP.24 [9].
[142] Ibid [15], [17], [29].
[143] UNFCCC, 'Local Communities and Indigenous Peoples Platform, The first meeting of the Facilitative Working Group: Agenda and annotations' (2019) UNFCCC Doc FWG/2019/1/1. See the report of the meeting, annexed to which is the proposed two-year workplan of the Facilitative Working Group: SBSTA, 'The 1st meeting of the Facilitative Working Group of the Local Communities and Indigenous Peoples Platform: Report by the secretariat' (2019) UNFCCC Doc FCCC/SBSTA/2019/4.
[144] UNFCCC, 'LCIPP Events in Conjunction with SBSTA 50, June 2019' https://unfccc.int/sites/default/files/resource/LCIPP%20Events%20and%20relevant%20invites-SBSTA50_31May.pdf.
[145] Decision 2/CP.24 [18]-[19].
[146] Ibid [24], [27], [28].
[147] Toussaint (2018).
[148] In the consultation process on the role of the LCIPP, other civil society observers stressed that all affected peoples should have a greater voice in UNFCCC processes: ENGOs, Farmers, Trade Unions, Women and Gender Constituency, and the Youth Constituency, 'UNFCCC Constituencies Joint Submission on the Local Communities and Indigenous Peoples Platform' (May 2017).

process away from shared power, the fulfilment of the right would not require anything more than an advisory role for the LCIPP.

3.2.2 Motivations

The submissions made by states in the process of the establishment of the LCIPP, as well as relevant COP decisions, provide evidence as to states' intentions.[149] There is a broad recognition that intrinsically speaking, the voices of indigenous peoples ought to be heard. For instance, Australia stated that because indigenous peoples 'are directly affected by climate change', the country is a 'strong advocate' for their full and effective participation and is 'supportive and encouraging' of the LCIPP as 'an avenue' by which indigenous peoples can contribute to implementing the Paris Agreement.[150] Canada stressed the need to operationalise the Platform so as to respect and recognise 'the importance [of] indigenous peoples to be self-represented, have a stronger voice, and enhance their participation'.[151] Ecuador strongly underlined 'the importance of an active, permanent role and involvement of' indigenous peoples in 'all relevant UNFCCC negotiations and decisions', going so far as to say that they should be heard first, before states.[152] New Zealand supported providing indigenous peoples with 'a clear voice' in decision-making in the UNFCCC and 'an active role in helping to shape climate action'.[153]

Second, states also tend to cite the instrumental value of indigenous peoples' participation. In this vein, the preamble of decision 2/CP.23 emphasises the role of indigenous peoples in achieving the targets and goals set out in the UNFCCC, the Paris Agreement, and the 2030 Agenda.[154] Australia states that indigenous knowledge systems and practices are 'important resources for adaptation to climate change', constituting 'unique' and 'highly valuable' knowledge that can 'help inform climate-related decision-making at the UNFCCC'.[155] Brazil emphasises the potential role of the LCIPP in strengthening and facilitating the promotion and integration of traditional knowledge into mitigation and adaptation action.[156] Similarly Canada, when stressing its commitment to 'enhancing the voices of Indigenous Peoples in the work of the UNFCCC', underscores that states parties can 'benefit greatly'

[149] All submissions can be found at UNFCCC, 'Submission Portal', https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.
[150] Australia, 'Australia's submission on the Local Communities and Indigenous Peoples Platform' (3 May 2017) 2.
[151] Canada, first submission, 'Local Communities and Indigenous Peoples' Platform (April 2017) 2.
[152] Ecuador, 'Ecuador's Submission on Local Communities and Indigenous Peoples Platform' (2017) 1.
[153] New Zealand, 'Submission to the COP on the Local Communities' and Indigenous Peoples' Platform' (April 2017) [3], [11], [12].
[154] Decision 2/CP.23, preamble, third recital.
[155] Australia, 'Australia's submission on the Local Communities and Indigenous Peoples Platform' (3 May 2017) 2.
[156] Brazil, 'Views of Brazil on the on Local Communities and Indigenous Peoples Platform' (2017) 1.

from their participation in addressing climate change.[157] The EU noted that the LCIPP would 'help to create…more effective, coherent and inclusive climate policies'.[158]

The submissions of other IOs tended to fall along the same lines. The FAO said that it 'highly encourages the involvement of…indigenous peoples in the policy discussions that affect their lives' and stressed the value of a Platform that would 'ensure and channel their effective participation' to guarantee that 'climate change discussions are representative and owned by the very people whose livelihoods are affected by climate change'.[159] Underscoring that indigenous peoples' representatives should be directly involved in the design and leadership of the Platform and that their participation should be considered as distinct from rather than equivalent to that of civil society, the FAO stated that the Platform should be a way for indigenous peoples to influence policy. [160] The IFAD stated that climate action should be done 'in collaboration with' and while 'listening to the voices of' indigenous peoples, ensuring their full and effective participation in decision making.[161]

3.2.3 *Opinio juris*?

Some states, as well as the COP itself, appear to acknowledge that participation of indigenous peoples at the UNFCCC is aligned with the UNDRIP. Subject to the caveats outlined in Section 3.1.2, then, this could tentatively be considered evidence of *opinio juris*. The preamble of decision 2/CP.23 recalls the UNDRIP,[162] as does that of decision 2/CP.24, which also emphasises that the purpose and functions of the LCIPP and the Facilitative Working Group will be 'carried out consistent with international law'.[163] In its report to the UNPFII, the UNFCCC highlights that the Platform 'serves as an inclusive and participatory space…in a manner that abides by the principles based on the UNDRIP'.[164]

States also highlight the UNDRIP. Australia states that the Platform should 'take into account the broader developments' related to indigenous peoples' representation and participation, including the UNDRIP, the EMRIP and the UNPFII, and states that it 'could support the collective rights enshrined in the UNDRIP' including self-determination and FPIC.[165] Australia also supported the consultation of indigenous peoples in the process of operationalising the LCIPP, noting that giving them a 'strong

[157] Canada, first submission, 'Local Communities and Indigenous Peoples' Platform (April 2017) 1.
[158] EU, 'Submission by the Republic of Malta and the European Commission on behalf of the European Union and its Member States' (21 March 2017) 2.
[159] FAO, 'FAO Submission to the UNFCCC' (2017) 1.
[160] Ibid 1-2.
[161] IFAD, 'Views on the purpose, content and structure of the Local Communities and Indigenous Peoples Platform' (31 March 2017) 1.
[162] Decision 2/CP.23, preamble, first recital.
[163] Decision 2/CP.24, preamble, fourth recital.
[164] UNFCCC, '2019 report to the UNPFII', 3.
[165] Australia, 'Australia's submission on the Local Communities and Indigenous Peoples Platform' (3 May 2017) 1. However, Australia does not accept that the UNDRIP represents binding international law, so it is unlikely that this statement can be viewed as an instance of *opinio juris*.

role in organisation and participation' would be '[c]onsistent with the aims of the UNDRIP'.[166] Similarly, Canada referenced Article 41 of the UNDRIP (participation in matters affecting them at the UN), as well as the rights to self-determination and participation in decision-making affecting them as 'context' which 'reaffirm[ed] the importance of the Platform as a tool for enhancing and supporting the full and effective participation of Indigenous Peoples and local communities in the work of the UNFCCC'.[167] The EU and New Zealand also recalled the UNDRIP in their submissions.[168] The OHCHR, stressing the disproportionate negative impacts of climate change and mitigation and adaptation actions on indigenous peoples, as well as their role in supporting adaptation efforts, cited common Article 1 of the Human Rights Covenants and the UNDRIP in support of the increased participation of indigenous peoples in the UNFCCC by way of the LCIPP.[169]

In summary, the Platform is a mechanism whereby indigenous peoples participate in partnership with states on matters specifically pertaining to indigenous peoples. It may also provide for participation on an advisory basis in the wider work of the UNFCCC. This practice forms part of the widespread pattern constituting a legitimate expectation regarding the participation of peoples in global governance on matters concerning them. The motivations behind its creation are in part intrinsic, recognising the importance of peoples' participation on matters concerning them, and in part instrumental, pointing to the value of participation for achieving the objectives of the UNFCCC.

3.3 Convention on Biological Diversity

Like the UNFCCC and WIPO, processes occurring under the CBD[170] provide *sui generis* procedures for the participation of indigenous peoples in matters specifically concerning them.[171]

The rules regarding participation of observers in the Conference of the Parties ("COP") and its subsidiary bodies are similar to those under the UNFCCC, except that observers may speak during, rather than after the closure of, sessions, and that they may make textual proposals with the support of at least one state party.[172] On several occasions the COP has invited states to include indigenous

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[166] Ibid, 3.
[167] Canada, 'Canada's Second Submission on the Local Communities and Indigenous Peoples Platform' (October 2017) 2.
[168] EU, 'Submission by the Republic of Malta and the European Commission on behalf of the European Union and its Member States' (21 March 2017) 1; New Zealand, 'Submission to the COP on the Local Communities' and Indigenous Peoples' Platform' (April 2017) [10].
[169] OHCHR, 'Response to the UNFCCC Secretariat request for submissions on: possible elements of a Local Communities and Indigenous Peoples' Traditional Knowledge Platform' (16 May 2017) 1-2.
[170] CBD.
[171] It was not long after the entry into force of the CBD that indigenous peoples began to recognise the ways in which it concerned them, and to call for increased participation: International Alliance of the Indigenous Peoples of the Tropical Rainforest (1996) 1-2.
[172] CBD, Article 23(5) provides for observer status. See also: CBD, Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity, Annex to Decision I/1 and Decision V/20, Rule 7; CBD, Consolidated *Modus Operandi* of the Subsidiary Body on Scientific, Technical and Technological Advice, decision VIII/10, Annex III [19].

peoples' representatives in their official delegations to CBD meetings;[173] a few states have done so.[174] By Decision VII/16 the CBD established a voluntary funding mechanism to facilitate indigenous peoples' participation,[175] which unlike the equivalent WIPO fund appears to receive substantial contributions from states.[176] In addition, it has called for capacity-building activities to support and ensure that indigenous peoples' participation is effective.[177]

3.3.2 Working Group on Article 8(j)

As with the UNFCCC, under the CBD states have established a mechanism under which indigenous peoples have a higher level of participation on a matter specifically affecting them: the Ad hoc Open-ended Working Group on the Implementation of Article 8(j) and related provisions ("Working Group on Article 8(j)"). Established by the COP in 1998, the Working Group is tasked with implementing Article 8(j) of the Convention (traditional knowledge).[178] Its mandate is to provide advice on the application and development of legal and other protection for traditional knowledge relevant for the conservation and sustainable use of biodiversity, on the implementation of Article 8(j) and related provisions through *inter alia* the development and implementation of a work programme at national and international levels, and on measures and mechanisms to strengthen international cooperation among indigenous peoples and local communities relevant to the conservation and sustainable use of biodiversity.[179]

Membership of the Working Group is open to all states parties and observers, including 'in particular' representatives of indigenous peoples and local communities 'embodying traditional lifestyles

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[173] 'Decision V/16 (2000) UN Doc UNEP/CBD/COP/DEC/V/6 [18]; CBD, Decision VII/16 (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16 [29]; Decision VIII/5 (15 June 2006) UN Doc UNEP/CBD/COP/DEC/VIII/5 [6(b)]; Decision X/40 (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/40, C [3].

[174] CBD, 'Mechanisms to promote the effective participation of indigenous and local communities in matters related to the objectives of Article 8(j) and related provisions: Note by the Executive Secretary' (28 September 2003) UN Doc UNEP/CBD/WG8J/3/6 [27]-[28]; CBD, 'Participatory mechanisms for indigenous and local communities: Note by the Executive Secretary' (27 November 2001) UN Doc UNEP/CBD/WG8J/2/4 [34]; CBD, 'Compilation of views on participation of indigenous and local communities in the implementation of Article 8(j)' (9 September 2013) UN Doc UNEP/CBD/WG8J/8/INF/1 10.

[175] Decision VII/16 [30]. Also see, inviting contributions to the fund, CBD, 'Decision IX/13. Article 8(j) and related provisions' (9 October 2008) UN Doc UNEP/CBD/COP/DEC/IX/13, Decision IX/13 E [4]; Decision X/40 C [2]; Decision XI/14 (5 December 2012) UN Doc UNEP/CBD/COP/DEC/XI/14, B [14].

[176] In 2016-2017, it funded the participation of 79 representatives of indigenous peoples for participation in official meetings under the CBD: 'Report of the CBD to the UNPFII 2017' 9-10, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/02/SCBD_UNPFII-QUESTIONNAIRE-SCBD-Response-27-December-2017_vf_JSc-2.pdf.

[177] Decision V/16 [12(d)]; Decision IX/13 E [7]; Decision XI/14 B [10]; Decision XII/12 (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12, A [7]. Also see reports on capacity-building activities: CBD, 'Participatory Mechanisms for Indigenous and Local Communities in the Work of the Convention: Note by the Executive Secretary' (20 May 2009) UN Doc UNEP/CBD/WG8J/6/3; CBD, 'Progress report on capacity-building and development and participation of indigenous peoples and local communities in the work of the Convention' (1 February 2016) UN Doc UNEP/CBD/SBI/1/INF/1.

[178] Decision IV/9 (1998) UN Doc UNEP/CBD/COP/DEC/IV/9 [1].

[179] Ibid.

relevant to the conservation and sustainable use of biological diversity with participation to the widest possible extent in its deliberations in accordance with the rules of procedure'.[180] The COP specifically encouraged indigenous peoples to participate in the Working Group,[181] in addition to calling for states parties to include their representatives on their delegations.[182]

In practice, 'the fullest possible participation' of indigenous peoples occurs in the Article 8(j) Working Group, including in contact groups established under it.[183] Indigenous peoples' representatives are included as "Friends of the Co-Chairs" and "Friends of the Bureau"—small informal groups often formed during negotiations in order to reach agreement on specific issues—and are appointed as Co-Chairs of contact groups.[184] However, the procedure is still ultimately restricted by the procedural rules in that, for instance, text proposals by indigenous peoples' representatives still require the support of at least one state party.[185] In this way, indigenous peoples participate on almost, but not quite the same basis as states—similar to that in the WIPO IGC.

3.3.3 The Working Groups on Protected Areas, and Access and Benefit-sharing

The enhanced participatory procedures of the Article 8(j) Working Group do not necessarily extend to other processes under the Convention that affect indigenous peoples. Despite a recommendation of the UNPFII, the Ad hoc Open-ended Working Group on Protected Areas does not provide for the participation of indigenous peoples except to the default level in Convention processes.[186]

A lower level of participation was also provided for in the process of negotiating the Nagoya Protocol on Access and Benefit Sharing,[187] critical for indigenous peoples in terms of the protection of their traditional knowledge, innovations and practices associated with genetic resources, as well as the equitable sharing of benefits arising from the use of such resources.[188] The COP encouraged the participation of indigenous peoples in the work of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing in which the Protocol was negotiated (Working Group on Access and Benefit

[180] Ibid [2].
[181] Ibid [5].
[182] Ibid [3].
[183] Morgera (2018) 692.
[184] COP, 'Report of the Seventh Meeting of the Ad Hoc Open-Ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity' (24 November 2011) UN Doc UNEP/CBD/COP/11/7 [15], [20].
[185] Morgera (2018) 692.
[186] Decision VII/28 established the Working Group on Protected Areas. See UNPFII, 'Report of the seventh session' [80].
[187] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization (concluded 29 October 2010, entered into force 12 October 2014) UN Doc UNEP/CBD/COP/DEC/X/1.
[188] Acknowledged in CBD, 'Statement by Mr. Ahmed Djoghlaf, Executive Secretary of the Convention on Biological Diversity, on the Occasion of the Opening of the Ninth Session of the United Nations Permanent Forum on Indigenous Issues: "Indigenous Peoples; Development with Culture and Identity"' (19 April 2010) 4-5, https://www.cbd.int/doc/speech/2010/sp-2010-04-19-UNPFII-en.pdf.

Sharing),[189] requested the Working Group on Article 8(j) to collaborate with the Working Group on Access and Benefit Sharing in the fulfilment of its mandate,[190] and invited the chair of the group to facilitate the effective participation of indigenous peoples representatives and to consult them as appropriate.[191] In addition, there was a consultation on the proposed regime, [192] in which two members of the UNPFII and 20 representatives of indigenous peoples organisations were invited to provide recommendations.[193] While the report of the consultation fed into the 5th meeting of the Working Group on Access and Benefit Sharing,[194] it is unclear to what extent the recommendations were considered or incorporated.[195] Moreover, indigenous peoples representatives constituted 7 of 15 observers to the 30-member Expert Group on Traditional Knowledge Associated with Genetic Resources, established to assist the Working Group with legal and technical advice.[196]

This corresponds to Arnstein's notions of consultation and placation. Although indigenous peoples were given the opportunity to provide feedback at one stage of the drafting, and participated as observers to a body that gave expert advice to the negotiation group, they did not participate on the same level as that in the Article 8(j) Working Group.[197] This limited participation appears to have had affected the result, as the Protocol has been criticised for not sufficiently respecting the rights of indigenous peoples.[198] The statement of the Executive Secretary of the CBD in a 2010 speech to the UNPFII that 'the effective participation of indigenous and local community representatives…[had] been a unique feature of the process'[199] can therefore be questioned.

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[189] Decision V/16 [5].
[190] Decision VIII/5 C [1].
[191] Ibid [7].
[192] For the report of the consultation, see CBD, 'Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime' (19 September 2007) UNEP/CBD/WG-ABS/5/INF/9 and UNEP/CBD/WG8J/5/INF/13.
[193] Ibid [3]-[4].
[194] CBD, 'Statement by Dr. Ahmed Djoghlaf, Executive Secretary of the Convention on Biological Diversity, to the International Indigenous and Local Community Consultation on Access and Benefit-Sharing and the development of an International Regime' (19 September 2007) 3, https://www.cbd.int/doc/speech/2007/sp-2007-09-19-abs-en.pdf.
[195] See the recommendations ibid [15]-[55].
[196] Decision IX/13 [11], Annex [1]-[3].
[197] Despite calls for such participation by the UNPFII and the 2007 consultation: UNPFII, 'Report of the sixth session' UN Doc E/2007/43-E/C.19/2007/12 [133]; 'Report of the seventh session' [80]; CBD, 'Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime' [47]. In its response to this recommendation, the CBD stated that 'a balance must be achieved for all interested parties': CBD, 'Recommendations arising from the Seventh and Eight Sessions of the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity: Note by the Executive Secretary' (3 September 2009) UN Doc UNEP/CBD/WG8J/6.2.Add.5 [6].
[198] GA, Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly (2012) UN Doc A/67/301 [58]; EMRIP, 'Joint Submission of Grand Council of the Crees, et al: Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples Human Rights' (2011). Although one outcome has been that indigenous peoples have two observer seats on the Protocol's Compliance Committee: Decision NP-1/4 (20 October 2014) UN Doc UNEP/CBD/NP/COP-MOP/DEC/1/4, Annex [B.2].
[199] CBD, 'Statement by Mr. Ahmed Djoghlaf, on the Occasion of the Opening of the Ninth Session of the United Nations Permanent Forum on Indigenous Issues' 45.

3.3.4 Other participatory practice

Further, *ad hoc* examples of practice have occurred under the auspices of the CBD. In 2008 its Secretariat facilitated a global consultation of indigenous peoples on Reducing Emissions through Reducing Deforestation and Forest Degradation ("REDD").[200] That year it also ensured the representation of indigenous peoples at an expert meeting on biodiversity and climate change.[201] In 2009 it solicited views and experiences of indigenous peoples regarding the impacts of geoengineering on biodiversity, which fed into a meeting of one of the Convention's subsidiary bodies.[202]

3.3.5 Motivations

Statements made by representatives of the CBD suggest that it views the participation of indigenous peoples as important for the fulfilment of the objectives of the Convention, as well as for intrinsic reasons. In a 2007 statement to the UNPFII, the Executive Secretary of the CBD highlighted that the 'new enhanced phase of the implementation of the Convention…require[d] the active engagement of indigenous and local communities', which was 'more than ever crucial' to the success of the Convention's implementation.[203] In this regard, he referred to the establishment of the Voluntary Fund and the participation of indigenous peoples in the negotiations on access and benefit sharing.[204] In a speech to the indigenous peoples consultation on access and benefit sharing, he underscored that the participation of indigenous peoples was 'essential…to achieve the goals of the Convention'.[205] The Conference of the Parties has repeatedly stressed the importance of indigenous peoples participation in the Article 8(j) Working Group and in other processes under the Convention.[206]

3.3.6 *Opinio juris*?

Like the WIPO and the UNFCCC, there is some evidence to suggest that the CBD and its parties have recognised that the full and effective participation of indigenous peoples in its work is in line with the UNDRIP. In Decision IX/8, the COP noted the UNDRIP and recognised the need for participation in

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[200] CBD, 'Recommendations arising from the Seventh and Eight Sessions of the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity' [3].
[201] Ibid [3].
[202] CBD, 'Impacts of Climate-Related Geoengineering on Biodiversity: Views and Experiences of Indigenous and Local Communities and Stakeholders' (17 April 2012) UN Doc UNEP/CBD/SBSTTA/16/INF/30.
[203] CBD, 'Statement by Dr. Ahmed Djohlaf, Executive Secretary, Convention on Biological Diversity, to the United Nations Permanent Forum on Indigenous Issues at its sixth session' (17 May 2007) 2, https://www.cbd.int/doc/speech/2007/sp-2007-05-17-unpfii-en.pdf.
[204] Ibid 2-3.
[205] CBD, 'Statement by Dr. Ahmed Djoghlaf, Executive Secretary of the Convention on Biological Diversity, to the International Indigenous and Local Community Consultation on Access and Benefit-Sharing and the development of an International Regime' 1.
[206] Decision V/16 [9], [11]; Decision VI/10 (2002) UN Doc UNEP/CBD/COP/6/20, preamble, recitals four, six and seven; Decision IX/13 E [2].

the work on protected areas.[207] In a statement on the adoption of the UNDRIP, the CBD Executive Secretary said that states parties were 'committed to the participation of indigenous peoples in issues affecting them', consistent with articles 40 and 41 of the UNDRIP.[208]

In summary, the practice under the Convention on Biological Diversity is mixed. While it has established specific procedures to allow indigenous peoples to participate on nearly the same footing as states in the Article 8(j) working group, other processes concerning indigenous peoples have not seen the same level of participation. While indigenous peoples are not the only stakeholders affected by those other groups, their vital interests and rights are at play. I suggest that fulfilling the right to participate would have required a higher level of participation, that is, systematic consultation, in the Working Group on Access and Benefit Sharing. The practice appears to be fuelled by the notion that the participation of indigenous peoples allows the CBD to better fulfil its objectives, although there may also be a belief that it is required by, or at least consistent with, the UNDRIP.

3.4 The Food and Agriculture Organization

The FAO is another site of relevant practice regarding the participation of indigenous peoples in standard-setting affecting them. Constituted with the objective of improving agricultural productivity, raising levels of nutrition, bettering the lives of rural populations, and contributing to the growth of the world economy,[209] the FAO is a forum through which states set standards and devise national policies, legislation and strategies. Indigenous peoples are one group among several who are specifically affected by the work of the FAO, as they face unique challenges in terms of food security.[210]

3.4.2 The 2010 Policy, the Committee on Food Security, and subsequent practice

Recognising this, the 2010 FAO Policy on Indigenous and Tribal Peoples addresses indigenous peoples' participation in policy-making and standard-setting activities affecting them.[211] Itself prepared through consultations with indigenous peoples' representatives and the UNPFII, among others,[212] the Policy recognises the right of indigenous peoples to full and effective participation 'at every stage of any action that may affect them directly or indirectly',[213] and further states:[214]

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[207] Decision IX/8 (9 October 2008) UN Doc UNEP/CBD/COP/DEC/IX/8.
[208] CBD, 'Press Release: The Executive Secretary of the Convention on Biological Diversity Welcomes the Adoption of the Declaration on the Rights of Indigenous Peoples' (30 June 2006) https://www.cbd.int/doc/press/2006/pr-2006-07-06-drip-en.pdf.
[209] FAO Constitution, Article I.
[210] FAO, *FAO Policy on Indigenous and Tribal Peoples* (FAO 2010) ("FAO Policy") 1-2.
[211] Ibid. Participation in matters relating to the FAO's field programmes and projects will be considered in Chapter 5.
[212] Ibid 1.
[213] Ibid 5.
[214] Ibid 12.

> FAO will facilitate the direct and effective participation of indigenous peoples in current and future FAO programmes and activities that affect indigenous peoples. It will support enabling environments to foster inclusion of indigenous peoples in the design, execution and evaluation of policies and programmes that concern and/or affect them.

The Policy envisages that this will be implemented, firstly, by way of 'policy dialogue' between the FAO and indigenous peoples 'in order to communicate effectively what can be done for and with them as stipulated by FAO's mandate and operational boundaries'.[215] Noting the need for a representative body of indigenous peoples with which to engage, it notes that indigenous peoples' representatives at the Civil Society Forum at the World Food Summit in 2010 discussed forming a committee, stating that if such a body were established, FAO would 'consider it a counterpart through which partnership and dialogue can move forward'.[216] However, it does not appear that the envisaged committee was subsequently established, and this represents a gap in the FAO's engagement with indigenous peoples. This aspect of the Policy can also be criticised for its focus on one-way communication *from* the FAO *to* indigenous peoples; the Policy speaks of 'clarifying' to indigenous peoples 'what can be realistically expected'.[217] Similar emphasis is not placed on the potential role policy dialogue could play in conveying indigenous peoples' concerns and views to the FAO.

Secondly, the Policy envisages the participation of indigenous peoples through multi-stakeholder consultations with member states, research institutions, UN agencies, private sector organisations and CSOs,[218] as well as in FAO committees, conferences and regional conferences through FAO's internal civil society liaison or via its internal private sector cooperation group.[219]

This latter part of the policy appears to have been carried out. With respect to the participation of indigenous peoples in multi-stakeholder consultations, for instance, FAO mentions in its reporting to the UNPFII that it supported the participation of indigenous peoples in a regional and global consultation on farmers' rights, the outcomes of which were presented at the 7th meeting of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture.[220] In addition, the participation of indigenous peoples in FAO committees through the civil society mechanism, according to the FAO, has occurred.[221]

In addition to the Policy, the FAO's Committee on Food Security demonstrates relevant practice.[222] Reporting to the ECOSOC as well as the FAO Conference, it develops policy recommendations and

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[215] Ibid 16.
[216] Ibid 16-17.
[217] Ibid 16.
[218] Ibid 17.
[219] Ibid 17.
[220] FAO, '2017 Report to the UNPFII' (2018) https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/02/FAO-Questionnaire-to-Agencies-UNFPII-2017.pdf ("2017 Report") 12.
[221] 2018 report to UNPFII 6.
[222] FAO Constitution, Article IV.9; General Rules of the Organization, Rule XXXIII.

guidance on food security and nutrition. Unlike the FAO's other committees, in which states are the main actors, 2009 reforms saw the committee opened to a broader range of participants than just member states, including CSOs and NGOs 'with strong relevance to issues of food security and nutrition' particularly organizations representing, among others affected by food insecurity, indigenous peoples.[223] Participants may intervene in plenary and breakout discussions of the Committee to contribute to preparing meeting documents and agendas, submit and present documents, and make formal proposals.[224] This is a higher level of participation than that of an observer, a status that the new rules preserves for other interested organisations.[225] In its reports to the UNPFII, the FAO has highlighted its support for the participation of indigenous peoples in the Committee, including by ensuring the participation of the UNPFII Chair and representatives of indigenous youth.[226]

One emerging practice that, in the future, could constitute an example of indigenous peoples' participation at the FAO is the proposed Indigenous Youth Consultative Forum, which was suggested at a meeting between FAO and the Global Indigenous Youth Caucus to the UNPFII in April 2017.[227] Although FAO appears to have been supportive of the initiative, and hosted indigenous youth representatives again in October 2017 to advance work on its terms of reference,[228] it appears that the forum is not yet operational.[229]

It can be questioned whether participation in committees on the same footing as other civil society groups, and *ad hoc* participation in other work of the FAO, constitutes practice aligned with the right to be heard as set out in Chapter 2. The UNPFII evidently does not consider it sufficient to meet indigenous peoples' rights: in successive recommendations to the FAO, it has suggested that it establish a dedicated mechanism for partnership with indigenous peoples, such as a working group,[230] and has requested FAO to enhance the participation of indigenous peoples in the work of the Committees on Agriculture, Forestry, Fisheries, World Food Security, and Genetic Resources for Food and Agriculture.[231] On one hand, indigenous peoples are not the only non-state actors affected by the work of the FAO: to include their organisations in the Committee on Food Security on the same basis as organisations representing smallholder family farmers, artisanal fisherfolk, herders and

[223] FAO, 'Report of the Thirty-Fifth Session of the Committee on World Food Security' (2009) FAO Doc C 2009/21-Rev.1, Appendix H [11]. See also Rules of Procedure of the Committee on World Food Security, Rule I.
[224] FAO ibid [12].
[225] Ibid [13]-[15].
[226] 2017 Report 6-8.
[227] Ibid 5.
[228] Ibid 6.
[229] UNPFII, 'Report on the eighteenth session' (2019) UN Doc. E/2019/43-E/C.19/2019/10 [90] and 'Report on the sixteenth session' (2017) UN Doc. E/2017/43-E/C.19/2017/11 [59].
[230] UNPFII, 'Report on the fourteenth session' (2015) UN Doc. E/2015/43-E/C.19/2015/10 [27] and 'Report on the tenth session' [6].
[231] UNPFII, 'Report on the seventeenth session' (2018) UN Doc. E/2018/43*-E/C.19/2018/11* [112]; 'Report on the eighteenth session' [91].

pastoralists, the urban poor, and agricultural and food workers, who evidently have a stake in its discussions, is fair. Forms of participation on the higher levels of Arnstein's ladder, such as partnership, are clearly not appropriate here, where consultation in the present forms can be said to be sufficient to fulfil the right. On the other hand, indigenous peoples are not always constituted as NGOs and they may find it difficult to gain accreditation as such (as discussed in Chapter 6). As such, a separate status for indigenous peoples, or less stringent accreditation criteria, would be appropriate.

3.4.3 Motivations

The FAO's own discourse reveals a three-fold motivation behind its policies and practices. The first is the imperative to achieve its own mandate. In the introduction to its Policy on Indigenous and Tribal Peoples, the FAO states that '[t]he fight against hunger cannot be won without [indigenous peoples]', who may 'bring novel solutions' to the table.[232] Thus it considers indigenous peoples 'an undeniable stakeholder in a development agenda shaped by such a mandate'.[233] In this way, the engagement of indigenous peoples is framed as a means by which the organisation can better achieve its ends.[234]

Second, the FAO evidently recognises the importance of indigenous peoples being heard on matters affecting them. The document outlining the reforms to the Committee on Food Security highlights the importance of ensuring that the 'voices of all relevant stakeholders are heard in the policy debate on food and agriculture'.[235] The FAO Strategy for Partnerships with Civil Society Organizations states that 'the increasing participation of indigenous peoples and other ethnic minorities in public policy debates and fora is an important step towards strengthening their rights and improving their situation'.[236] A statement made by Brazil on behalf of the Group of Latin American and Caribbean Countries, similarly, recognises that 'it is important to listen to the voices of those who are actually suffering from hunger and involve them in democratic and transparent for a involving the most vulnerable populations, indigenous peoples, family farmers'.[237]

The 2010 Policy also cites Article 41 of the UNDRIP, suggesting that FAO sees the policy as aligned with, and perhaps required by, international (soft) law.[238]

In conclusion, the practice of the FAO provides further evidence of the existence of a norm whereby indigenous peoples participate on matters concerning them in IOs and global governance. As

[232] FAO Policy, 1-2.
[233] Ibid 2.
[234] Also see ibid at 7-8.
[235] FAO, Committee on World Food Security, 'Reform of the Committee on World Food Security' (2009) FAO Doc CFS:2009/2 Rev.2 [2], [7].
[236] FAO, 'Report of the Council of FAO, Hundred and Forty-sixth Session' (2013) FAO Doc CL 146/REP, Appendix F, FAO Strategy for Partnerships with Civil Society Organizations [18].
[237] FAO, Conference, 'Thirty-ninth Session, Rome, 6-13 June 2015, Verbatim Records of Meetings of Commission I of the Conference' (2015) FAO Doc C 2015/I/PV, 63.
[238] FAO Policy, 2.

elsewhere, the motivation for the establishment of the practice appears to be at least in part related to the organisation's mandate. The idea is that the participation of indigenous peoples will help the organization achieve its goals. The practice could be critiqued on the basis that the participation is at a relatively low level, but on the other hand the FAO has many stakeholders to take into account, of which indigenous peoples are only one group.

3.5 The UN Educational, Scientific and Cultural Organization

UNESCO, as explained in Chapter 2, sets standards relevant to indigenous peoples' rights, and has recently adopted a policy regarding the participation of indigenous peoples.[239]

3.5.2 UNESCO Policy on Engaging with Indigenous Peoples

The 2018 UNESCO Policy on Engaging with Indigenous Peoples[240] is a recent example of practice relevant to the formation of a legitimate expectation regarding the participation of indigenous peoples in matters affecting them. Itself developed through a process of meetings and workshops between indigenous peoples and UNESCO staff,[241] the policy sets out provisions of the UNDRIP of specific relevance to UNESCO's work. It states that with respect to UNESCO's work in the field of culture, UNESCO, '[i]n line with all relevant articles of the UNDRIP…commits to respect, protect and promote' indigenous peoples' rights to 'full and effective participation in matters affecting their lives and cultures', and to 'take part in the development of policies concerning their cultures, cultural expressions and heritage, including through effective participation in relevant consultative bodies and coordination mechanisms'.[242] In addition, the Policy provides that UNESCO will '[i]mprove participation of indigenous peoples' organizations through promoting official partnerships between their organizations and UNESCO',[243] and 'promote dialogue and participatory mechanisms between indigenous people[s], Member States and UNESCO that allows the collection of information on the implementation of activities relevant for indigenous peoples and within the framework of the policy'.[244]

Much will depend on how this policy is to be implemented, which is not yet known. The few isolated examples of the participation of indigenous peoples in UNESCO's activities to date—in a workshop

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[239] UNESCO's World Heritage Committee and indigenous peoples' participation in decision-making on World Heritage nominations will be discussed separately in Chapter 5.
[240] UNESCO, UNESCO Policy on Engaging with Indigenous Peoples (2018) UNESCO Doc No 201 EX/6 ("UNESCO Policy"); UNESCO, 'Decisions adopted by the Executive Board at its 202nd session', UNESCO Doc No 202 EX/DECISIONS, 16. See also UNESCO, *2014-2021 Medium-Term Strategy* (2014) UNESCO Doc 37 C/4 17, 21.
[241] UNESCO Policy 4.
[242] Ibid [77](b) and (d).
[243] Ibid [102(a)].
[244] [105].

on indigenous knowledge and climate change in October 2017;[245] in the preparatory process for the 8th World Water Forum in March 2018;[246] in a high-level policy forum and international conference on language and education in 2019;[247] and in sessions of the Open Science Forum for Latin America and the Caribbean in 2018[248]—may be a promising beginning, but are far from the more systematic participation that is envisaged in the Policy. Time will tell as to whether the policy is implemented in a way that provides for the full and effective participation of indigenous peoples on matters affecting them.

3.5.3 State practice

The submissions of states to the consultation on the Engagement Policy represent instances of state practice regarding the obligation to promote the participation of indigenous peoples. For instance, Canada's submission expressly supported the possibility of UNESCO establishing formal partnerships with indigenous peoples' organizations to improve the participation of indigenous peoples in UNESCO's activities.[249] Chile supported a 'dialogue and participation mechanism' between indigenous peoples, states and UNESCO to 'allow the collection of information on policy implementation'.[250] Colombia supported, in order to ensure that indigenous peoples benefit from and are not harmed by UNESCO's activities, their 'full and effective participation and inclusion leading to empowerment' at all levels, 'including the decision-making and strategic levels' and at all stages 'including planning, programming, implementation, monitoring and evaluation'; this should include 'continued and direct dialogue and interaction with indigenous peoples through their freely chosen representatives'.[251] In making this submission, Colombia referred explicitly to Article 41 of the UNDRIP. Denmark suggested UNESCO consider adding an advisory body of indigenous peoples' representatives, highlighting that this would 'ensure that the voice of indigenous peoples is heard, and taken into account by UNESCO on a systematic basis'.[252] Canada, Chile, Colombia and Denmark, then, can be said to have complied with their obligation to promote the participation of indigenous peoples in the affairs of IOs concerning them. In addition, there are a limited instances of the

[245] UNESCO, '2017 Report to the UNPFII' (2018) 14, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/02/UNESCO_03012018Questionnaire-to-Agencies-Nov-2017.pdf.
[246] Ibid.
[247] UNESCO, '2018 Report to the UNPFII' (2019) 13, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/PFII-Questionnaire-to-Agencies-UNESCO.pdf.
[248] Ibid, 8.
[249] UNESCO, 'Consultation on a UNESCO Policy on Engaging with Indigenous Peoples, Comments' (12 July 2017) 7, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/170712-UNESCO-IPP-MSConsultation-Compilation-comments.pdf.
[250] Ibid 8.
[251] Ibid 10.
[252] Ibid 13.

inclusion of indigenous peoples' representatives on state delegations, which can also be viewed as exemplary of state practice regarding the obligation to enable peoples to participate.[253]

3.5.4 Motivations

UNESCO has justified its 2018 Policy on the basis of achieving its mandate. The Policy states that indigenous peoples' concerns are 'also the heart of the concerns of UNESCO's mandate', as they are living manifestations of cultural diversity, the stewards of rare languages, and 'essential partners in building knowledge societies and achieving the 2030 Agenda'.[254] Past statements of senior UNESCO officials reinforce the idea that indigenous peoples are important to UNESCO's mandate. In 2010, then Director-General Irina Bokova, lamenting that indigenous peoples were 'still not the real designers and drivers of their own development initiatives' and recognising that major challenges 'simply cannot be addressed without the participation of indigenous peoples, called upon governments and the international community to 'promote equity by fully respecting the rights of indigenous peoples, and engaging them on equal terms in all decisions regarding their future'.[255]

Mandate-related motivations aside, other statements evidence a recognition by UNESCO that indigenous people should be heard on matters affecting them. In 2012, Bokova noted indigenous peoples' valuable sustainability knowledge, and challenges faced due to discrimination and marginalisation, stating that 'sustainable development must be inclusive' and '[a]ll voices must not only be heard but listened to'.[256] That same year, the Chief of UNESCO's Small Islands and Indigenous Knowledge Section and the organization's focal point for indigenous peoples stated that 'the active participation of Indigenous peoples within the framework of UNESCO is extremely important'.[257] In 2015 Bokova, in an address to an international conference on indigenous peoples and climate change, said UNESCO was 'the house of all peoples' and stressed the importance of ensuring 'the voices of indigenous peoples are heard' in combating climate change due to the impacts of climate change on indigenous peoples.[258]

3.5.5 *Opinio juris*?

Is there acceptance as law? The Policy states that it is a means by which 'UNESCO reaffirms its commitment to implement the [UNDRIP]'.[259] Referring to Articles 18 and 41, it recognised that the

[253] UNESCO, '2018 Report to the UNPFII', 13-14.
[254] UNESCO Policy, 1.
[255] UNESCO, 'Message from Irina Bokova, Director-General of UNESCO on the occasion of the international Day of the World's Indigenous People' (9 August 2010) UNESCO Doc DG/ME/ID/2010/11, 1-3.
[256] UNESCO, 'Message from Ms Irina Bokova, Director-General of UNESCO on the occasion of the International Day of the World's Indigenous People' (9 August 2012) UNESCO Doc DG/ME/ID/2012/015, 1.
[257] IWGIA (2012) 20.
[258] UNESCO, 'Address by Irina Bokova, Director-General of UNESCO on the occasion of the closing of the Conference "Resilience in a Time of Uncertainty: Indigenous Peoples and Climate Change"' (27 November 2015) UNESCO Doc DG/2015/235, 1, 4.
[259] UNESCO Policy, 1.

governing bodies of UNESCO's conventions, such as the WHC, 'can play an important role in developing relevant standards, guidance and operational mechanisms to ensure full and effective participation and inclusion of indigenous peoples in the processes of these instruments.[260] As mentioned above, it discusses the right to participation—which it links to self-determination and free, prior and informed consent—in stating that UNESCO should include indigenous peoples in the development of policies concerning them.

Statements made by UNESCO senior officials bolster the notion that the Policy was adopted in part with an acceptance that it was required by the UNDRIP. In a message on the occasion of the International day of the World's Indigenous People in 2008, then Director-General of UNESCO, Koïchiro Matsuura, emphasised the importance of translating the—then newly-adopted—UNDRIP into 'concrete policies that will enable indigenous peoples to participate fully and equally in the national and international life', and expressed hope that the Declaration 'will serve as a platform for genuine dialogue between indigenous and non-indigenous partners'.[261] The next year Matsuura, after noting the UNDRIP, called on the international community 'to engage in genuine dialogue with indigenous peoples', and, noting that indigenous voices had 'remained largely on the sidelines' of international debates on climate change despite indigenous communities facing the first and worst impacts, drew attention to a UNESCO-launched internet forum providing 'a space for local and indigenous voices to contribute to decision-making' in the lead-up to the 2009 UN Climate Change Conference in Copenhagen.[262] In 2018, Director-General Audrey Azoulay 'reaffirm[ed]' UNESCO's 'full commitment' to the UNDRIP.[263] In 2019, Azoulay underscored that UNESCO was 'committed to…enabling [indigenous peoples] to participate fully and equally at national and international levels', highlighting their knowledge 'crucial' for achieving the SDGs and drawing attention to several UNESCO programmes relevant to indigenous peoples.[264]

In summary, UNESCO's recent policy is an example of practice contributing to the emergence of a norm regarding the participation of peoples in matters affecting them. However, it is unclear as to whether the implementation of the policy will be sufficient to fulfil the right. As in other organizations, there is substantial evidence to show that the policy was adopted in order to further the mandate of the organization, but there are also indications that the organization views the policy as in

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[260] Ibid.
[261] UNESCO, 'Message from Mr Koïchiro Matsuura, Director-General of UNESCO on the occasion of the International day of the World's Indigenous people' (9 August 2008) UNESCO Doc DG/ME/ID/2008/011 REV, 1, 3.
[262] UNESCO, 'Message from Mr Koïchiro Matsuura, Director-General of UNESCO on the occasion of the International day of the World's Indigenous people' (9 August 2009) UNESCO Doc DG/ME/ID/2009/12, 2-3.
[263] UNESCO, 'Message from Ms Audrey Azoulay, Director-General of UNESCO, on the occasion of International Day of the World's Indigenous Peoples – *Migration and movement*' (9 August 2018) UNESCO Doc DG/ME/ID/2018/26, 2.
[264] UNESCO, 'Message from Ms Audrey Azoulay, Director-General of UNESCO on the occasion of the international Day of the World's Indigenous Peoples' (9 August 2019) UNESCO Doc DG/ME/ID/2019/26, 1.

line with the UNDRIP, which could show evidence of *opinio juris* subject to the caveat that it is unclear whether UNESCO perceived the UNDRIP as law.

3.6 Negative examples

The above examples should not be taken to show that the participation of peoples in standard-setting activities affecting them is universal. Notable counter-examples exist. Two will be explored here: the ISA and the IMO.

3.6.2 The International Seabed Authority

Established under the 1982 UN Convention on the Law of the Sea ("UNCLOS")[265] and the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS,[266] the ISA organises and controls activities for the exploration and mining of minerals in the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction ("the Area").[267]

Rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area, including on the equitable sharing of benefits deriving therefrom, are adopted by the ISA's Council—its executive organ, composed of 36 member states—and approved by the Assembly, the supreme organ representative of member states which meets annually.[268] These regulations are developed by the Legal and Technical Commission, a subsidiary body of the Council composed of 15 members acting in an expert capacity, which is also tasked with preparing assessments of the environmental implications of activities in the Area and making recommendations to the Council on the protection of the marine environment.[269]

The UN Permanent Forum on Indigenous Issues ("UNPFII") has called for the ISA to 'ensure respect for and recognition of' the UNDRIP, including to 'pay immediate and special attention to the right of indigenous peoples to participate in decision-making in all matters that affect their rights', and has recommended that the ISA ensure 'meaningful participation, such as dedicated indigenous representation…and regard for indigenous peoples' world views'.[270] As a special report prepared by Valmaine Toki, UNPFII member, put it, the ISA should provide a place for indigenous peoples in its policy-making processes 'so as to allow indigenous peoples to meaningfully contribute to decisions that affect their lives and environment',[271] and free, prior and informed consent is required for 'any

[265] UNCLOS, Article 156.
[266] 1994 Agreement Relating to the Implementation of Part XI of UNCLOS.
[267] UNCLOS, Article 157.
[268] UNCLOS, Articles 158(1) and (4), 159(1) and (2), 160(1) and (2)(f), 161, 162(1) and (2)(o).
[269] UNCLOS, Articles 163(1)-(3), 165(2).
[270] UNPFII, 'Report on the twelfth session' (2013) UN Doc E/2013/43-E/C.19/2013/25 [51] and 'Report on the fifteenth session' (2016) UN Doc E/2016/43-E/C.19/2016/1 [14]. Also see UNPFII, 'Study on the relationship between indigenous peoples and the Pacific Ocean' (19 February 2016) UN Doc E/C.19/2016/3 [4], [5], [14], [40]-[45].
[271] Ibid [45].

activity, such as seabed mining, that takes place within their traditionally owned or otherwise occupied and used lands'.[272]

Yet, while NGOs and IGOs can participate as observers in the Assembly and the Council with the right to make oral and written statements, membership of the ISA is confined to states parties to the UNCLOS, and there is no provision for participation by indigenous peoples or non-independent territories.[273] In practice, no indigenous peoples' organisations, not even those that could technically be admitted as NGOs, hold observer accreditation.[274] In addition, the Legal and Technical Commission does not allow observer participation.[275] Nor does there appear to have been any consideration by any of the ISA's organs of indigenous peoples' concerns.

The ISA, then, has not recognised nor fulfilled the proposed obligation to hear peoples on matters affecting them. As an example of a lack of practice, it must be taken into account in the overall analysis.

3.6.3 International Maritime Organization

The IMO is another organization in which indigenous peoples are affected,[276] but in which no rules or mechanisms exist to enable their participation. Its organs include the Assembly (general body of member states),[277] the Council (forty member states with delegated authority),[278] the Secretariat,[279] and various Committees and Sub-Committees.[280] The Marine Environment Protection Committee submits recommendations and guidelines, and proposals for regulation, to the Council for approval—many of which concern coastal and Arctic indigenous peoples. While the Rules of Procedure of the Committee provide for the participation of 'liberation movements' as observers, alongside other types of observer organizations, they do not provide for the participation of indigenous peoples.[281]

Several representatives of Arctic indigenous peoples have attended IMO meetings as members of the Canadian delegation and as members of NGO delegations, beginning in 2016 at the 70th meeting of the Marine Environment Protection Committee.[282] At that session they participated in a panel discussion and met with the Secretary General and staff of the IMO, as well as several member state

[272] Ibid [42].
[273] ISA, Rules of Procedure of the Assembly of the International Seabed Authority (n.d.) Rule 82; Rules of Procedure of the Council of the International Seabed Authority (n.d.) Rule 75. Lodge, Segerson and Squires (2017) 434.
[274] ISA, 'Observers' (n.d.), https://www.isa.org.jm/observers.
[275] Except in the case of a member state particularly affected by a matter under consideration: Rules of Procedure of the Legal and Technical Commission (n.d.), Rule 53.
[276] As discussed in Chapter 2.
[277] IMO Constitution, Articles 12-15.
[278] Ibid, Articles 16-26.
[279] Ibid, Articles 52-56.
[280] Ibid, Article 11.
[281] IMO, Rules of Procedure of the Marine Environment Protection Committee (n.d.), Rule 4(a).
[282] Friends of the Earth (2018) 2.

delegations.[283] A proposal submitted by Friends of the Earth on behalf of Arctic indigenous peoples at that session invited the Committee to note indigenous peoples' concerns regarding threats to food security from increased Arctic shipping, and propose corresponding safeguards;[284] the Committee did not accede to this request. At a 2019 meeting of the Sub-Committee on Pollution Prevention and Response concerning heavy fuel oil, the Vice-President of the Inuit Circumpolar Council spoke during the opening plenary.[285] However, these forms of participation, while evidencing the beginnings of a recognition by the IMO and its member states that indigenous peoples are affected by its activities and should be heard on relevant matters, are clearly insufficient to fulfil the right of indigenous peoples to participate. As such, Arctic indigenous peoples have called for 'permanent status' at the IMO 'so that they can be party to decisions that are affecting their livelihoods and their food security'.[286] The UNPFII, too, has requested that the IMO 'facilitate indigenous peoples' participation in [its] processes'.[287] The IMO, in summary, can be viewed as a negative example whereby peoples do not participate in standard-setting matters concerning them to the requisite degree.

4. Conclusion

This chapter has canvassed the practice of IOs and states regarding the participation of indigenous peoples in standard-setting matters affecting them, covering the process leading to the adoption of the UNDRIP and standard-setting processes under the UNFCCC, CBD, WIPO, UNESCO, and FAO. It has been seen that there exists a widespread practice whereby IOs create *sui generis* mechanisms and procedural rules to enable indigenous peoples to participate in relevant matters, although in nearly all cases there is more that could be done to fulfil the right. In addition, IOs and states commonly justify this practice by reference to the UNDRIP, suggesting that *opinio juris* could exist, although this is uncertain due to the fact that the UNDRIP is regarded by many as "soft law", albeit of a highly persuasive nature. Because of this uncertainty, it is difficult to argue that there is practice accompanied by law for the purposes of the formation of a rule of custom. However, the widespread practice, taken together with that explored in the following chapters, points to the emergence of a norm regarding the conduct of IOs and states, corresponding to the right and obligations set out in Chapter 2. In almost all cases, it can be seen that the practice is fuelled by the idea that the participation of affected peoples can assist the organization in fulfilling its mandate, or states in fulfilling the objectives of a treaty, respectively. In addition, there is widespread acceptance that

[283] Ibid.
[284] See IMO, 'Marine Environment Protection Committee, 70th session, Agenda Item 17, Any other business, Arctic indigenous food security and shipping, submitted by FOEI, WWF and Pacific Environment' (19 August 2016) IMO Doc MEPC 70/17/10 [15].
[285] Inuit Circumpolar Council (2019).
[286] Friends of the Earth (2018) 2.
[287] UNPFII, 'Report on the tenth session' [31].

peoples ought to be heard on matters affecting them. The pattern of practice is not universal, demonstrated by the ISA and the IMO, but these can be viewed as exceptions that reinforce the existence of the norm.

CHAPTER FIVE: Participation in Decision-Making

1. Introduction

This chapter will consider ways in which IOs and states enable the participation of indigenous peoples in decision-making affecting them. As in Chapter 4, four threads will run throughout it. The first regards the existence of a norm corresponding to the right proposed in Chapter 2: there are numerous examples of practice, indicating that peoples have a legitimate expectation to fully and effectively participate in decision-making processes affecting them at the international and global levels. This is examined here with regard to IOs that make discrete decisions regarding funding, field programmes, and other matters with the potential to affect indigenous peoples. Practice is not wholly consistent and the level of participation varies and in some cases is not up to the required standard; however, there is a reasonably consistent practice. It will also be seen that there is a strong norm whereby indigenous peoples participate in the making of policies on their participation in decision-making. Second, it is difficult to discern the existence of practice accepted as law: *opinio juris* is even more elusive here than in the previous chapter. However, third, evidence regarding the motivations of IOs abounds, indicating that a crucial reason for the inclusion of peoples relates to the imperative of IOs to fulfil their mandates.

The chapter is divided according to the means by which indigenous peoples participate. Section 2 of this chapter considers indigenous peoples' free, prior and informed consent to decisions of IOs affecting them. Section 3 considers participation in the form of membership of, or observer status to, decision-making committees and boards. Section 4 examines participation in the form of advisory bodies to decision-making institutions. Section 5 concludes.

2. Free, prior and informed consent

IOs typically require FPIC—or, at minimum consultations to obtain FPIC—of indigenous peoples before making a decision to invest in, or carry out, development projects with the potential to affect them. This is grounded in, and informed by, the law of FPIC as discussed in Chapter 3. However, unlike that law, which applies as between states and peoples, this practice concerns IOs and peoples. In some instances, the organization delegates the task of obtaining or consulting in order to obtain FPIC to the state in which the proposed activity is to be carried out; in these cases, it can still be said to be practice of the organization as opposed to that of the state because the FPIC is a material and in most cases necessary factor in whether the organization decides to pursue the investment or project. The state is effectively acting as an agent of the IO.

It will be seen that FPIC policies abound that are in many ways consistent with the standard of FPIC contained in the UNDRIP and the decisions of international judicial and quasi-judicial bodies, introduced in Chapter 3. Under that standard, consultations must be conducted in good faith, without

pressure or coercion, with the disclosure of sufficient information, respecting the customs and traditions of the peoples concerned, with the objective of reaching agreement. There is a sliding scale approach whereby the greater the potential impacts on a people, the greater the level of participation required: if the decision could result in a substantial impact on a people's fundamental rights, consent will be required, not merely "consultation in order to obtain consent". The FPIC policies examined in this section broadly fit these contours, although the practice is not uniform and some of the policies deviate from the standard. In addition, in many cases IOs consulted indigenous peoples on the policies' contents, which are additional data points supporting the existence of the norm of the participation of peoples in policy-making or standard-setting affecting them.

This chapter considers the FPIC requirements of international financial institutions, UN agencies that carry out field programmes, and the UNESCO World Heritage Committee ("WHC"). In addition to financing decisions, IOs have instituted FPIC requirements when it comes to decisions about field projects and programmes potentially affecting indigenous peoples. The specific organizations considered are the World Bank, the IFAD, the GEF, the GCF, the UN-REDD Programme, the EU, the UNDP, the UNEP, the UNIDO, and the FAO.

2.1 World Bank

The policies and practices of the World Bank regarding the participation of indigenous peoples have developed significantly since a 1982 policy document entitled "Tribal People in Bank financed Projects" outlined procedures for protecting the rights of "tribal people", recognising that they were more likely to be negatively impacted than helped by development projects.[1] The 1982 policy did not provide for the participation of such peoples in the development process; like the early ILO Convention 107, it was premised on the integration of indigenous peoples into Western society.[2]

Beginning in 1991, however, with the Bank's adoption of Operational Directive 4.20 on Indigenous Peoples[3] a participatory approach began to take shape. With a view to ensuring that indigenous peoples would not be subject to adverse effects during the development process and would receive 'culturally compatible social and economic benefits',[4] the policy provided that 'the strategy for addressing the issues pertaining to indigenous peoples must be based on the *informed participation* of the indigenous peoples themselves'.[5] Operational Directive 4.20 further provided that mechanisms should be established for indigenous peoples' participation 'throughout project planning, implementation and evaluation', noting the existence of indigenous peoples' organizations 'that provide effective channels for communicating local preferences' and that 'traditional leaders' should

[1] World Bank, Operational Manual Statement, 'Tribal People in Bank financed Projects', OMS 2.34 (1982) [5].
[2] Davis (1994) 76.
[3] World Bank, *Operational Directive 4.20, Indigenous Peoples* (World Bank 1991).
[4] Ibid [6].
[5] Ibid [8] (emphasis in original).

be brought into the planning process. It also recognised that due concern should be given to ensuring 'genuine representation' and that no 'foolproof methods' exist for guaranteeing full participation at the local level.[6] It called for the borrowing country to prepare an Indigenous Peoples Development Plan in projects affecting indigenous peoples, with their participation.[7] In practice, this was mainly done through consultations.[8]

The implementation of the Directive was imperfect. A 2003 internal review found that there was a 'marked increase' in indigenous peoples' participation in the design and implementation of projects where the directive was applied, but their participation in decision-making and financial management was low, in part due to national regulations controlling the use of public funds. Moreover, in 33% of projects where indigenous people were affected, the Operational Directive was not applied, and in those cases the participation rates were much lower.[9]

The current regime is set out in Operational Policy 4.10, which replaced Operational Directive 4.20 in 2005,[10] and the 2016 Environmental and Social Framework ("ESF") which contains an Environmental and Social Standard ("ESS") on Indigenous Peoples and Sub-Saharan African Historically Underserved Traditional Local Communities.[11] Applicable whenever indigenous peoples 'are present in, or have collective attachment to a proposed project area',[12] the ESS has the objective of ensuring that indigenous peoples 'are fully consulted about, and have opportunities to actively participate in, project design and the determination of project implementation arrangements'.[13]

The policies set out requirements that correspond to the accepted principle of FPIC. Operational Policy 4.10 requires the borrower to engage in a process of consultation on all projects potentially affecting indigenous peoples.[14] The ESS requires 'stakeholder analysis and engagement planning, disclosure of information, and meaningful consultation, in a culturally appropriate and gender and inter-generationally inclusive manner'.[15] It also requires that consultation must involve indigenous peoples' representative bodies and organizations, provide sufficient time for their decision-making processes, and allow for their effective participation in the design of project activities or mitigation

[6] Ibid [15(d)]. On the policy generally, see Davis (1994) 80.
[7] Ibid [13], [14], [15].
[8] World Bank Country Evaluation and Regional Relations Operations Evaluation Department, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results* (10 April 2003) Report No 23754 [3.7]-[3.8].
[9] World Bank Operations Evaluation Department, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review* (10 January 2003) Report No 25332 [3.21] and Table 3.4.
[10] OP 4.10, and *Bank Procedure 4.10 on Indigenous Peoples* (20 May 2005).
[11] ESS. The category of 'Sub-Saharan African Historically Underserved Traditional Local Communities' reflects the rejection by many African nations of the term "indigenous peoples" with respect to their countries: Lewis and Söderbergh (2019) 69. Here I will continue referring to "indigenous peoples" for simplicity. For problems with the additional terminology, see Lewis and Söderbergh (2019) 69-70.
[12] ESS [7].
[13] Ibid [11].
[14] OP 4.10 [10].
[15] ESS [23].

measures that could potentially affect them.[16] Free, prior and informed consent is to be established through good faith negotiation, in a mutually accepted process to be documented by the borrowing country, but does not require unanimity amongst an affected indigenous people, rather 'collective support'.[17]

In addition, the World Bank's policies reflect the accepted standard by which the degree of participation corresponds to the level of potential impacts on the affected peoples, and provide for differing levels of participation where indigenous peoples are the only affected groups as opposed to where they are one group among others. The ESS provides that the 'scope and scale' of consultation and participation will be 'proportionate to the scope and scale of potential project risks and impacts' that may affect indigenous peoples.[18] Where indigenous peoples are the sole beneficiaries of a project, it requires the borrower to 'proactively engage' to ensure their ownership and participation throughout the project cycle.[19] Where indigenous peoples are not the sole beneficiaries, the policy requires 'meaningful consultation'.[20] Operational Policy 4.10 states that the Bank will finance a project only when free, prior and informed *consultation* results in 'broad community support to the project by the affected indigenous peoples',[21] notably stopping short of recognising the right to free, prior and informed *consent* in all cases.[22] The ESS further provides that the borrowing country *must* obtain the FPIC of the affected indigenous peoples where the project will (a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation; (b) cause relocation of indigenous peoples from such land and natural resources; or (c) have significant impacts on indigenous peoples' cultural heritage that is material to their identity or cultural, ceremonial or spiritual aspects of their lives.[23] Read in conjunction, these policies require consent when the impacts on indigenous peoples would be substantial; in cases of lesser impacts, consultation resulting in 'broad community support' will suffice. While the scope of the situations where consent is required does not precisely correspond to that in the UNDRIP,[24] the broad contours of the law of FPIC are reflected in the World Bank's policies.

The consultation process surrounding the adoption of the policies is also relevant to the broader study. The Operational Policy 4.10 was adopted following consultations with indigenous peoples'

[16] Ibid [23]. Also see [12].
[17] Ibid [25], [26]. Also see [27] and [28].
[18] Ibid [11].
[19] Ibid [14].
[20] Ibid [16].
[21] OP 4.10 [1].
[22] On the failure to recognise FPIC, see Errico (2006).
[23] ESS [24].
[24] See the associated criticisms in Cabrera Ormaza and Ebert (2019) 492-494; Lewis and Söderbergh (2019) 67, 72-73.

organisations.[25] The ESF, too, was developed in a process involving extensive consultation with governments, IOs, experts, civil society groups and indigenous peoples.[26] The consultation proceeded in three phases. First, the Bank prepared a paper on its approach to the new safeguards and opened it up to public consultation,[27] part of which consisted of 16 dedicated dialogues with indigenous peoples.[28] In its second phase, the Bank released a proposal document for consultation, and held eight consultation meetings with indigenous peoples.[29] The third phase involved a three-month consultation on a revised draft of the proposed ESF, which focused on feedback from borrower countries.[30] This process evidences the World Bank's recognition that because indigenous peoples are especially affected by its activities and the ESF has the potential to better protect their interests, they should participate in the ESF's development. The final decision-making was done by the Development Committee of the World Bank, and the draft was approved by its Board of Executive Directors.[31] Although a seemingly promising procedure, often the notice given for consultations was short, documents were not circulated in sufficient time, translation for local languages and facilities for disabled persons were lacking, and some major indigenous organizations were not aware of the consultations in their countries.[32] In addition, several important changes to the final ESF were made without the consultation of indigenous peoples: for instance, the addition of the 'Sub-Saharan African Historically Underserved Traditional Local Communities' terminology.[33] The structure of the third phase of consultation meant that borrower countries had the most input into the final outcome document, and indigenous peoples were not able to participate to defend their rights at the point where it mattered most.[34]

In summary, the policies of the World Bank contributes to the pattern of practice that constitutes a norm regarding the participation of peoples in matters affecting them. The consultation and FPIC policies broadly reflect accepted principles, and correspond to the theory whereby the degree of participation should be higher where the level of affectedness is greater. Evidence of the motivations of the World Bank, including any *opinio juris*, is sparse; for instance, the ESF does not contain any reference to the UNDRIP. Further, it is not possible to say on the basis of the available information

[25] World Bank, 'Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy, Draft OP/BP 4.10' (18 April 2002).
[26] For an overview of the consultations held with indigenous peoples, see World Bank, 'World Bank Policies Review and Update, Dialogue with Indigenous Peoples October 2013-March 2014 Summary' (n.d.).
[27] World Bank, 'The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper' (10 October 2012).
[28] Houghton (2019) 470. See World Bank, 'World Bank Environmental and Social Safeguard Policies Review and Update: Regional Dialogue with Indigenous Peoples, Terms of Reference' (n.d.).
[29] Houghton (2019) 470.
[30] Ibid 470.
[31] Ibid 478.
[32] Ibid 475-476.
[33] Lewis and Söderbergh (2019) 69-70.
[34] The Bank itself documented borrower countries' concerns over the inclusion of FPIC in the ESF: World Bank, 'Summary of Phase 3 Consultations and Bank Management Responses' (n.d.) 29-33.

whether the Bank's participation policies were adopted with the purpose of allowing it to better fulfil its mandate. In addition, the consultations in the process of adopting the ESF and the Operational Policy further contribute to the norm, although the ESF processes demonstrate the limitations of consultations without shared power in decision-making and the need for sufficient notice periods and for consultations to be conducted in local languages.

2.2 The International Fund for Agricultural Development

The policies of the IFAD also reflect the contours of FPIC laid out above. By way of background, the IFAD's main decision-making body is the Governing Council, consisting of representatives of its 177 member states,[35] but decisions on whether to approve projects and programmes are made by the Executive Board composed of 18 member state representatives.[36] The IFAD Policy on Engagement with Indigenous Peoples[37] sets out principles of engagement for IFAD to follows in its work with indigenous peoples in the formulation of country strategies, in policy dialogue, and throughout the project cycle.[38] Aiming 'to enhance IFAD's development effectiveness in its engagement with indigenous peoples' communities in rural areas, and especially to empower them to overcome poverty by building on their identity and culture',[39] the policy itself was developed in consultation with indigenous peoples' representatives and the UNPFII.[40] It lists FPIC as one of nine fundamental principles.[41]

On FPIC, the Policy states that IFAD, when working with member states on projects targeting or affecting indigenous peoples, shall support 'the participation of indigenous peoples' communities in determining priorities and strategies for their own development'.[42] The Policy states that "consultation to obtain" FPIC is a criterion for approving a project.[43] IFAD has detailed policies on how consultations are to be carried out, broadly mirroring accepted principles.[44] Consultations should be carried out through indigenous peoples' freely chosen representatives and institutions, without coercion, intimidation or manipulation, with sufficient time and information, and with the expected

[35] IFAD Agreement, Article 6.1(a) and 6.2.
[36] IFAD Agreement, Articles 6.5, 6.6 and 7.2(c)-(d), and Schedule II. IFAD also has a President and staff responsible for conducting its business: IFAD Agreement, Article 6.8.
[37] IFAD, *Engagement with Indigenous Peoples: Policy* (November 2009) ("2009 Policy"). Also see IFAD, 'Executive Board: Minutes of the Ninety-seventh Session' (2009) IFAD Doc Document EB 2009/97/R.3/Rev.1.
[38] 2009 Policy, 15.
[39] Ibid 6.
[40] Ibid 6.
[41] Ibid 4.
[42] Ibid 13.
[43] Ibid 13.
[44] See IFAD, *Social, Environmental and Climate Assessment Procedures* (IFAD 2017) ("SECAP"), 230; IFAD, *How to do Seeking Free, Prior and Informed Consent in IFAD investment* projects (IFAD 2015) ("2015 Policy"). See also *Policy on Improving Access to Land and Tenure Security* (IFAD 2008); *Policy on Environment and Natural Resource Management* (IFAD 2011).

outcome of consent.[45] Consent is clearly required when a project would result in physical displacement or impacts on access to land or other resources.[46]

The Policy also provides for the participation of indigenous peoples at earlier stages in the IFAD's work. Before specific projects are carried out, IFAD works with a country receiving funds to create a "country strategic opportunities programme" that defines priority objectives and presents concepts for projects, providing a framework for IFAD's work in the country.[47] For countries where indigenous peoples and ethnic minorities are relevant to issues of rural poverty, IFAD's Policy provides that IFAD 'will' invite indigenous peoples' representatives to be part of the team that prepares the country strategic programme.[48] In addition, the Policy provides for the participation of affected indigenous peoples later in the project cycle: IFAD will invite representatives to participate in the country project management team or in the preparation of the project.[49] Arrangements for implementing a project 'should facilitate a direct role by indigenous peoples in managing resources', including capacity-building measures where needed to enable affected indigenous peoples' organizations to 'assume effective control over the resources to be invested in their communities'.[50]

While one reason for IFAD's adoption of practices regarding the participation of indigenous peoples in activities of the Fund which affect them, as evidenced by its publicly available documents and statements, is to better fulfil its own mandate and bolster its own legitimacy, there is also evidence to suggest that it is doing so in the belief that the UNDRIP requires it.

Regarding the former, the Policy on Engagement with Indigenous Peoples begins with the acknowledgement that reaching indigenous peoples with agricultural development—recognised by the Fund as an important part of fulfilling its mandate—'requires tailored approaches that respect their values and build upon their strengths'.[51] It goes on to express the aim of enhancing IFAD's development effectiveness in its engagement with indigenous peoples' communities in rural areas.[52] The Policy further states that a participatory approach can 'better address complexity and diversity' and make programmes more 'responsive to local problems and to the goals and visions of indigenous peoples'.[53] The Strategic Framework 2016-2024 further supports this view, stating that because of its responsiveness to the needs and priorities of indigenous peoples 'IFAD's interventions, and their

[45] 2015 Policy 2, 5-8.
[46] SECAP, 9.
[47] IFAD, *Operational Procedures and Guidelines for Country Strategies* (IFAD n.d.) 2.
[48] 2009 Policy 15. For an example of COSOPs adopted using this approach, see IFAD, 'India: Country Strategic Opportunities Programme 2018-2024' (21 August 2018) IFAD Doc EB 2018/124/R.19.
[49] 2009 Policy 15.
[50] Ibid 16.
[51] Ibid 4.
[52] Ibid 6.
[53] Ibid 11.

targeting will be improved'.[54] In a speech to the 2014 World Conference on Indigenous Peoples, the President of the Fund stated that working with indigenous peoples as equal partners through inclusive processes was necessary to fulfilling development objectives.[55]

However, there are also reasons to believe that IFAD's practices are partly motivated by the belief that they are required by the UNDRIP, which the Fund may regard as being part of international law. The Policy on Engagement with Indigenous Peoples states that it was developed in response to 'rapidly evolving national and international normative frameworks on the rights of indigenous peoples', including the adoption of policies on indigenous peoples by other international financial institutions,[56] and cites the international legal framework on indigenous peoples' rights including ILO 169 and the UNDRIP, which it says 'promotes [indigenous peoples'] full and effective participation in all matters that concern them'.[57] In addition, in 2017 the President of IFAD stated in a speech that IFAD had 'become a role model for how institutions can build relationships with indigenous peoples based on inclusive and horizontal partnerships, in line with UNDRIP's article on self-determined development'.[58] Similarly, in a speech to the UNPFII in 2019, a representative of IFAD stated that 'giving Indigenous Peoples the driving seat' was 'in line with the principles of UNDRIP'.[59] At the World Conference on Indigenous Peoples in 2014 the President emphasised Article 18 of the UNDRIP.[60] In another speech the President stated that the Fund wants 'to support [indigenous peoples'] efforts to make yourselves heard in the defence of your rights, which are established by international conventions and declarations'.[61] On another occasion, the President said that the Forum was established 'within the framework of' the UNDRIP.[62] The repetitive reference to the UNDRIP in the course of outlining IFAD's procedures for indigenous peoples' participation strongly suggests that IFAD views such processes as in line with UNDRIP, and that IFAD views UNDRIP as at least highly persuasive legal authority. IFAD officials have repeatedly emphasised the Fund's commitment to

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[54] IFAD, *Strategic Framework 2016-2024* (IFAD 2015) 19. For further examples, see IFAD, *The Traditional Knowledge Advantage: Indigenous peoples' knowledge in climate change adaptation and mitigation strategies* (IFAD 2016) 7 ('IFAD has made significant progress in enhancing its development effectiveness with regard to indigenous peoples. It established instruments to support indigenous peoples' self-driven development and their full and effective participation at all levels'); IFAD, 'IFAD's Statement by Mattia Prayer Galleti Lead Technical Specialist at UNPFII' (26 April 2019), https://www.ifad.org/en/web/latest/speech/asset/41123449; IFAD, 'Welcoming remarks by Gilbert Houngbo, President of IFAD at the Fourth Indigenous Peoples' Forum' (12 February 2019) https://www.ifad.org/en/web/latest/speech/asset/41016256 ('We believe that ownership is essential to development. …Dialogue has vastly improved our understanding').
[55] IFAD, 'Statement by IFAD President to Roundtable at the World Conference on Indigenous Peoples (22 September 2014), https://www.ifad.org/en/web/latest/speech/asset/39030687.
[56] 2009 Policy, 6.
[57] Ibid 7.
[58] IFAD, *Proceedings of the Third Global Meeting of the Indigenous Peoples Forum at IFAD* (IFAD 2017) 7.
[59] IFAD, 'IFAD's Statement by Mattia Prayer Galleti Lead Technical Specialist at UNPFII'.
[60] IFAD, 'Statement by IFAD President to Roundtable at the World Conference on Indigenous Peoples'.
[61] IFAD, 'Welcoming remarks by Gilbert Houngbo'.
[62] IFAD, 'Closing remarks by IFAD President at the indigenous people's international conference on sustainable development and self-determination' (19 June 2012) https://www.ifad.org/en/web/latest/speech/asset/39034628.

ensuring that indigenous peoples' voices are heard on the global stage, stressing that its Engagement Policy represents '[t]he right thing to do'.[63]

In summary, IFAD has established a Policy, which has largely been adhered to in practice,[64] relating to the participation of affected indigenous peoples in decision-making regarding the allocation of finance, as well as throughout the development and implementation of projects affecting them. The Policy largely mirrors the accepted principle of FPIC, and is thus in line with the fulfilment of the right to participate. The Policy is motivated by the belief that it is required by UNDRIP, in addition to the recognition that it enables the organisation to better carry out its functions. The repetitive references to the UNDRIP may suggest a belief that the instrument is international law. As the Policy was drafted by a group of IFAD staff and approved by the Executive Board—which is not representative of member states—it can be regarded as an act of IFAD as an IO, rather than as reflecting the collective will of its members.[65] As such, its contents can evidence the practice and potentially the *opinio juris* of IFAD itself.

2.3 The Green Climate Fund

The FPIC of indigenous peoples is also required by the GCF, an entity established by the UNFCCC COP with the objectives of making 'a significant and ambitious contribution' to global efforts to achieve international goals to combat climate change and to promote the shift toward low-emission and climate-resilient development, by providing funding to developing countries to mitigate and adapt to climate change.[66] While it is accountable to, and functions under the guidance of the UNFCCC COP, it has its own international legal personality.[67] The GCF is governed by a Board of 24 members with equal representation from developed and developing countries, that makes decisions about the Fund's policies and funding allocation.[68] Its founding document provides that the Board will develop mechanisms to promote the input and participation of indigenous peoples, among other stakeholders, to the design, development and implementation of activities financed by the GCF.[69]

The Environmental and Social Policy of the GCF provides that, as a guiding principle, all activities it finances will 'support the full and effective participation of indigenous peoples', and the design and implementation of activities will be guided by the UNDRIP including the right to FPIC, which is

[63] See e.g. IFAD, *Proceedings of the Second Global Meeting of the Indigenous Peoples Forum at IFAD* (IFAD 2015) 10; IFAD, 'Governing Council Report, Fortieth Session' (2017) IFAD Doc GC 40, 73, 82.
[64] See e.g. IFAD, *IFAD's progress in its engagement with indigenous peoples in the biennium 2017-2018* (IFAD 2018), particularly at 6, 8, and 9.
[65] See 2009 Policy, Acknowledgements.
[66] GCF, *Governing Instrument for the Green Climate Fund* (GCF 2011) ("Governing Instrument") [1]-[3]. The Governing Instrument was approved by UNFCCC COP 17 in 2011: see UNFCCC, Decision 3/CP.17, 'Launching the Green Climate Fund' UNFCCC Doc FCCC/CP/2011/9/Add.1, Annex.
[67] Governing Instrument, [4], [7], [8].
[68] Ibid [5], [9], [14], [16], [18].
[69] Ibid [71].

noted as being 'of particular importance'.[70] Further, the GCF requires that activities are screened for potential impacts on indigenous peoples, that borrowers facilitate the participation of indigenous peoples in risk screening and assessment, and that any plans will be developed with their full and effective participation 'through a process of meaningful consultation tailored to them' and ensuring their FPIC.[71]

Further to this, the GCF's 2018 Indigenous Peoples Policy, developed with the participation of a wide range of indigenous peoples' organizations,[72] sets out requirements for participation, consultation and FPIC that are consistent with the UNDRIP and, indeed, are on the more stringent side of the policies examined in this chapter. In terms of consultation and participation, the Policy requires the GCF's accredited entities—the third parties that it delivers funds through, which include international financial institutions and UN agencies—with the participation of potentially affected indigenous peoples, to prepare a consultation strategy and identify how the affected indigenous peoples will participate in the design and implementation of activities, and share in their benefits.[73] Further, when the only beneficiaries of proposed activities are indigenous peoples, the accredited entities and executing entities (the third parties who carry out projects) are required to proactively engage with the relevant peoples 'to ensure their ownership, buy-in and participation' in the entire life-cycle of the activities.[74] When indigenous peoples are not the only beneficiaries, their concerns must be addressed through 'meaningful consultation' including a process to seek FPIC.[75] Measures to minimise, mitigate and compensate for any adverse impacts to indigenous peoples, as well as to mitigate environmental and social risks and impacts, must also be determined with the full and effective participation of the affected indigenous peoples.[76] Consultations are required to be proportionate in scope and scale to the potential risks and impacts on indigenous peoples.[77]

On FPIC, the 2018 Policy requires that GCF will 'ensure and require' evidence of 'the effective consultation and application of free, prior and informed consent' when activities are being considered that would affect indigenous peoples' lands, territories, resources, livelihoods and cultures or require their relocation.[78] Although this wording is ambiguous—what does it mean to "apply" FPIC?—a later provision clarifies that the GCF will require consent.[79] The policy thereby appears to support consent

[70] GCF, 'Environmental and Social Policy' (2018) Decision B.19/10, GCF Doc GCF/B.19/06 [8(p)].
[71] [47].
[72] GCF, 'GCF Indigenous Peoples Policy' (2018) GCF Doc GCF/B.19/05 ("2018 Policy") [8].
[73] Ibid [37].
[74] [42].
[75] [44]. "Meaningful consultation" is defined at [9(m)]. See further requirements at [51]-[53].
[76] [46], [48].
[77] [36].
[78] [22(a)].
[79] [54].

in a wider range of situations than is strictly required, going over and above the spectrum-based approach. The policy further requires that consent must be given:[80]

> on the basis of indigenous peoples' own independent deliberations and decision-making process, based on adequate information to be provided in a timely manner, in a culturally appropriate manner, in a local language that is understood by them, and through a process of transparent and inclusive consultations, including with women and youth, and free of coercion or intimidation.

Recognising that indigenous peoples may need support to be able to participate, it provides that the Fund will support capacity-building programs for indigenous peoples to ensure their full and effective engagement with the GCF.[81]

In summary, the GCF's policies on participation and FPIC align with the general principles and provide further support for the establishment of the norm. Information on the GCF's motivations is sparse. From the 2018 Policy, it can be inferred that one reason for its adoption was to contribute to the ultimate aims of the UNFCCC as well as the GCF's own mandate. The objectives of the 2018 Policy include promoting indigenous peoples' positive contributions to climate change mitigation and adaptation and ensuring more effective, sustainable and equitable climate change results, outcomes and impacts.[82] However, references to the UNDRIP in the Policy suggest that the latter was also considered necessary to align the GCF's activities with the UNDRIP's requirements.

2.4 The UN-REDD Programme

The UN-REDD Programme is a joint initiative of FAO, UNDP and UNEP that gives support to developing countries for nationally-led REDD+ processes.[83] Its Operational Guidance on Engagement of Indigenous Peoples & Other Forest Dependent Communities, developed in consultation with indigenous peoples,[84] provides that FPIC 'must be adhered to' as well as the full and effective participation of indigenous peoples in policy-making and decision-making in UN-REDD Programme activities.[85] The Operational Guidance suggests that all this is required under the UNDRIP.[86] Further, its 2013 Guidelines on Free, Prior and Informed Consent set out specific requirements for FPIC that correspond to the accepted principle in terms of the manner in which consultations are to be carried out, and in terms of an acknowledgement that while consent will not always be required, it will be

[80] Ibid. The evidence that accredited entities must provide is set out at [55].
[81] [96].
[82] [11(a)].
[83] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme), *Framework Document* (UN-REDD Programme 2008)
[84] UN-REDD Programme, *UN-REDD Programme Operational Guidance: Engagement of Indigenous Peoples & Other Forest Dependent Communities* (UN-REDD Programme 2009) 1.
[85] Ibid [2]-[3].
[86] Ibid [1].

under certain circumstances.[87] The Guidelines state that FPIC is a 'legal norm under international law' while also acknowledging that it is 'essential to the success of REDD+'.[88] This is evidence of a dual motivation: the fulfilment of the Programme's objectives, as well as a belief that the participation of affected peoples in terms of FPIC is required by law.

2.5 The Global Environment Facility

The GEF, an IO that serves as the financial mechanism to five multilateral environmental agreements, provides new and additional grant and concessional funding to assist developing countries in meeting the objectives of the conventions it serves.[89] Like the World Bank and the IFAD, the GEF has adopted policies regarding participation and FPIC. Unlike other organisations, however, it requires FPIC before deciding to finance a project only for countries that have acceded to ILO Convention No. 169, or that are required to seek FPIC under another domestic or international legal obligation.[90] Its 2012 Principles and Guidelines for Engagement with Indigenous Peoples merely 'recogni[se] the recommendation from Indigenous Peoples that FPIC be applied to GEF-financed activities on, or significantly impacting, their traditional and user rights on their land, territories and resources, consistent with the [UNDRIP]'.[91] The policy further provides that the GEF will ensure the full and effective participation of indigenous peoples in GEF activities that may impact them or infringe upon their rights, meaning that indigenous peoples should be identified in a timely manner and participate in impact assessments and in the identification, development, implementation, monitoring and evaluation of relevant projects.[92] In other words, the GEF does not require that UNDRIP be complied with, but sees it as a non-binding recommendation. In cases where the country is not required to seek FPIC, the GEF merely requires consultations resulting in 'broad community support' for the project, rather than consent.[93]

While it falls below the requisite standard of participation, the 2012 Principles and Guidelines suggest that this practice was nonetheless adopted in the belief that it would allow the GEF to better fulfil its mandate, as well as to realise the UNDRIP. In that document the GEF acknowledges 'the important role' of indigenous peoples in GEF's activities, 'both as valuable contributors in the project

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[87] UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (UN-REDD Programme 2013), 18-20, 24-29. The provisions are substantially similar to those of the World Bank, so are omitted to avoid repetition.
[88] Ibid 8, 9.
[89] GEF, *Instrument for the Establishment of the Restructured Global Environment Facility* (GEF 2015), Articles I.2 and I.6. The relevant conventions are the UNFCCC, the CBD, the Stockholm Convention on Persistent Organic Pollutants, the UN Convention on Combatting Desertification, and the Minamata Convention on Mercury.
[90] GEF, *GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards* (2011) GEF Doc GEF/C.41/Rev.1 ("2011 Policy"), 18; GEF, *Principles and Guidelines for Engagement with Indigenous Peoples* (2012) GEF Doc GEF/C.42/Inf.03/Rev.1 [36(e)], [37] ("2012 Policy").
[91] 2012 Policy [38].
[92] Ibid [36](a).
[93] 2011 Policy, 18.

development stages, and as potential partners and stakeholders in the identification, development, implementation, monitoring, and evaluation stages'.[94] It acknowledges the importance of indigenous peoples' efforts in 'fulfilling [the GEF's] mandate to protect the global environment,[95] and states that it 'acknowledges' the UNDRIP and 'supports' the realisation of its provisions.[96] In a separate document, the GEF similarly states that it supports, through its operations and policies, the realisation of the UNDRIP.[97]

The practice of the GEF, in summary, falls below the standard of other financial institutions as well as that of the UNDRIP, and is lower than that required to fulfil the right. This represents a variation from the norm—an exception which highlights the existence of the general rule.

2.6 European Union development cooperation

The EU, in providing financing to developing countries, has set requirements regarding participation and FPIC of indigenous peoples. In addition, it has consulted with indigenous peoples more generally about their development priorities.

In a 1998 resolution on indigenous peoples and development cooperation, the European Council took note of international instruments on indigenous peoples,[98] and acknowledged the importance that indigenous peoples attach to their "self-development"—which the resolution defines as 'the shaping of their own social, economic and cultural development and their own cultural identities'.[99] In 2002 the European Council set out principles to be applied in EU strategies and financing instruments, including the full and effective participation of indigenous peoples at all stages of the project cycle, and the importance of building the capacities of indigenous peoples' organisations.[100] This brief statement was further developed in 2017 Council Conclusions:[101]

> The Council underscores the crucial importance of further enhancing opportunities for dialogue and consultation with indigenous peoples at all levels of EU cooperation, including in EU funded programmes and projects under all aid modalities to secure their full participation and their free, prior and informed consent in a meaningful and systematic way, and to inform and underpin EU external action policy and its implementation worldwide.

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[94] 2012 Policy [14].
[95] Ibid [34(i)].
[96] Ibid [34(vii)].
[97] GEF, *User Guide: Indigenous Peoples and GEF Project Financing* (GEF 2016) 3. Also see GEF, 'Partnering with Indigenous Peoples to Conserve the Global Environment' (8 August 2014) https://www.thegef.org/news/partnering-indigenous-peoples-conserve-global-environment.
[98] 1998 Council Resolution 'Indigenous peoples within the framework of the development cooperation of the Community and the Member States' (30 November 1998) C/98/421 [1].
[99] Ibid [2].
[100] 2002 Council Conclusions on indigenous peoples, General Affairs and External Relations, 2463rd Council meeting, document 13466/02 (18 November 2002) [8].
[101] 2017 Council Conclusions on Indigenous Peoples, Doc. 8814/17 (15 May 2017) [8].

A 2002 report of the European Commission detailed efforts undertaken by the Commission to consult widely with indigenous peoples to identify their priorities for development, the results of which were to feed into project design and implementation as well as the EU's wider development cooperation strategy.[102] Further, it highlights 'practical mechanisms' set up by the Commission to ensure the consultation of indigenous peoples in policies and activities which affect them.[103]

Part of the 2017 Conclusions suggests that the Council sees participation and FPIC as required by the EU's commitments to the UNDRIP and under the Outcome Document of the WCIP.[104] But the Commission has also stated that 'building partnerships with indigenous peoples is essential to fulfil the objectives of poverty elimination, sustainable development, and the strengthening of respect for human rights and democracy'.[105] As in other cases, indigenous peoples' participation is both instrumentally useful to the EU in terms of fulfilling its objectives and, it seems, accepted as a requirement of the UNDRIP. While detail is lacking as to what the Council means by FPIC—does it require consent in all circumstances, for instance—this is nonetheless an example of practice going to the establishment of the norm.

2.7 The UN Development Programme

The UNDP provides for the participation of indigenous peoples in its field programmes and projects, including FPIC in a way that conforms with the established standard. The foundation for this was laid in a 2001 policy developed as a result of consultation with indigenous peoples' organisations.[106] The policy recognised that UNDP needed to develop its own capacity to enable indigenous peoples' full participation in the design and implementation of UNDP projects and programmes.[107] The policy went on to state that UNDP 'promotes and supports' the right to FPIC regarding development projects and programmes affecting indigenous peoples, '[c]onsistent with United Nations conventions such as ILO Convention 169'.[108] It highlighted that consultation should include representatives from indigenous peoples' organisations, and the need for the use of culturally appropriate consultation methods and respect for indigenous peoples' concepts of time.[109] It encouraged UNDP country offices to develop their own strategies for engaging with indigenous peoples, including building the capacity of

[102] European Commission, 'Report from the Commission to the Council – Review of progress of working with indigenous peoples' COM(2002) 291 final, 13.
[103] Ibid 12-13.
[104] 2017 Council Conclusions on Indigenous Peoples [2], [8]. See also European Commission, 'Joint Staff Working Document: Implementing EU External Policy on Indigenous Peoples' (17 October 2016) SWD(2016) 340 final 5, 8-9, 17-18.
[105] European Commission, 'Report from the Commission to the Council – Review of progress of working with indigenous peoples' 3.
[106] UNDP, *UNDP and Indigenous People: A Policy of Engagement* (UNDP 2001) ("2001 Policy") [4].
[107] Ibid [22]-[23].
[108] [28].
[109] [60], [61].

indigenous peoples' organizations to participate in the design of development activities affecting them.[110]

Building on this, UNDP's 2014 Social and Environmental Standard on Indigenous Peoples aims to ensure that projects that may impact indigenous peoples are designed 'in a spirit of partnership with them, with their full and effective participation' and with the objective of securing their FPIC where their rights, lands, resources, territories, or traditional livelihoods may be affected.[111] It requires that mechanisms be identified and implemented to guarantee their meaningful, effective and informed participation on all matters throughout the project cycle.[112] Further, it requires that 'culturally appropriate consultation' is carried out with the objective of achieving agreement, and that FPIC is obtained on any matters affecting them before any project activities are carried out.[113] It emphasises that FPIC is required for any relocation of indigenous peoples.[114] In addition, it requires the development of a plan in accordance with their effective and meaningful participation, to avoid, minimise and mitigate any adverse effects of any project affecting indigenous peoples.[115]

There is evidence for the presence of mandate-related motivations, as well as a belief that the practice is required by law. UNDP often points to the importance of indigenous peoples' participation for the organisation's objectives.[116] Its 2001 Policy highlights that ensuring participation is 'critical in preventing and resolving conflict, enhancing democratic governance, reducing poverty and sustainably managing the environment'.[117] Similarly, remarks delivered to the UNPFII by the Associate Administrator of the UNDP highlighted that improving indigenous peoples' participation was 'crucial' for generating inclusive development.[118] There is also evidence that UNDP perceives its participation policies as required by international law: the 2001 Policy states that it is 'informed and underpinned by the international human rights framework', as well as by 'the international conventions, declarations and programmes of action that recognize indigenous peoples' rights'.[119]

2.8 The UN Environment Programme

The 2015 Environmental, Social and Economic Sustainability Framework of the UNEP includes a standard that applies whenever indigenous peoples are or may be present in an area affected by a

[110] [47].
[111] UNDP, *Social and Environmental Standards* (UNEP 2014), Standard 6: Indigenous Peoples, 36.
[112] Ibid 38.
[113] 38-39.
[114] 38.
[115] 39.
[116] 2001 Policy [5].
[117] Ibid [3].
[118] UNDP, 'Rebecca Grynspan: Remarks at UN Permanent Forum on Indigenous Issues' (16 May 2011) (speech delivered to UNPFII) https://www.undp.org/content/undp/en/home/presscenter/speeches/2011/05/16/rebeca-grynspan-remarks-at-un-permanent-forum-on-indigenous-issues-.html.
[119] 2001 Policy [7].

project supported by UNEP.[120] It provides that when indigenous peoples may be affected, UNEP and its implementing and/or executing partners will prepare a plan in conjunction with indigenous peoples, assessing potential socioeconomic impacts and risks, and will apply the principle of FPIC with full consideration given to options preferred by the affected peoples.[121] Further, it provides that when it is impossible to avoid restricting indigenous peoples' access to legally designated parks and protected areas, UNEP will ensure that the affected indigenous peoples 'fully and effectively participate' in the design, implementation, monitoring and evaluation of area management plans.[122]

The purpose of the standard is to ensure that UNEP projects respect indigenous peoples' rights, and taken into account their views and needs to avoid any harm and promote opportunities to improve their livelihoods.[123] The earlier Policy Guidance on Indigenous Peoples explicitly states that participation is in line with the UNDRIP, as well as being important for achieving the objectives of UNEP.[124] The Policy Guidance goes on to quote Article 41 of the UNDRIP on ways and means of ensuring participation of indigenous peoples at the UN.[125]

In summary, UNEP also requires FPIC of indigenous peoples on matters affecting them, although its policy contains less detail than those of similar organisations. There is evidence that it considers such practice as being important for fulfilling its mandate, as well as considering it to be consistent with the UNDRIP.

2.9 The UN Industrial Development Organization

The UNIDO, a specialized agency that promotes industrial development for poverty reduction, inclusive globalisation and environmental sustainability,[126] has adopted Environmental and Social Safeguards similar to those of the UNDP and UNEP discussed above.[127] In the safeguards, UNIDO commits to 'undertake prior consultations with affected indigenous people to ascertain their broad community support for projects affecting them and to solicit their full and effective participation' in designing, implementing and monitoring measures to ensure their positive engagement in projects, avoid, minimise, mitigate or compensate for adverse effects, and tailor benefits in a culturally appropriate way.[128] Where a project affects indigenous peoples, a plan must be developed with the full

[120] UNEP, *UNEP Environmental, Social and Economic Sustainability Framework* (UNEP 2015), Safeguard Standard 5: Indigenous Peoples ("UNEP 2015") 20.
[121] Ibid [5.3]. On FPIC, see further UNEP, *UNEP and Indigenous Peoples: A Partnership in Caring for the Environment: Policy Guidance* (UNEP 2012) ("UNEP 2012") 9.
[122] UNEP 2015 [5.5].
[123] UNEP 2015, 20.
[124] UNEP 2012 2.
[125] Ibid 5.
[126] Constitution of the United Nations Industrial Development Organization.
[127] UNIDO, 'Director General's Administrative Instruction No. 23: UNIDO Environmental and Social Safeguards Policies and Procedures (ESSPP') (2015) UNIDO Doc. UNIDO/DGAI.23.
[128] Ibid [C.2]. Also see Annex A, on FPIC.

and effective participation of the relevant indigenous peoples.[129] This is clearly below the standard, as it does not refer to the FPIC of affected peoples, and thus represents another deviation from the norm. In addition, it is unclear to what extent this policy was adopted with the motivation of advancing the organisation's mandate or in the belief that it was required by law.

2.10 The Food and Agriculture Organization

The FAO, in addition to its standard-setting function discussed in Chapter 4, also carries out field programmes and projects. In doing so, it is guided by organisational policies providing for indigenous peoples' participation and FPIC. The 2010 FAO Policy on Indigenous and Tribal Peoples emphasises that FAO is required to 'facilitate the direct and effective participation' of indigenous peoples in programmes and activities affecting them, and support enabling environments to foster their inclusion.[130] Further, it will:[131]

> establish measures to collaborate with indigenous peoples and discourage ventures that will have an adverse impact on their communities. When there is a direct impact or relation to indigenous peoples' issues, it will follow the provisions of the [UNDRIP] that relate to free, prior and informed consent.

Elaborating on FPIC, the Policy provides that the FAO will seek FPIC when its projects directly affect indigenous peoples.[132] It clarifies that FPIC must be obtained before adopting and implementing projects affecting them, that there must be no act of coercion, intimidation or manipulation, and that indigenous peoples should be included as 'competent and legitimate stakeholders' in projects affecting them.[133] Building on this, the FAO Environmental and Social Management Guidelines clarify the FAO's requirement that before implementing projects and programmes that may affect indigenous peoples' rights, lands, natural resources, territories, livelihoods, knowledge, social fabric, traditions, governance systems, or culture or heritage, FPIC is required 'in all cases'.[134] Environmental and Social Standard 9 provides that in the process of obtaining FPIC, complete information must be disclosed to the indigenous peoples in a timely manner, with sufficient time for them to carry out internal deliberations, in accordance with their traditions and customs, in their local language, and in an environment and in ways to which the indigenous peoples can relate.[135] Where FPIC is given, the

[129] Ibid [C.6].
[130] FAO Policy, 12.
[131] Ibid 13.
[132] Ibid 14.
[133] Ibid 5.
[134] FAO, *Environmental and Social Management Guidelines* (FAO 2015), Environmental and Social Standard 9 ("ESS") [6], [9]. Further on FPIC, see FAO, *Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities: Manual for Project Practitioners* (FAO 2016); FAO, *Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (FAO 2014).
[135] ESS [7].

Standard requires that a plan be prepared in full consultation with the affected peoples to avoid, minimise, mitigate or compensate for any adverse impacts.[136]

With regard to the FAO, here too it is unclear to what extent the participation policies were adopted in the belief that they were required by law, or under a motivation to enable the organisation to better fulfil its mandate. Nevertheless the FAO's policy, like that of the GCF, is aligned with the principle of FPIC and indeed exceeds it in respect of requiring consent in all circumstances.

2.11 FPIC in decisions of the UNESCO World Heritage Committee

In addition to the FPIC requirements of IOs making decisions regarding financing and field projects, a specific example will be explored in relation to UNESCO's decision-making activities relating to the protection of natural and cultural heritage. Despite the potentially serious impacts of decisions to place a site on the World Heritage List ("the List"),[137] affected indigenous peoples have historically been overlooked by the World Heritage Committee ("WHC"), which consists of 21 representatives of states parties to the World Heritage Convention and holds annual sessions to decide on whether nominated sites are to be inscribed on the List, examine reports on the state of conservation of listed properties, and make other decisions on the implementation of the Convention.[138]

The GA,[139] the UNPFII,[140] the EMRIP,[141] the Special Rapporteur on the Rights of Indigenous Peoples,[142] the ACHPR[143] and the IUCN[144] have all expressed concern about the lack of participation of indigenous peoples in the nomination, inscription and management of World Heritage Sites. A joint statement from indigenous peoples' organizations to the UNPFII in 2011 emphasised that:[145]

> There are numerous examples of Indigenous sites on the World Heritage List that have been inscribed without the free, prior and informed consent of the Indigenous peoples concerned. In many cases Indigenous peoples were not even consulted when their territories were designated as World Heritage sites, although this designation can have far-reaching consequences for their lives and human rights,

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[136] Ibid [8], [10].
[137] Explored in Chapter 2, section 2.
[138] World Heritage Convention, Articles 8, 9, 11, and 13.
[139] GA, 'Programme of Action for the Second International Decade of the World's Indigenous People' (2005) UN Doc A/60/270 [16].
[140] UNPFII, 'Report on the tenth session' 14 and 'Report on the second session' 18.
[141] EMRIP, 'Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fifth session', 7; EMRIP, 'Final report of the study on indigenous peoples and the right to participate in decision-making', Annex [38]; EMRIP, 'Advice No 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making' (2011) UN Doc A/HRC/18/42, 11; EMRIP, 'Advice No 8 (2015): Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage' (2015) UN Doc A/HRC/30/53, Annex, 10, 20, 23.
[142] Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples' (2012) UN Doc A/HRC/21/47.
[143] ACHPR, *Resolution on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage site* (5 November 2011) ACHPR res.197 (L)2011 [2]-[3].
[144] IUCN (2012) [2].
[145] Endorois Welfare Council et al (2011).

their ability to carry out their subsistence activities, and their ability to freely pursue their economic, social and cultural development in accordance with their right of self-determination.

The joint statement named three nominations under consideration by the Committee at the time that had been prepared without the meaningful involvement or consultation of affected indigenous peoples; all three were subsequently inscribed on the List although the concerns had not been resolved.[146]

In 2015, the Committee changed the Operational Guidelines of the Convention to include indigenous peoples in a list of potential 'partners in the protection and conservation of World Heritage', and encourage states to obtain their FPIC when nominating sites for the List.[147] However, FPIC was a recommended practice rather than obligatory, and as indigenous peoples were referred to as stakeholders rather than rights-holders.[148]

The Guidelines were further updated in 2019,[149] and now encourage states parties to ensure 'a wide variety of stakeholders and rights-holders', including indigenous peoples,[150] to prepare their tentative lists of sites for nomination with their 'full, effective and gender-balanced participation'.[151] Further, in cases of sites affecting the lands, territories or resources of indigenous peoples, states parties are now required to 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain' FPIC before the sites can be included on the list of properties that the state party is considering nominating to the List.[152] At the nomination stage, the guidelines provide that states parties ''shall' demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained, through, inter alia making the nominations publicly available in appropriate languages and public consultations and hearings'.[153] Thus, despite the language of "consult in order to obtain consent", the consent of affected indigenous peoples seems now to be required before the WHC makes a decision to inscribe a property on the List.

2.12 Conclusion

In conclusion, FPIC has become a widely used standard as a means of participation in the decision-making of IOs on matters with the potential to affect indigenous peoples. There are exceptions in which the policy falls well below the international standard as contained in the UNDRIP, as with the

[146] Disko, Tugendhat and García-Alix L (2014) 25.
[147] WHC, Operational Guidelines for the Implementation of the World Heritage Convention (2015) Doc WHC.15/01, [40] and [123].
[148] UNPFII, 'Statement of O. Lorde on Behalf of the UNPFII at the World Heritage Committee', 39th Session, 29 June 2015; see also Vrdoljak (2018) 269.
[149] UNESCO, 'Decisions adopted during the 43rd session of the World Heritage Committee' (2019) UNESCO Doc WHC/19/43.COM/18, Decision 43 COM 11A, Annex.
[150] Ibid I.C.12.
[151] II.C.64.
[152] II.C.64.
[153] III.A.123.

GEF and UNIDO, and others where the standard is exceeded, such as the GCF and FAO. However, the overwhelming trend fits with the contours of the general principle by which consent is required—that is, power is distributed to indigenous peoples—where fundamental rights could be affected, whereas in less serious cases "consultation in order to obtain consent" suffices, a lesser form of participation. In some cases, such as the GCF and the World Bank, it is expressly acknowledged that for participation to be meaningful in some cases capacity building may be required. Furthermore, there is a strong norm as to the participation of affected indigenous peoples throughout the cycle of a project or programme—its design, implementation, monitoring and evaluation. It is frequently the case that the motivation for pursuing these policies is in part mandate-related, but there are also many cases where the UNDRIP and ILO Convention 169 are cited as influence, and two cases—the UN-REDD Programme and the UNDP—where there is arguably *opinio juris*.

3. Membership of, and participation in, decision-making bodies

A second means by which indigenous peoples participate in decisions affecting them is direct participation in the decision-making body, whether as a member or observer. This can be seen at the Forest Carbon Partnership Facility ("FCPF"), the IFAD Indigenous Peoples' Assistance Fund ("IPAF"), the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean ("FILAC"), the UN Indigenous Peoples Partnership ("UNIPP") and the UN-REDD Programme. In some cases—the UNIPP, the IPAF, and the FILAC—by reference to Arnstein's typology, indigenous peoples have delegated power over funding decisions concerning them. In the case of the FCPF and the UN-REDD Programme, Arnstein would categorise the participation as placation, in that indigenous peoples have a minority of seats on the decision-making board or have only observer status. This does not necessarily mean that such participation is not up to the standard required to fulfil the right; in the following discussion, such matters will be considered in light of each organisation's practice. In these cases, *opinio juris* and other evidence as to the motivation of the IOs is not generally available except where already explored in relation to the IFAD.

3.1 Forest Carbon Partnership Facility

In 2007 the World Bank established the FCPF to assist its borrowing member states located in sub-tropical and tropical areas in their efforts to achieve emissions reductions from deforestation and forest degradation by providing technical and financial assistance for capacity building, and to pilot a performance-based payment system for emissions reductions from REDD+ activities.[154] One of the FCPF's operating principles is that it shall comply with the World Bank's operational policies and procedures, 'taking into account the need for effective participation of Forest-Dependent Indigenous Peoples and Forest Dwellers in decisions that may affect them, respecting their rights under national

[154] International Bank for Reconstruction and Development, *Charter Establishing The Forest Carbon Partnership Facility* (IBRD 2015) ("FCPF Charter"), Article 2.1.

law and applicable international obligations'.[155] In addition, its Charter provides that representatives of "forest-dependent indigenous peoples and forest dwellers" may be invited by the FCPF to attend its annual meetings as observers, along with representatives of relevant IOs, NGOs, and private sector entities,[156] and provides for one seat as a non-voting observer in the Participants Committee,[157] the FCPF's main functional body consisting of 14 donor state and 14 borrower state representatives.[158] Affected indigenous peoples, then, have a voice in decision-making at the FCPF, albeit not at the same level as member states. The level of participation falls short of delegated power or partnership; it may be characterised as placation. However, such a level is appropriate in this case, as indigenous peoples (and forest dwellers) may not be relevant to every project, and in any case the FPIC policies of the World Bank will apply.

3.2 The IFAD Indigenous Peoples Assistance Facility

IFAD enables the participation of indigenous peoples in decision-making affecting them through the IPAF, which gives small grants of US$20-30,000 to indigenous and tribal peoples.[159] While a small funder by comparison to large international financial institutions, the Facility is not insignificant: it is disbursing a total of US$5 million from 2017 to 2020, supporting up to 35 projects,[160] and as of 2019 it had supported a total of 127 projects in 45 countries with about US$3.6 million.[161]

The board of the IPAF, which makes decisions about which proposals to finance, consists in majority of indigenous peoples' leaders: four representatives of indigenous peoples' organizations from different regions, as well as one representative each of the UNPFII and IFAD.[162] The Policy on Engagement of Indigenous Peoples describes the IPAF as a 'listening and learning instrument' on the needs, solutions and innovations of indigenous peoples.[163] Thus, indigenous peoples have delegated power over some decisions of the IFAD that directly affect them.[164] As decisions on larger proposals are taken by the Executive Board, where indigenous peoples cannot participate,[165] it may be questioned as to whether indigenous peoples' ownership over the IPAF is merely a token gesture intended to placate indigenous advocates and enhance the IFAD's perceived legitimacy. It is unlikely that that is the case, however, due to the IFAD's FPIC policies explored above; in addition,

[155] FCPF Charter, Article 3.1(d).
[156] Ibid Article 10.1(b).
[157] Ibid Article 11.7(b).
[158] Ibid Article 11.
[159] IFAD Policy, 29.
[160] IFAD, *IFAD's progress in its engagement with indigenous peoples in the biennium 2017-2018*, 10.
[161] IFAD, *The Indigenous Peoples Assistance Facility (IPAF): Assessment of the Performance of the Fourth IPAF Cycle* (IFAD 2019), 9.
[162] IFAD Policy, 16, 29-30.
[163] IFAD Policy, 29.
[164] Not all decisions, as the Executive Board still makes decisions on proposals of larger amounts, many of which affect indigenous peoples.
[165] IFAD, *Rules of Procedure of the Executive Board* (IFAD 1977, amended May 2019).

indigenous peoples would not be affected by every funding decision made by the IPAF. The IFAD IPAF is another data point supporting the emergence of the norm.

3.3 The Fund for the Development of Indigenous Peoples of Latin America and the Caribbean

The FILAC[166] is an IO established in 1992 under an agreement signed at the Second Ibero-American Summit.[167] With the objective of supporting indigenous peoples' self-development,[168] it provides funding for projects and programs organised by indigenous peoples in the region.[169] The supreme organ of FILAC is its General Assembly, made up of representatives of each of the 22 member states and 18 representatives of indigenous peoples, one from each of its Latin American and Caribbean member states.[170] Indigenous peoples' representatives are elected by indigenous peoples themselves, in processes beginning at the local level and culminating in national assemblies of indigenous peoples.[171] Decisions are taken by a majority both of member states and indigenous delegates.[172] Indigenous peoples are also permitted to attend as observers or guests, and may speak during the meetings.[173] FILAC's Council, which carries out governance activities, is composed of six member state representatives and six indigenous peoples' representatives.[174] FILAC, then, is another example of power-sharing between states and indigenous peoples, giving indigenous peoples control over decision-making affecting them. FILAC's motivations are unknown, including the extent to which it views these procedures as required by law.

3.4 The UN-REDD Programme's governing bodies

The body of the UN-REDD Programme that governed the Programme from 2008-2015, the Policy Board, reserved four seats for indigenous peoples, alongside representatives of donor countries, recipient countries, civil society and UN agencies: one for the UNPFII chair as a full member along

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[166] In Spanish: El Fondo para del Desarrollo de los Pueblos Indígenas de América Latina y el Caribe. See generally http://www.filac.org.
[167] Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean ("Constitutive Agreement").
[168] Constitutive Agreement, Article 1.1.
[169] Article 1.2.
[170] Article 3.2.
[171] FILAC, Operational Directive No. 11, 'Establecimiento de la representación de los pueblos indígenas ante la Asamblea General del Fondo Indígena', in FILAC, *Normatividad Institucional* (n.d.) www.filac.org/wp/wp-content/uploads/2017/10/Jerarquia-Normativa.pdf.
[172] FILAC, *XIII Asemblea General – Sesión Extraordinaria: Minuta de Resoluciones* (FILAC 2016), Resolution XIII AG/FILAC/003.
[173] FILAC, *Acta de la Primera Asamblea General Ordinaria del Fondo para el Desarrollo de los Pueblos Indigenas de America Latina y el Caribe, Santa Cruz de la Sierra, Boliva, 22 a 25 de mayo de 1995* (FILAC 1995) [11]. Also see 'Reglamento de la Asamblea General' (13 September 2006), Article 22, in FILAC, *Normatividad Institucional* (n.d.) www.filac.org/wp/wp-content/uploads/2017/10/Jerarquia-Normativa.pdf.
[174] Constitutive Agreement, Article 3.3; 'Reglamento del Consejo Directivo y de la Secretaría Técnica' (24 June 2004), Article 3, in FILAC, *Normatividad Institucional* (n.d.) www.filac.org/wp/wp-content/uploads/2017/10/Jerarquia-Normativa.pdf.

with three observer seats for indigenous peoples' representatives from the three regions in which the Programme operates.[175]

As of 2017, the governance structure of the Programme has changed so that it is now controlled by an Executive Board coupled with a Programme Assembly. The Executive Board, which is responsible for operational guidance, decision-making and general oversight, no longer provides for full member participation of indigenous representatives: rather, indigenous peoples have one seat as a "permanent observer".[176] Indigenous peoples do have representatives on the Programme Assembly, but this is only an advisory forum whose role is to share best practices, discuss challenges and lessons learned, recommend actions to improve its performance and impact, promote collaboration with other initiatives, and to discuss developments in the international REDD+ processes and initiatives.[177]

While the former practice of UN-REDD clearly provides for a higher level of participation than the current practice, both can be said to be placation in the sense that they do not provide for power over the outcome. This is appropriate, though, as not all decisions will affect indigenous peoples, and the UN-REDD policies provide for FPIC where that is the case.

3.5 The UN-Indigenous Peoples Partnership Policy Board

The UNIPP is a multi-donor trust fund, set up by several UN organizations, that mobilises and manages funding to facilitate the implementation of international standards on indigenous peoples' rights.[178] Decisions on funding projects as well as strategic direction and governance are made by a 10-member Policy Board composed of equal representation from participating UN organisations and indigenous peoples' representatives and experts.[179] A 2017 report of the UNIPP states that it was developed to promote indigenous peoples' rights at the national level by, among other things, providing and supporting consultative and participatory processes and mechanisms 'based on the rights enshrined in Article 41 and 42 of UNDRIP and ILO Convention No. 169',[180] implying that the UNIPP sees its Board structure, in addition to the participatory processes it supports at the national level, as required by law. Here, too, there is partnership between indigenous peoples and states whereby the power is shared to make decisions that affect indigenous peoples.

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[175] UN-REDD Programme, *UN-REDD Programme Rules of Procedure and Operational Guidance* (UN-REDD Programme 2009) [1.2.4]. For the role of the Policy Board, see UN-REDD Programme, *Policy Board Terms of Reference* (UN-REDD Programme 2009).
[176] UN-REDD Programme, *Terms of Reference* (UN-REDD Programme 2015) [4.2].
[177] Ibid [4.1]
[178] UNDP, *Multi-Partner Trust Fund of the UN Indigenous Peoples' Partnership: Final Programme Narrative Report 2010-2017)* (UNDP 2017) 4-5.
[179] Ibid 5-6.
[180] Ibid 5.

3.6 Conclusion

International financial institutions have displayed an consistent pattern of practice regarding the inclusion of indigenous peoples' representatives on committees making funding decisions affecting them. For boards that make decisions solely on funding to indigenous peoples, power is shared with indigenous peoples such that they have control over decision-making; in Arnstein's terminology, the level of participation is partnership or delegated power. This is seen in the IFAD IPAF, the UNIPP, and the FILAC. In funds which are more general in nature, making decisions that may impact upon indigenous peoples and others, the level of participation is lower—placation, in Arnstein's terms—seen in the UN-REDD Programme's decision-making bodies, as well as in the World Bank FCPF, both of which have FPIC policies for cases where indigenous peoples are affected. Such a division corresponds well to the theory developed in Chapter 2: where indigenous peoples are the only ones affected, their representatives are granted a higher level of participation; whereas where they are only one affected group among several, the level of participation is lower. Evidence of *opinio juris*, or other motivations, is scarce to be found here except possibly in the case of the UNIPP. In general, this practice contributes to evidence of a norm corresponding to the proposed right.

4. Advisory bodies to decision-making entities

Advisory bodies are a third mechanism seen in the practice of IOs by which peoples may participate in decision-making affecting them. However, in most cases the extent to which these bodies feed into decision-making processes is unclear. They provide for a low level of participation—"consultation", in Arnstein's terms—which is appropriate where the organization makes decisions affecting a range of individuals and groups, not just indigenous peoples, and where the organization also provides for the FPIC of affected peoples. This section discusses the IFAD Indigenous Peoples Forum, the Indigenous Peoples Advisory Groups to the GEF and the GCF respectively, the World Bank Inclusive Forum, and the prospect of an advisory group to the UNESCO WHC.

4.1 IFAD Forum

In addition to the IPAF and FPIC requirements, IFAD supports the participation of indigenous peoples in matters concerning them through its Indigenous Peoples Forum ("the Forum"). Since 2013 IFAD has convened a biennial Forum alongside meetings of its Governing Council.[181] It is a 'process of dialogue and consultation between representatives of indigenous peoples, IFAD Staff and Member States' with the objectives of discussing the assessment of IFAD's engagement with indigenous peoples, consulting on rural development and poverty reduction, and promoting the participation of indigenous peoples' organizations in IFAD-supported activities at national, regional and international

[181] IFAD committed to establishing the Forum in its 2009 Policy on Engagement with Indigenous Peoples: 17.

levels.[182] Each meeting of the Forum is preceded by a series of regional workshops with indigenous peoples' representatives.[183] The Forum itself is guided by a steering committee composed of seven indigenous peoples' representatives from different regions, as well as one representative each from the IPAF, the UNPFII and the IFAD.[184] In addition, the process of establishing the Forum involved indigenous peoples.[185]

The Forum presents recommendations to the IFAD,[186] but it is not clear as to how these recommendations are considered and integrated into the Fund's work. A synthesis is presented to the Governing Council following each meeting of the Forum, but it does not appear that member states engage in any discussion or otherwise acknowledge the recommendations.[187] In addition, at the conclusion of the Forum, a representative of IFAD's management responds to the recommendations, and has at past Forums expressed an intention to implement them,[188] but there is no information available on how the recommendations are followed up.

The Forum was widely welcomed by indigenous peoples.[189] However, given the lack of formality as to how the Forum feeds into the rest of IFAD's work, as well as the lack of representation of indigenous peoples in Governing Council and Executive Board meetings,[190] it may be questioned as to whether the Forum really contributes to the full and effective participation of indigenous peoples. In the light of the FPIC requirement, however, the Forum seems unnecessary to provide for the fulfilment of the right in relation to participate in decision-making affecting them.

4.2 The GEF Indigenous Peoples Advisory Group

In another instance of practice, the GEF has established an Indigenous Peoples Advisory Group ("IPAG") with the purpose of enhancing coordination between the Facility and indigenous peoples.[191]

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[182] IFAD, 'Indigenous Peoples' Forum' (n.d.), https://www.ifad.org/en/indigenous-peoples-forum; Policy on Engagement with Indigenous Peoples, 17.
[183] See e.g. IFAD, *Proceedings of the Second Global Meeting of the Indigenous Peoples' Forum at IFAD* (IFAD 2015), 8.
[184] IFAD, *IFAD's progress in its engagement with indigenous peoples in the biennium 2017-2018*, 3.
[185] IFAD, 'Event: Workshop establishing the Indigenous Peoples' Forum' (2011), https://www.ifad.org/en/web/latest/event/asset/39009688. Note: the workshop produced two documents, but these are not available.
[186] See e.g. IFAD, *Fourth global meeting of the Indigenous Peoples' Forum at IFAD: Synthesis of Deliberations* (IFAD 2019) 2-3; IFAD, *Proceedings of the Third Global Meeting*, 17-18; IFAD, *Synthesis of deliberations, Second Global Meeting, Indigenous Peoples Forum at IFAD* (IFAD 2015) 2-3. IFAD, *Proceedings of the First Global Meeting of the Indigenous Peoples' Forum at IFAD* (IFAD 2013) 30-31.
[187] See e.g. IFAD, 'Governing Council Report: Forty-second Session' (2019) IFAD Doc GC 42 [188]-[200]; IFAD, 'Governing Council Report: Thirty-Sixth Session' (2013) IFAD Doc GC 36 [54]-[55]; IFAD, 'Governing Council Report: Thirty-eighth Session' (2015) IFAD Doc GC 38 [90]; IFAD, 'Governing Council Report: Fortieth Session' [77]-[78].
[188] See e.g. *Proceedings of the Third Global Meeting*, 19.
[189] See e.g. *Proceedings of the First Global Meeting*, 8.
[190] *Rules of Procedure of the Governing Council* (IFAD 2011); *Rules of Procedure of the Executive Board* (IFAD 2019).
[191] GEF, Principles and Guidelines [45(b)].

It is tasked with providing advice to the GEF on the operationalisation and reviewing of the 2012 Principles and Guidelines for Engagement with Indigenous Peoples, particularly on the appropriate modalities to enhance dialogue among indigenous peoples, the GEF and its partner agencies, and others, modalities for enhancing indigenous peoples' capacity to engage in GEF projects and processes, resources and tools that can be used to enhance implementation of the Guidelines, and the identification and strengthening of financial arrangements to support indigenous peoples' efforts to protect their rights and effectively manage their resources through existing and new projects and programs.[192]

Membership of the GEF IPAG consists of seven experts serving in their individual capacity: three indigenous persons chosen from a pool of candidates self-selected by indigenous peoples, with consideration for geographic balance, one chosen from the GEF NGO Network's indigenous peoples' representatives, one independent expert, one representative from GEF partner agencies, and the GEF indigenous peoples focal point.[193]

A 2017 review of the IPAG found that beyond its original mandate, it had also provided a vehicle for indigenous peoples' input into the programming strategy for the GEF's sixth cycle, and had '[f]ostered the inclusion of an indigenous women's perspective in GEF's gender discussions', as well as contributing to discussions on the GEF's stakeholder engagement policy.[194] However, the review also noted that the IPAG was constrained due to its low capacity and the fact that its business was conducted in English.[195] Hence, the IPAG seems to be a means by which indigenous peoples can be heard at the GEF, and as such contributes to the emergence of the norm, but also demonstrates the ways in which a mechanism that appears promising on paper might be limited in practice. Its representativeness could also be questioned: the indigenous members are chosen by the GEF from a pool. However, this could be considered appropriate in the case of an expert body rather than a representative body.

4.3 The GCF Indigenous Peoples Advisory Group

The GCF's 2018 policy stated that the organisation would establish an indigenous peoples advisory group 'to enhance coordination' between the GCF, the entities that carry out the projects and programmes it finances, states, and indigenous peoples.[196] Constituted of one indigenous peoples' representative from each of the four regions in which the GCF funds activities, selected by indigenous peoples,[197] the key functions of the advisory group will be to provide advice on GCF-financed

[192] GEF, *Indigenous Peoples Advisory Group to the GEF: Terms of Reference* (GEF 2013) [1], [4].
[193] Ibid [10].
[194] GEF, 'Review of GEF's Engagement with Indigenous Peoples' (2017) GEF Doc GEF/ME/C.53/Inf.07, Executive Summary [12] 15-19.
[195] Ibid [13].
[196] 2018 Policy [81].
[197] Ibid [82].

activities affecting indigenous peoples, review the implementation of the 2018 Policy particularly on the appropriate modalities to enhance dialogue between indigenous peoples and the GCF, and provide such other advice to the Executive Board as may be requested.[198] Further, the policy stated that the Facility would 'support the work of' such a group and ensure that its recommendations were effectively conveyed to the latter entities.[199] It does not appear that the IPAG has yet been established. Time will tell as to whether it provides a means for the full and effective participation of indigenous peoples in matters concerning them at the GCF.

4.4 The World Bank Inclusive Forum

Similarly, the World Bank has stated that it is establishing an Inclusive Forum for Indigenous Peoples, 'which will serve as a platform to identify and share good practices across regions and deepen the understanding of initiatives to advance the integration of Indigenous Peoples' issues in development efforts'.[200] As of writing, however, little information exists about how this Forum will work and to what extent it will give indigenous peoples a voice at the Bank.

4.5 Towards an advisory body at the UNESCO World Heritage Committee?

Successive attempts by indigenous peoples to gain an advisory mechanism to the Committee have proved unsuccessful. At its 24th and 25th sessions in 2000-2001 the WHC considered a proposal, submitted by a forum of indigenous peoples, for the establishment of a World Heritage Indigenous Peoples Council of Experts ("WHIPCOE") as a consultative body to the Committee.[201] The forum had proposed that, given the 'lack of involvement of Indigenous peoples in the development and implementation of laws, policies and plans…which apply to their ancestral lands'[202] a WHIPCOE should sit alongside, and 'add value [to] rather than displace',[203] the Committee's existing advisory bodies.[204] It would provide 'expert Indigenous advice on the holistic knowledge, traditions and cultural values of Indigenous Peoples relative to the implementation of the World Heritage Convention', including on 'the appropriate identification, evaluation and management of 'mixed' properties and 'cultural' properties with indigenous associations and the identification, management and possible renomination of properties listed for their 'natural' World Heritage values that may also

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198 Ibid [81].
199 Ibid [29].
200 World Bank, 'Indigenous Peoples' (n.d.), https://www.worldbank.org/en/topic/indigenouspeoples#2. Also see UNPFII, 'Report on the eighteenth session' [63].
201 WHC, 'Report of the twenty-fifth session' (2002) UNESCO Doc WHC-2001/CONF.205/WEB.3.
202 World Heritage Committee, 'Supporting Paper to the Submission of the Indigenous Peoples Forum Presented to the 24th Session of the World Heritage Committee' (2000) UNESCO Doc WHC-2001/CONF.205/WEB.3 (28 November 2000), Annex 1, 2.
203 Ibid 3.
204 The International Union for Conservation of Nature (IUCN), the International Council on Monuments and Sites (ICOMOS), and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM): Article 8.3 World Heritage Convention.

hold indigenous values'.[205] The proposal stated that it was designed as a 'means of giving Indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them'.[206]

Although the proposal was initially 'warmly received' by the WHC and the World Heritage Centre conducted a feasibility study on the proposal including developing draft terms of reference with the assistance of the indigenous representatives who had made the proposal,[207] the Committee ultimately did not approve the request, owing to 'a number of legal concerns and issues relating to the funding, legal status, role and relationships (with the States Parties, Advisory Bodies, World Heritage Committee and World Heritage Centre)', as well as the fact that '[s]ome members of the Committee questioned the definition of indigenous peoples and the relevance of such a distinction in different regions of the world'.[208]

The creation of an advisory body of indigenous peoples would be well within the Committee's capacity. Article 10.3 of the World Heritage Convention provides that it may create 'such consultative bodies as it deems necessary for the performance of its functions'. Regardless, and despite repeated calls from the UNPFII[209] as well as organs and officers of UNESCO itself,[210] the Committee has not done so.

In 2017 indigenous peoples' organizations set up the International Indigenous Peoples' Forum on World Heritage ("IIPFWH") as a 'standing global body aiming to engage with the WHC during its meetings, in order to represent the voices of indigenous peoples with regard to the World Heritage Convention'.[211] The WHC 'noted the establishment' of the IIPFWH 'as an important reflection platform on the involvement of Indigenous Peoples in the identification, conservation and management of World Heritage properties',[212] but so far it has not resulted in any changes in indigenous peoples' participation in the Committee, which 'continues to be marginal'.[213] This is

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[205] WHC, 'Report on the Proposed World Heritage Indigenous Peoples Council of Experts (WHIPCOE)' (2001) UNESCO Doc WHC-01/CONF.208.24.
[206] 'Supporting Paper to the Submission of the Indigenous Peoples Forum Presented to the 24th Session of the World Heritage Committee', 12.
[207] WHC, 'Progress Report on World Heritage Indigenous Peoples Council of Experts (WHIPCOE)' (2001) UNESCO Doc WHC-2001/CONF.208/13, 1.
[208] WHC, 'Report of the twenty-fifth session', 57. For more detail, see Meskell (2013).
[209] UNPFII, 'Statement of the UN Permanent Forum on Indigenous Issues at the 35th Session of the World Heritage Committee (delivered by Paul Kanyinke Sena)' (2011) http://www.iwgia.org/iwgia_files_news_files/0314_UNPFII_Statement_at_HC_Paris_2011.doc.
[210] The Assistant Director-General for Culture, Francesco Bandarin: UNESCO, *Celebrating 40 years of the World Heritage Convention* (UNESCO 2013) 43; UNESCO, *International Expert Workshop on the World Heritage Convention and Indigenous Peoples, Copenhagen* (UNESCO 2012) 62.
[211] See IIPFWH, 'International Indigenous Peoples' Forum on World Heritage' (n.d.), www.iipfwh.org. This is not an official advisory body to the WHC.
[212] WHC, 'State of Conservation of the Properties Inscribed on the World Heritage List' (2017) Decision 41 COM 7.
[213] IWGIA (2019) 664.

despite the fact that UNESCO has presented the launch of the IIPFWH to the UNPFII as a 'major step in engaging indigenous peoples' and as 'well-received by the World Heritage Committee'.[214] Given that UNESCO also said that the World Heritage Centre is 'continuously liaising with the forum regarding the next steps',[215] it may be that this is a quickly changing area, and that enhanced participation of indigenous peoples in the work of the Committee will soon ensue. For now, the UNESCO WHC may be noted as an example of an organisation that does not provide for the participation of indigenous peoples via an advisory body, a prospect that remains 'perpetually deferred'.[216]

5. Conclusion

This chapter has shown that IOs that make decisions affecting indigenous peoples enable them to participate in the decision-making processes via requiring their FPIC, via their inclusion in decision-making committees, and via advisory groups to decision-making committees. While there are exceptions to each of these, and all three are not necessarily required to fulfil the right, the chapter has demonstrated a broad pattern of practice which, when combined with that in other chapters, serves to indicate the emergence of a norm corresponding to the right and obligations as outlined in Chapter 2.

The practice supports the notion that a higher level of affectedness justifies a higher degree of participation. The practice regarding FPIC generally supports the international standard whereby matters with a more substantial impact require consent, whereas those with less serious impacts require merely consultation in order to obtain consent—and the exceptions to this serve to highlight the existence of the standard. With regard to board membership, where indigenous peoples are the only third parties affected by the decisions of a given body they generally hold distributed power (partnership or delegated power, in Arnstein's typology) over the result, whereas where they are only one among several potentially affected groups, a minority of seats or observer participation (placation) is the norm. The advisory bodies, similarly, represent a low level of participation.

In many cases—the IFAD, GCF, UNDP, UN-REDD Programme, GEF, EU, and UNEP—there is evidence that the practice is motivated by the organisation's drive to fulfil its mandate. Instances of the participatory practice being carried out in the belief that it is required by law are rarer, and could only be said to exist in the case of the IFAD, UNDP, UNIPP, and UN-REDD Programme. As such, only these latter four cases could be said to contribute to the formation of a rule of custom.

[214] '2018 Report to the UNPFII (2019)', 13.
[215] Ibid.
[216] Vrdoljak (2018) 271.

CHAPTER SIX: Participation in the General Affairs of an International Organization

1. Introduction

This chapter considers general forms of participation of peoples in IOs. As opposed to the participation in specific instances of activity that affect a people, such as the standard-setting and decision-making activities considered in Chapters 4 and 5, this chapter is the first to examine participation in a more general sense. In these cases, the fulfilment of the right does not often require peoples to exercise a level of participation going beyond "consultation" or "placation", in Arnstein's terminology. However, it may require a separate status or accreditation procedure from that applicable to NGOs to ensure that participation is meaningful. The chapter is also the first that considers practice relating to the participation of peoples other than indigenous peoples.

The first two sections of this chapter examine the UN system. Section 2 assesses the participation of non-self-governing territories and national liberation movements, as well as that of Palestine. It will be seen that "peoples" in this sense have been enabled to participate in matters affecting them, via associate member status and institutionalised participation in relevant UN bodies.

Then, in Section 3 the discussion will cover the participation of indigenous peoples in the UN system: following on from the process of adoption of the UNDRIP outlined in Chapter 4, this section will consider the UNPFII, the EMRIP, the World Conference on Indigenous Peoples ("WCIP"), as well as the ongoing discussions on enhancing the participation of indigenous peoples in the UN system. Section 4 will examine on example of a regional organization, the Arctic Council.[1] The Arctic Council is an especially intriguing case whereby the indigenous peoples of the region hold "permanent participant" status which grants them nearly the same rights as those of states: an example of "partnership" in the Arnsteinian sense.

Similar trends will be observed here as have been pointed out previously. The case studies in this chapter serve to further evidence the emergence and acceptance of a norm regarding the participation of peoples in global governance. The case of non-self-governing territories shows that this practice is by no means new: its genealogy dates back to the early days of the UN. Second, in many instances here, too, IOs and states are motivated by the idea that such participation will help a given organization to better fulfil its mandate and objectives. However, here too, evidence of *opinio juris* is scarce, meaning that the practice examined here is unlikely to contribute to the emergence of CIL.

[1] Other regional organizations demonstrate relevant practice, including the EU, the Organization of American States, the Barents Councils, the Amazonian Cooperation and the Andean Community. However, for reasons of space the Arctic Council was prioritised as it is the highest level of participation found in a regional organization.

2. Non-self-governing territories and national liberation movements in the UN system

The peoples of non-self-governing territories have so far taken up less space in the empirical part of this thesis. However, that is not for a lack of relevant data. They have been enabled to participate in decolonization processes under the UN, as well as in the more general affairs of several UN specialized agencies and regional commissions. Beginning in the 1950s and 1960s, the participation of representatives of non-self-governing territories and national liberation movements in the UN system was provided for via associate membership, as well as participation in relevant committees such as the Committee on Information from Non-Self-Governing Territories, the Committee of Twenty-Four, and the Trusteeship Committee. Relevant GA resolutions indicate that such participation was viewed by the international community as helpful to enable the UN to fulfil its objectives under Chapter XI of its Charter. In addition, national liberation movements were increasingly given voice throughout the 1960s and 1970s in relevant UN bodies. This section will consider these matters before turning to the special case of Palestine.

2.1 Associate Member status

Several UN system entities provide for the participation of the peoples of non-self-governing territories by way of Associate Membership, a status invented to assist the UN in achieving its objectives. The first recognition by the GA of this form of participation is found in GA resolution 566(VI) of 1952, which considered that the direct involvement of non-self-governing territories in the work of the UN and its specialized agencies was an effective means of 'promoting the progress' of their peoples.[2] The GA commended the practice of including, in the constitutions of specialised agencies and regional commissions, provisions permitting the admission of non-self-governing territories as associate members.[3] In a subsequent resolution, the GA invited administering states to arrange for the participation of representatives of non-self-governing territories in the work of the appropriate UN organs, and further invited them to propose to specialised agencies and regional economic commissions to provide for the participation of non-self-governing territories as members or associate members.[4]

Several UN agencies and regional organizations provide for non-self-governing territories to become Associate Members, including the FAO,[5] IMO,[6] UNESCO,[7] the UN Economic Commission for Latin

[2] GA res 566(VI), preamble, fourth recital.
[3] Ibid [1]-[2].
[4] GA res 1539(XV) [2]-[3]. See also GA res 1466(XIV) [1]-[2].
[5] FAO Constitution, Article II.
[6] IMO Convention, Articles 8, 9, and 77.
[7] UNESCO Constitution, Article II; UNESCO res 41.2 on Rights and Obligations of Associate Members (1951) UNESCO Doc 6 C/Resolutions, 83 ("UNESCO res 41.2").

America and the Caribbean ("ECLAC"),[8] the UN Economic Commission for Africa ("ECA"), [9] and the UN Economic and Social Commission for Asia and the Pacific ("ESCAP").[10] Typically, for a territory to gain status requires an application to be made on behalf of the state having responsibility for the international relations of the territory.[11] Associate Members do not have voting rights, but otherwise can participate on the same basis as member states.[12] In relation to UNESCO, for instance, Associate Members can participate equally with member states, except without voting rights, in the deliberations of the General Conference—UNESCO's main governing body—and its commissions and committees, and in matters pertaining to the conduct of business of such meetings.[13] They can propose items for inclusion in the provisional agenda of the General Conference, receive all notices, documents, reports and records that member states receive, and participate equally with member states in the procedure for convening special sessions of the Conference.[14] Associate Members can also submit proposals to the UNESCO Executive Board and participate in committees established by it, although they are not eligible for Board membership.[15] When the UNESCO General Conference convenes intergovernmental conferences under Articles IV.3 and IV.4 of its Constitution, it may invite territories which are not Associate Members but are 'self-governing in the fields covered by the terms of reference of the conference' to participate, with the approval of the administering member state.[16]

Associate Member status can sometimes lead to non-self-governing territories being invited to participate in wider UN processes, beyond the specific agency or regional commission. For instance, in the three global conferences on the sustainable development of small island developing states—including the 2014 conference that resulted in the Small Island Developing States Accelerated Modalities of Action ("SAMOA") Pathway,[17] as well as the 2019 mid-term review of the SAMOA Pathway held under the auspices of the 74th session of the GA—the participation of associate members of ECLAC and ECA has been consistently enabled at the same level as that of observer organizations and states.[18] Associate members participated in those meetings.[19] This practice is

[8] ECLAC, 'Terms of Reference and Rules of Procedure of the Economic Commission for Latin American and the Caribbean' (2014) UN Doc LC/G.1403/Rev.8, Terms of Reference of the Commission [3].
[9] ECA, 'Terms of Reference and Rules of Procedure of the Economic Commission for Africa' (1994) UN Doc E/CN.14/III/Rev.8/Corr.2, Terms of Reference of the Commission, [6]-[8].
[10] ESCAP, 'Terms of Reference and Rules of Procedure of the Economic and Social Commission for Asia and the Pacific' (ESCAP n.d.) [4]-[7].
[11] See e.g. FAO Constitution, Article II; IMO Constitution, Article 8.
[12] See e.g. IMO Convention Article 9; UNESCO res 41.2.
[13] UNESCO res 41.2, [i]-[ii].
[14] Ibid, [iii]-[v].
[15] Ibid, chapeau.
[16] UNESCO, 'Regulations for the general classification of the various categories of meetings convened by UNESCO', in *UNESCO Basic texts: 2018 edition* (UNESCO 2018), Articles 11.1(c) and 21.1(b).
[17] GA res 69/15.
[18] GA res 57/262 [14]; GA res 67/207 [18]; GA res 72/307 [7].
[19] For instance, the 2005 conference saw the participation of Anguilla, Aruba, French Polynesia, Guam, Montserrat, Netherlands Antilles, New Caledonia, Puerto Rico, and the US Virgin Islands: GA, 'Report of the

aligned with the theory set out in Chapter 2: the peoples of the non-self-governing territories that are associate members of ECLAC and ESCAP are peoples of small islands and as such are particularly affected by, and have a stake in, the discussions.[20]

An examination of GA resolutions reveals that the GA considers the inclusion of non-self-governing territories as Associate Members to contribute towards the fulfilment of the objectives contained in Chapter XI of the UN Charter.[21] In resolution 1539 of 15 December 1960, the GA stated that the direct participation of non-self-governing territories in the work of the UN and its specialised agencies was 'an effective means of promoting the progress of those Territories and their people towards the attainment of' the objectives of Chapter XI,[22] that the direct participation of 'duly qualified indigenous representatives of the dependent peoples' was 'essential at [their] present stage of development',[23] and that it had 'proved a useful means of promoting the progress of the peoples of those Territories towards complete self government or independence'.[24]

In summary, the records show that the peoples of non-self-governing territories have been enabled to participate in several UN specialised agencies and regional commissions as Associate Members, on substantially the same basis as states (albeit without voting rights). In addition, the Associate Member status can lead to participation in other UN processes that concern peoples. Furthermore, the GA resolutions demonstrate that a primary motivation for doing so was that it would better enable the UN to achieve one of its objectives: the self government or independence of all states on conditions of equality. There does not appear to be any suggestion that participation through such status was perceived as required by law; indeed, this practice occurred before the adoption of many of the key instruments regarding self-determination of peoples. Nonetheless, this is relevant practice for the purposes of establishing a norm, and provides another data point regarding the relevance of the mandates of IOs as providing impetus for such participation.

2.2 Participation in the Committee on Information from Non-Self-Governing Territories

In addition to associate member status, in the early days of the UN non-self-governing territories could also participate directly on matters of decolonization in the Committee on Information from Non-Self-Governing Territories, which existed from 1946 to 1963 and was mandated to receive

International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States' (2005) UN Doc A/CONF.207/11, 41, 52-54.

[20] The Associate Members of ECLAC are Anguilla, Aruba, Bermuda, British Virgin Islands, Cayman Islands, Curaçao, Guadeloupe, Martinique, Montserrat, Puerto Rico, Sint Maarten, Turks and Caicos Islands, US Virgin Islands, and French Guiana. The Associate Members of ESCAP are American Samoa, The Cook Islands, French Polynesia, Guam, Hong Kong, Macao, New Caledonia, Niue, and the Northern Mariana Islands. The ECA does not have associate members.

[21] Article 73 (administering powers recognize the principle that the interests of the inhabitants of non-self-governing territories are paramount, and accept as a sacred trust the obligation to promote their wellbeing).

[22] GA res 1539, Preamble, first recital.

[23] Ibid, second recital.

[24] Ibid, third recital. Also see GA res 566(VI), preamble, fourth recital.

information on non-self-governing territories.[25] GA resolution 647(VII) of 10 December 1952, noting that from time to time, administering states had included representatives of non-self-governing territories in their delegations to the Committee on Information,[26] considered it desirable that 'qualified indigenous representatives' from non-self-governing territories participated in the Committee's work, and invited administering member states to enable such participation.[27] In resolution 744(VIII) of 27 November 1953, the GA invited administering states to include in their delegations indigenous representatives qualified to speak on economic, social and educational policies, in respect of non-self-governing territories that had 'attained a large measure of responsibility' for such policies.[28] Thereby, peoples were able to exercise voice on the fundamental matter of their self-determination.

As with associate membership status, this practice was carried out in the belief that it could contribute to the fulfilment of the objectives of the UN. The GA in resolutions 647(VII) and 744(VIII) recognised that the direct participation of non-self-governing territories in the work of the Committee on Information from Non-Self-Governing Territories could assist in promoting the progress of their peoples towards the goals set out in Chapter XI of the UN Charter.[29]

2.3 Participation in the Committee of Twenty-Four, the Trusteeship Committee, and the General Assembly

The participation of peoples in the decolonization process was also seen in other venues. Throughout the 1960s, representatives of non-self-governing territories and national liberation movements appeared at the Fourth Committee as well as the Committee of Twenty-Four.[30] For instance, in 1963 the Vice-President of the African National Congress of South Africa appeared,[31] and in 1964 representatives from Oman and South West Africa were permitted to appear and speak—particularly remarkable in the case of the latter as it was not formally a trusteeship territory.[32]

Participation became further institutionalised from 1974, when representatives of national liberation movements recognised by the Organization of African Unity were permitted to participate in the GA and its committees and subsidiary organs.[33] In making this decision, the GA recognised the 'positive results achieved' in the UN bodies concerned 'as a direct consequence' of the participation of

[25] First established by GA res 66. Later subsumed by the Committee of Twenty-Four. On the mandate of the Committee on Information, see generally Sud (1965).
[26] GA res 647, preamble, fourth recital. See also GA res 744, preamble, sixth recital.
[27] GA res 647 [1].
[28] GA res 744 [1].
[29] GA res 647, preamble, third recital. See also GA res 744, preamble, second recital.
[30] The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
[31] UN Doc A/SPC/SR.379 (1963).
[32] On Oman, see UN Doc A/C.4/643 (1965) and UN Doc A/C.4/641 (1965). On South West Africa, see GAOR, Fourth Committee, 1518th Meeting (5 October 1965) UN Doc A/C.4/SR.1518.
[33] GA res 3280 [6]; GA res 3412 [7].

representatives of national liberation movements in the past.[34] The GA also requested that other UN organs make the necessary arrangements to facilitate the effective participation of national liberation movements in their relevant proceedings.[35] In addition, it requested all governments, specialised agencies and other UN organizations to ensure the representation of African colonial territories by their national liberation movements when dealing with matters pertaining to those territories.[36] In 1975 it stated that national liberation movements recognised by the Arab League or the Organization of African Unity should participate as observers at the GA, as well as conferences held under its auspices and in meetings of specialized agencies and UN organs.[37] African liberation movements were invited to participate as observers in several UN conferences around this time.[38] Rule 73 of the ECOSOC Rules of Procedure provides that the Council may invite any national liberation movement recognised by, or in accordance with, GA resolutions to participate on a non-voting basis in its deliberations on any matter of particular concern to that movement.[39]

This practice demonstrates that the international community has considered it important that peoples participate in UN processes concerning them, particularly on matters relevant to decolonization and self-determination, via the representatives of national liberation movements and non-self-governing territories. This constitutes practice evidencing the emergence and acceptance of a norm.

2.4 The case of Palestine

No discussion of the participation of peoples in IOs is complete without examining the case of the Palestinian people. Representatives of the Palestinian people have been participating in matters concerning them at the UN since its earliest days. Before 1948 the Arab Higher Committee, which has been described as 'in some sense' the PLO's precursor,[40] was invited alongside the Jewish Agency for Palestine, the representative of the Jewish population authorised by the British mandatory power, to participate in the deliberations of the First (Political and Security) Committee on Palestine,[41] and in the discussions of the Ad Hoc Committee on the Palestine Question.[42]

One of the first acts of the PLO following its establishment in 1964 was to claim representation for the PLO in matters relevant to the Palestinian people.[43] In 1965 the Fourth Committee granted permission for a PLO delegation to attend its hearings and present evidence on Palestinian refugees,

[34] GA res 3412, preamble, sixth recital.
[35] GA res 3280 [7].
[36] GA res 3280 [10].
[37] GA res 3247.
[38] See e.g. ibid.
[39] ECOSOC, Rules of Procedure of the Economic and Social Council (1992) UN Doc E/5715/Rev.2.
[40] Silverburg (1977) 379.
[41] GA res 104, reaffirmed in regard to the invitation of the Arab Higher Committee in GA res 105 of 7 May 1947.
[42] GAOR, Ad Hoc Committee (1947) 225.
[43] Silverburg (1977) 369, citing an article in the London Times of 30 May 1964.

on the request of the PLO and thirteen Arab member states,[44] while not giving them formal recognition.[45] In 1969 the GA first recognised the Palestinians as a "people",[46] and in 1974 invited the PLO to plenary deliberations on the 'Question of Palestine'.[47] Shortly afterward, the GA granted the PLO observer status at the Assembly, at international conferences held under its auspices, and at meetings conducted by other UN organizations.[48] The following year the PLO was invited to participate, on an equal footing with other parties, in all 'efforts, deliberations and conferences' held on the Middle East under UN auspices, and the GA also requested the Secretary-General to take all necessary steps to ensure the PLO was invited to the Geneva Peace Conference on the Middle East.[49] The PLO was also invited to participate in Security Council debates on matters concerning it in early 1976.[50]

Since the 1970s, the level of participation exercised by Palestine has been repeatedly increased. In 1988, the GA re-titled the PLO "Palestine"; although this did not change its level of participation, it had a political effect.[51] In 1998 Palestine was granted additional rights including the right to co-sponsor draft resolutions on Palestinian and Middle East issues—although such resolutions were to be put to a vote only upon request from a member state—the right of reply, and the right to raise points of order related to proceedings on Palestine and Middle East issues.[52] In 2012, Palestine was granted the status of "non-member observer State", which did not entail any additional rights but again had political ramifications.[53] The following year, the GA clarified that Palestine, in UN conferences, 'may participate fully and on an equal basis with other States in conferences that are open to members of specialized agencies or that are open to all States'.[54] In late 2018 the GA granted Palestine, in light of the latter assuming the position of chair of the Group of 77 and China—a key political bloc of developing UN member states—for 2019, the right to make statements, submit proposals and

[44] GAOR, General Assembly, 13th Session (12 November 1958) UN Doc A/SPC/SR.104; GAOR, General Assembly, 13th Session (13 November 1958) UN Doc A/SPC/105.
[45] GAOR, General Assembly, 20th Session (21 October 1965) UN Doc A/SPC/SR.436.
[46] GA res 2535B.
[47] GA res 3210.
[48] GA res 3237. This followed GA res 3236 of the same day, which requested the Secretary-General to establish contacts with the PLO as 'representative of the Palestinian people' on all matters concerning the Palestine question.
[49] GA res 3375. A second resolution on the same day, GA res 3376, established the Committee on the Exercise of the Inalienable Rights of the Palestinian People and authorised it to receive and consider suggestions and proposals from the PLO.
[50] SCOR, 1856th Meeting (30 November 1975) UN Doc S/PV.1856; SCOR, 1959th Meeting (4 December 1975) UN Doc S/PV.1959.
[51] GA res 43/177.
[52] GA res 52/250.
[53] GA res 67/19.
[54] UN, 'Status of Palestine in the United Nations: Report of the Secretary-General' (9 March 2013), UN Doc A/67/738 [7].

amendments and introduce them on behalf of the group, to co-sponsor proposals and amendments, and to raise procedural motions.[55]

Palestine is a highly unusual case. It participates in the UN on essentially the same footing as a member state. For several reasons it is unlike any other people referred to in this thesis: the highly political nature of the issues, its status as a "state". However, before 2012 at least the people of Palestine were not formally recognised as a state, yet had a voice at the UN. The participation of the people of Palestine in the UN system—regardless of the question of its statehood—forms part of the patchwork tapestry of practice regarding the participation of peoples in global governance.

2.5 Conclusion

Representatives of non-self-governing territories, national liberation movements, and Palestine have participated in the UN by way of procedures and mechanisms sanctioned and encouraged by the GA. In a lot of this practice, a sense emerges that the international community has viewed the participation of peoples as being aligned with the objectives of the UN regarding decolonisation. Although there is no *opinio juris*, this practice contributes towards the formation of a legitimate expectation of peoples regarding participation in global governance.

3. Indigenous peoples' participation at the United Nations

In addition to the peoples assessed in Section 2 of this chapter, indigenous peoples also participate in the UN system more generally. From the time of the Working Group on Indigenous Populations, indigenous peoples have gradually gained greater voice. This section will consider two mechanisms for participation—the UNPFII and the EMRIP—as well as a one-off event, the World Conference on Indigenous Peoples ("WCIP"). It will also explore current developments regarding the potential creation of a separate status or other enhanced means for participation of indigenous peoples within the UN.

3.1 The Permanent Forum on Indigenous Issues

The UNPFII was established in 2000 by consensus resolution as a subsidiary body of the ECOSOC.[56] Its mandate is to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights, to (a) provide advice and recommendations on indigenous issues to the UN, (b) raise awareness and promote the integration and coordination of activities relating to indigenous issues within the UN system, and (c) prepare and disseminate

[55] GA res 73/5.

[56] ECOSOC res 2000/22. For the procedural background to the establishment of the Forum, see Vienna Declaration and Programme of Action, Part I, section II, [32]; GA res 48/163; Commission on Human Rights res 1994/28; ECOSOC, 'Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System' (1999) UN Doc E/CN.4/1999/83; Commission on Human Rights res 2000/87.

information on indigenous issues.[57] Under the UNDRIP, it is additionally tasked with promoting 'respect for and full application' of the Declaration's provisions and following up its effectiveness.[58] Made up of 16 members serving in a personal expert capacity, half of which are nominated by governments and the other half appointed on the basis of broad consultations with indigenous organizations including 'local indigenous consultation processes',[59] the UNPFII holds annual two-week sessions,[60] and makes recommendations by way of annual report to the ECOSOC as well as other UN organs, funds, programmes and agencies.[61]

The participation of indigenous peoples in the work of the UN through the UNPFII is thereby double-layered: first, through the members of the expert council who are themselves indigenous; and second, through the participation of indigenous peoples' organizations as observers. The same procedures applicable to the WGDD also apply to the UNPFII,[62] so that indigenous peoples' organizations do not first have to hold consultative status with the ECOSOC.[63] In practice the UNPFII's meetings are 'always full of indigenous activists from every corner of the globe'.[64]

Unlike the WGIP, the UNPFII is established at the highest level within the UN at which a body can be established without constitutional reform;[65] as such, it is a means by which indigenous peoples can exercise considerable influence over other organs and bodies of the UN system. The UNPFII is regularly invited to participate in the work of other UN bodies and specialised agencies, representing the interests of indigenous peoples.[66] In this way, it has become the *de facto* representative of indigenous peoples in the UN.

Indigenous peoples have broadly hailed the UNPFII as a 'historic milestone', being 'the first body within the UN system in which indigenous peoples are represented with the same status as governmental representatives'.[67] At the same time, there is a recognition that participation through the UNPFII is not 'an end in itself or sufficient', as the substantive work must be done in the UN agencies and programmes whose activities affect indigenous peoples.[68] This danger—that indigenous peoples' concerns might become siloed away from the rest of the system—is one reason why the existence of

[57] Resolution 2000/22 [2].
[58] UNDRIP, Article 42.
[59] Resolution 2000/22 [1]. In practice, these 8 members are themselves leaders of indigenous organizations or peoples: Anaya (2004) 220.
[60] Resolution 2000/22 [4].
[61] Ibid [5].
[62] Discussed in Chapter 4, section 2.
[63] Ibid [1].
[64] Erueti (2011) 102.
[65] Lindroth (2006) 246.
[66] See e.g. UNESCO, 'Consultation on a UNESCO Policy on Engaging with Indigenous Peoples' (12 July 2017) 26.
[67] García-Alix (2003) 6.
[68] Ibid.

the PFII alone is not necessarily enough to fulfil the proposed right to participate. Additional means may be needed, as the ongoing process examined in Section 3.4 of this chapter aims to determine.

3.2 The Expert Mechanism on the Rights of Indigenous Peoples

The EMRIP is a subsidiary body of the Human Rights Council established to provide it with expertise and advice on the rights of indigenous peoples as set out in the UNDRIP and to assist states in achieving the ends of the Declaration through the promotion, protection and fulfilment of its rights.[69] Made up of seven independent experts,[70] it prepares annual studies on the status of the rights of indigenous peoples, identifies, disseminates and promotes good practices and lessons learned, and provides technical advice to states on domestic legislation and policies and on the implementation of recommendations made by human rights treaty bodies.[71]

The EMRIP follows a similar approach to accreditation of indigenous peoples' organizations as that established under the WGDD. Meetings are open to the observer participation of, in addition to states, NGOs, IGOs and others:[72]

> …indigenous peoples' organizations and non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the rules of procedure of the Human Rights Council, which will provide for timely information on participation and consultation with the States concerned.

In practice, the Office of the High Commissioner for Human Rights requests all non-State bodies to seek accreditation to the EMRIP, irrespective of any entitlement to accreditation under ECOSOC procedures.[73] The EMRIP is thus another mechanism by which indigenous peoples can make indirect inputs into wider UN processes.

The EMRIP has played a pre-eminent role in outlining and promoting the right of indigenous peoples to participate in international processes affecting them. In a 2010 report, it stated that the right to self-determination is the 'normative framework' underlying the right to participation, and stressed that an 'appropriate goal' was 'the full and direct participation of indigenous peoples in all international processes on matters that particularly concern them'.[74] The next year, it called for the establishment of 'a permanent mechanism or system for consultations with indigenous peoples' governance bodies,

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[69] Human Rights Council res 6/36; Human Rights Council res 22/35 [1].
[70] Human Rights Council res 22/35 [4]-[7].
[71] Ibid [2].
[72] Ibid [13]; Human Rights Council res 6/36 [9].
[73] Human Rights Council, Participation Report [19].
[74] Human Rights Council, 'Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples' (23 August 2010) UN Doc A/HRC/15/35 [30], [95]-[96].

including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure effective participation at all levels of the United Nations'.[75]

There is nothing in its mandate, or the surrounding discussions, pointing to an acceptance as law of the practice. However, there is evidence of states' recognition of the intrinsic importance of participation of peoples. During the 2016 review of the EMRIP's mandate, Argentina and Chile highlighted the importance of ensuring the full participation of indigenous peoples, while Canada stated that space for 'dialogue' between states and indigenous peoples is 'essential'.[76]

3.3 The World Conference on Indigenous Peoples

In addition to the institutional mechanisms of the UNPFII and the EMRIP, indigenous peoples had a voice on matters affecting them at the UN during the World Conference on Indigenous Peoples ("WCIP"), held by the GA in 2014.[77] The WCIP was concerned with the implementation of the UNDRIP, and produced an outcome document which has fed into other processes.[78]

The WCIP was arranged as three round-table discussions and one panel discussion, enclosed by opening and closing sessions.[79] In the opening session, speaking slots were held by the Chair of the UNPFII and three indigenous peoples' representatives, nominated by indigenous peoples, alongside the GA President, the Secretary-General, the UN High Commissioner on Human Rights, and heads of state.[80] The round-tables and panel were each co-chaired by one indigenous peoples' representative and one member state,[81] demonstrating a high level of ownership by indigenous peoples over the process. Indigenous peoples participated in the discussions on the same footing as member states, as well as other observers, civil society organisations and national human rights institutions.[82] The accreditation of indigenous peoples' organizations was arranged 'in accordance with the established procedure' under the WGDD and EMRIP, whereby organisations 'whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations' were invited

[75] Human Rights Council, 'Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 August 2011) UN Doc A/HRC/18/42 [36].
[76] OHCHR, 'Summary of responses to the questionnaire on the review of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples' (April 2016), https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Reviewofthemandate.aspx. See also Human Rights Council, 'Expert workshop to review the mandate of the Expert Mechanism on the Rights of Indigenous Peoples: Report' (10 May 2016) UN Doc A/HRC/32/26 [51].
[77] Mandated in GA res 65/198 [8]: invited GA Pres to conduct open-ended consultations with member states and IP reps to determine the modalities for the meeting.
[78] GA res 69/2.
[79] GA res 66/296.
[80] Ibid [3(b)].
[81] Ibid [3(c)].
[82] [3(g)].

to apply to the Secretariat for accreditation 'through an open and transparent procedure'.[83] In addition, indigenous peoples participated in the preparatory process leading up to the conference.[84]

The case of the WCIP shows that by 2014, the UN and its member states regarded it as important that indigenous peoples participate in decision-making regarding the implementation of their rights on an equal basis with states. However, there is no indication in the relevant statements or resolutions that it was perceived as a legal requirement. Nonetheless, it is relevant practice to the determination of whether a norm has emerged regarding the participation of indigenous peoples in matters affecting them.

3.4 Towards a separate status for indigenous peoples in the UN system

Beyond indigenous peoples' participation via the UNPFII and the EMRIP, there is a protracted process currently underway by which they seek an increased level of participation, including a separate status at the ECOSOC.

The process began with a report of the Secretary-General, prepared pursuant to a resolution of the Human Rights Council, on the ways and means of promoting participation at the UN of indigenous peoples' representatives on issues affecting them.[85] In the report, the Secretary-General first outlined ways in which indigenous peoples' representative organisations and institutions differ 'qualitatively and functionally' from NGOs:[86] such organisations often represent indigenous individuals, collectives, families and extended families;[87] membership in them can be hereditary and/or based on indigenous legal and cultural norms;[88] they have often been recognised, whether constitutionally, legally, or politically, by the state concerned;[89] and their purposes may include the public governance of their peoples and/or territories—that is, they are not "non-governmental" in nature.[90] Accordingly, an indigenous peoples' organisation might not choose to seek accreditation as an NGO under the ECOSOC rules even if technically eligible.

Moreover, it is difficult for many indigenous peoples' organisations to meet the criteria for consultative status at the ECOSOC.[91] Often they will not be registered or even recognised by the state, have an executive officer, headquarters or the requisite documentation, nor be broadly representative of major segments of society in a large number of countries in different regions of the world.[92]

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[83] [3(h)].
[84] [7].
[85] Human Rights Council, Participation Report.
[86] Ibid [7].
[87] [7].
[88] [7].
[89] [8].
[90] [9].
[91] ECOSOC res 1996/31, principles 9, 10 and 22.
[92] Human Rights Council, Participation Report [10].

As a result, the Secretary-General explained, indigenous peoples can find themselves unable to participate in UN meetings of direct relevance to them.[93] The report went on to outline four preliminary issues to be considered by states in partnership with indigenous peoples before deciding exactly how to fix the problem.[94] What should the criteria be for eligibility for accreditation?[95] Whom should decide who is eligible—what should be the nature and membership of such an accrediting body?[96] What sort of information should a would-be indigenous peoples' representative be required to submit?[97] Finally, what measures, such as technical and administrative support and training, are required to ensure that participation is meaningful and effective?[98]

The Secretary-General's report was taken note of by the Assembly,[99] and at the 2014 WCIP member states committed to consider ways to enable the participation of indigenous peoples' representatives and institutions in meetings of relevant UN bodies on issues affecting them.[100]

Subsequently, GA resolution 70/232 of 2015 requested that the President of the Assembly conduct consultations on the matter with member states, indigenous peoples' representatives and institutions, and existing UN mechanisms, and prepare a compilation of the views presented, including existing good practices, to form the basis of a draft text to be adopted by the GA at its following session.[101] Consultations were carried out and the compilation of views duly presented.[102]

However, contrary to expectations, and perhaps due to the changing geopolitical context, a final decision was not taken at the 71st session of the GA in 2017. Despite the fact that drafts of the resolution up until three months before the debate in the GA envisaged inviting indigenous peoples' organisations to participate, on a non-voting basis, in the sessions and work of the GA and its committees affecting them,[103] the resolution as adopted does not make any such moves, merely delaying any final decision.[104] It requests the Secretary-General to produce a further report on 'achievements, analysis and concrete recommendations' on 'possible further measures necessary to enable participation' by the 74th session of the GA,[105] and asks the GA President to hold 'informal

[93] Ibid [11].
[94] [57]-[58].
[95] [61]-[62].
[96] [63].
[97] [64].
[98] [65].
[99] GA res 67/153 [3]. See also GA res 68/149 [8].
[100] GA res 69/2 [33], [40]
[101] GA res 70/232 [19].
[102] GA, 'Compilation of views on possible measures necessary to enable the participation of indigenous peoples' representatives and institutions in relevant United Nations meetings on issues affecting them, and of good practices within the United Nations regarding indigenous peoples' participation' (25 July 2016) UN Doc A/70/990.
[103] See discussion thereof in Cambou (2018) 45-46.
[104] GA res 71/321.
[105] Ibid [5]. At [6] it requested the Secretary-General, in doing so, to seek input from indigenous peoples from all regions of the world.

interactive sessions' during the 72nd, 73rd and 74th sessions of the Assembly and to prepare summaries of these.[106] The GA decided to continue its consideration of the matter at its 75th session in 2020.[107] It remains to be seen whether the political will to enhance the level of participation of indigenous peoples in the UN system will be found on what will be a historic occasion for the UN—its 75th anniversary.

Two of the three 'informal interactive hearings' have since been held.[108] From the summaries, it appears that disagreements remain on issues including whether a new category of participation is required or whether existing mechanisms should be enhanced;[109] whether participation of indigenous peoples should be on the same level as that of permanent observers or states, or a lesser level like that of observers;[110] whether indigenous peoples' representatives should be self-identified or whether they require the recognition or "non-objection" of relevant states;[111] who is "indigenous";[112] and on the composition of the body to accredit indigenous peoples' representatives.[113]

Of these issues, it is clear from Chapter 2 that indigenous peoples and their representatives should be self-identified, as is the established practice evident in the cases examined in this thesis. Owing to the difficulties of indigenous peoples' access to existing categories of participation, a new category will be required. Indigenous peoples should have at least equal representation with states on any accreditation body, if not full delegated power.

3.4.2 Practice and *opinio juris* of states

The submissions and statements made by UN member states to the process constitute examples of practice—in terms of the obligation to promote the participation of peoples in matters affecting them—and also evidence a recognition that such participation is in line with the UNDRIP.

For instance Sweden, in its submission to the consultation leading up to the Secretary-General's 2012 report, stated that it 'saw merit' in the notion of the GA adopting general procedures applying to the participation of indigenous peoples' representatives at the UN, since they are not always organised as NGOs and that issues affecting them are not limited to human rights. Further, Sweden said, this would

[106] Ibid [8]. At [9] the General Assembly expanded the mandate of the Voluntary Fund in order to assist indigenous peoples to participate in these hearings.
[107] Ibid [7].
[108] GA, 'First Informal Interactive Hearing with Indigenous Peoples, President's Summary' (31 May 2018) ("First Hearing"); GA, 'Second Informal Interactive Hearing with Indigenous Peoples on Indigenous Peoples enhanced participation in the United Nations, President's Summary' (20 May 2019) ("Second Hearing"). See also; GA res 72/155; GA res 73/156 [32].
[109] First Hearing, 4-5.
[110] Ibid 5-6; Second Hearing, 7.
[111] First Hearing, 5-6; Second Hearing, 3.
[112] Second Hearing, 2.
[113] Second Hearing, 4.

be 'in line with' the UNDRIP.[114] For another example, Mexico has exhibited active practice in promoting indigenous peoples' participation. It co-presented, with Guatemala, the original Human Rights Council resolution, makes annual contributions to the Voluntary Fund, and supports a separate status for indigenous peoples at the UN.[115]

Other Nordic countries have also demonstrated an acceptance of the right to participate as law. In a statement to the Assembly in 2014, Finland on behalf of the Nordic countries—Finland, Sweden, Denmark, Iceland and Norway—stated that the right of indigenous peoples to participate in decision-making in matters which would affect their rights, through self-chosen representatives, was recognised by '[i]nternational human rights law' and the UNDRIP, and stated that the Nordic countries 'look[ed] forward to' further progress on the issue.[116]

3.5 Conclusion

In conclusion, the participation of indigenous peoples at the UN remains a work in progress. While indigenous peoples are able to participate in the protection of their own rights via the EMRIP and the UNPFII, and have been able to participate in the WCIP on the implementation of their rights on an equal footing to states, discussions on further improving their level of participation in general affairs of the UN are still continuing. In the meantime, in the course of these ongoing discussions some states have professed the belief that the participation of indigenous peoples in decision-making affecting their rights is required by law. It may be that any eventual decision by the GA is evidence of the formation of CIL. However, any eventual decision will need to provide for a separate status that does not pose unjustified barriers to participation, as well as provide for the self-identification of indigenous peoples and their representatives, if the right to participate as set out in Chapter 2 is to be fulfilled.

4. The Arctic Council

The Arctic Council, an organisation of somewhat ambiguous legal status, provides a glimpse of what, for many indigenous peoples, is an ideal scenario regarding participation in the general affairs of an organization. The Arctic Council is a 'high level forum' established to:[117]

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[114] Sweden, 'Submission to the OHCHR' (4 April 2012). All submissions were accessed at OHCHR, 'Consultation on Indigenous Peoples' Participation in the United Nations' (n.d.) https://www.ohchr.org/EN/Issues/IPeoples/Pages/ConsultationonIPparticipationintheUN.aspx.

[115] Mexico, 'Contribución del Estado mexicano al documento que prepara la oficina del Secretario General de las Naciones Unidas' (2012). Accessed at OHCHR, 'Consultation on Indigenous Peoples' Participation in the United Nations' (n.d.) https://www.ohchr.org/EN/Issues/IPeoples/Pages/ConsultationonIPparticipationintheUN.aspx.

[116] Finland, Statement of Finland for Nordic countries, 2. Accessed at UN Department of Economic and Social Affairs, 'UN General Assembly Resolutions and Discussions on Indigenous peoples' (n.d.), https://www.un.org/development/desa/indigenouspeoples/about-us/unga-res-on-ips.html.

[117] Declaration on the Establishment of the Arctic Council (1996) 35 ILM 1387 ("Ottawa Declaration"), Article 1.

(a) provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.
(b) oversee and coordinate the programs established under the AEPS on the Arctic Monitoring and Assessment Program (AMAP); Conservation of Arctic Flora and Fauna (CATF); Protection of the Arctic Marine Environment (PAME); and Emergency Prevention, Preparedness and Response (EPPR).
(c) adopt terms of reference for, and oversee and coordinate a sustainable development program.
(d) disseminate information, encourage education and promote interest in Arctic-related issues.

The Council's work is carried out through (i) biennial ministerial meetings, (ii) working groups which carry out the technical and research work of identifying and analysing challenges to the Arctic environment, and (iii) meetings of senior civil servants—known as Senior Arctic Officials—occurring at least twice a year and serving as a liaison between the ministerials and the working groups.[118]

Indigenous peoples' organizations such as the Inuit Circumpolar Conference played an instrumental role in the Council's creation.[119] The Ottawa Declaration on the Establishment of the Arctic Council recognised in its preamble 'the special relationship and unique contributions to the Arctic of indigenous people and their communities' and noted states' desire to 'ensure full consultation with and the full involvement of indigenous people and their communities and other inhabitants of the Arctic' in cooperative activities to address Arctic issues requiring circumpolar cooperation.[120]

In addition to its eight member states, the Arctic Council creates a "permanent participant" status for Arctic organizations of indigenous peoples, which is intended to 'provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council'.[121] Article 2 of the Ottawa Declaration grants such status to the Inuit Circumpolar Conference, the Saami Council, and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation, while providing that permanent participant status is open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency, representing either a single indigenous people resident in more than one Arctic state, or more than one Arctic indigenous people resident in a single Arctic state, with the caveat that the number of permanent participants should be less than that of member states.[122] Since its establishment, the Arctic Council has welcomed the Aleut International Association, the Gwich'in Council International, and the Arctic Athabascan Council as

[118] See Rottem (2015) 51.
[119] Israel (2014) 357.
[120] Ottawa Declaration, preamble, recitals 1 and 6.
[121] Ottawa Declaration, Article 2. The United States attempted to block the status of indigenous peoples as permanent participants until late in the negotiations on the Declaration: Koivurova and Heinamaki (2006) 105.
[122] Also see Arctic Council *Arctic Council Rules of Procedure* (rev 2013) ("Rules of Procedure"), Rule 34.

additional permanent participants.[123] Indigenous peoples are clearly distinguished from NGOs: an observer status, which entails fewer rights than permanent participancy, is open to NGOs as well as non-Arctic states, IGOs, and inter-parliamentary organizations.[124]

Under the Council's Rules of Procedure, permanent participants may participate in all meetings and activities of the Council, and may be represented by 'a head of delegation and such other representatives as each Arctic State and Permanent Participant deems necessary'.[125] The principle of active participation and full consultation with the permanent participants applies to 'all meetings and activities' of the Council,[126] and while decision-making is by consensus of the member states,[127] permanent participants may propose agenda items for Ministerial meetings,[128] and make proposals for cooperative activities.[129]

Indigenous peoples thus have 'almost equal participatory rights as the state members'.[130] In practice, despite the stipulation that only states hold formal decision-making power, that the permanent participants must be fully consulted on decisions is 'close to a *de facto* power of veto should they all reject a particular proposal'.[131] Moreover, the 'fluid manner in which many decisions are made in the council's working groups and task forces' means that 'it is seldom clear when a formal decision is being taken'.[132] Further, indigenous peoples' organizations have in fact been highly influential. They played an active role in the negotiation of two legally binding instruments negotiated under the Council's auspices—the Arctic Search and Rescue Agreement and the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic—and in both cases managed to have their rights reflected in the text of the agreements.[133] In addition, two proposals submitted by the Saami Council were chosen by ministers at the Iqaluit ministerial meeting for completion and implementation under the guidance of SAOs.[134] Significant, too, is an element of institutional memory: many of the heads of delegation of the permanent participants 'have been involved in the council much longer than their government counterparts', enabling them to be 'highly effective – and influential' participants.[135]

[123] Koivurova and Heinamaki (2006) 107.
[124] Ottawa Declaration, Article 3.
[125] Rules of Procedure, Rule 4.
[126] Ibid, Rule 5.
[127] Ottawa Declaration Article 7; Rules of Procedure, Rule 7.
[128] Rules of Procedure, Rule 19.
[129] Ibid, Rule 26.
[130] Poto (2017) 40.
[131] Koivurova and Heinämäki (2006) 104.
[132] Israel (2014) 357.
[133] Poto (2017) 46; Poto (2016) 88.
[134] Bloom (1999).
[135] Israel (2014) 357.

The Arctic Council falls short of formal status as an IGO: states have not formalised Arctic cooperation through an international treaty, meaning that it is commonly described as a "soft law" or "informal" organization.[136] However, the negotiation of internationally legally binding agreements under its auspices, as well as the establishment of a standing secretariat, has arguably transformed the Council from an inter-governmental forum into an IO.[137] As Klabbers writes, 'if an entity looks like an international organization, functions like one, and is treated by outsiders as one', then it is likely that it is, appearances notwithstanding, an international organization.[138] The Arctic Council's initial façade of legal ambivalence thus seems a mere pretence.

Even if the Arctic Council cannot be treated as an IO—for instance, for the purpose of establishing a rule of custom—it is relevant for the purposes of this study. First, it shows that states are willing to give voice, on a partnership basis, to indigenous peoples in IOs the activities of which affect them and in which they have relevant expertise to contribute. It evidences acceptance of the norm. The high level of participation—partnership, in Arnstein's terminology—is justified as the regional cooperation primarily affects the area in which the indigenous peoples live. Although states clearly also have a stake in the governance of the region, this high level of affectedness distinguishes the Arctic Council from organizations of more general membership. Second, it provides an indication as to how the right may be implemented. It could thus 'serve as a model' for other global governance bodies, both formal and informal.[139] Third, in a region of growing interest due its rapid warming and hence the potential for hitherto untapped resources and shipping routes, the Arctic Council is an increasingly powerful player with global economic relevance.[140] Many non-Arctic states are attempting to become involved in Arctic governance,[141] and the position of indigenous peoples as "insiders" rather than "outsiders" in this regime of "newfound celebrity",[142] in which status is grounded in localness rather than statehood,[143] seems set to be increasingly consequential for their self-determination.

5. Conclusion

This chapter has demonstrated that the peoples of non-self-governing territories and peoples aspiring to be independent during the decolonization period have been enabled to participate in matters affecting them, via associate member status and institutionalised participation in relevant UN bodies. In addition, indigenous peoples have been enabled to participate in the UN through the UNPFII and the EMRIP, and at the WCIP. The UN may yet further conform to the norm by way of the

[136] Rottem (2015) 56; Koivurova and Heinämäki (2006) 104; Bloom (1999) 721.
[137] Byers (2013) 8-9, n 36; Sellheim (2012) 67-68.
[138] Klabbers (2001).
[139] Heinämäki (2011) 235; Koivurova and Heinämäki (2006) 106.
[140] Israel (2014) 350, 356.
[141] Ibid 356.
[142] Ibid.
[143] Steinberg and Dodds (2013) 109.

establishment of a separate status for indigenous peoples. In the Arctic Council, the indigenous peoples of the region participate as partners with states. The case studies in this chapter serve to further evidence the emergence and acceptance of a norm regarding the participation of peoples in global governance. The case of non-self-governing territories shows that this practice is by no means new: its genealogy dates back to the early days of the UN. Here, too, IOs and states are motivated by the idea that such participation will help a given organization to better fulfil its mandate and objectives. However, the practice examined here is unlikely to contribute to the emergence of CIL as evidence of *opinio juris* is scarce.

CHAPTER SEVEN: Participation at International Courts and Tribunals

1. Introduction

The final type of practice investigated in this thesis is that of, and in, international courts and tribunals ("ICTs"). Have ICTs, or states enabled peoples to participate in cases affecting them, and is any practice in this regard accompanied by a recognition that doing so is required by law? If it cannot be said that there is practice accepted as law, does practice nonetheless exist that further evidences the establishment of a norm whereby ICTs enable peoples to participate in matters affecting them?

This chapter does not claim to be comprehensive in the sense of covering *all* ICTs.[1] I focus on those in which there is relevant practice in relation to the participation (or distinct lack of participation) of peoples in cases affecting their rights and interests: the ICJ, the WTO Dispute Settlement Mechanism ("DSM"), and ISDS tribunals.[2]

Section 2 will examine the practice of the ICJ; it will be seen, firstly, that ICJ practice has evolved from not allowing affected peoples to participate, to enabling them to do so via innovative means, and, secondly, that emerging state practice is occurring. Section 3 examines *amicus curiae* participation in trade and investment disputes. While some have hailed the rise of *amicus* participation in the proceedings of the WTO dispute settlement bodies and ISDS tribunals as a means by which peoples may gain a hearing in processes affecting them, it is unlikely that this constitutes practice contributing towards the emergence of a rule of CIL or towards the establishment of a norm.

To fulfil the right does not necessarily require an affected people to have standing as a party in the proceedings, nor the ability to initiate proceedings. An ability to initiate proceedings is relevant where a people is attempting to review or correct the actions of a state at the international level; this may be appropriate in courts with relevant jurisdiction, such as international human rights courts, but not others. In addition, *locus standi* will be relevant to the right to access justice as against IOs themselves. However, for the purposes of the ICTs discussed in this chapter, the ability to initiate proceedings is not necessary for the fulfilment of the right. Rather, in light of the nature of ICTs, what

[1] In 2011 De Brabandere counted 22 international courts and 60 quasi-judicial, implementation control and other dispute settlement bodies: De Brabandere (2011) 342.
[2] In the case of ISDS, a caveat should be added that the system consists of thousands of treaties, interpreted and applied by hundreds of *ad hoc* tribunals, under various sets of arbitration rules, not subject to any centralised form of appeal or review: Roberts (2013) 52. However, this difficulty can be overcome to a large extent by focusing on proceedings under the ICSID and UNCITRAL Arbitration Rules: the former account for more than half of all cases, by some counts up to 70%, and the majority of the remaining cases are dealt with under the UNCITRAL rules since they are most commonly included in bilateral investment treaties: Reinisch and Malintoppi (2008) 711. In addition, despite its fragmentation ISDS is also subject to 'centripetal forces' such as an informal system of precedent and a relatively small set of similar model treaties: Roberts (2013) 52-53.

the fulfilment of the proposed right requires is for an affected people to be heard, and their position to be taken into account. Arnstein's typology holds less relevance here. The proposed right entails an obligation of states parties to proceedings to enable the participation of affected peoples in proceedings—for instance, by including their positions in written submissions and including their representatives in state delegations to hearings. Evidently, states will not always be willing or able to do this; where they are not, the obligation of ICTs to enable the people to be heard by other means will come into play.

2. The International Court of Justice

It has been observed that the ICJ, 'although sometimes called the World Court, is a Court for states'.[3] On the face of its Statute and Rules, there is no contemplation of the participation of "peoples" in either contentious or advisory proceedings. In contentious proceedings, only states can be parties or intervenors.[4] Peoples do not have standing.[5] While Article 34(1) of the Court's Statute, on standing, has been criticised as 'if not definitely outdated, somewhat disconnected' from modern international law,[6] to alter it would open the door to a much greater workload for the Court, and is unlikely to be politically feasible.

Theoretically, in contentious proceedings information could be transmitted from an affected people to the Court by way of several mechanisms established under the ICJ Statute and its Rules. Under Article 34(2) of the Statute, the ICJ may request relevant information from IGOs;[7] it could be contemplated that this mechanism be used to request information from the UNPFII if a case were to arise concerning indigenous peoples. Further, according to Article 50 of the Statute, the Court may instruct an individual or other entity to carry out an inquiry or give an expert opinion.[8] In addition, under its rules the Court may call upon the parties to produce such evidence or to give such explanations as the Court may consider necessary to elucidate any aspects of the matters in issue, or

[3] Koivurova (2007) 180. See also Zyberi (2013) 327, 338.
[4] ICJ Statute, Articles 34(1), 62 and 63.
[5] Zyberi (2013) 327.
[6] Pierre-Marie Dupuy (2012) 590. See also Jennings (1995) 504.
[7] ICJ, Rules of Court (1978) 17 ILM 1286, rules 69(1), 69(4).
[8] Also see Rules of Court, Article 67. In applying Article 50, the Court has a wide discretion: Tams (2012) 1293. In practice, the provision has rarely been used; when it has, it has been regarding questions of a scientific or technical nature: see e.g. *Corfu Channel (United Kingdom/Albania)* (Order of 17 December 1948) [1948] ICJ Rep 124 and (Order of 19 November 1949) [1949] ICJ Rep 236; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United State of America)* (Order of 30 March 1984) [1984] ICJ Rep 165. On several occasions, the ICJ has declined to make use of Article 50: See e.g. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1985] ICJ Rep 192 [65]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* [1992] ICJ Rep 351 [22], [65]. Judges El-Khasawneh and Simma have lamented the Court's failure to utilise Article 50: *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14 ("*Pulp Mills*"), Dissenting opinion of Judges Al-Khasawneh and Simma [12].

may itself seek other information for this purpose;[9] this provision could be used to obtain evidence as to the views and wishes of an affected people. Finally, the Court may arrange for the attendance of a witness or expert to give evidence in the proceedings.[10] In addition, the ICJ recognised in *Nicaragua* that information can come to it 'in ways and by means not contemplated' by its rules:[11] regarding questions of law, it is 'not solely dependent on the argument of the parties before it',[12] and in relation to disputed facts, it is 'not bound to confine its consideration to the material formally submitted to it by the parties'.[13] Although these provisions and statements were not made with the participation of affected peoples in mind and have not been used for this purpose, the Court if it were so minded could utilise them to fulfil the right.

In advisory proceedings,[14] the concept of being a "party" does not quite translate. Standing consists, instead, in the ability to submit written and oral statements—an ability that is granted to states and IOs under Article 66(2) of the Statute. Under that provision, the Registrar of the Court shall 'notify any state entitled to appear before the Court or international organization considered…likely to be able to furnish information on the question' that the Court 'will be prepared to receive…written statements, or to hear…oral statements relating to the question'. Unlike under Article 34(2) where the scope of the term "international organization" is strictly limited to 'public international organizations', nothing in the Statute or the Rules of Court, nor in their *travaux preparatoires*, limits the application of Article 66(2) to IGOs. In practice, however, the Court has largely interpreted "international organization" as so restricted, rejecting NGOs' requests to participate under this provision.[15] Practice Direction XII further restricts the scope of Article 66(2), providing that where an NGO submits a written statement on its own initiative, the statement is not to be considered part of the case file and will instead be placed in a designated location in the Peace Palace, where it may be consulted by states and IGOs.[16] The Statute does not provide for hearing witnesses and experts or receiving enquiries and opinions in advisory proceedings, although it does stipulate that the Court shall be guided by the provisions which apply in contentious cases 'to the extent which it recognizes them to be applicable'.[17]

Despite the rules' restrictions, in practice the Court, as well as advocates representing states parties to proceedings, have increasingly found innovative ways to enable affected peoples to participate in advisory proceedings. While affected peoples struggled unsuccessfully to be heard in the *South West Africa* cases, in the *Kosovo* and *Wall* advisory proceedings the Court invited the affected people to

[9] Rules of Court, Article 62(1).
[10] Rules of Court, Article 62(2).
[11] *Nicaragua*, [31].
[12] Ibid [29].
[13] Ibid [30]. Although these statements were made in the context of a case in which one party did not appear, it is submitted that this principle is subject to broader application.
[14] ICJ Statute, Article 65; UN Charter, Article 96.
[15] Paulus (2012) 1649-1650.
[16] ICJ, Practice Direction XII (2004) [1]-[3].
[17] ICJ Statute, Article 68.

participate on the same footing as states. Moreover, in the *Chagos* proceedings there is state practice regarding the inclusion of representatives of an affected people on a state delegation—and, implicitly, practice of the Court in allowing such behaviour.

The Court does not explicitly link its practice to the concept of self-determination, nor can evidence be found of the Court's acceptance of the practice as law. Nonetheless, this practice can be understood as an implicit recognition by the Court that it ought to enable an affected people to be heard in relevant proceedings. Although these developments have taken place in advisory proceedings, it can be argued that if an appropriate contentious case were to arise, the court should use its information-receiving powers, noted above, to enable an affected people to participate, building on statements made in separate opinions in the *East Timor* case whereby judges of the Court recognised that the voice of a people directly affected was missing in the proceedings.[18]

As a caveat, the scope of cases considered here is restricted to those expressly concerning self-determination. Although it is highly likely that other ICJ proceedings have had a direct impact on peoples' rights,[19] for instance, in territorial disputes where an indigenous people live along the disputed border region, these cases do not appear to evidence any relevant practice.[20] As another caveat, in 1994 the Court ceased to publish its correspondence,[21] so after this date it cannot be determined whether affected peoples have unsuccessfully attempted to access the Court.

2.1 A Struggle to be Heard in the *South West Africa* cases

A brief mention of earlier cases is useful in order to more fully appreciate the extent to which the Court's practice has evolved.[22] The people of Namibia—or the Territory of South West Africa, as it was then known to the international community—did not themselves participate in any of the five sets

[18] As discussed in Chapter 3, section 2.
[19] As recognised by Shelton (2007) 142.
[20] While the ICJ in some cases pays regard to the interests of the inhabitants of disputed border regions such as nomadic peoples, this does not extend to the participation of those peoples; indeed, participation may not be required under the theory: see e.g. *Burkina Faso/Niger* [112]; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Provisional Measures, Order of 18 July 2011) [2011] ICJ Rep 537, Separate Opinion of Judge Cançado Trindade [46], [62], [70]; *Navigational Rights* [14]; *Pulp Mills* [215]-[216], [219]. Boundary disputes in other international courts and tribunals are also pertinent in this respect. In the *Dubai/Sharjah Border Arbitration*, 19 October 1981, Court of Arbitration (Cahier, Simpson, Simmonds) (1993) 91 ILR 543, 639, where the Court emphasised the importance of a statement made by representatives of the Bani Qitab, the tribal people whose traditional lands were located in the disputed territory, stating which emirate they pledged allegiance to. However, the Court did not go so far as to consider that the Bani Qitab should participate in the proceedings. See also the *Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Eritrea-Ethiopia Boundary Commission, 13 April 2002, 130 ILR 1, [7.3] (regard should be paid to the customary rights of the local people to access the river).
[21] As noted by Wiik (2018) 98.
[22] It may also be noted that the Sahrawi people did not participate in the *Western Sahara* advisory proceedings, perhaps because they did not consider the dispute relevant to them, as it concerned questions of a historical nature rather than the right to self-determination: *Western Sahara* [70], [162]. It could also be that the Sahrawi simply did not know of the proceedings or had no capacity to prepare a statement.

of proceedings brought concerning their decolonization.[23] This was not entirely for lack of trying. The correspondence reveals a people's struggle to be heard. On several occasions, the court received applications from various individuals and organisations who claimed to represent the people of Namibia and requested to participate in proceedings including via witness testimony, written statements, and oral statements. By and large, the court was not open to these requests, and the voices of the people of Namibia ultimately went unheard by the ICJ.

By way of background,[24] following World War I the League of Nations placed South West Africa, which had been a German colony, under a mandate held by Britain but in practice to be exercised by South Africa. Under the mandate's terms, South Africa would have full power of administration and legislation as if South West Africa were an integral part of its territory. After the creation of the UN, the Charter of which did not automatically convert mandates into trust territories but rather required a trusteeship agreement,[25] South Africa resisted bringing South West Africa into the trusteeship system. Furthermore, concerns had arisen about the way in which South Africa had discharged its role as mandatory power: it had allowed German settlers to keep their land, while refusing to restore indigenous lands, and placed South West Africa under the *apartheid* system.[26] In 1947 South Africa had even proposed, to the GA, that it annex South West Africa.[27] The GA, not inclined to acquiesce to this request, recommended that South West Africa be brought under trusteeship,[28] a course of action that South Africa continued to resist for many years. It was not until 1966 that the GA placed South West Africa under direct UN responsibility,[29] and South Africa continued to occupy Namibia even after it was formally required to leave in 1969.

Against this background, the first set of advisory proceedings in the ICJ, in 1950, concerned whether South Africa continued to have obligations under the mandate, and if so, the content of those obligations; whether Chapter XII of the Charter applied to South West Africa; and who could modify the international status of South West Africa.[30] The Court found that South Africa continued to have obligations under the mandate, but that there was no obligation to place South West Africa under trusteeship, and that South Africa could modify its international status only with UN consent.[31]

The correspondence reveals two attempts to participate by individuals and groups purporting to represent the people of South West Africa. The first is in respect of a letter of 20 January 1950 from

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[23] *International status of South-West Africa, Advisory Opinion* [1950] ICJ Rep 128 ("*South West Africa AO*"); *South West Africa, Second Phase, Judgment* [1966] ICJ Rep 6.
[24] For a fuller explanation of the historical situation, see Dugard (1973); Falk (1967); Clark (1981).
[25] UN Charter, Article 77.
[26] Yates and Chester (2006) 77.
[27] UN, *Yearbook of the United Nations 1947-48* (UN 1948) 205-208.
[28] GA res 65.
[29] GA res 2145.
[30] *South-West Africa AO*, 129.
[31] Ibid, 138-141.

RH Swale to the Secretary-General, where Swale requests to be heard as a witness in the ICJ proceedings:[32]

> I claim to be heard as a witness before the said Court because I am a chief of the Zulus in South Africa.
>
> Because I raised the natives of German South-West Africa in rebellion against the Germans in 1903 known as the Herero rebellion.
>
> …
>
> Because I know more of the reasonable wants and wishes of the native population of the mandated Territory of South-West Africa than anyone else, I claim a right to be heard on their behalf.

This is an attempt to represent the people of South West Africa in proceedings concerning them. Although it may be questioned whether Swale was a legitimate representative of the people—he was living in South Africa, and did not indicate his extent of involvement with the people of South West Africa after he had led the Herero rebellion 47 years previously—the Court did not reference any such concern in its rejection. Rather, by letter dated 17 April, the Registrar informed Swale that because the request for an advisory opinion involved only questions of law, the Court believed that it would 'not be necessary to call witnesses'.[33]

The second attempt originated from an organisation which, on its face, seems unlikely to have any claim to represent the people of South West Africa: the International League for the Rights of Man ("ILRM"), an NGO based in New York. However, when viewed in historical context, this request can in fact be seen as a people's attempt to participate in the ICJ proceedings.

The record of the correspondence shows that Robert Delson, a member of the Board of Directors of the ILRM, wrote to the Registrar requesting to submit a written statement under Article 66(2) of the ICJ Statute.[34] The Court acceded to the request, notifying Delson that it would accept a written statement on legal questions within a certain time limit.[35] Before the time limit had elapsed, the Registrar received a statement of facts and a statement of law from Gordon F Muirhead, who wrote that he had been requested to forward these to the Court on behalf of Reverend Michael Scott in his capacity as advisor to the ILRM.[36] However, the Registrar refused to accept the statements: 'I have no information to this effect from the League. This Organization has requested permission to submit a statement to the Court, and the Court has acceded to its request. Further communications in this

[32] *South-West Africa AO* (Correspondence) [1950] ICJ Rep 320, 340-341.
[33] Ibid 342.
[34] Ibid 324.
[35] Ibid 327.
[36] Ibid 328.

matter should, therefore, emanate from the headquarters of that organization.'[37] The ILRM later sent a written statement, but this was rejected for being outside the time limit.[38]

This is commonly cited as an example of NGO participation: scholars tend to lament the failure of the ILRM to submit its statement within the time limit, opining that if it had, this could have set a precedent for further NGO participation under Article 66(2).[39] Digging deeper, however, reveals that the ILRM's involvement in the case was very much at the initiative of the Herero people of South West Africa, who had been repressed by South Africa and in 1946 had become concerned about South African moves to annex South West Africa including through a poorly conducted "referendum".[40] The connection is through Reverend Michael Scott, an Anglican priest in South Africa who later became an adviser to the ILRM and played a crucial role in bringing the situation in South West Africa to international attention.[41]

The historical record shows that in 1946 Scott, who was living in Johannesburg, was asked to meet with Frederick Mahareru, the Paramount Chief of the Herero tribe, who then lived in exile in Bechuanaland, South Africa with 15,000 other Hereros.[42] Mahereru explained his concerns about the South West African referendum and sent Scott to meet with Herero chiefs still in South West Africa, including Chief Hosea Kutako. Those chiefs had requested the South African administrator of the Territory to allow a UN commission to conduct the referendum, or in the alternative, to allow Herero spokespeople to attend the GA. Both requests had been declined; the Administrator informed the Hereros that they 'had no right to go to the United Nations while they had not got their own government'.[43] Scott worked with the chiefs to draft a petition to the UN asking for, *inter alia*, the return of Herero lands and the return of Mahareru.[44] As the South West African administration did not permit the chiefs to leave the country, they asked Scott to deliver the petition.[45] So it was that in 1947 Scott presented the petition to the Fourth Committee of the UN. Over the following years, Scott repeatedly advocated for the Herero chiefs, or himself in their stead, to be heard by the Trusteeship Council and the Fourth Committee.[46] It was not until 1949 that Scott started to work with the ILRM, and it appears that the ILRM only became engaged in the South West African issue to the extent of Scott's work.[47]

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[37] Ibid 329.
[38] Ibid 346.
[39] See e.g. Shelton (1994) 623-624; Hernandez (2011) 149.
[40] Yates and Chester (2006) 75-78; Scott (1958).
[41] Among other things, Scott was an early practitioner of non-violent direct action, and was the first white man to be imprisoned for protesting against South Africa's apartheid system. See Scott (1958).
[42] Scott (1958) 219.
[43] Ibid 223.
[44] Ibid 224-225.
[45] Ibid 232.
[46] Clark (1981) 109-118.
[47] Ibid 110.

Following Scott's intensive lobbying, in 1949 the majority of the committee agreed to grant a hearing to one or more representatives of the indigenous population of South West Africa who could provide evidence of their status by submitting suitable credentials.[48] A subcommittee subsequently examined Scott's credentials and unanimously found that they were in order and should be given 'full faith and credit',[49] and the Fourth Committee agreed to give him a hearing.[50] In his address to the Committee, Scott explained that he was representing the views of the Herero people, the Nama people and the Berg Damara people of South West Africa.[51] He went on to detail South Africa's breaches of its mandate regarding its efforts to incorporate South West Africa into its territory, its alienation of indigenous peoples' land, and its denial of fundamental civil and political rights. He asked that the peoples for whom he spoke be given an opportunity to state their case before the UN or a commission appointed for that purpose, and that their lands should be returned to them and their territory brought under trusteeship. The Committee subsequently recommended to the GA that an opinion be sought from the ICJ as to the obligations of South Africa.[52]

Scott had lobbied to allow the peoples of South West Africa to be heard by the UN, as their chosen representative. The Hereros could not have participated on their own behalf, as they were unable to leave the country. That the matter was brought before the ICJ was the result of Scott's efforts on behalf of the Hereros and other peoples of South West Africa. In this light, then, the ILRM's attempts to participate in the 1950 proceedings can be seen as a continuation of Scott's work to allow the Hereros to be heard at the international level. Although there is no available evidence as to whether Scott was explicitly instructed by the Hereros to participate in the ICJ proceedings on their behalf, it seems likely that his requests to the Court—and those of the ILRM—were made on this basis. There is no indication that the ILRM was working on the South West Africa issue in any additional way to Scott's work. Scott had gained a position with the League while lobbying at the UN as it had helped him gain accreditation and legitimacy within the process, but even though his official title was as advisor to the ILRM, 'it was as a representative of the Hereros and other tribes that he spoke'.[53]

The 1971 advisory proceedings saw a continuation of attempts to allow the people of South Africa to be heard.[54] In 1966, the UN had terminated South Africa's mandate for South West Africa, and assumed direct responsibility itself.[55] However, South Africa continued to occupy South West Africa, now renamed Namibia.[56] These proceedings concerned the legal consequences for states of the

[48] UN Doc A/C.4/SR.134 (1949).
[49] UN Doc A/C.4/L.62 (1949).
[50] UN Doc A/C.4/SR.137 (1949).
[51] UN Doc A/C.4/SR.138 (1949).
[52] And the GA subsequently voted to ask for the Court's opinion: GA res 338.
[53] Clark (1981) 112-114.
[54] *Namibia AO*.
[55] GA res 2145.
[56] SC res 264; SC res 276.

continued presence of South Africa in Namibia. In its decision, the Court acknowledged that Namibia was affected by the proceedings: 'the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted'.[57]

The most notable of these attempts was a letter from Kuaima Riruako, Kanepure Mbaha, Veiue Mbaeva and Mburumba Kerina, on behalf of the South West Africa National United Front ("SWANUF").[58] Riruako et al wrote that they were 'indigenous inhabitants of the international Territory of South West Africa (Namibia)', and requested to be 'heard as "petitioners" by the Court'. They referred to the people of Namibia as a 'Namibia Nation' and 'a political and judicial entity'. They sought to provide legal backing for their claim to be heard, stating that their 'right as indigenous inhabitants of South West Africa (Namibia) to petition' had been established in the ICJ statute, the 1956 advisory opinion and in GA decisions; the Registrar, when declining their request based on Article 66(2), roundly rejected this assertion.[59]

SWANUF, it must be noted, was not exactly a central player in the Namibian liberation struggle. Two main rival Namibian liberation groups existed at the time,[60] one of which would be recognised in the 1970s as the 'sole and authentic representative of the Namibian people'.[61] In 1966, SWANUF was set up as an attempt to unify the divergent groups.[62] However, although SWANUF was active at the UN it had no support base in Namibia, and both main groups opposed it; as a result, SWANUF remained a 'marginal' player.[63] Perhaps, then, it could be argued that the ICJ did not allow the participation of SWANUF because it was not sufficiently representative of the Namibian people. However, there is no evidence that the Court considered the degree of representativeness of the individual or entity purporting to represent the people of Namibia as a factor in its decisions to decline the various requests. The requests from Michael Scott, who was recognised by the UN as a legitimate representative of the Herero people, were declined in just the same manner.

The ILRM again requested to participate through the making of written and oral statements.[64] So too did the American Committee on Africa, another NGO.[65] Both requests were declined on the basis that these organisations were not 'international organizations' within the meaning of Article 66(2).[66] Michael Scott also requested to participate on a separate basis: he wrote to the Registrar to ask

[57] *Namibia AO* [127].
[58] *Namibia AO* (Correspondence) 677.
[59] Ibid 678.
[60] On the distinctions between the two, see Saunders (2018) 155; Sellström (2003) 261-293.
[61] GA Res 31/146 [2]; Also see GA res 3111 [2].
[62] Geingob (2004) 77. Cf Saunders (2018) 156.
[63] Sellström 288; Geingob (2004) 77.
[64] *Namibia AO* (Correspondence) 639-640, 678.
[65] Ibid 643. Scott's hand is implicit here: he enclosed the American Committee's statement in his own request to the Court.
[66] Ibid 647, 652, 672, 679.

whether the Court would receive a written or oral statement from him.[67] Scott noted that '[i]t was at the request of the Herero chiefs Frederich Mahareru, Hosea Kutako and others' that he appealed to the UN in 1946 and conveyed their petition there in 1947, and that his credentials to represent the Herero people had been found to be 'worthy of "full faith and credit"' by a UN subcommittee. In a further plea, he stated that he had 'received a renewed request from Chief Clements Kapuuo of the Hereros to represent them'.[68] The Registrar declined Scott's request, citing Article 66(2).[69]

The *South West Africa* cases, then, reveal continued attempts by affected peoples to participate in the proceedings affecting them at the ICJ. However, the Court repeatedly declined to accede to these requests. The Court did not recognise any right of peoples to be heard in proceedings affecting them, and treated these requests in the same way that it had treated those by NGOs and individuals.

2.2 Peoples as participants in the *Wall* and *Kosovo* advisory proceedings

The Court on two occasions has allowed a people to participate in advisory proceedings concerning it, through the submission of written statements and comments and the making of oral statements.[70] In the *Wall* advisory proceedings, representatives of the Palestinian people submitted written statements and comments and gave an oral statement at hearing.[71] Similarly, in the *Kosovo* advisory proceedings the elected representatives of the Republic of Kosovo, who had declared its independence, submitted written statements and comments and gave an oral statement.[72]

Taking these cases in turn, in the *Wall* proceedings the GA raised a question as to the legal consequences arising from the construction of the wall being built by Israel in the Occupied Palestinian Territory. In the outcome, the Court found that the construction of the wall severely impeded the Palestinian people's exercise of self-determination, and was therefore a breach of Israel's obligation to respect that right.[73]

By an Order of 19 December 2003 the ICJ decided that, taking into account Palestine's observer status in the GA and that it had co-sponsored the draft resolution requesting the advisory opinion, Palestine could submit a written statement on the question and take part in the hearings. Palestine proceeded to submit a statement, and spoke first in the subsequent oral hearings.[74] The order made no reference to Article 66(2), although this provision was undoubtedly the basis for the invitation.[75] In

[67] Ibid 644-645.
[68] Ibid 676-677.
[69] Ibid 647.
[70] See more generally Zyberi (2013) 338-339.
[71] *Wall AO.*
[72] *Kosovo*.
[73] *Wall AO* [122].
[74] Ibid [12].
[75] Ronen (2012) 95.

one place in the majority opinion, the Court makes explicit reference to Palestine's statements.[76] The only clue in the judgment as to the reason for allowing Palestine to participate comes in the separate opinion of Judge Higgins, where she notes that '[t]he Court has regarded the special status of Palestine, though not yet an independent State, as allowing it to be invited to participate in these proceedings'.[77]

The *Kosovo* advisory proceedings concerned a declaration of independence from Serbia by the Provisional Institutions of Self-Government of Kosovo. The question was whether this declaration of independence was adopted in violation of international law.[78] The Court found it unnecessary to decide on the consequences of the right to self-determination in order to respond to the question before it. Importantly, in the advisory opinion the Court held that the authors of the declaration of independence 'did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration'.[79] The Court, by this statement, recognised the authors of the declaration as representatives of the people of Kosovo.[80] This statement offers an interesting clue as to how the court thought of the authors of the declaration and, perhaps, why it invited them to participate.

Similarly to the *Wall* case, the Court invited the people of Kosovo—via their representatives, the authors of the declaration of independence—to participate via an Order providing that, 'taking account of the fact that the unilateral declaration of independence…is the subject of the question submitted to the Court for an advisory opinion', the authors of the declaration were 'considered likely to be able to furnish information on the question'. The authors of the declaration were therefore invited to make 'written contributions' to the Court,[81] which they subsequently submitted.[82] It is interesting to note here the term used in relation to the people of Kosovo's written submission – "contribution" – while all submissions made by states were referred to, as in other cases, as "statements".[83] The Court gave no explanation for this difference in terminology, nor is it reflected in the wording of the ICJ Statute; the Court seems to imply a distinction between the status of the authors of the declaration and that of states.[84] The Court also heard an oral statement made for the

[76] *Wall AO* [115].
[77] Separate opinion of Judge Higgins [7].
[78] *Kosovo* [56].
[79] *Kosovo* [109].
[80] Although the authors of the declaration were neither UN observers nor recognised as an national liberation movement representing a people striving to exercise an internationally-recognized right of self-determination.
[81] *Kosovo* (Order of 17 October 2008) [2008] ICJ Rep 409.
[82] Ibid [6]. See *Kosovo* (Written Contribution of the authors of the unilateral declaration of independence), 17 April 2009.
[83] Ibid [6], [11].
[84] Paulus (2012) 1646. Also note that Palestine's written submission was referred to as a "statement", not a "contribution".

authors of the declaration, which was the second statement delivered in the oral proceedings, directly after that of Serbia.[85] Two of the judges explicitly refer to the Kosovar statements in their opinions.[86]

There is no procedural basis for the participation of the representatives of Kosovo or Palestine in the ICJ Statute, nor in the Rules.[87] Article 66(2) had previously been applied in a restrictive way so as to exclude the participation of, for instance, NGOs and individuals;[88] thus, it cannot easily be argued that the provision should be interpreted permissively.[89] Neither Palestine nor Kosovo were states entitled to appear before the Court at the time; neither meets the relevant definition under the ICJ Statute. Nor could Palestine or Kosovo be conceived of as "international organizations" within the meaning of Article 66(2).[90] Yet Palestine and Kosovo were effectively granted the same participatory rights as states.

Commentators have advanced various legal and pragmatic explanations for this discrepancy. Some argue that Kosovo and Palestine were "quasi-parties" to the respective "quasi-disputes" with Serbia and Israel, with a special interest in the outcome of the proceedings which justified their participation under the maxim *audiatur et altera pars* (hear the other side).[91] Others argue that the Court allowed the participation in order to obtain useful information, which is the principal aim of Article 66(2).[92] A variation on that argument is that the Court enabled participation because it was 'essential to the administration of justice'.[93] Still others explain the practice by saying that Kosovo and Palestine were "aspiring states" and the matter underlying the question before the Court was their external right to self-determination.[94] Therefore, according to Ronen, a decisive factor in the Court's willingness to allow participation is an underlying dispute over territorial status deriving from a claim of a quasi-state recognised as entitled to exercise the right to self-determination.[95]

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[85] Order of 17 October 2008, [14]. See *Kosovo*, CR 2009/24 and 2009/25.
[86] Declaration of Judge Simma, 479; Dissenting Opinion of Judge Bennouna, 510.
[87] Hernandez (2011) 151; Quigley (2010) 193-194; Bartholomeusz (2005) 218.
[88] E.g. *Namibia AO* (Correspondence) 638, The Registrar to Professor Reisman: the Registrar, in response to Professor Reisman's request to submit an *amicus curiae* brief, replied that the 'expression of its [the Court's] powers in Article 66, paragraph 2 is limitative, and that *expressio unius est exclusion alterius*'.
[89] Thirlway (2010) 388.
[90] Fry (2010) 52; Paulus (2012) 1646.
[91] Paulus (2012) 1646; Fry (2010) 52; Ronen (2012) 96. On *audiatur et altera pars*, see *Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999* [1999] ICJ Rep 124 [44]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Provisional Measures, Order of 8 December 2000* [2000] ICJ Rep 182 [63].
[92] See e.g. Hernandez (2011) 151; Paulus (2012) 1647-1648. Zyberi also seems to suggest this: (2013) 338-339.
[93] Bartholomeusz (2005) 218. On this basis, Bartholomeusz distinguishes the *Wall* case from the proceedings in *Applicability of the Obligation to Arbitrate under S. 21 of the United Nations Headquarters Agreement of 26 June 1947* [1988] ICJ Rep 12, which directly affected the PLO's mission to the United Nations but in which the PLO was not requested to supply information to the Court. To my mind, the difference can be better explained by virtue of the fact that the former case concerned the territorial aspect of self-determination, whereas the latter concerned a much less fundamental interest.
[94] Hernandez (2011) 150; Ronen (2012) 98-101.
[95] Ronen (2012) 101.

These arguments do not satisfactorily explain the practice. Any entity may have a "quasi-dispute" with a state; if the participation of Kosovo and Palestine was solely because of such a dispute, this would open the floodgates to a vast number of potential claims to participate. If the reason was simply the provision of information, it is hard to explain why NGOs with relevant expertise have not been similarly invited to participate. With respect to the "quasi-states" argument, Ronen fails to connect the dots by explaining why the Court might have assigned importance to the fact that self-determination was at issue in the case.

The better view is that the Court's invitations to representatives of the peoples of Palestine and Kosovo to participate in the respective advisory proceedings is that it implicitly recognised that peoples should participate in proceedings affecting them. While the ICJ's practice cannot be justified on the basis of the wording of Article 66(2) and its established interpretation, I argue that the court implicitly construed the provision broadly in order to fulfil the right. A future case would not necessarily have to involve a quasi-state, or a quasi-dispute, for a people to have a right to be heard.

In conclusion, although it is unlikely that the ICJ's practice in the *Wall* and *Kosovo* advisory proceedings can be said to contribute to the emergence of a rule of CIL, as there is no indication that the Court viewed what it was doing as required by law, I argue that in effect it fulfilled the right of peoples to participate. This forms part of the emerging pattern of practice.

2.3 State practice in the *Chagos Islands* proceedings

The final example of practice to be examined here is that of the ICJ and Mauritius in the *Chagos Islands* advisory proceedings.[96] It will be argued that Mauritius' inclusion of Chagossians on the state's delegation to the ICJ can be viewed as an instance of state practice regarding the obligation to enable affected peoples to be heard, as well as practice of the ICJ in allowing this to occur.

First, the factual background. The Chagos Islands[97] are an isolated archipelago in the Indian Ocean. A British colony since 1814, they were administered by the Crown as a lesser dependency of Mauritius.[98] Prior to the independence of Mauritius in 1968, the UK separated the Chagos Islands from Mauritius and established a separate British colony that included the Islands, the British Indian Ocean Territory.[99] A US military base was subsequently constructed on Diego Garcia, the largest island in the archipelago, in accordance with an agreement between the UK and the USA.[100] From 1967 to 1973, the UK government forcibly removed the entire population of the archipelago—around

[96] *Chagos AO*.
[97] Here used interchangeably with the term "Chagos Archipelago".
[98] *Chagos AO* [25], [27]-[28].
[99] Ibid [32]-[33], [42].
[100] Ibid [31], [36], [94]-[97].

1,500 people[101]—and legislated to prohibit their return.[102] Most of the inhabitants settled in Mauritius, although some emigrated to the UK. Since 1974, Chagossians[103] have repeatedly sought to return to the islands, but have not been able to do so.[104]

The question before the Court was two-fold: (i) whether the process of decolonization of Mauritius was lawfully completed when Mauritius was granted independence in 1968, following the detachment of the Chagos Archipelago; and (ii) what were the consequences in international law arising from the continued administration of the Chagos Archipelago by the UK, including with respect to the resettlement of Mauritian nationals, particularly those of Chagossian origin, on the Archipelago.[105]

The ICJ found that, in respect of the first question, the process of decolonization had not been lawfully completed; under the law of self-determination that applied at the relevant time, the detachment of part of the non-self-governing territory of Mauritius was contrary to the right to self-determination, as it was not based on the freely expressed and genuine will of the people of the entirety of the territory.[106] In relation to the second question, the Court held that the UK's continued administration of the Archipelago constituted an unlawful act of a continuing character entailing international responsibility, it was under an obligation to bring its administration to an end as rapidly as possible, and that all UN member states were obliged to cooperate with the UN to complete the decolonization of Mauritius.[107] The Court did not deal with the question of the return of the Chagossians except to note that it was an issue 'relating to the protection of the human rights of those concerned' and should be addressed by the GA during the completion of the decolonization of Mauritius.[108] Thus, the court considered that the relevant self-determination unit was Mauritius, and did not find that the Chagossians were also a people with the right to self-determination.

Statements in the separate opinions, however, suggest that some judges saw the Chagossians as being a people who ought to have been heard in the process of the detachment of the Archipelago from Mauritius. Judge Robinson referred to the Chagossians as 'a people uprooted from their homeland'.[109] Judge Cançado Trindade mentioned the provisions of the UNDRIP on reparations for forced population transfer, which implies that he viewed the Chagossians as an indigenous people.[110] Judge Sebutinde referred to the 'Mauritian peoples, including the Chagossians',[111] and held that the right of

[101] Oral statement of Mauritius – Prof Pierre Klein [13].
[102] *Chagos AO* [43], [113]-[120].
[103] Also known as Ilois or Chagos Islanders. "Chagossians" is used here as it was the term most commonly used in the ICJ proceedings.
[104] *Chagos AO* [118]-[131].
[105] Ibid [1].
[106] Ibid [160]-[161], [170]-[174].
[107] Ibid [177]-[178], [182].
[108] Ibid [181].
[109] Separate Opinion of Judge Robinson [102].
[110] Separate Opinion of Judge Cancado Trindade [244].
[111] Separate Opinion of Judge Sebutinde, [13], [47], [51].

the Chagossians to self-determination entitled them to exercise a free and genuine choice regarding whether to return to the Archipelago.[112] Similarly, Judge Gaja noted that:[113]

> The will of the peoples belonging to the non-self-governing territory did not play any significant role in the process that led to the separation of the Archipelago from Mauritius. The Chagossians were never consulted or even represented. The people of Mauritius were never given an opportunity to express their views on the separation of the Archipelago or on any issue relating to its future status.

Judge Gaja urged the GA, in revisiting the issue, to 'take into account the will of the Chagossians', stressing the importance of their will 'under the perspective of self-determination'.[114] These statements suggest that Judge Gaya viewed the Chagossians to be a people, in addition to recognising the people of Mauritius. Along similar lines, Judge Abraham declared that the principle of territorial integrity could not preclude taking into account the freely expressed will of the different components of a population of a territory, noted that the British authorities did not consult the Chagossian people, and stated that if such a consultation had taken place 'and the Chagossian people had expressed their free and informed will' to have been separated from Mauritius, the question to the Court would have been different.[115] These judges essentially recognised that there were two layers of self-determination at issue in the case: that of Mauritius, and that of the Chagossians.

This recognition by judges of the Court that the Chagossians are a people, entitled to self-determination which should have entailed their participation in decision-making as to the fate of the territory came in the wake of similar statements by counsel for Mauritius in oral argument.[116] Counsel discussed the 'immense suffering' that the Chagossians were subjected to due to their forced displacement, highlighting 'flagrant and ongoing breaches of their fundamental human rights, rights that are an inherent part of the principle of self-determination'.[117] Further, counsel noted that 98% of Chagossian respondents to a recent consultation had expressed a wish to return to the Archipelago, stressing the importance of their right of self-determination.[118] In this way, counsel appealed to the right of self-determination of the Chagossians themselves.

It is in this context that the practice outlined next must be viewed. In an unprecedented move, Mauritius included several Chagossians on its delegation to the Court. Counsel for Mauritius repeatedly referred to these Chagossians in their oral statements.[119] Moreover, as part of its oral

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[112] Separate Opinion of Judge Sebutinde [51].
[113] Separate Opinion of Judge Gaja [2].
[114] Ibid [6].
[115] Declaration of Judge Abraham, 2.
[116] Other states, too, recognised the Chagossians as a people entitled to self-determination: Oral statement for Israel – Becker [5]; Oral statement for South Africa – de Wet [21]-[22]; Oral statement for the African Union – Gomaa [15]; Oral statement for Nigeria – Apata [11].
[117] Oral statement of Mauritius – Prof Pierre Klein [13]-[14].
[118] Oral statement of Mauritius – Philippe Sands [6], [9].
[119] Oral statement of Mauritius – Prof Pierre Klein [13]; Oral statement of Mauritius – Philippe Sands [5], [4]: '…may I record the presence in this Great Hall of three members of the Chagossian community, who have

statement, Mauritius included a video statement from one Chagossian woman, Marie Liseby Elysé.[120] Introducing her statement, counsel noted that it was said that 'it is appropriate that the Court should hear the voice of the Chagossians directly'.[121] Counsel clarified that her statement was 'not offered as testimonial evidence, but simply as a member of the delegation of Mauritius – if you like – a statement of *impact*, what the continuation of colonialism really means for real people'.[122] Contrary to Sands' characterisation, however, Elysé effectively appears as a quasi-witness. Elysé, in her statement, outlined the trauma she suffered during and following her forcible removal from Chagos. She said, 'I am happy that the International Court is listening to us today. And I am confident that I will return to the island where I was born.'[123] Two judges referred to her statement in separate opinions.[124]

It is argued that the inclusion of the Chagossians on the delegation of Mauritius constitutes practice by Mauritius fulfilling its obligation to enable an affected people to participate in proceedings concerning them. While it is unclear to what extent the individual Chagossians in attendance could be said to be representatives of the Chagossians as a whole, it is similarly unclear who the proper representative of the Chagossians would be. If Mauritius had not done this, the theory suggests that the Court would have been under an obligation to otherwise enable the Chagossians to be heard. In any event, the Court effectively discharged itself of a situation where it would have been under an obligation to hear the Chagossians, as it referred their circumstances back to the GA.

2.4 Conclusion

In summary, the practice of the ICJ has developed from a complete refusal to hear peoples affected by its decisions that are not represented by states parties, as shown in the *South West Africa* cases, to enabling affected peoples to be heard via innovative means, as seen in the *Kosovo* and *Wall* advisory proceedings. In addition, the *Chagos* proceedings represent emerging state practice with respect to promoting the participation of peoples in proceedings concerning them. Building on this practice, and enabled by its procedural rules, the Court can and should continue this practice in similar cases in future.

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travelled a great distance from Mauritius: Mme Marie Liseby Elysé and M. Louis Olivier Bancoult, both from Peros Banhos; and M. Louis Rosemond Saminaden from Salomon Islands. Also in the Peace Palace are Mme Marie Janine Sadrien and Mme Marie Rosemonde Berthin, both from Salomon Islands, Mme Marie Mimose Furcy from Peros Banhos and finally, from Diego Garcia, M. Louis Roger Alexis, Mme Marie Suzelle Baptiste and Mme Marie Nella Gaspard'.

[120] Oral statement of Mauritius – Prof Pierre Klein [13].

[121] Oral statement of Mauritius – Philippe Sands [4].

[122] Ibid.

[123] Oral statement of Mauritius, 74-75.

[124] Separate Opinion of Judge Robinson [101]-[106]; Separate Opinion of Judge Cançado Trindade [228].

3. *Amicus curiae* participation in trade and investment disputes

The proceedings of ISDS tribunals and WTO dispute settlement bodies can affect peoples. Regarding the WTO, an indigenous people's trade interests might be negatively impacted by a measure at dispute in the proceedings; alternatively, the disputed measure might have been adopted by a state to protect, or with the effect of protecting, a people's rights, such that a finding of a violation of WTO law would place the indigenous people's rights in jeopardy. In terms of investor-state disputes, a tribunal may be tasked with deciding whether a measure taken by a state to protect indigenous peoples' lands or resources breached investor protections; as another example, an indigenous people might be an investor in a foreign state.[125]

Such cases, of course, will be a small minority of trade and investment proceedings. Of the 855 publicly known treaty-based cases of ISDS, as of 2018,[126] indigenous peoples have filed applications to participate as *amici* in just four, and there are a handful of others in which indigenous peoples were arguably affected.[127] In the WTO there are only two cases to date which could be argued to have affected indigenous peoples.[128]

Under the theory advanced in Chapter 2, peoples have a right to participate in proceedings of WTO dispute settlement and ISDS that affect them; investor-state tribunals and the WTO panels and Appellate Body—collectively referred to in this introduction as "tribunals"—have correlative obligations to enable affected peoples to participate and hear them. In addition, states have an obligation to promote and enable such participation. In the implementation of the right, its limitations must be kept in mind. If a state has heard the people at the domestic level, for instance by cancelling a foreign investment project or changing domestic regulations at the behest of an indigenous people, it has incorporated the views and concerns of the affected people into its submissions to the international tribunal, it may not be necessary for the tribunal to provide for separate participation. If a people is only one among many affected third parties, its rights must be balanced against those of others. If a people is only tangentially affected, for instance because it has an ongoing dispute with one of the states involved on a point only marginally related to the trade or investment matter at issue, it may be that the tribunal is simply not the right place for the people to air its grievances due to its

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[125] See e.g. *Grand River Enterprises Six Nations v USA* ("*Grand River*") (NAFTA/UNCITRAL), Award, 12 January 2011.
[126] UNCTAD (2018) 88, 91.
[127] See e.g. *Glamis Gold v USA* ("*Glamis Gold"*) (NAFTA/UNCITRAL), Award, 8 June 2009; *Grand River*; *Chevron and Texaco v Ecuador*, PCA Case No. 2009-23, Procedural Order No. 8, 18 April 2011; *Bernhard von Pezold v Zimbabwe* and *Border Timbers Ltd v Zimbabwe* ("*Border Timbers*"), ICSID Case No ARB/10/25 and ICSID Case No ARB/10/15.
[128] *EC—Seal Products*, WT/DS400/R and WT/DS401/R and Add.1, (Panel) 25 November 2013 ("*Seal Products*"); *US—Preliminary Determinations with respect to Certain Softwood Lumber from Canada*, WT/DS236/R, (Panel) 27 September 2002 ("*Softwood Lumber—Panel*").

limited jurisdiction. On the other hand, if the fundamental rights of peoples are at stake, states and tribunals are duty-bound to respect, protect and fulfil the right to participate.

In theory, indigenous peoples are able to participate as *amicus curiae* in proceedings in both the WTO dispute settlement system and investor-state arbitration tribunals.[129] Such participation has been welcomed by indigenous peoples' advocates, and carries benefits including assisting a people to advance a cause on the international stage and to draw attention to rights violations by states. This section investigates whether the practice is sufficient to fulfil the right, and whether it is accompanied by *opinio juris*. It sets out the respective *amicus* participation procedures in ISDS and WTO dispute settlement, including cases where peoples have participated as *amici*, before turning to assessing whether *amicus* participation is sufficient to meet the obligation in each setting. Finally, it turns to the question of *opinio juris*.

3.1 *Amicus* participation in investor-state arbitration and WTO dispute settlement

Both ISDS and WTO tribunals have established procedures for *amicus* participation through which affected peoples can ostensibly participate. These will be examined in turn.

3.1.1 Investor-state dispute resolution

ISDS is set up so to allow a foreign investor to bring proceedings against a state in which an investment is located, if the rights of the investor are breached; it historically developed from the model of commercial arbitration and thus prioritised confidentiality and party autonomy.[130] Indigenous peoples do not have standing as claimants or interveners; a significant power asymmetry exists between peoples and tribunals.[131] But the early 2000s witnessed a significant shift whereby tribunals constituted under the North American Free Trade Agreement ("NAFTA") and the UN Commission on International Trade Law ("UNCITRAL") Arbitration Rules began to allow non-disputing parties to participate as *amicus curiae*.[132] The tribunals in the leading cases based their reasoning on Article 15(1) of the 1976 UNCITRAL Arbitration Rules—now Article 17(1) of the 2010 UNCITRAL Arbitration Rules—which grants a 'broad discretion as to the conduct of [the] arbitration, subject always to the requirements of procedural equality and fairness' towards the parties,[133] and is intended to provide powers to facilitate a tribunal's 'process of inquiry into,

[129] On *amicus curiae* participation in general, see Wiik (2018).
[130] Roberts (2012) 65.
[131] Vadi (2018) 728, 739; Perrone (2018) 16.
[132] *Methanex v USA* (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 ("*Methanex*"); *United Parcel Service v Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 ("*UPS*").
[133] *Methanex* [26]. The current Article 17(1) reads: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity off presenting its case.

understanding of, and resolving' the dispute.[134] The tribunals found that the power to accept *amicus curiae* submissions fell within this broad discretion.[135] Tribunals in proceedings under the ICSID Arbitration Rules soon followed suit[136] under the general procedural power in Article 44 of the ICSID Convention,[137] setting out criteria on which the power to receive *amicus* submissions should be exercised.[138]

The tribunals have been clear that allowing *amicus* participation is not equivalent to adding a party to the arbitration.[139] The *amicus* does not acquire any rights, let alone those of a disputing party,[140] and 'is not participating to vindicate its rights': it is a matter of a discretionary power of the tribunal, rather than of a right of the third party.[141]

This jurisprudence was subsequently reflected across the procedural rules of tribunals.[142] Representative of these rules is Rule 37(2) of the ICSID Arbitration Rules, which provides:[143]

The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

[134] *UPS* [60].

[135] *Methanex* [31]; *UPS* [61], [63].

[136] The first attempt by would-be *amici* proved unsuccessful: *Aguas del Tunari, SA v Bolivia*, ICSID Case No. ARB/02/3, Letter from the President of the Tribunal, 29 January 2003, 1. Two identically constituted tribunals held that they were entitled to accept written *amicus curiae* submissions: *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic ("Suez/Vivendi v Argentina"),* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, 3-4; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v Argentine Republic* (*"Suez/InterAguas v Argentina*"), ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, [14]. ICSID tribunals have subsequently received *amicus* submissions in numerous cases, see e.g. *Biwater Gauff (Tanzania) Limited v Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007; *Piero Foresti & Others v South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties, 5 October 2009 ("*Piero Foresti*"); *PacRim Cayman LLC v El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 March 2011; *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, 17 February 2015; *Infinito Gold*, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016 ("*Infinito Gold*").

[137] Convention on the settlement of investment disputes between States and nationals of other States. 'If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'

[138] *Suez/Vivendi v Argentina* 7-8; *Suez/InterAguas v Argentina* [17].

[139] In *UPS*, the *amici* had originally requested the 'standing of parties' to the arbitration, asking for *amicus* participation only in the alternative, as they alleged a 'direct interest in the subject matter' of the claim such that they might be 'adversely affected by the award': *UPS*, ICSID Case No. UNCT/02/1, Petition from the Canadian Union of Postal Workers and the Council of Canadians, 8 November 2000, [1]-[2]; Petition to the Arbitral Tribunal, Canadian Union of Postal Workers and of the Council of Canadians, 9 May 2001, [1]-[2].

[140] *Methanex* [27], [30]; *UPS* [39], [60]. See also *Suez/InterAguas v Argentina* [14].

[141] *UPS* [61]. *Suez/Vivendi v Argentina* [14].

[142] NAFTA Free Trade Commission statement on non-disputing party participation, 7 October 2003. NAFTA will be superseded by the United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018)—which has not yet been ratified by all parties; while the Rules of Procedure for panel proceedings under Chapter 31 (dispute settlement) have not yet been established, Article 31.11(e) provides that the panel shall consider requests to submit written views from 'non-governmental entities located in the territory of a disputing party'. Text accessed at https://www.ustr.gov/. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted 11 July 2013, entered into force 1 April 2014), Article 4(3).

[143] Rule 41(3) of the ICSID Arbitration (Additional Facility) Rules, which apply in circumstances where only the State of the investor or the respondent State is a party to the ICSID Convention, is identical to Rule 37(2) of the Arbitration Rules. Stockholm Chamber of Commerce Arbitration Rules (2017), Appendix III, Articles 3(3),

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

On the face of such rules, investment arbitration tribunals allow for the participation of affected peoples as *amici*. Indeed, indigenous peoples have participated in relevant cases on this basis. The first such instance was *Glamis Gold v United States of America* ("*Glamis Gold*"), in which a Canadian mining company proposing to build a mine on federal US lands challenged state environmental regulations requiring among other things the back-filling of open pit mines and steps to preserve Native American sites.[144] The Quechan Indian Nation opposed the project as it would have been on the Quechan's ancestral lands in an area with historic cultural associations and a high density of religious sites.[145] The Nation sought to file written submissions, arguing that it had a significant interest in the arbitration due to its occupation of the region since time immemorial and the continuing ceremonial and religious values of the site, that its interests could not be adequately represented by either of the parties, that it would assist the tribunal in its determination by bringing a perspective and expertise unique to a tribal sovereign government, and that there was wide public interest in the subject-matter of the arbitration.[146] The tribunal accepted the Quechan's submission, finding that it satisfied the requirements of the rules.[147]

The second case in which indigenous peoples participated via the *amicus curiae* mechanism was *Grand River Enterprises Six Nations v United States of America* ("*Grand River*"), which was also brought under NAFTA and the UNCITRAL rules.[148] This case was distinct from *Glamis Gold* in that

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3(9); Singapore International Arbitration Centre Investment Arbitration Rules (2017), Rules 29.2, 29.3, 29.5, 29.9, 29.10. Despite minor variations in wording, on the whole these rules further crystallise the practice of *amicus curiae* in international investment arbitration.

[144] *Glamis Gold*, Award [1].

[145] Ibid [101]-[101], [105]; Application for Leave to File a Non-Party Submission, 4.

[146] *Glamis Gold*, Application for Leave to File a Non-Party Submission, 3-5. Corresponding to the requirements of the NAFTA FTC Statement.

[147] *Glamis Gold*, Decision on the Application and Submission by Quechan Indian Nation, 16 September 2005 [9]-[13].

[148] *Grand River*, Award, 12 January 2011.

the claimant cigarette manufacturing company, Grand River, was owned by members of indigenous peoples—the Canadian Haudenosaunee nations. The company was the 'largest employer on the most populous aboriginal reserve in Canada'.[149] The three individual claimants were all members of the Iroquois: two were controlling shareholders of Grand River, while one had a substantial importing business in the US.[150] The claimants alleged that actions of the US government to settle litigation against domestic cigarette manufacturers breached NAFTA. The claimants emphasised that the tobacco business was a 'traditional trade of the Six Nations peoples', and alleged that the arbitration concerned 'discrimination against a group of aboriginal investors, their traditions, businesses and livelihoods, and the expropriation of their markets', the adverse effects of which had been felt not only by the claimants themselves, but by 'all the members of the Six Nations', whose livelihoods depended on the business.[151] The case largely failed at the jurisdiction stage, as the company was based in Canada rather than in the US and the claimants could not establish that they had an "investment" in the US.[152] Nevertheless, it shows that an indigenous people may be able to initiate ISDS proceedings as an investor.[153]

Relevant for current purposes is an unsolicited letter from the National Chief of the Assembly of First Nations, in which the Chief expressed support for the claimants, citing the UNDRIP and 'the customary international law principles [it] reflects'.[154] The letter did not request to make written submissions as an *amicus*. Nevertheless, the tribunal noted that the letter should be dealt with according to the NAFTA rules on *amicus* participation,[155] although it did not ultimately decide the issue, stating that the letter had been 'read and considered' in its context as a supporting exhibit to a claimant's submissions, to which it had been appended.[156]

3.1.2 World Trade Organization dispute settlement

The WTO DSM was set up for states: under the WTO Dispute Settlement Understanding ("DSU"), only WTO member states can be parties or third parties to a dispute.[157] However, as in ISDS, WTO panels and the Appellate Body can, at their discretion, accept unsolicited *amicus curiae* briefs submitted by individuals, NGOs, and other non-state actors including industry organisations.[158] In

[149] *Grand River*, Statement of Claimants' Claims Arising Directly Out of the Adoption and Implementation of the Allocable Share Amendments, 6 November 2006, 1.
[150] *Grand River*, Award [3].
[151] *Grand River*, Statement of Claimants' Claims Arising Directly Out of the Adoption and Implementation of the Allocable Share Amendments, 6 November 2006.
[152] *Grand River*, Award [5]-[6].
[153] Although it is unclear here as to what extent the claimants were representatives of the Iroquois.
[154] *Grand River*, Letter to the Tribunal from Phil Fontaine, 19 January 2009; Award [60].
[155] *Grand River*, Letter from the Tribunal to the Parties, 27 January 2009.
[156] *Grand River*, Award [60].
[157] Understanding on rules and procedures governing the settlement of disputes (DSU), Annex 2 of the WTO Agreement, Articles 1(1), 10(2), and 17(4). *US—Certain Shrimp and Shrimp Products*, (AB) WTO Doc WT/DS58/AB/R (12 October 1998) ("*US—Shrimp*") [101].
[158] For an overview of *amicus* participation in the WTO generally, see Lim (2005); Howse (2003).

US—Shrimp the Appellate Body held that under Article 11 DSU (right to seek information), panels have a discretion to accept unsolicited *amicus curiae* briefs from non-governmental sources as long as this does not unduly delay the process.[159] The Appellate body read DSU Articles 12 and 13, taken together, as meaning that panels have 'ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts',[160] necessary for the panel to discharge its Article 11 duty to make an objective assessment of the matter.[161] This means that 'to any explicitly limiting or prohibitive provisions in the DSU, the real scope of the panel's authority is defined by what is 'indispensably necessary'' to perform its Article 11 function.[162] In addition, the Appellate Body held that any party to a dispute may attach the briefs, or any part thereof, to its own submission, upon which the panel is entitled to treat and take it into consideration just like any other part of the party's submission.[163] The Appellate Body itself can also accept unsolicited *amicus curiae* briefs.[164]

There is one case in which an indigenous people has utilised the *amicus curiae* procedure. The *Softwood Lumber* dispute between Canada and the United States concerned the stumpage fees paid to Canadian provincial and federal governments by Canadian softwood lumber producers for the right to harvest trees on public land.[165] The United States, alleging that the stumpage fee was lower than market value and therefore constituted a subsidy creating an unfair advantage for Canadian procedures over US producers, imposed countervailing duties on imported Canadian softwood

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[159] *US—Shrimp* [107]-[110]. Panels have subsequently accepted *amicus* briefs in e.g. *Australia—Measures Affecting the Importation of Salmon—Recourse to Article 21.5 by Canada* WT/DS18/RW, 18 February 2000 [7.8]-[7.9]; *US—Section 110(5) of the Copyright Act*, WT/DS160/R, 15 June 2000 [6.7]-[6.8]; *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, 18 September 2000 ("*EC—Asbestos*"); *EC—Cotton-Type Bed Linen from India*, WT/DS141/R, 30 October 2000 [6.1]. Also see affirmations by the panel of its authority to accept unsolicited *amicus curiae* briefs in e.g. *US—Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS/138/R, 23 December 1999 ("*US—Lead*") [6.3]; *US—Hot-Rolled Steel Products from Japan* WT/DS184/R, 28 February 2001 [7.5], [7.10].

[160] Under Article 12, panel procedures are to provide sufficient flexibility so as to ensure high-quality reports, while not unduly delaying the panel process. Under Article 13(1), a panel has 'the right to seek information and technical advice' from 'any individual or body which it deems appropriate', although a panel must inform the authorities of a member state before it seeks such information or advice from any individual or body within that state's jurisdiction. Under Article 13(2) panels 'may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter', and may request an advisory report from an expert review group with respect to a factual issue concerning a scientific or other technical matter raised by a party to the dispute.

[161] [106]. In so ruling, the Appellate Body reversed an earlier panel decision which had read Article 11 narrowly so as to reject two *amicus* briefs: *US—Shrimp* [7.1], [7.8].

[162] Howse (2003) 498.

[163] *US—Shrimp* [109]-[110].

[164] *US—Lead* [36]-[42] (Rule 16(1) of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) provides a basis for a broad discretionary authority, and Article 17(9) DSU provides for broad authority to adopt procedural rules which do not conflict with any rules or procedures in the DSU or the covered agreements). The Appellate Body is authorised to draw up its own working procedures under Article 17(9) of the DSU. The Appellate Body in *EC—Asbestos* adopted its own rules of procedure for accepting *amicus curiae* briefs, but subsequently rejected all 17 applications for leave to file following backlash from member states: *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001 [50]-[57].

[165] *Softwood Lumber*, Panel. Also see the summary of prior proceedings in Carmody (2006).

lumber, which Canada claimed was inconsistent with Article 1.1 of the Subsidies and Countervailing Measures Agreement.[166]

Three indigenous groups sought permission to participate as *amici*, two of which were rejected for lateness.[167] One of the latter was the Meadow Lake Tribal Council, a representative organisation of indigenous peoples on Canadian lands which held an exclusive license for the right to harvest timber from its traditional lands, sought to participate as an *amicus curiae* presumably to defend its trade interest.[168] Its arguments supported the Canadian position in the dispute, albeit for different reasons.[169] While it could be reasoned that the fulfilment of the right would not have required the hearing of the Meadow Lake Tribal Council, as its interests were already being represented by the Canadian government, the panel's reasoning was rather based on lateness.

The *amicus* brief accepted by the panel was submitted by the Interior Alliance, an organization representing five indigenous peoples, the Nlaka'pamux, Okanagan, Southern Carrier, Secwepemc and St'at'imc.[170] The submission was made in the context of a long-standing land dispute between the peoples of the Interior Alliance, who have not ceded rights to their traditional lands, and the Canadian government.[171] The Interior Alliance were concerned about the unsustainable large-scale exploitation of timber on their unceded lands with 'a disastrous impact on their traditional territories and multifaceted use',[172] and on their livelihoods, spirituality and culture.[173] They particularly objected to an argument made by Canada in the proceedings that the stumpage fee was not a "financial contribution" because the Canadian lumber harvesting companies had quasi-proprietary interests in the timber growing on public lands by virtue of their land tenures or licenses which conferred a property right to exploit the resource.[174] The Alliance argued that as they had never ceded land rights, and were not remunerated for the harvest, the Canadian government could not have passed on limited ownership rights to companies.[175]

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[166] Article 1.1 provides that a subsidy shall be deemed to exist when a financial contribution confers a benefit. The panel held that although the lower-than-market value fees constituted the provision of a good, and therefore a "financial contribution" for the purposes of whether a subsidy existed under Article 1.1, the US had acted inconsistently with the Agreement in imposing a provisional countervailing duty without determining the existence and amount of the "benefit" conferred: Ibid [7.30], [7.79].
[167] Ibid [7.2]. For details of those rejected, see Manuel and Schabus (2002) 13. The briefs themselves are not available, and secondary material is limited. Nothing is known about the submission of the Nishnawbe Aski nation, the other brief rejected for lateness.
[168] Gastle (2002) 33-34.
[169] Ibid. The Meadow Lake Tribal Council sought to rely on its treaty rights and customary aboriginal title to argue that no subsidy existed.
[170] Interior Alliance (2002) 14. See panel decision [7.2].
[171] See Manuel and Schabus (2005) 227-229, 235-236; Ibid 3.
[172] Interior Alliance (2002) 15-16.
[173] Ibid 3, 16.
[174] So that the stumpage fee was not remuneration for the exercise of the right, but rather a levy or tax on the exercise of an existing harvesting right. Panel report [4.117]-[4.118]. The argument was ultimately rejected by the Panel, which found that Canada was providing a "good" in the form of timber: [7.18].
[175] Manuel and Schabus (2005) 247; Interior Alliance (2002) 6-7.

Although the brief was accepted, and the Alliance's participation may have brought benefits including the dissemination of information about the Alliance's dispute internationally, it is arguable that *amicus* participation was not necessary to fulfil the right. The underlying dispute between the Interior Alliance and Canada was not within the power of the panel to address. Although the Interior Alliance was tangentially affected by the outcome, and in particular the panel's finding on the specific point of concern, it seems unlikely that the decision had a great effect.

In the only other WTO dispute to date that can be said to have affected a people—the *Seal Products* proceedings—the affected people did not seek to participate.[176] The case concerned the EU Seal Regime prohibiting the placing of seal products on the EU market except those from seals hunted by Inuit or other indigenous communities;[177] despite the exception, the regime affected the economic and cultural self-determination of the Inuit of Canada and Norway.[178] It is unclear why those peoples did not seek to participate.[179] The panel and the Appellate Body did not recognise that affected peoples were going unheard and did not seek to use its discretionary powers to seek more information.

3.2 The limitations of *amicus curiae* participation

For many commentators these cases sparked optimism that the voices of affected peoples can be heard through *amicus* participation. For instance, amongst indigenous peoples the *Softwood Lumber* panel's acceptance of the *amicus* brief was hailed as a 'groundbreaking victory'.[180] A closer examination reveals that, on the contrary, there are several reasons for caution. Even taking into account reasonable limitations on the implementation of the right, currently it cannot be said that it is being, or can be, fulfilled by *amicus* participation as practiced by WTO and ISDS tribunals, for the following reasons. Most of the reasons correspond to both the WTO and ISDS; a few relate to only one or the other.

2.2.1 Oral submissions, hearing attendance, and disclosure of documents

First, the scope of participation is substantially limited in practice: *amici* are not permitted to make oral submissions or physically attend hearings. In ISDS, tribunals have consistently refused such

[176] *EC—Seal Products*.
[177] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, and Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products. For the exception, see Commission Regulation, Article 7. There were also other exceptions.
[178] Hossain (2013) 162-163; Cambou (2013) 390, 395-397, 399; Fakhri (2015) 287-291.
[179] Three *amicus* briefs were submitted: panel report [1.15]. On at least two separate occasions, the Inuit Tapiriit Kanatami—representative of Canadian Inuit—had brought proceedings against the European Parliament in the Court of Justice of the European Union, seeking the annulment of the Seal Regime regulations. *Inuit Tapiriit Kanatami v European Parliament* (Case T-18/10), Judgment of the General Court, 6 September 2011, OJ C 319; *Inuit Tapiriit Kanatami v European Parliament* (Case T-526/10), Judgment of the General Court, 25 April 2013.
[180] Interior Alliance (2002b); Davis (2005) 16-19; Manuel and Schabus (2005) 249-251.

requests by reason of the applicable arbitration rules. For instance, Article 28(2) of the 2010 UNCITRAL Arbitration Rules provides that hearings shall be held 'in camera unless the parties agree otherwise'; tribunals under theserules have consistently found that requests to attend hearings must be refused if the parties have not positively agreed such;[181] they have not accepted arguments that the presence of an *amicus* would not necessarily cause proceedings to be any less *in camera*, in the sense of confidentiality.[182] Under the ICSID Rules in principle a tribunal may allow attendance of *amici* at hearings, an objection by a party to the proceedings overrules.[183] In the context of the right of peoples to participate, it could be argued that these restrictions are simply a justified limitation on the right, as participation at oral hearings would impose greater costs on the proceedings. However, it could also be argued that this cost would be balanced out by the added value and usefulness of the *amicus* to the tribunal. In addition, as affected peoples would have a direct interest in the dispute, rather than a merely informational role, this limitation is unjustified.

A related issue is that the rules and practice on disclosure of documents are inconsistent; for meaningful participation, *amici* require access to case documents. Without such access, *amici* are rendered 'if not totally blindfolded, at least myopic'.[184] While public disclosure of documents is the rule rather than the exception under the 2014 UNCITRAL Transparency Rules,[185] the ICSID rules are silent on the question of *amici* access to documents and the practice of tribunals on the matter has varied considerably.[186]

In WTO proceedings, too, meaningful participation is significantly limited by transparency considerations. For instance, in *Softwood Lumber*, the Panel sent its notification of acceptance of the Interior Alliance's brief to the states parties but not the Alliance, and the lack of transparency of proceedings meant that throughout the proceedings they were 'forced to rely heavily on discussions and information being passed on by other parties, especially third parties'.[187]

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[181] See e.g. *Methanex* [42]; *UPS* [67].
[182] See e.g. *Methanex*, Petitioner's Final Submissions regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status, 16 October 2000, [24].
[183] Rule 32(2) ICSID Arbitration Rules; Rule 39(2) ICSID Arbitration (Additional Facility) Rules.
[184] Simoes (2016).
[185] UNCITRAL Rules on Transparency. Article 3 provides that key arbitration documents must be made available to the public. Exceptions exist for confidential or protected information: Article 7.
[186] See e.g. *Biwater Gauff (Tanzania) Limited v Tanzania*, Procedural Order No. 3, 29 September 2006 ("*Biwater Gauff*") [65]-[66] (refusing access to documents due to investor objection and because the broad policy issues were already in the public domain); *AES Summit Generation v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 [3.22] (access refused); *Electrabel SA v Hungary*, ICSID Case No. ARB/07/19, Procedural Order No. 4, 28 April 2009, [27], [29], [31]-[34] (partial access granted as to hold otherwise would deprive the *amicus* of any effective role); *Piero Foresti* 1-2 and Award, 4 August 2010, [27] (access granted as necessary to enable the *amici* to focus their submissions on the issues arising in the case); *Ioan Micula v Romania*, ICSID Case No. ARB/05/20, Award, [36] (granted); *Infinito Gold* [43]-[44] (granted in part). See further ICSID, *Proposals for Amendment of the ICSID Rules — Working Paper*, 2 August 2018, Proposed Rules 44, 45 and 46.
[187] Manuel and Schabus (2005) 250.

2.2.2 Jurisdiction stage

In ISDS, another cause for concern is the uncertain potential for participation at the jurisdiction stage. While it may seem unlikely that peoples could be affected by jurisdictional issues, the proceedings in *Chevron and Texaco v Ecuador* illustrate otherwise.[188] By way of background, Texaco, an American oil company later acquired by Chevron, was from part of an oil concession consortium that in 1967 struck oil in Ecuador. The extraction site was near the territory of the Huaorani people; as a result, the Huaorani 'lost their political sovereignty and sovereignty over their natural resources', they were subject to displacement and appropriation of land, their means of subsistence was harmed, and their ability to carry on certain cultural practices relating to the environment was undermined.[189] The consortium's activities caused considerable environmental pollution.[190] After exiting the concession, in 1992 Texaco carried out environmental remediation measures pursuant to a 1995 agreement with Ecuador.[191] Subsequently, a coalition of indigenous communities and local farmers brought a class action in Ecuador's domestic courts seeking damages for the impacts of the consortium's operations,[192] resulting in a large award for damages.[193] Chevron and Texaco alleged that Ecuador's conduct violated the Ecuador-US BIT by allowing the litigation to proceed,[194] seeking remedies clearing them from liability and responsibility for the remaining environmental impacts.[195]

An Ecuadorian NGO working on behalf of indigenous peoples, together with another NGO sought to participate as *amicus*, arguing that even the decision on jurisdiction would directly affect the rights and interests of the domestic plaintiffs as the claimants were asking the tribunal to order the Ecuadorian government 'to politically interfere in, and effectively terminate' a case it was not party to,[196] as 'part of an ongoing effort to preclude the indigenous peoples…from having any effective judicial remedies regarding their claim…for environmental damages'.[197]

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[188] *Chevron and Texaco v Ecuador*, PCA Case No. 2009-23, Procedural Order No. 8, 18 April 2011. On the facts, see *Chevron and Texaco v Ecuador*, Notice of Arbitration [1]-[5]. For facts relating to the indigenous communities, see: Kimerling (2013); Kimerling (2013b); Kimerling (2006).
[189] Kimerling (2013) 44, 50-52.
[190] Ibid 60-61.
[191] This agreement itself was reached following a class action lawsuit filed against Texaco in a New York federal court by indigenous communities and local residents harmed by the pollution. Under the agreement, Texaco would implement environmental remediation work, and Ecuador would release Texaco from all liability to the Ecuadorian state related to environmental contamination. The federal court eventually dismissed the case on the ground of *forum non conveniens*: *Aguinda v Texaco* 142 F Supp 2d 534 (SDNY 2001), 303 F 3d 470 (2nd Cir 2002).
[192] The adequacy of the consortium's prior remediation measures was disputed.
[193] In 2011 the domestic court ruled that Texaco/Chevron should pay US $8.6 billion in damages or $18.6 billion if they failed to publicly apologise; the Supreme Court of Ecuador later adjusted the amount of damages to $9.51 billion: Kimerling (2013).
[194] Ibid.
[195] *Chevron and Texaco v Ecuador*, Notice of Arbitration.
[196] *Chevron v Ecuador*, Petition for Participation as Non-Disputing Parties, 22 October 2010, [3.1], [4.1].
[197] *Chevron v Ecuador*, Submission of Amici, 5 November 2010, [4.12].

The tribunal rejected the application, noting parties' agreement that the *amicus* submissions would not be helpful to the tribunal, and that neither side favoured participation during the jurisdictional phase 'in which the issues to be decided are primarily legal and have already been extensively addressed' by the parties.[198] While the construction of the right of peoples to participate developed in Chapter 2 would not necessarily suggest that the NGOs ought to have been able to participate, as it is unclear the extent to which they legitimately represented the affected peoples, the tribunal did not refuse permission on this basis. Aside from *Chevron v Ecuador*, the practice of tribunals has been inconsistent.[199] But the case of *Chevron* indicates significant reason for caution. A people should be able to participate at the jurisdictional stage if their rights are affected.

2.2.3 The introduction of a requirement to be independent

Again in ISDS proceedings, another issue is that the test for qualifying as an amicus in ICSID proceedings may have become considerably stricter, meaning that it will be extremely difficult, if not impossible, for affected peoples to qualify. Major new restrictions were introduced by the tribunal in the joined cases of *Bernhard von Pezold v Republic of Zimbabwe* and *Border Timbers v Republic of Zimbabwe* ("*Border Timbers*"). These proceedings concerned Zimbabwe's land reform programme in favour of the black indigenous population, which the claimants alleged breached investment agreements with respect to their timber plantations.[200] Four Zimbabwean indigenous groups, the Chikukwa, Nogorima, Chinyai and Nyaruwa peoples, filed a petition to submit an *amicus* brief together with a European NGO.[201] The claimants' plantations were located on the ancestral lands of the indigenous communities,[202] who submitted that they had a significant interest in the outcome of the arbitrations due to their distinct cultural identities and social histories inextricably linked to the lands.[203]

The tribunal denied the application and in doing so, reinterpreted Rule 37(2) so as to considerably limit the scope for future amicus participation including, and perhaps especially, by affected peoples. It did so by, first, introducing a new requirement and, second, by a strict reading of the rule. The chief innovation the tribunal made was to read an additional requirement into Rule 37(2): independence from the parties to the arbitration, which it found was implicit in Rule 37(2)(a).[204] Because the indigenous communities had received support from a local NGO, the director of which had a dispute

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[198] *Chevron v Ecuador*, Procedural Order No. 8, [18], [20].
[199] *UPS*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, [71] (permission to make *amicus* statements on questions of jurisdiction declined); *Infinito Gold v Costa Rica*, [38] (permission granted).
[200] *Border Timbers*, Award.
[201] *Border Timbers*, Procedural Order No. 2, 26 June 2012 [1], [14]-[15].
[202] Ibid [18].
[203] Ibid [20].
[204] Ibid [49].

with the claimants and publicly supported the respondent's land reform policies,[205] the tribunal found that 'legitimate doubts' existed as to the petitioners' 'independence and neutrality' and this was a sufficient ground to deny the application.[206]

This reasoning can be subject to criticism in a number of respects. Contrary to the tribunal's suggestion, a requirement of independence is not implicit in Rule 37(2)(a), which read together with the chapeau requires the tribunal to *consider the extent to which* the *amicus* submission would assist the tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[207] Independence and a diverse perspective are two different things, and the rule contains only a factor to take into account rather than a strict requirement.[208] Moreover, the tribunal's reasoning runs contrary to the decisions of previous tribunals.[209] It is hard to imagine a case in which a would-be *amicus* would have a 'significant interest' in the proceedings—also required by the rules—while meeting the *Border Timbers* test of independence as neutrality.[210]

The tribunal went on to examine the petition under each of the (a)-(c) factors in Rule 37(2), and its reasoning in this respect can also be criticised. It appears to have erred in treating each criterion as a minimum standard that must be met, whereas these are only matters that the tribunal is required to consider.[211] Under the first criterion, it found that the petitioners' submissions would not assist the determination of a factual or legal issue related to the proceeding; rather, they sought to submit on unrelated issues;[212] the tribunal was not persuaded that its mandate allowed it to consider international human rights law.[213] This reasoning can be criticised: the tribunal could have actually benefitted from more factual information about the indigenous communities and the impacts of the land reform, enabling the tribunal to better evaluate whether the respondent's measures that formed the basis of the alleged expropriation served a public interest and were non-discriminatory.[214]

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[205] Ibid [19], [56].
[206] Ibid [56].
[207] Schliemann (2013) 386.
[208] Mowatt and Mowatt (2013) 42.
[209] The only authority relied on was a statement that the proposed *amici* had to establish that they had the 'expertise, experience, and independence to be of assistance', in a case decided before the enactment of Rule 37(2): *Suez/InterAguas v Argentina*, Order in Response to a Petition for Participation as Amicus Curiae [23]; *Border Timbers*, Procedural Order No. 2 [49]. The Quechan Indian Nation received financial support from a US government agency; this was not considered to exclude them from participation in the case. Most *amici* have expressed a position in support of one of the disputing parties: see e.g. *Methanex*, where the environmental NGOs submitted in support of the environmental regulation under dispute; *UPS*, where the *amici* opposed the claimant investor's position; and *Glamis Gold*, where the Quechan supported the state regulations and opposed the investor's proposed project.
[210] Wiik (2018) 261; also see Mowatt and Mowatt (2013) 42; Bastin (2013) 103.
[211] Mowatt and Mowatt (2013) 42.
[212] *Border Timbers* [57].
[213] Ibid [58]-[59].
[214] Schliemann (2013) 384.

Regarding criterion (b), the tribunal found that for it to consider the submission, it would need to consider and decide whether the indigenous communities constitute "indigenous peoples" under international human rights law, which was 'clearly outside' the scope of the dispute.[215] However, the tribunal arguably erred in dismissing the need for self-identification of indigenous peoples.[216] On criterion (c), the tribunal found that the indigenous communities had 'some interest' in the land over which the claimants asserted title and, therefore, that the outcome of the proceedings might 'have an impact' on their interest.[217] However, the tribunal stated that, regardless, the claimants would be unfairly prejudiced by the petitioners' participation and that the petition should therefore be denied. On this last point, it is inevitable that an *amicus* submission will support the substantive arguments of one of the parties, so this factor alone should not be held to constitute unfair prejudice. In addition, in practice many tribunals have imposed procedural safeguards such as a limit on the length of submissions, which could have been utilised here.[218]

In summary, not only does the reasoning appear to be incorrect, but if future tribunals follow this approach, a significant burden will thereby be imposed on any potential *amicus* in investor-state arbitration. While this is a high barrier for any non-disputing party, it is particularly so for affected peoples. An indigenous people has distinct rights and interests which are likely to be in conflict with either the investor or the state, or both, in a given proceeding, and will therefore necessarily make submissions opposing the positions of at least one of the parties. The tribunal's decision therefore creates an irreconcilable paradox for indigenous peoples, whose "significant interest" necessarily causes them to lose "independence" in the eyes of the tribunal.

It may be that the *Border Timbers* decision is simply an anomaly that future tribunals will disregard. There is no strict doctrine of binding precedent in investor-state arbitration.[219] The 2016 decision in *Bear Creek Mining Corporation v Peru* may serve to indicate that tribunals will follow the bulk of prior jurisprudence rather than *Border Timbers*.[220] In that case, brought under the Canada-Peru Free Trade Agreement, the claimant sought to hold Peru liable for revoking its silver mining concession following strong opposition, including violent protests, from the Aymara indigenous people. An NGO that had worked with the Aymara people, along with an individual jurist, sought to file an *amicus* brief.[221] The tribunal made its decision on whether to accept the brief based on a provision of the

[215] *Border Timbers* Procedural Order No. 2, [60].
[216] Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples', UN Doc A/HRC/33/42 [65].
[217] *Border Timbers v Zimbabwe* [61].
[218] Schliemann (2013) 387.
[219] *Burlington v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 [100].
[220] *Bear Creek Mining Corporation v Peru* ("*Bear Creek*"), ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016.
[221] *Bear Creek*, Application to file a non-disputing party written submission of DHUMA and Dr Carlos Lopez, 9 June 2016.

Canada-Peru FTA, worded substantially similarly to ICSID Arbitration Rule 37(2).[222] Applying these criteria, the tribunal made clear that the list is non-exhaustive, consisting of 'only "criteria" and not conditions'; it had a discretion as to which of these criteria and which other matters it could into account.[223] In finding that criterion (a) had been met because of the NGO's local knowledge of the facts and because the jurist's legal expertise might 'add a new perspective that differs from that of the parties', it held that it did not need to examine the other criteria.[224] This interpretation clearly counters that of the *Border Timbers* tribunal. But it does not remove concern, as the decision was made with regard to an FTA rather than ICSID Rule 37(2). *Border Timbers* establishes a troubling precedent on which future ICSID tribunals could rely. It creates uncertainty about whether indigenous peoples can qualify as *amici* at all under the ICSID rules, and arguably constitutes a substantial and unjustified limitation on participation.

2.2.4 A discretion of the tribunal

In ISDS tribunals, as many tribunals have emphasised, all *amicus* participation occurs at the discretion of the tribunal. It is unlikely that this effectively protects the right to participate.[225] Tribunals should, in the case of affected peoples, exercise their discretion so as to permit participation.

In WTO proceedings, acceptance of an *amicus* brief is similarly discretionary. Indeed, *amicus* briefs are often rejected for no apparent reason. In a comprehensive analysis of all *amicus* submissions from 1998 to 2014, Theresa Squatrito found that 30% were rejected with no reason given.[226] While panels and the Appellate Body may have their own internal reasons for rejecting submissions, these are not clear to an external eye; rather, it gives the impression of being a lottery. Further, while panels have in many cases accepted *amicus* submissions, the Appellate Body hardly ever does,[227] raising questions as to whether an affected people would be able to participate in a relevant Appellate Body proceeding. In addition, *amicus* briefs are in practice accepted on questions of fact only, rather than questions of law,[228] which is a significant, unjustified limitation on the right to participate.

2.2.5 Incorporation by a party

Moreover, in practice WTO panels only accept *amicus* briefs where a state party to the dispute has endorsed the brief either by appending it to its own submission or otherwise by expressly supporting

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[222] Canada-Peru Free Trade Agreement, Article 836. Like the NAFTA FTC statement, it adds a fourth criterion of 'public interest in the subject-matter of the arbitration', but otherwise is identical to Rule 37(2).
[223] *Bear Creek*, Procedural Order No. 5, [35].
[224] Ibid [40]-[46].
[225] Vadi notes that the discretion is 'deeply unsatisfactory' from an indigenous peoples' perspective: Vadi (2011) 832.
[226] Squatrito (2018) 72.
[227] As of 2014, the Appellate Body had only considered one, out of 57 submitted, and that was the submission of a member state in *EC—Sardines*: Ibid 73.
[228] Ibid 85.

its consideration.[229] Such a practice enables the DSM to 'shield itself politically' by aligning itself with the preferences of the state(s) that benefit from the amicus submission, and thereby 'accommodate its political constraints'.[230] These findings strongly suggest the conclusion that under the theoretical obligation, states parties to a dispute are obliged to append to their own submissions any submissions that an affected people wishes to make, or alternatively strongly encourage the tribunal to accept *amicus* submissions. There may be cases in which the interests of an affected people do not align with those of either party to the dispute, such that neither party is willing to append the people's submissions to its own; this possibility highlights that the panels' practice is not consistent with the right to participate.

2.2.6 No indication that *amicus* submissions are taken into account

Finally, questions may be raised about the extent to which admitted *amicus* submissions are actually considered and used by tribunals, and the extent to which they influence outcomes. Unlike the submissions of parties, tribunals are not required to address *amicus* submissions in their decisions. In ISDS proceedings, tribunals are not obliged to consider a submission once they have accepted it.[231] Butler shows, in an examination of ICSID proceedings until mid-2018, that out of 11 cases where *amicus* submissions were accepted[232] in six cases the tribunal cited or made explicit reference to the submission, and in one case there was an indirect effect whereby an inspection of the submission and the award shows that the former influenced the latter.[233] While this result is promising, the other side of the coin is that in nearly half of cases, *amicus* submissions, even once accepted, appear not to be taken into account by tribunals. This is a clear limitation of the potential of the *amicus* mechanism for fulfilling the right, which would require that submissions are taken into account.

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[229] Ibid 74-75. See e.g. *Softwood Lumber*, where the indigenous peoples' brief was adopted in the US submission: Panel Report [4.232]-[4.297]. In subsequent proceedings on the final countervailing duty determination, in which an *amicus* brief was accepted from the Interior Alliance acting together with several other indigenous peoples from across Canada, the panel ruled that it would consider any *amicus curiae* submissions 'only to the extent that those arguments were taken up in the written submissions and/or oral statements of any party or third party': *US—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/R, 21 October 2003 [7.1] n75. In the Appellate Body no *amicus* submissions were accepted from the Interior Alliance because they had not been adopted by the parties: *US—Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 19 January 2004 [9]. See also *EC—Farmed Salmon from Norway*, WTO/DS337/R, 17 November 2006 [1.13].

[230] Squatrito (2018) 74.

[231] Some commentators therefore conclude that the *amicus* mechanism is not well-suited to raise human rights concerns in ISDS: Dumberry and Dumas-Aubin (2012) 371.

[232] There were 16 completed cases where *amicus* applications had been made; 2 of these cases were discontinued, and in 3 cases the *amicus* applications were denied: Butler at 151.

[233] Butler (2019) 150-151. The cases in which *amicus* submissions was found to have a direct effect were: *Philip Morris*; *Micula*; *AES*; *Electrabel*; *Biwater Gauff*; and *Eli Lilly*. The case where *amicus* submissions were found to have an indirect effect was *Bear Creek*.

In WTO proceedings it is similarly unclear to what extent a panel engages with an admitted brief substantively.[234] Squatrito found that only around half of accepted submissions were taken into consideration.[235] For instance, in *Softwood Lumber*, the submission was not mentioned at all in the panel's decisions save for a brief note that it had been submitted.[236]

2.2.7 No *opinio juris*

The amicus procedures in WTO and ISDS proceedings were not developed with the rights of peoples in mind. Rather, as statements by ISDS tribunals show, one reason for allowing amicus participation was the broad public interest in the case.[237] Another reason was to enhance tribunals' own legitimacy and credibility by allowing *amicus* participation.[238] Tribunals are 'inherently interested in fortifying their authority by making sure that the general public as well as *prospective supervising or enforcing jurisdictions* perceive the award as lawful'.[239] Similarly, the initial decisions to admit *amicus* briefs in WTO proceedings must be viewed in the context of heightened public scrutiny and debate regarding perceived substantive and procedural failures of WTO dispute settlement.[240] There has been nothing since to indicate that tribunals have admitted *amicus* briefs of indigenous peoples in the belief that such peoples ought to participate in cases that affect them, or in the belief that such a practice is required by law.

2.3 Conclusion

I have argued that while the *amicus* procedures may have allowed affected indigenous peoples to be heard, to a restricted extent, in certain instances of ISDS and WTO dispute resolution, the mechanisms ultimately cannot, at least in their current incarnations, fulfil the right to be heard. *Amici* have limited access to documents and hearings, and in ISDS cannot participate at the jurisdiction stage. In ISDS, the test for participation appears to have been considerably narrowed so as to *prima facie* exclude participation by affected indigenous peoples. In addition, whether to admit a submission is at a tribunal's discretion, and in WTO proceedings nearly a third of briefs have been rejected for no reason. In practice, WTO panels only admit briefs where a party has already appended them to its submission. Even once accepted, in many cases there is no indication that tribunals take submissions into account. Active consideration of a brief is the exception, rather than the rule. The meaningful

[234] Squatrito (2018) 65.
[235] Ibid 72.
[236] Manuel and Schabus (2005) 250; Lim (2005) 94.
[237] *Methanex* [49]. This reasoning has been explicitly adopted by several other tribunals: *Biwater Gauff* [51]-[52]; *Philip Morris* [26]. *Suez/Vivendi* [19].
[238] *Methanex* [49]. *Suez/Vivendi* [22]. This reasoning has been explicitly adopted by several other tribunals: e.g. *Biwater Gauff* [54]; *Philip Morris* [26].
[239] Saei (2017) 270 (emphasis in original).
[240] See criticism at the time e.g. Charnovitz (2000) 175-176; Housman (1994) 711; Esty (1998).

participation of affected peoples therefore cannot be ensured by way of the *amicus* mechanism. There is only an 'illusion of inclusion'.[241]

Ultimately, the practice of accepting *amicus* briefs was designed with cases of broad public interest in mind, and *amici* have no protected legal interest underlying in the dispute. For this reason, some have proposed the establishment of an "intervention" mechanism for third parties with a legitimate interest in the outcome of existing proceedings and who are unrepresented by existing parties.[242] Such a status would accord peoples, along with other affected third parties,[243] the right to submit briefs with no length restrictions, attend and participate in oral hearings, access documents, cross-examine witnesses, and, in ISDS, challenge arbitral awards or the appointment of arbitrators.[244] Intervener status would thus mean more extensive and meaningful participation, and is therefore arguably more appropriate for third parties with an interest in the outcome of the proceedings, such as affected indigenous peoples. An intervener status would fulfil the right of peoples to be heard—but is unlikely to be implemented in the near term. Unless and until such a status is created, tribunals should accept and take into account *amicus* submissions from affected peoples, even where such submissions have not been adopted by a party to the dispute.

4. Conclusion

This chapter has assessed the extent of practice corresponding to the right of peoples to participate in proceedings of international courts and tribunals affecting them. It has found that there is an emerging pattern of practice at the ICJ whereby the Court enables or allows affected peoples to be heard in relevant proceedings. This latter practice can be added to the emerging pattern which can be said to constitute a norm corresponding to the proposed right. In addition to the cases examined, further negative cases exist—for instance that the ethnic groups of the former Yugoslavia did not participate in the proceedings of the Arbitration Commission regarding self-determination.[245] However, the *amicus curiae* participation of peoples in WTO and ISDS dispute resolution proceedings cannot be characterised as a fulfilment of the right of peoples to participate. To fulfil the obligation, WTO and ISDS tribunals should *prima facie* accept and consider *amicus curiae* submissions from peoples with an interest in the outcome of the dispute, and further should consider establishing a mechanism for intervention. It can be said, therefore, that the practice of international courts and tribunals regarding the participation of peoples is not particularly widespread, nor does it constitute practice accepted as law.

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[241] Dunoff (2001) 279.
[242] Wieland (2011) 336, 360-361.
[243] Gerlich (2017) 264; Butler (2019) 156, 157.
[244] Gerlich (2017) 361. The intervention idea was proposed in the context of ISDS but it is equally imaginable with regard to the WTO.
[245] Conference on Yugoslavia, Arbitration Commission, Opinion No. 2 (11 January 1992) 31 ILM 1497, 92 ILR 167.

CONCLUSION

The purpose of this thesis has been to examine the idea that peoples are entitled, by virtue of the right to self-determination, to participate in matters concerning them at the global level. While this has been frequently asserted by, in particular, indigenous rights advocates, it had not been systematically assessed.

The contribution of this thesis has been to show that this notion is supported in theory, and in practice corresponds to a norm that constrains the behaviour of IOs and states. Its main claim has been that peoples have a right, derived from the law of self-determination, to participate in global governance, which entails correlative obligations for states and IOs, and that this constitutes a standard of conduct to which there is a legitimate expectation of compliance. This claim built on an account of the law of self-determination as dynamic, multifaceted, relational and remedial. The law consists of a broad umbrella principle under which multiple specific legal rules are located, and the specific rules tend to emerge to remedy situations of domination or subjugation of peoples by others. The self-determination of peoples is an ongoing process, and although the law has been concerned with remedying the domination of peoples by states, this account suggests that different remedies are justified when different relations emerge.

After constructing the account of the law of self-determination, the thesis turned to consider the rise of IOs and other global governance bodies, and the relations that such entities have with peoples. It demonstrated that activities carried out at international and global levels can significantly and adversely impact on peoples, and also, conversely, benefit peoples by, among other things, providing them a means of appeal against violations of self-determination by states. It argued that IOs, and states acting collectively at the intergovernmental level, exercise dominance over peoples, in such a way as to justify a remedy according to the law of self-determination. On this basis, it argued that a right of peoples to participate in global governance derives from the law of self-determination. The thesis then turned to examine the scope and contours of the right, proposing that corresponding obligations are held by states and IOs. It examined the degree of participation required for the right to be fulfilled by reference to Arnstein's typology of participation. The level of participation needed to fulfil the right depends on the situation, particularly on the extent to which the people is affected by a given matter, and on whether the people are the only third parties with a legitimate stake in the outcome. Participation does not necessarily require the sharing of power between states and peoples, although in some cases this may be needed. The contribution of this part of the thesis has been to identify a new right located under the umbrella principle of self-determination, bypassing the classic internal-external dichotomy.

The rest of the thesis was concerned with assessing whether and to what extent the theoretical construction of the right is consistent with the doctrinal law and the empirical practice of global governance. The positive law was considered first and it was explained how international instruments and the decisions of judicial and quasi-judicial bodies provide some support for the notion that the law of self-determination contains a participatory element. The thesis also explained how the international law relating to indigenous peoples' rights supports the conclusion that indigenous peoples have a right to participate in matters affecting them at the international level. The thesis found that a major area where the doctrinal law does not align with the right as constructed is with respect to the obligations of IOs: they are not members of relevant treaties, and it is unlikely that the law of self-determination, and by extension the proposed right, is peremptory in nature. The thesis argued that the obligations of IOs can be located in CIL, and that the practice of IOs can contribute to the formation of custom, and set out the considerations for determining whether the right has crystallised into a rule of custom.

The empirical assessment found that it is unlikely that the right of peoples to participate in global governance has hardened into a rule of CIL. While it is difficult to assert this conclusion with complete certainty, owing to the difficulty and lack of clarity involved in the determination of a rule of custom, it is more likely to be true than not. While there was a widespread—albeit not universal nor uniform—practice, found in the conduct and policies of IOs and states, there was little to indicate that such practice was carried out in the belief that it was required by law. Although many instances of practice were accompanied by statements of an IO or states referring to the UNDRIP, owing to the soft law nature of this instrument it is unlikely that this constitutes evidence of *opinio juris*.

Notwithstanding the lack of CIL, the thesis argued that the consistent pattern of practice whereby IOs and states enable peoples to participate in matters affecting them at the international level evidences a standard of conduct which is widely adhered to by IOs and states. This constructivist norm corresponds to the right and obligations and could in future evolve into a rule of CIL. To reach this conclusion, the thesis examined standard-setting and decision-making processes of IOs as well as states acting through intergovernmental fora, participation in more general processes of IOs, and the proceedings of ICTs. The thesis explained how this practice is often carried out in the belief that the increased participation of affected peoples will enable an organization to better carry out its functions and fulfil its mandated objectives. The functionalist approach to IOs, by which the functions assigned to an organization by its member states both enable and limit the organization's activity, is thereby shown to be not necessarily incompatible with the idea that organizations should include and pay regard to non-state actors who their activities affect. While the ultimate extent to which participation may assist peoples to realise their substantive rights is unclear, this thesis shows that peoples have a legitimate expectation to participate in global governance processes concerning them.

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