

## INDIGENOUS PEOPLES AS INTERNATIONAL LAWMAKERS

LILLIAN APONTE MIRANDA\*

### ABSTRACT

Through a transnational social movement that has capitalized upon the politics of difference, local communities of indigenous peoples have significantly participated in the construction of a distinctive international legal identity and derivative framework of human rights. The ability of a traditionally marginalized community to succeed in strategically facilitating the recognition of an international legal identity and substantive reconstitution of human rights precepts is a unique phenomenon that merits attention. To that end, this Article addresses the role of indigenous peoples in international human rights lawmaking. It argues that indigenous peoples have played a significant role in changing the legal landscape of human rights in ways that are not necessarily captured by mainstream accounts of non-state actor participation

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\* Assistant Professor of Law, Florida International University College of Law. This Article was selected for presentation at the "New Voices in Human Rights" Panel for the 2009 Association of American Law Schools ("AALS") Annual Meeting, and I am grateful to Christiana Ochoa and Sarah Paoletti for their consideration as well as to the audience members and co-panelists who provided comments. I am also grateful to Karen Engle, Vasuki Nesiah, and Dennis Davis, the facilitators of the Human Rights and Social Justice Writing Workshop at the 2010 Summer Institute for Global Law and Policy at Harvard Law School, and the other members of the writing workshop for their comments, feedback, and encouragement. I am thankful to the audience members and co-panelists who provided comments on earlier versions of this Article at the 2010 Michigan State University College of Law Junior Faculty Forum, the 2009 Stetson Florida Faculty Scholarship Forum, 2008 Oregon Review of International Law Symposium on "Legal Pluralism and Inequality," and 2007 LatCrit Annual Conference on "Critical Localities." I would additionally like to thank my colleagues at the FIU College of Law for their feedback during a workshop presentation of this paper. I am also indebted to Jorge Esquirol, Hari Osofsky, Charles Pouncy, Ediberto Roman, and Carlton Waterhouse for their valuable insights. This Article benefitted from the excellent research assistance of Sophia Boderer, Natalie Castellanos, Melanie Martinez, Erin Miller, and International Law Research Librarian, Marisol Floren.

in international norm-building and decision-making. It further proposes, however, that the participation of indigenous peoples in international human rights lawmaking continues to operate within certain discursive and structural limitations. While indigenous peoples' participation may serve to lend greater legitimacy to international human rights law and lawmaking processes, such participation may not effectively deliver material gains. As a result, continued advocacy on behalf of indigenous peoples must acknowledge and respond to these challenges.

## 1. INTRODUCTION

Today, indigenous peoples have a presence in the halls of the United Nations and the Organization of American States. Victoria Tauli-Corpuz, a member of the Igorot community from the Philippines and Chairperson of the United Nations Permanent Forum on Indigenous Issues, walks the halls of the United Nations headquarters in New York on her way to an annual session of the Permanent Forum.<sup>1</sup> Carrie Dann, a member of the Western Shoshone Tribe, appears with her attorney, Julie Fischel, and other members from the Western Shoshone delegation before the Committee on the Elimination of Racial Discrimination in Geneva.<sup>2</sup> Hugo Jabini, a member of the Association of Saramaka Authorities and its Paramaribo representative, sits before the Inter-American Commission and provides testimony regarding the Saramaka

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<sup>1</sup> See *Biography of Victoria Tauli-Corpuz*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, [http://www.un.org/esa/socdev/unpfii/en/member\\_tauli.html](http://www.un.org/esa/socdev/unpfii/en/member_tauli.html) (last visited Oct. 30, 2010) (providing detailed information on Chairperson Tauli-Corpuz). The other members of the Permanent Forum nominated by indigenous peoples include: Lars Anders-Baer, a member of the Saami community from Sweden; Hassan Id Balkassm, an Amazigh member from Morocco; Mick Dodson, a Yawuru member from Australia; Margaret Lokawua, a Karimjong member from Uganda; Elisa Canqui Mollo, an Aymara member from Bolivia; Pavel Sulyandziga, an Udege member from the Russian Federation; and Tonya Gonnella Frichner, an "Onondaga Nation, Six Nations Iroquois Confederacy Haudenosaunee" member from the United States. *Members of the United Nations Permanent Forum on Indigenous Issues*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, [http://www.un.org/esa/socdev/unpfii/en/members.html#members\\_08-10](http://www.un.org/esa/socdev/unpfii/en/members.html#members_08-10) (last visited Oct. 30, 2010).

<sup>2</sup> See *Western Shoshone*, THE UNIV. OF ARIZ. JAMES E. ROGERS COLLEGE OF LAW INDIGENOUS PEOPLES LAW AND POLICY PROGRAM, <http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/index.cfm?page=advoc> (last visited Oct. 30, 2010) (discussing the advocacy efforts of Mary and Carrie Dann, two Western Shoshone grandmothers, before international human rights bodies).

people's efforts to protect their lands and resources from mining and logging companies.<sup>3</sup>

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Over the past forty years, indigenous peoples have played an increasing role in global governance, particularly in processes of international lawmaking.<sup>4</sup> Through a transnational social movement that has capitalized upon the politics of difference, indigenous peoples have participated significantly in the construction of a distinctive international, legal identity and derivative framework of human rights.<sup>5</sup> The ability of a traditionally marginalized community to succeed in strategically facilitating the recognition of an international legal identity and substantive reconstitution of human rights precepts is a unique phenomenon that merits attention.

There is a continuously evolving stream of international law literature that contests the orthodox taxonomy of international lawmaking as exclusively statist or state-centered and acknowledges the varying participatory roles of non-state actors.<sup>6</sup> However, this literature does not address indigenous peoples' participation in the creation of a distinctive international legal identity and derivative framework of human rights.<sup>7</sup> For

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<sup>3</sup> See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶64 (Nov. 28, 2007) (noting that Hugo Jabini testified regarding "the Saramaka people's efforts to protect their land and resources, their alleged attempts to settle the case with the State, and their methods for documenting traditional Saramaka use of the territory").

<sup>4</sup> See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 56-72 (2d ed. 2004) (discussing indigenous peoples' increasing representation, status, and rights at the international scale).

<sup>5</sup> See *infra* Part 3 (discussing indigenous peoples' participation in international lawmaking). This Article does not focus on the classic concept of "indigeness," which is "ultimately based on Eurocentric notions of cultural hierarchy, according to which 'indigenous peoples' occupied the lower stages on a single scale of 'civilization.'" For an analysis of the classic concept of "indigenous," see LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919-1989)* 338-41 (2005). Rather, this Article is concerned with the contemporary legal construction of indigenous peoples, "denoting culturally distinct groups within the political framework of independent states." *Id.* at 338; see also ANAYA, *supra* note 4, at 57-58 (describing conferences through which indigenous peoples have contributed to the formulation of a transnational identity and which have led indigenous peoples to coordinate their contemporary demands).

<sup>6</sup> See *infra* Part 2.1.

<sup>7</sup> See *infra* Part 2.2.

indigenous peoples, participation in international human rights lawmaking is a means to the realization of claims that require the restructuring of power relationships among states, non-state actors, and local communities.<sup>8</sup> Specifically, such participation is part of a strategy aimed at shifting the balance of power in contested domestic, political struggles stemming from claims to increased protection of cultural practices, greater control over ancestral lands and resources, and ultimately, the meaningful exercise of self-determination.<sup>9</sup>

Accordingly, this Article focuses on the participation of indigenous peoples in international human rights lawmaking and seeks to answer the following questions: (1) What circumstances have facilitated indigenous peoples' participation in international human rights lawmaking? (2) Through what processes have indigenous peoples participated in international human rights lawmaking? (3) How have indigenous peoples contributed to the indigenous peoples' category and to a derivative framework of human rights? (4) What are the implications of such participation, not only with respect to the constitution of international law, but also with respect to the continued advancement of indigenous peoples' claims? Ultimately, does indigenous peoples' participation in international human rights lawmaking reveal a space of contestation that could lead to the use of international human rights law as a means of social transformation for indigenous peoples? What are the possibilities? What are the challenges?

To that end, Part 2 examines existing literature regarding the role of non-state actors in international lawmaking as a means of

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<sup>8</sup> See Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OR. REV. INT'L L. 419, 421-22 (2008) (suggesting that indigenous peoples have strategically engaged in human rights litigation at the international level with respect to claims of ownership, occupancy, use, and control of ancestral lands as a means of challenging domestic law).

<sup>9</sup> See, e.g., S. James Anaya, *The Maya Petition to the Inter-American Commission on Human Rights: Indigenous Land and Resource Rights and the Conflict over Logging and Oil in Southern Belize*, in *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 180-85 (Isfahan Merali & Valerie Oosterveld eds., 2001) (suggesting that the Maya's pursuit of international recourse against the state of Belize for granting logging and oil exploration concessions to multinational corporations on the Maya's traditional lands constituted an "attempt[] to use the sphere of international human rights law to . . . shift the balance of power and terms of debate in their favor").

contextualizing an account of indigenous peoples' participation in human rights lawmaking. Part 3 analyzes the informal and formal norm-building and decision-making processes utilized by indigenous peoples to participate in transnational identity building and the substantive reconstitution of international human rights law. Part 4 evaluates the implications of indigenous peoples' participation in international human rights lawmaking from two distinct vantage points: (1) the constitution of international human rights law, and (2) the continued advancement of indigenous peoples' claims.

Ultimately, this Article argues that indigenous peoples have played a significant role in changing the legal landscape of human rights in ways that are not necessarily captured by mainstream accounts of non-state actor participation in international norm-building and decision-making. Indigenous peoples have employed a multi-layered approach to international human rights lawmaking that includes participation in both informal mechanisms of knowledge production and norm-generation as well as more formal decision-making structures. Indigenous peoples have forever changed the landscape of human rights through their participatory efforts by contributing to the recognition of a distinctive indigenous peoples category and derivative framework of human rights. However, this Article further proposes that the participation of indigenous peoples in international human rights lawmaking continues to operate within certain discursive and structural limitations. While indigenous peoples' participation may serve to lend greater legitimacy to international human rights law and lawmaking processes, such participation may not serve to effectively deliver material gains. As a result, continued advocacy on behalf of indigenous peoples must acknowledge and respond to these challenges.

## 2. ACCOUNTING FOR INDIGENOUS PEOPLES' PARTICIPATION IN INTERNATIONAL LAWMAKING

There are two primary streams of literature pertaining to indigenous peoples' participation in international lawmaking.<sup>10</sup>

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<sup>10</sup> As referred to in this Article, international lawmaking involves international processes of norm-building and decision-making aimed at determining the content of international law. There has been a recognition that, broadly conceived, international processes of norm-building and decision-making may result in the production of both "hard" and "soft" international law. *See*

One stream addresses non-state actor participation in international lawmaking.<sup>11</sup> While this literature includes some passing references to the participatory role of indigenous peoples, it does not provide a discrete narrative of indigenous peoples' role in

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Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319-23 (2006) (discussing the "dynamic interplay" between "hard law" and "soft law").

<sup>11</sup> See generally Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980) (conceiving of international lawmaking as a process of authoritative and controlling decision-making within the global community that includes the participation of non-state actors); W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007) (providing an overview of the New Haven school of thought); see also José Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT'L L. REV. 591, 591 (2008) [hereinafter Alvarez, *Governing the World*] (discussing the role of international organizations in international lawmaking); José Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 324 (2006) (discussing how the evolution of international organizations has led to an increase in the institutionalization of international law); Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulations*, 10 OR. REV. INT'L L. 453, 476 (2008) (discussing, in part, the role of cities as "global legal actors in the international legal regime"); Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006) (discussing how nongovernmental organizations have successfully lobbied for increased participation in international lawmaking processes); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 140 (2005) (evaluating "whether the role non-state actors play in making, applying, and interpreting treaties has changed who is truly authorized to form treaties"); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005) [hereinafter Levit, *A Bottom-Up Approach*] (proposing that public and private practitioners play a role in "bottom-up" international lawmaking); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007) [hereinafter Levit, *Reflections on the New Haven School*] (analyzing bottom-up international lawmaking through the lens of the New Haven school of thought); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999) [hereinafter Mertus, *Transnational Civil Society*] (detailing how "[n]on-state actors and transnational networks now play a greater role in the promotion and protection of human rights in local, regional, and international arenas"); Julie Mertus, *Kitchen Table Lessons: Why the Local Matters*, 94 AM. SOC'Y INT'L L. PROC. 307 (2000) [hereinafter Mertus, *Kitchen Table*] (discussing how social movements may impact the development and internalization of international norms); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007) (discussing the role of the individual in customary international lawmaking); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L. Q. 1789, 1855 (2005) (proposing that "governmental actors are playing a critical role in shaping a transnational regulatory process" with respect to climate change).

international lawmaking nor comprehensive treatment regarding the normative implications of such participation.<sup>12</sup> Another stream focuses on indigenous peoples' status and rights under international human rights law.<sup>13</sup> While a subset of this literature addresses indigenous peoples' role in human rights advocacy and norm-building, it nevertheless does not comprehensively address the normative implications of indigenous peoples' participatory role.<sup>14</sup> This Article seeks to bridge, and build upon, these two streams of literature to provide a discrete narrative of indigenous peoples' participation in international lawmaking and a more

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<sup>12</sup> See *infra* Part 2.1.

<sup>13</sup> See, e.g., Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 609, 609 (2007) (analyzing the Inter-American Court on Human Rights' recognition of indigenous peoples' communal property rights in the *Awas Tingni* case and suggesting that "indigenous peoples are increasingly utilizing international human rights institutions to defend their lands, territories, and cultures, and for their survival"); S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J.L. & POL'Y 107, 111 (2006) (detailing the contributions of indigenous peoples to human rights law); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994) (analyzing international trends in the 1990s and concluding that indigenous people have begun to develop a distinctive international identity as well as a distinctive set of rights in international law); Erik B. Bluemel, *Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making*, 30 AM. INDIAN L. REV. 55, 57 (2005-2006) (arguing for "a more coherent framework advanced for the debate about group participatory rights, more legitimacy provided to group participation, and an enhanced understanding of what forces drive participation in international law" through an analysis of indigenous peoples' participation in the international arena); Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 AM. INDIAN L. REV. 375, 375-78 (2006-2007) (analyzing the potential of utilizing international human rights law to address indigenous peoples' claims for self-determination); Robert T. Coulter, *Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview*, 31 AM. INDIAN L. REV. 573 (2006-2007) [hereinafter Coulter, *International Human Rights Mechanisms*] (suggesting that international legal procedures offer Native Americans an effective means through which to expand their rights); Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539 (2009) [hereinafter Coulter, *The U.N. Declaration*] (calling the declaration historic because it contains "legal elements never before included in a major human rights instrument"); Maivân Clech Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 621 (1992) (proposing that the U.N. provide "fora for indigenous people and other ethnic groups to question state decisions and arrangements that affect them").

<sup>14</sup> See *infra* Part 2.2.

comprehensive discussion regarding the implications of such participation.<sup>15</sup>

### 2.1. *International Lawmaking and Non-State Actors*

Viewed through a positivist lens, international law is ultimately produced through state consent.<sup>16</sup> Pursuant to such a perspective, states are deemed the subjects of international law, and thereby constitute the proper participants in processes of international lawmaking.<sup>17</sup> However, international lawmaking has alternatively been understood as a complex and dynamic process of decision-making that includes the participation of non-state actors.<sup>18</sup> Viewed through such alternative lens, non-state actors “play important roles in influencing decision outcomes.”<sup>19</sup> In effect, such a view not only permits, but requires, a robust analysis of non-state actors’ participation in international lawmaking.

International law scholars, whether explicitly or implicitly drawing upon such an alternative conception of international lawmaking, have developed a subset of literature that identifies, describes, and questions the role of non-state actors in international norm-building and decision-making processes.<sup>20</sup> These analyses

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<sup>15</sup> While this Part provides a general overview of the two paradigmatic streams of literature that impact the analyses in this Article, it is not meant to exhaustively capture any particular author’s scholarly contribution.

<sup>16</sup> See Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 83 (2007) (“State consent could provide a positivist basis for international law in the absence of a sovereign and could be used as a scientific criterion of investigation.”).

<sup>17</sup> *Id.* at 83–85. In this Article, I treat analyses of international lawmaking as related to, but nevertheless distinct from, analyses of state compliance with international law. For analyses that focus more directly on state compliance with international law and the role of non-state actors, see generally Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 559 (2007); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *The Value of Process*, 11 INT’L LEGAL THEORY 27 (2005).

<sup>18</sup> See generally McDougal & Reisman, *supra* note 11; Reisman et al., *supra* note 11; see also Symposium, *Foreword to The “New” New Haven School: International Law – Past, Present, & Future*, 32 YALE J. INT’L L. 299 (2007) (discussing the history, impact, and future of the New Haven School on international legal theory and scholarship).

<sup>19</sup> Reisman et al., *supra* note 11, at 578.

<sup>20</sup> See generally Levit, *Reflections on the New Haven School*, *supra* note 11 (conveying the importance of “bottom-up” international lawmaking); Mertus, *Kitchen Table*, *supra* note 11 (exploring how social movements wield influence over international norms); Mertus, *Transnational Civil Society*, *supra* note 11 (arguing that non-state actors play a role in protecting human rights).

offer a thicker description of non-state actors' participation, lend greater philosophical and theoretical coherency to non-state actors' operational realities, and make important normative contributions regarding the role of non-state actors in international lawmaking.<sup>21</sup> As a whole, the normative thrust of existing literature focuses on the effects of non-state actor participation on the international legal regime. For example, international law scholars' normative insights address how non-state actor participation impacts the appropriate scope of international law,<sup>22</sup> the efficiency and legitimacy of alternative approaches to making international law,<sup>23</sup> and the need to, and potential for, democratizing international lawmaking processes.<sup>24</sup>

More specifically, at the macro-level, attention has been devoted to distinguishing between non-state actors' participation in "top-down" versus "bottom-up" lawmaking processes.<sup>25</sup> At a more micro-level, scholars have addressed the participatory role of a variety of non-state actors. In this latter vein, scholars have canvassed the role of supra-national, transnational, and sub-national non-state actors in international lawmaking. At the supra-

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<sup>21</sup> See generally Levit, *A Bottom-Up Approach*, *supra* note 11 (proposing that public and private practitioners play a role in "bottom-up" international lawmaking); Mertus, *Kitchen Table*, *supra* note 11; Mertus, *Transnational Civil Society*, *supra* note 11.

<sup>22</sup> See, e.g., Ochoa, *supra* note 11, at 136 (critiquing foundational literature that discusses, but dismisses, the role of non-state actors in the formation of customary international law); Osofsky, *supra* note 11, at 1797-80 (surveying the impact of corporations on international lawmaking); Reisman et al., *supra* note 11, at 578 (providing that "participants in any decision process include those formally endowed with decision competence, such as executives, legislators and judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes").

<sup>23</sup> See generally Levit, *A Bottom-Up Approach*, *supra* note 11, at 209 (suggesting that bottom-up international lawmaking is a legitimate alternative route to law in the realm of international trade and finance where most scholarship focuses on treaty-based institutions).

<sup>24</sup> See Mertus, *Transnational Civil Society*, *supra* note 11, at 1361 (noting that global democratic governance has yet to be fully realized). Professor Mertus focuses on the paradox between the "existence of a robust civil society as a precondition to democratic governance," and the way that "transnational civil society may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign and, thus, may act in a manner contrary to democratic principles." *Id.* at 1340.

<sup>25</sup> See Levit, *Reflections on the New Haven School*, *supra* note 11, at 408-10 (noting that literature discussing "bottom-up" international lawmaking has contributed distinct insights on the norm-building processes that homogenous, sub-national groups may engage in).

national scale, much analysis has been devoted to the role of intergovernmental organizations, such as the International Monetary Fund, the World Bank, and the World Trade Organization, as participants in international lawmaking.<sup>26</sup> Attention has also been devoted to the role of transnational entities, such as non-governmental organizations (“NGOs”),<sup>27</sup> transnational civil society,<sup>28</sup> and transnational networks.<sup>29</sup> The literature further includes specific treatment of participation by sub-national public entities, such as autonomous non-state groupings<sup>30</sup> and cities,<sup>31</sup> as well as private entities, such as corporate actors,<sup>32</sup> private practitioners,<sup>33</sup> and individuals.<sup>34</sup>

While some of this literature includes passing references to the participatory role of indigenous peoples, it does not provide a discrete narrative of indigenous peoples’ role in international lawmaking nor comprehensive treatment regarding the normative

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<sup>26</sup> See generally Alvarez, *Governing the World*, *supra* note 11 (discussing how the creation of inter-governmental organizations leads to fundamental changes in international law); Alvarez, *International Organizations: Then and Now*, *supra* note 11 (discussing the institutionalization of international law through the establishment of international organizations).

<sup>27</sup> See, e.g., Charnovitz, *supra* note 11 (evaluating the influence that non-governmental organizations exert over international law); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273 (2002) (arguing that globalization has increased the involvement of non-state actors in human rights issues with the resulting paradox that human rights are promoted, yet, at the same time, violated in “unforeseen ways”).

<sup>28</sup> See generally Mertus, *Transnational Civil Society*, *supra* note 11 (proposing that transnational civil society plays an increased role in the promotion of human rights).

<sup>29</sup> See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 239–40 (2004) (discussing the ability of transnational networks to aggregate policy).

<sup>30</sup> See generally Hollis, *supra* note 11 (discussing sub-state actor participation).

<sup>31</sup> See, e.g., Osofsky, *supra* note 11, at 1806–07 (noting that cities, by serving as petitioners in litigation, can advance greater regulation in certain contexts). See generally Aoki, *supra* note 11 (surveying how cities have injected themselves into the international sphere, particularly in international human rights lawmaking).

<sup>32</sup> See, e.g., David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 957–58 (2004) (discussing how transnational corporations help shape informal social norms that impact domestic and international law).

<sup>33</sup> See, e.g., Levit, *Reflections on the New Haven School*, *supra* note 11, at 411 (proposing that private actors, which include private individuals in addition to NGOs and corporations, “do not merely exert influence on . . . lawmaking processes but in fact constitute such processes and make law themselves”).

<sup>34</sup> See generally Ochoa, *supra* note 11 (discussing how individuals have the capacity to influence customary international law).

implications of such participation.<sup>35</sup> For example, at the macro-level, a narrative of indigenous peoples' role in international lawmaking defies a "top-down/bottom-up" dichotomy. Indigenous peoples' participation reflects a bottom-up transnational social movement that engages both informal mechanisms of knowledge production and norm-generation and formal, top-down decision-making structures with the aim of establishing indigenous peoples' distinctiveness. More specifically, sub-national, identity-based local communities—such as the Awas Tingni in Nicaragua, U'wa in Colombia, and Western Shoshone in the United States—resist local challenges that present affronts to the exercise of cultural practices, control over lands and resources, or other forms of exercising meaningful self-determination. As a means of furthering such resistance to local circumstances, these communities engage informal mechanisms of transnational knowledge production such as transnational networks and non-governmental organizations. They further engage formal channels of decision-making through advocacy before international and regional human rights bodies. Indigenous communities' multi-layered participatory efforts focus on strategically identifying core indigenous norms and values that distinguish indigenous communities from other groups. These efforts serve as a foundation for the recognition of a distinctive transnational identity and framework of rights.

Furthermore, at the micro-level, indigenous peoples' participatory role in international lawmaking is not appropriately cabined within existing categories of analysis. Indigenous peoples may, indeed, constitute members of non-governmental organizations, participate in transnational civil society, organize as transnational public networks, function as autonomous non-state groupings, and bear individual identities. Nevertheless, indigenous peoples are best understood as comprising a loose transnational network composed of sub-national, identity-based, local communities.

Accordingly, indigenous peoples' role in international lawmaking merits greater attention. An account of indigenous peoples' role in international human rights lawmaking is a necessary component of the broader narrative of non-state actor participation in international lawmaking. Moreover, shifting focus

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<sup>35</sup> See *infra* Part 2.2.

to the participatory role of a traditionally marginalized community broadens normative categories of analysis. Normative questions arise more explicitly not only with respect to what such participation does to, or for, international law, but also with respect to what such participation does to, or for, indigenous peoples.

## 2.2. *International Lawmaking and Indigenous Peoples*

The literature that addresses indigenous peoples' status and rights under international human rights law has devoted some attention to indigenous peoples' participatory role in human rights advocacy and norm-building. However, such analyses are not explicitly tied to the broader literature on non-state actor participation in international lawmaking. Accordingly, they do not purport to identify or develop a distinctive narrative describing how indigenous peoples' participation in international lawmaking fits within the broader literature concerning non-state actors. They also do not develop the normative implications of indigenous peoples' participation with respect to the advancement and realization of indigenous peoples' claims.

Drawing on the dichotomy between "subjects" and "objects" of international law, some literature claims that indigenous peoples now constitute "subjects of international law."<sup>36</sup> While this conclusion suggests that indigenous peoples bear a personality under international law commensurate with participation in international lawmaking, these references do not develop a discrete narrative of indigenous peoples' participation in international lawmaking or the implications of such participation.<sup>37</sup>

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<sup>36</sup> See, e.g., Barsh, *supra* note 13 (proposing that indigenous peoples be viewed as "subjects" rather than objects of international law); Cirkovic, *supra* note 13 (examining "the struggle over the recognition of indigenous peoples as subjects under public international law"); Lâm, *supra* note 13 (arguing that international law "may have to be reconceived . . . to include peoples as well as states as its rightful subjects").

<sup>37</sup> See Barsh, *supra* note 13, at 33-35 (tracing the growing acceptance of indigenous peoples' collective identity and distinct rights in international law and practice and arguing that explicit recognition of indigenous peoples' right to self-determination would establish indigenous peoples as "subjects of international legal rights and duties rather than mere objects of international concern"); Cirkovic, *supra* note 13, at 375-76 (examining "the struggle over the recognition of indigenous peoples as subjects under public international law"); Lâm, *supra* note 13, at 621 (proposing that indigenous peoples be recognized as "subjects of international law competent to represent their interests in the international arena").

Some analyses go further by implicitly providing support for, and important elements of, an independent narrative concerning indigenous peoples' role in international human rights lawmaking.<sup>38</sup> For example, there is ample literature that addresses indigenous peoples' human rights advocacy with respect to their claims before international and regional human rights bodies.<sup>39</sup> This literature identifies and analyzes the doctrinal sources of indigenous peoples' human rights arguments, and further, suggests that indigenous peoples have been at the forefront of such advocacy efforts.<sup>40</sup> Additionally, there is literature that discusses the mechanics of navigating the human rights institutional regime as a means of providing helpful guidance on appropriate avenues of advocacy.<sup>41</sup> This literature focuses on the international and regional human rights forums that provide indigenous peoples

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<sup>38</sup> See generally ANAYA, *supra* note 4; S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001) (proposing that "the Inter-American human rights system recognizes and protects indigenous peoples' rights over their traditional lands and resources, and that it establishes for states corresponding international legal obligations"); Coulter, *The U.N. Declaration*, *supra* note 13, at 539 (calling the U.N. Declaration on the Rights of Indigenous Peoples historic because it contains "legal elements never before included in a major human rights instrument"); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 189-90 (2001) (observing that indigenous peoples' legal claims rest on five distinct conceptual structures: "(1) human rights and non-discrimination claims; (2) minority claims; (3) self-determination claims; (4) historic sovereignty claims; and (5) claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states"); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999) (discussing both the conquest and dispossession of indigenous peoples' lands and the mechanisms by which they have gained increased recognition and participation in international law).

<sup>39</sup> See, e.g., ANAYA, *supra* note 4; Anaya & Williams, *supra* note 38 (discussing the contemporary indigenous peoples' movement in which representatives for indigenous peoples more frequently advocate for their rights before human rights bodies); Wiessner, *supra* note 38, at 120-26 (discussing developments in indigenous peoples' claims to collective rights and avenues of enforcement).

<sup>40</sup> ANAYA, *supra* note 4, at 56 ("The international system's contemporary treatment of indigenous peoples is the result of activity over the last few decades. This activity has involved, and substantially been driven by, indigenous peoples themselves.").

<sup>41</sup> See Coulter, *International Human Rights Mechanisms*, *supra* note 13, at 575-89 (discussing the "international bodies" through which Indian nations and tribes may assert their rights).

with opportunities for voicing their claims and seeking redress.<sup>42</sup> While these two streams of literature implicitly support the existence of an independent narrative of indigenous peoples' participation in international lawmaking, they do not explicitly develop the discrete substantive contours or implications of such narrative.

A few analyses provide more explicit support for, and development of, a discrete narrative of indigenous peoples' participation in international lawmaking and its normative implications. There is literature that addresses the possible justifications for indigenous peoples' participation in international lawmaking.<sup>43</sup> This literature bridges the gap between the broader recognition of participatory rights in international lawmaking processes and possible normative theories that could appropriately justify indigenous peoples' participatory role.<sup>44</sup> Moreover, there is some development in the literature regarding the possible normative implications of indigenous peoples' participation; however, much of this literature focuses on the implications of such participation with respect to the constitution of international law rather than with respect to the continued advancement and further operationalization of indigenous peoples' claims.<sup>45</sup>

Ultimately, while this subset of literature recognizes, and provides support for, the proposition that indigenous peoples have played a role in human rights lawmaking, further development of

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<sup>42</sup> See *id.*

<sup>43</sup> See Bluemel, *supra* note 13, at 72 (discussing shortcomings of the mainstream literature that articulates justifications for indigenous peoples' participation in international lawmaking).

<sup>44</sup> See *id.* at 60 (focusing on indigenous peoples' participation in human rights lawmaking, Bluemel "seeks to understand group participation by looking at the relationship between the various actors in the international system and the values enhanced or undermined by such group participation").

<sup>45</sup> See Anaya, *supra* note 13, at 118-19 (focusing on the impact of indigenous peoples' participation in international lawmaking with respect to human rights law). There is also a stream of related literature that does not specifically deal with non-state actor participation in international lawmaking, but addresses the use of the human rights discourse as a discourse of resistance by traditionally marginalized communities, including indigenous peoples. See generally BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003) (discussing the emergence of transnational resistance by indigenous peoples); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (synthesizing case studies of grassroots movements advocating for global social justice).

this narrative, as well as the broader normative implications that may flow from it, are merited. Unlike the existing narratives of non-state actor participation in international lawmaking, the narrative of indigenous peoples' participation is one that showcases the nuances of participation by a traditionally marginalized community. Procedurally, indigenous peoples' participation highlights a multi-layered approach to international lawmaking through both informal avenues of knowledge production and norm-generation, and formal, top-down structures engaged in decision-making. Substantively, indigenous peoples' participation showcases the ability of a traditionally marginalized community to succeed in strategically facilitating the recognition of a distinctive international legal identity and substantive reconstitution of human rights precepts. Furthermore, such a narrative provides normative insights regarding the implications of participation with respect to indigenous peoples' realization of their claims. Moreover, the narrative has the potential to provide normative insights regarding possible dissonance between what such participation does to, or for, international law, and what it does to, or for, indigenous peoples. Ultimately, such analysis can serve as a platform for identifying the possibilities and limits of engaging international human rights lawmaking processes as avenues of resistance or tools of social transformation for traditionally marginalized communities.

### 3. INDIGENOUS PEOPLES' PARTICIPATION IN INTERNATIONAL LAWMAKING

Indigenous peoples have participated in international lawmaking as a means of reconstituting international and, derivatively, national legal frameworks that significantly bypass their historical subordination. The project of reconstituting international law, specifically human rights law, was pursued by indigenous peoples as a means of organizing transnational resistance to continuing affronts to their way of life. Human rights offered a normative framework potentially capable of lending legitimacy to indigenous peoples' local, anti-subordination struggles and of translating indigenous peoples' claims into recognizable rights. To that end, indigenous peoples engaged in both informal mechanisms of knowledge production and norm-generation, and formal, top-down decision-making structures. Through such participation, indigenous peoples have been

successful in identifying and uploading core normative precepts that distinguish indigenous peoples from other groups. The emphasis on precepts of communal association and existence, as well as cultural and religious ties to lands and resources, have facilitated the recognition of a distinctive indigenous peoples category and shaped the substantive scope of human rights applicable to indigenous peoples.

### *3.1. Emergence as Participants in International Lawmaking*

The “emergence” of indigenous peoples as participants in international law did not become a part of international law discourse until the latter part of the twentieth century. Indeed, indigenous peoples’ status and rights have been historically limited under international law. Only in the past forty years have indigenous peoples, through a convergence of sociopolitical factors, been able to incrementally play a significant participatory role in international lawmaking processes.

During the colonial period, indigenous peoples were, for the most part, ideologically constructed as irrational and uncivilized.<sup>46</sup> Furthermore, during the post-colonial period of state formation, the doctrine of sovereignty developed from a Eurocentric perspective to privilege existing European or European-derived territorial arrangements as states.<sup>47</sup> Because indigenous peoples’ associational, social, and political structures did not resemble the contours of the territorial state, indigenous peoples were not considered sovereigns under international law.<sup>48</sup> Moreover, even the early post-World War II era of decolonization and human rights bypassed indigenous peoples. The post-World War II decolonization project, grounded in human rights precepts, promoted the right of peoples to self-determination.<sup>49</sup> However,

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<sup>46</sup> During the colonial period, debates between leading intellectuals focused on the proper treatment of “newly discovered” peoples. *See generally* BARTOLOMÉ DE LAS CASAS, *HISTORY OF THE INDIES* (Andrée Collard ed. and trans., 1971) (chronicling early interactions between Europeans and indigenous peoples in the West Indies); FRANCISCUS DE VICTORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (Ernest Nys ed., Carnegie Institution of Washington 1917) (1557) (collecting the perspectives of the Spanish theologian, Franciscus de Victoria, on indigenous peoples in the West Indies).

<sup>47</sup> *See* ANAYA, *supra* note 4, at 19–31 (discussing the dominance of the early Eurocentric modern state system).

<sup>48</sup> *See id.* at 26–31 (discussing the positivist approach to international law regarding treatment of indigenous peoples).

<sup>49</sup> *See id.* at 53–54.

self-determination applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of indigenous peoples existing within the colonial territories and colonizing states.<sup>50</sup>

Nevertheless, the convergence of four primary factors during the past forty years has contributed to indigenous peoples' participation in international norm-building and decision-making processes: (1) shifts in ideological conceptions of indigeneity; (2) local affronts to indigenous peoples' way of life and greater opportunities for transnational coalition-building, simultaneously facilitated by circumstances of globalization; (3) attention under international law to promoting ideals of participatory democracy; and (4) advocacy by indigenous peoples aimed at greater recognition of participatory rights.

First, indigenous peoples' incremental participation in international lawmaking would probably not have been possible without significant shifts in ideological conceptions of indigeneity. The idea of indigeneity was originally associated with savage inferiority as a means of justifying colonization and the continued subordination of communities of first peoples.<sup>51</sup> Historically, the idea of indigeneity remained tied to notions of cultural inferiority, resulting in either the perpetual marginalization or mandated assimilation of indigenous peoples.<sup>52</sup> In the latter vein, policies of

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<sup>50</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), para. 5, U.N. GAOR, 15th Sess., 947th plen. mtg., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960).

Immediate steps shall be taken, in . . . territories which have not yet attained independence, to transfer all powers to the people of those territories . . . in accordance with their freely expressed will and desire . . . in order to enable them to enjoy complete independence and freedom.

*Id.*; see also G.A. Res. 1541 (XV), princ. IV, U.N. GAOR, 15th Sess., 948th plen. mtg., Supp. No. 16, U.N. Doc. A/4684 (Dec. 15, 1960) (hinging the application of self-determination to geographically separate territories).

<sup>51</sup> See generally G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, 13 *AUSTL. Y.B. INT'L L.* 1, 37-39, 49-53 (1990-1991) (articulating the debate regarding the relationship between "newly discovered" first peoples and colonizing states).

<sup>52</sup> The ideology of assimilation is reflected in international legal contexts as well as national social and legal contexts. For example, the first comprehensive treaty addressing the status and rights of indigenous peoples' under international law, ILO Convention 107, is premised on notions of integration. See Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, ILO

sociopolitical dependency on state structures and programs of indigenous acculturation emerged as vehicles of expeditious incorporation into dominant legal and social frameworks.<sup>53</sup>

Arguably, today, there has been a significant rejection of assimilationist ideology in favor of a recognition of difference based on indigenous peoples' distinctive cultural, religious, associational, and political orders. Assimilation ultimately became associated with discriminatory practices leading to cultural genocide—the shattering of communal ties through the imposition of Eurocentric legal and social transplants.<sup>54</sup> Also, assimilation as a social policy simply proved ineffective; it ignited further resistance from local communities of indigenous peoples that sought to preserve an independent identity and way of life.

Ultimately, overarching normative and political shifts lead to a more comprehensive and less discriminatory ideology of indigenous peoples grounded in indigenous peoples' own

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No. 4738, pt. 1 art. 2, 2(c), 328 U.N.T.S. 247 (entered into force June 5, 1959) (including measures for “creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations”). At the domestic level, social contexts determined the viability of programs of assimilation. While in some states, efforts and programs aimed at greater integration and assimilation were perceived as too great a grant of increased status, other states fully engaged such approach. See Marie Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 428–30 (2009) (discussing Congress's recognition of problems associated with the assimilation of American Indians and the effect of this recognition on the passage of the Indian Child Welfare Act); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 923 (2003) (discussing the relationship between Native nations and the U.S. government with respect to assimilation, integration, and self-determination); Pamela O'Connor, *Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment*, 28 INT'L J. LEGAL INFO. 232, 239–40 (2000) (noting the Canadian government's approach to assimilation of Native children through education).

<sup>53</sup> See ANAYA, *supra* note 4, at 31–34 (articulating the “trusteeship doctrine,” which aimed to “civilize” indigenous peoples).

<sup>54</sup> The rejection of assimilation as an overarching policy for the management of indigenous peoples is evident in the revision processes undertaken by the ILO with respect to ILO Convention 107. The product of that revisionary process, ILO Convention 169, reflects a progression toward the recognition of indigenous peoples as a distinct social group. See International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 28 I.L.M. 1382, 1384 (entered into force June 27, 1989) (“[I]t [is] appropriate to adopt new international standards . . . removing the assimilationist orientation of the earlier standards . . .”).

accounts of their lived experiences.<sup>55</sup> This continuously evolving ideology is primarily one of indigenous peoples' survival as distinct communities which are now constrained within domestic and international legal and institutional systems that did not foresee their endurance. In this vein, indigenous peoples have extolled their religious, cultural, and political differences as reasons for greater self-determination. They have sought to harness this developing ideology to gain legal redress for their historical subordination and contemporary claims at the international scale. Ultimately, legal developments in human rights law during the latter part of the twentieth century reflect a recognition, accommodation, and progression of such ideology.

Second, circumstances of globalization have facilitated indigenous peoples' participatory role in international lawmaking. While circumstances of globalization have led to increased affronts on indigenous peoples' way of life, they have also prompted and enabled the transnational organization of local communities of indigenous peoples. On the one hand, globalization has arguably led to increasing assaults by states and non-state actors, such as corporate entities, on indigenous peoples' ability to determine their own futures.<sup>56</sup> For example, the deregulation of market forces has

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<sup>55</sup> See RODRÍGUEZ-PIÑERO, *supra* note 5, at 259–60 (situating a shift regarding the status of indigenous peoples and the affirmation of indigenous rights during the last quarter of the century within the confluence of several normative and political changes, including (1) a paradigmatic shift from an “uncontested notion of ‘development’ typical of the post-war era” toward a model of “‘participatory development’” or “‘ethno-development,’” (2) a progression in the liberal model of “‘universal citizenship’” based on notions of assimilation and integration toward a model of “‘multicultural citizenship’” based on the acknowledgement of cultural distinctions, and (3) a “generalized political and intellectual attack” on existing anthropological conceptions of indigenism that promoted integrationist governmental policies).

<sup>56</sup> See Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 333, 335–36 (1997) (proposing the following distinction between globalization from above and globalization from below: “the restructuring of the world economy on a regional and global scale through the agency of the transnational corporation and financial markets from above, and the rise of transnational social forces concerned with environmental protection, human rights, and peace and human security from below”); see also RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 9 (2003) (suggesting that indigenous identity has been created, in part, as a result of the “shared experiences of marginalized groups facing the negative impacts of resource extraction and economic modernization and . . . the social convergence and homogenization that these ambitions tend to bring about”); Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and*

potentially made it easier for transnational corporate actors to engage in large infrastructure and natural resource extraction projects on indigenous peoples' claimed lands.<sup>57</sup> On the other hand, circumstances of globalization have led to the rise in participation of non-state actors in international lawmaking.<sup>58</sup> Scholars have suggested that globalization, from above and from below, has changed the role of states in global governance and, concurrently, increased the opportunities for non-state actors and transnational networks to participate in global governance.<sup>59</sup>

Two specific circumstances of globalization have primarily facilitated indigenous peoples' participation in global governance: (1) the increasing interdependence at the global level where the activities of people in one locality have repercussions elsewhere, and (2) the increasing fragmentation of states into autonomous groups.<sup>60</sup> Increasing interdependence at the global level has prompted local communities of indigenous peoples to organize themselves transnationally. Since the activities of one indigenous community could have repercussions on the activities of another indigenous community elsewhere, coalition-building at the international scale has presented an opportunity for greater gains. An increasing fragmentation of states has also prompted local communities of indigenous peoples to organize themselves transnationally. If state entities are giving way to other types of autonomous groupings, then coalition-building at the international scale serves as an avenue of survival. It presents a greater

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*Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135 (2007) (canvassing the impacts of corporate entities on the promotion and protection of indigenous peoples' land rights).

<sup>57</sup> See Miranda, *supra* note 56, at 154-60 (discussing the effects of "hybrid state-corporate activity" on indigenous peoples' lands).

<sup>58</sup> See Mertus, *Transnational Civil Society*, *supra* note 11, at 1341 (proposing that globalization has been a catalyst for the increase of non-state actor participation in the international human rights system).

<sup>59</sup> See *id.* at 1341-42 (articulating the notion of globalization from above and below).

<sup>60</sup> See *id.* at 1342-46 (emphasizing four dimensions of globalization that have had an impact on the increase of non-state actor participation at the international scale: (1) "an increasing interdependence at the world level, where the activities of people in a specific area have repercussions that go beyond local, regional, or national borders," (2) "fragmentation of States and peoples into autonomous groups and areas," (3) "homogenization of the world wherein 'instead of differences among territorial units which were mutually exclusive, there is now a uniformity,'" and (4) the undercutting of "homogeneity by producing diversification within territorial communities").

opportunity for continued existence amidst a world of changing borders, fluid groupings, and tenuous identities.

Third, interest in the achievement of democratic global governance has facilitated the recognition of indigenous peoples' participatory role in international lawmaking.<sup>61</sup> Democratic global governance has been linked to notions of "good" governance or legitimacy in governance.<sup>62</sup> It involves the "participation for the peoples of the world, independent of governmental representation."<sup>63</sup> In this context, the increasing participatory role of indigenous peoples in international lawmaking can be understood as a functional necessity of addressing pressing issues of human dignity and providing greater legitimacy to a key component of international governance: international lawmaking.

Fourth, as a means of advancing their claims, communities of indigenous peoples have strategically pursued recourse at the international scale. Through such engagement, communities have specifically advocated for, and furthered the recognition of, participatory rights in decision-making processes that have an impact on their way of life.<sup>64</sup> Such participatory rights function at all levels of decision-making: local, national, and international.<sup>65</sup> They specifically include the right to prior informed consultation or consent with respect to state activities that impact their ancestral

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<sup>61</sup> See Falk, *supra* note 56, at 334 (discussing "the emergence of transnational democratic tendencies as a feature of the international legal order"); Mertus, *Transnational Civil Society*, *supra* note 11, at 1361 (proposing that "democratic governance" continues to grow on a global scale). See generally Richard Falk, *What Comes After Westphalia: The Democratic Challenge*, 13 WIDENER L. REV. 243 (2007) [hereinafter Falk, *What Comes After*].

<sup>62</sup> See Mertus, *Transnational Civil Society*, *supra* note 11, at 1352 (looking to the World Bank's definition of "good governance").

<sup>63</sup> Falk, *What Comes After*, *supra* note 61, at 251.

<sup>64</sup> See James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 16 (2005) ("[i]ndicat[ing] a general norm duty on states to consult with indigenous peoples and accommodate their concerns whenever state action is contemplated that would affect their interests"); Bluemel, *supra* note 13, at 77-78 (discussing indigenous peoples' right to participate in lawmaking processes).

<sup>65</sup> See U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 5, 15, 17-19, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP] (articulating indigenous peoples' rights to self-determination and participation in political processes).

lands and resources<sup>66</sup> and the right to participate in governmental policy-setting and decision-making.<sup>67</sup>

In sum, a convergence of these four factors has facilitated the emergence of indigenous peoples as participants in international lawmaking. Indigenous peoples have contributed to, and employed, a developing ideology that emphasizes cultural difference as a reason for the recognition of a distinctive identity commensurate with specifically designed rights. Circumstances of globalization have offered local communities of indigenous peoples both common experiences of continued subordination and greater opportunities for transnationally sharing those experiences and developing strategies of resistance that hinge on participation in international lawmaking. An increased focus on the benefits of greater direct participation by non-state actors in global governance, has, in turn, enabled the recognition of indigenous peoples' participatory rights at such level. Indeed, academics, activists, and policy-makers have begun to refer to the "emergence" of indigenous peoples in international lawmaking processes.

### *3.2. Translation of Claims into Human Rights*

Indigenous peoples have engaged the human rights framework to translate their claims into recognizable rights. Indigenous peoples' claims include increased protection over cultural practices, greater control over ancestral lands and resources, and ultimately, the meaningful exercise of self-determination. To advance their claims, indigenous communities have identified and emphasized attributes that distinguish them from other groups, and consequently, have argued that generally applicable human rights should be interpreted to account for such distinctive attributes. Indigenous peoples' efforts have resulted in the

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<sup>66</sup> *See id.* art. 32(2).

States shall consult and cooperate in good faith with . . . indigenous peoples . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

*Id.*

<sup>67</sup> *See id.* arts. 5, 18-19 (declaring that indigenous peoples should be actively included in decision-making processes, especially regarding decisions that affect them directly).

recognition of a distinctive indigenous identity capable of triggering a specific set of human rights.<sup>68</sup>

As an initial matter, it is important to note that indigenous peoples' claims do not need to be cabined within the discourse of human rights. For example, the claims of indigenous peoples may be conceptualized as minority claims, self-determination claims by a colonized peoples, historical sovereignty claims by first peoples, and *sui generis* as indigenous peoples' claims based on treaty or other agreements with states.<sup>69</sup> However, while indigenous peoples' claims may be grounded in more than one category, many claims have been designed as primarily human rights claims and channeled through the human rights system.<sup>70</sup> The formulation of indigenous peoples' claims as human rights is not without controversy. While a significant number of scholars, indigenous peoples' representatives, and state representatives have supported the channeling of indigenous peoples' claims through the human rights discourse, others have argued that the discourse's "equal rights rhetoric" as well as its system of implementation and enforcement itself are inherently unjust, flawed, or insufficient.<sup>71</sup> Nevertheless, advocates of indigenous peoples' rights at the international scale may be relying on the human rights program while acknowledging that it "might be made more useful by reform," and "leav[ing] for later consideration the question [of] whether a reformed human rights program could ever satisfactorily address all the issues, and in particular, whether a

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<sup>68</sup> See RODRÍGUEZ-PIÑERO, *supra* note 5, at 258 ("Contemporary discourse on 'the rights of indigenous peoples' or 'indigenous rights' refers to the concretization of generally applicable human rights principles to the specific circumstances of, and demands from [indigenous] peoples.").

<sup>69</sup> See Kingsbury, *supra* note 38, at 190 (identifying conceptual structures pursuant to which indigenous peoples form claims). See generally S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 240-42 (2005).

<sup>70</sup> The discourse of human rights has not been the only means of contemporary advocacy on behalf of indigenous peoples. See Anaya, *supra* note 69, at 239-42 (addressing the divergence and interplay of discourses regarding historical sovereignty and human rights). Nevertheless, indigenous peoples have found their greatest success by grounding their contemporary claims within the discourse of human rights. *Id.* at 241.

<sup>71</sup> See Kingsbury, *supra* note 38, at 193-94. As suggested by Professor Kingsbury, this line of argumentation is akin to "Derrick Bell's critique of the civil rights struggle as channeling energies of black Americans into areas of symbolic success but with limited impact on underlying problems." *Id.*

distinct category of indigenous peoples' rights ought to exist alongside the human rights program and other international legal structures."<sup>72</sup>

Specifically, indigenous peoples have grounded their claims on human rights articulated in declarations and treaties, such as the right to self-determination,<sup>73</sup> the right to not be discriminated against,<sup>74</sup> the right to cultural integrity,<sup>75</sup> and the right to property.<sup>76</sup> These human rights have been interpreted to account for indigenous peoples' identification of political, associational, religious, and cultural distinctiveness and contemporary circumstances that present affronts by states to preservation of their way of life and control over their ancestral lands and resources. For example, human rights precepts of self-determination and non-discrimination have been interpreted to protect indigenous peoples' claims of a distinctive indigenous identity and way of life.<sup>77</sup> Additionally, human rights precepts of

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<sup>72</sup> Kingsbury, *supra* note 38, at 194.

<sup>73</sup> See International Covenant on Civil and Political Rights art. 1, para. 1, Dec. 19, 1966, 999 U.N.T.S. 171 (providing for the right to self-determination); International Covenant on Economic, Social and Cultural Rights art. 1, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 ("All peoples have the right of self determination.").

<sup>74</sup> Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. GAOR, 52nd Sess., Supp. No. 18, at 122-23, U.N. Doc. A/32/18 Annex V. (Aug. 18, 1997), available at <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>.

<sup>75</sup> See International Covenant on Civil and Political Rights, *supra* note 73, art. 27, para. 3 (providing that members of minority populations "shall not be denied the right . . . to enjoy their own culture"); see also ANAYA, *supra* note 4, at 134 (proposing that article 27 of the International Covenant on Civil and Political Rights is representative of customary international law).

<sup>76</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 17, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html> (providing, *inter alia*, that "[e]veryone has the right to own property alone as well as in association with others," and "[n]o one shall be arbitrarily deprived of his property"); see also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXVIII, OEA/Ser.L./V/II.23, doc. 21 rev. 6 (1948), available at <http://www.oas.org/juridico/English/ga-Res98/Eres1591.htm> [hereinafter American Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (providing that "every . . . person is entitled to the peaceful enjoyment of his possessions"); Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.cidh.org/Basicos/English/Basic1.%20Intro.htm> [hereinafter American Convention] ("Everyone has the right to the use and enjoyment of his property.").

<sup>77</sup> See S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L., no. 2, 1991 at 1, 32 (discussing the principle of self-

self-determination, non-discrimination, cultural integrity, and property have been interpreted to protect indigenous peoples' claims to a distinctive communal, religious, and cultural association with ancestral land. Indeed, indigenous peoples' claims to ownership, occupancy, use, and control of their traditional lands and resources are recognized as human rights.<sup>78</sup> More broadly, the recently adopted United Nations Declaration on the Rights of Indigenous Peoples, which draws upon the development of human rights jurisprudence with respect to indigenous peoples, reflects a more comprehensive translation of indigenous peoples' claims into recognizable rights.<sup>79</sup>

### 3.3. *Participation in Human Rights Norm-Building and Decision-Making Processes*

Communities of indigenous peoples have primarily participated in international lawmaking within the human rights regime. They have sought to translate their claims into recognizable human rights through participation in informal and formal norm-building and decision-making processes.<sup>80</sup> Through

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determination in relation to indigenous peoples); Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1170-76 (2008) (suggesting a re-definition of indigenous sovereignty based on the adoption of the United Nations Declaration on the Rights of Indigenous Peoples). See generally MAIVÂN C. LÂM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION 51-62, 123-35 (2000) (discussing the history and development of norms relevant to self-determination claims and the application through the U.N. of these norms to indigenous peoples); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992) (addressing barriers regarding the recognition of indigenous peoples' right to self-determination).

<sup>78</sup> See Miranda, *supra* note 8, at 447-54.

<sup>79</sup> See UNDRIP, *supra* note 65, at pmb1. The U.N. Declaration on the Rights of Indigenous Peoples "is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field." *Id.* The Declaration affirms "that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples." *Id.*

<sup>80</sup> Indigenous peoples' participation in international lawmaking has been dynamic and fluid, and therefore, cannot be appropriately presented in a chronological timeline nor dissected into a narrative of events that necessarily build upon each other in a particular order. Accordingly, this Article provides an account of indigenous peoples' participation by analyzing the primary informal

participation in such processes, indigenous peoples have contributed to the recognition of the legal category “indigenous peoples” and to the creation of a well-established body of international norms that specifically address indigenous peoples’ human rights.

First, sub-national, identity-based communities have engaged in bottom-up resistance against affronts to their way of life through participation in informal norm-building processes. These communities have formed, or engaged, transnational networks and non-governmental organizations dedicated to the production of knowledge and generation of norms regarding the recognition of a distinctive transnational indigenous identity and a derivative framework of indigenous rights. Second, these communities have engaged in resistance against affronts to their way of life through participation in more formal, institutionalized, top-down structures that contribute to the development of norms and decision-making regarding indigenous peoples’ rights. Ultimately, indigenous peoples’ participation in these informal and formal processes has contributed to the formulation of “hard” and “soft” law applicable to indigenous peoples.<sup>81</sup> Both hard law, which traditionally encompasses binding treaty and customary international law, and soft law, which includes declarations and non-binding jurisprudence from human rights bodies, constitute sources of rights for indigenous peoples today.

The activities of transnational networks and non-governmental organizations have contributed to indigenous peoples’ ability to participate, even if only informally or indirectly, in international identity-building and rights formulation.<sup>82</sup> Transnational networks have been instrumental in creating such opportunities through the organization of transnational conferences. Non-governmental organizations have similarly been involved in identity-building and rights-formulation through advocacy efforts.

In the 1970s, indigenous peoples from around the world began to gather at transnational conferences aimed at addressing pressing

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and formal processes through which norm-building and decision-making regarding the scope of indigenous identity and rights has taken place.

<sup>81</sup> See Shelton, *supra* note 10, at 319–23 (distinguishing between “hard” and “soft” international law).

<sup>82</sup> See NIEZEN, *supra* note 56, at 9 (finding that indigenous peoples have been successful in forming transnational networks that pool resources and strategize for purposes of identity-building and norm-generation).

issues faced by indigenous peoples. At such transnational conferences, indigenous communities and their leaders shared information regarding activities that affect their way of life, claims against states, and effective human rights advocacy strategies. Indigenous communities identified norms and values that could propel the recognition of a distinctive transnational indigenous identity and framework of rights responsive to their claims. They debated the appropriate scope of such transnational indigenous identity and the substance of such rights.

For example, in 1974, indigenous leaders from North America, Greenland, Colombia, Scandinavia, Australia, and New Zealand met at a conference in Guyana that prompted the World Council of Indigenous Peoples, one of the first indigenous NGOs with official U.N. consultative status.<sup>83</sup> The meeting consisted of determining details of the organization, such as the selection of delegates, accreditation of observers, and, saliently, the adoption of a definition of "indigenous peoples" for the purpose of determining delegate status at the proposed international conference.<sup>84</sup>

Subsequent significant conferences included the International Non-Governmental Organization Conference on Discrimination Against Indigenous Peoples of the Americas,<sup>85</sup> the Inuit Circumpolar Conference,<sup>86</sup> and the World Conference of Indigenous Peoples on Territory, Environment, and

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<sup>83</sup> See Douglas Sanders, *The Formation of the World Council of Indigenous Peoples*, IWGIA Doc. No. 29 (1980), available at <http://www.cwis.org/fwdp/International/wcipinfo.txt> (providing a comprehensive account of the development of the World Council of Indigenous Peoples).

<sup>84</sup> See generally Sanders, *supra* note 83.

<sup>85</sup> See Comm. on Human Rights, Study of the Problem of Discrimination Against Indigenous Populations, 34th Sess., U.N. Doc. E/CN.4/Sub.2/476/Add.5 (June 17, 1981) [hereinafter Declaration for Defense of Indigenous Nations] (proposal resulting from the conference). See generally Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 613-14 (1987).

<sup>86</sup> See ICC's *Beginning*, INUIT CIRCUMPOLAR COUNCIL, <http://inuitcircumpolar.com/section.php?ID=15&Lang=En&Nav=Section> (last visited Oct. 30, 2010) (describing the creation of the Inuit Circumpolar Council). See also Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231, 232 n.7 (2007) (discussing the ICC petition to the Inter-American Commission on Human Rights against the United States); *Inuit Circumpolar Council (ICC)*, INUIT CIRCUMPOLAR COUNCIL, [http://inuitcircumpolar.com/index.php?auto\\_slide=&ID=16&Lang=En&Parent\\_ID=&current\\_slide\\_num](http://inuitcircumpolar.com/index.php?auto_slide=&ID=16&Lang=En&Parent_ID=&current_slide_num) (last visited Oct. 30, 2010) (describing the goals and activities of the ICC).

Development.<sup>87</sup> The International Nongovernmental Organization Conference on Discrimination Against Indigenous Peoples of the Americas occurred in Geneva in 1977.<sup>88</sup> This conference constituted the first major meeting in which representatives of indigenous groups were provided “the opportunity to express their views in an international forum.”<sup>89</sup> The Conference served as a platform for the recognition of indigenous peoples under international law.<sup>90</sup> It ultimately resulted in the adoption of a “Draft Declaration of Principles for the Defense of Indigenous Nations and Peoples of the Western Hemisphere,” which was prepared by participating indigenous peoples.<sup>91</sup>

Furthermore, in June 1977, Eben Hopson, Mayor of the North Slope Borough, Alaska and Inuit advocate, hosted the first Inuit Circumpolar Conference (“ICC”), for the purpose of uniting Inuits from various countries.<sup>92</sup> At the conference, fifty-four delegates from Canada, Greenland, and Alaska agreed to found an organization to continue their collective work on an international basis.<sup>93</sup> The ICC has subsequently developed into a major international organization representing 150,000 Inuits from Alaska, Canada, Greenland, and Russia and holding Consultative Status II at the United Nations.<sup>94</sup>

Moreover, The World Conference of Indigenous Peoples on Territory, Environment and Development, commonly referred to as the Kari-Oca meeting, was held in the outlying area of Rio de Janeiro, Brazil in June 1992.<sup>95</sup> The Conference centered on the role of indigenous peoples as part of the global community in the twenty-first Century.<sup>96</sup> Delegates discussed and solidified

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<sup>87</sup> See Ingrid Washinawatok, *International Emergence: Twenty-One Years at the United Nations*, 3 N.Y. CITY L. REV. 41, 50 (1998) (describing the purpose and proceedings of the World Conference of Indigenous Peoples on Territory, Environment, and Development).

<sup>88</sup> See Kronowitz et al., *supra* note 85, at 613–14 (describing the conference and “Declaration on Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere” that resulted from the conference).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Declaration for Defense of Indigenous Nations, *supra* note 85.

<sup>92</sup> See *ICC's Beginning*, *supra* note 86 (describing the formation of the Inuit Circumpolar Council).

<sup>93</sup> *Id.*

<sup>94</sup> See generally *Inuit Circumpolar Council (ICC)*, *supra* note 86.

<sup>95</sup> Washinawatok, *supra* note 87, at 50.

<sup>96</sup> *Id.*

advocacy positions on a number of issues, including the use of nuclear material on indigenous lands, the destruction of indigenous ecosystems and natural resources, and the eradication of the principle of *terra nullius*.<sup>97</sup>

Likewise, NGOs created to study, investigate, and promote indigenous peoples' claims have also contributed to indigenous peoples' ability to participate, whether informally or formally, in international norm-building and decision-making processes. More specifically, indigenous peoples have assisted non-governmental organizations in the creation of reports regarding contemporary conditions of subordination, marginalization, and discrimination against indigenous communities in different parts of the world. They have further assisted such organizations in identifying indigenous norms and values that could serve as a platform for advocacy strategies that capitalize on the politics of difference for distinctive identity and rights recognition.

There are a number of NGOs dedicated to studying and investigating indigenous peoples' claims and violations of indigenous peoples' human rights, including among others, the International Working Group for Indigenous Affairs ("IWGIA")<sup>98</sup> and El Consejo Indio de Sud America ("CISA").<sup>99</sup> Established in 1968, IWGIA's mission is to endorse indigenous peoples' rights to self-determination, cultural integrity, and development based on indigenous peoples' own values.<sup>100</sup> One of the main undertakings of IWGIA is to ensure the promotion of indigenous issues and indigenous peoples' participation in international and regional forums.<sup>101</sup> CISA was founded in 1980 and possesses consultative

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<sup>97</sup> *Id.*

<sup>98</sup> See generally *IWGIA Mission Statement*, INT'L WORK GROUP FOR INDIGENOUS AFF., <http://www.iwgia.org/sw17673.asp> (last visited Oct. 30, 2010) [hereinafter *IWGIA Mission Statement*] (announcing, in its mission statement, the International Work Group for Indigenous Affairs' commitment to indigenous peoples' claims for self-determination).

<sup>99</sup> See *El Consejo Indio de Sud America*, PUEBLO INDIO, <http://www.puebloindio.org/CISA/cisa.htm> (last visited Oct. 30, 2010) [hereinafter *CISA*] (surveying CISA's work and commitment to ensuring the rights of indigenous peoples); see also Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 165 (1991) (describing CISA as one of "[t]he most vocal organizations" and briefly relating its operations "at the domestic, regional and international level . . . to further indigenous causes").

<sup>100</sup> See *IWGIA Mission Statement*, *supra* note 98 (stating that the International Work Group for Indigenous Affairs works to advance indigenous peoples' claims to self-determination).

<sup>101</sup> *Id.*

status with the U.N. Economic and Social Council.<sup>102</sup> CISA's mission is to promote respect for indigenous peoples' right to life, justice, development, peace, and autonomy.<sup>103</sup> To that end, CISA coordinates activities that promote the exchange of knowledge, experiences, and perspectives between indigenous peoples in order to improve their welfare.<sup>104</sup>

In turn, NGOs have the ability to participate in more formal norm-generation and decision-making forums. NGOs that possess consultative status with the U.N. Economic and Social Council are entitled to attend and contribute to a wide range of international and inter-governmental conferences that often involve human rights standard-setting.<sup>105</sup> While local indigenous communities may directly engage in more formal avenues of participation offered by United Nations institutional forums, NGOs also have the potential to engage such avenues. NGOs participate in the activities of the United Nations Permanent Forum on Indigenous Issues as well as specialized working groups aimed at standard-setting activities that impact indigenous peoples. NGOs also assist indigenous peoples in filing petitions before human rights treaty compliance bodies, including the Committee on Human Rights<sup>106</sup> and the Committee on the Elimination of Racial Discrimination.<sup>107</sup> Furthermore, NGOs have the ability to petition the Inter-American Commission on Human Rights.<sup>108</sup>

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<sup>102</sup> See generally *CISA*, *supra* note 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *NGO Branch*, U.N. DEP'T OF ECON. AND SOC. AFFAIRS (Oct. 30, 2010), <http://www.un.org/esa/coordination/ngo/> (explaining the process by which NGOs can attain consultative status with the U.N. Economic and Social Council).

<sup>106</sup> See Optional Protocol to the International Covenant on Civil and Political Rights art. 2, Dec. 16, 1996, 999 U.N.T.S. 302 ("Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.").

<sup>107</sup> See International Convention on the Elimination of All Forms of Racial Discrimination art. 14, Dec. 21, 1965, G.A. Res 2106A, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (granting individuals and groups the right to make claims against a state party to the Convention).

<sup>108</sup> See American Convention, *supra* note 76, art. 44 ("Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.").

In sum, through transnational conferences, leaders and representatives of indigenous communities have debated and solidified the creation of a transnational indigenous identity. They have additionally shared on-the-ground perspectives, identified core normative values shared by indigenous communities, and strategized routes for further advocacy. Moreover, indigenous peoples have contributed to NGOs' production of knowledge regarding the continued subordination and marginalization of indigenous communities and the design of advocacy strategies.

Indigenous peoples, whether independently as local communities or through engagement with NGOs, have additionally participated in international lawmaking through formal forums established by international organizations. Through their participation in these forums, indigenous peoples have contributed to the production of "hard" and "soft" international law regarding indigenous peoples' rights. While only hard law bears the emblem of binding authority, soft law nonetheless shapes an understanding of indigenous peoples' international rights.

With respect to the production of "hard law," indigenous peoples participated, albeit in a limited manner, in the International Labour Organization's ("ILO") design of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Although the ILO is not an international body strictly within the human rights regime, the ILO's work has impacted the recognition and development of indigenous peoples' human rights. In the context of "soft-law," indigenous peoples have contributed to the standard-setting work of the United Nations Permanent Forum on Indigenous Issues, United Nations working groups dedicated to addressing indigenous peoples' issues and rights, human rights treaty compliance bodies, and regional human rights commissions and courts.

As an initial matter, indigenous peoples played a limited participatory role in the constitution of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which revised ILO Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.<sup>109</sup> While the lack of avenues for indigenous peoples' meaningful participation

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<sup>109</sup> See RODRÍGUEZ-PIÑERO, *supra* note 5, at 291-331 (giving a thorough account of the processes leading to the revision of ILO Convention 107 and resulting in the creation of ILO Convention 169).

garnered much criticism, indigenous peoples' limited participation nevertheless constituted an unprecedented entry into the sphere of hard law-making. Additionally, although the crafting of ILO Convention 169 was plagued with controversy<sup>110</sup> and was initially perceived by a number of indigenous peoples and NGOs as a limiting document that failed to strongly reject racist policies toward indigenous peoples and to promote modern notions of self-determination, it remains a source of binding obligations on states regarding their treatment of indigenous peoples. Despite the controversy surrounding its creation,<sup>111</sup> ILO Convention 169 has come to be regarded as a document reflecting the progression from the assimilationist and integrationist policies represented in ILO Convention 107.

Even though at the time such revision process was undertaken there was already a robust, transnational indigenous peoples movement and the United Nations Working Group on Indigenous Populations had been established, indigenous peoples' participation in the crafting of ILO Convention 169 was constrained. Significantly, the structure of the ILO's decision-making process did not account for the involvement of non-state actors other than employers and workers.<sup>112</sup> Moreover, because the revision process was largely driven by the ILO's desire to remain in an international leadership role regarding indigenous peoples' affairs,<sup>113</sup> "there was never a perception that serious consensus-building with the international indigenous movement concerning the need (or scope) of the revision was required."<sup>114</sup>

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<sup>110</sup> See *id.* at 291 ("Issues concerning the ILO's legitimacy in retaking the lead in international action on indigenous peoples and the participation of indigenous peoples themselves in this process, constitute[d] the convention's 'original sin,' which explains many of the complex reactions that the instrument still engenders.").

<sup>111</sup> See Robin M. Maher & David Weissbrodt, *The 41st Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 12 HUM. RTS. Q. 290, 323 (1990) (describing indigenous peoples' controversial exit from a meeting of the U.N. Working Group on Indigenous Populations in response to the introduction of ILO Convention 169 by the ILO representative).

<sup>112</sup> See RODRÍGUEZ-PIÑERO, *supra* note 5, at 312 (emphasizing that the institutional culture of the ILO limited the participation of non-governmental actors to its constituents). Interestingly, the ILO is the only international organization that possesses a tripartite governance structure consisting of states and non-state actors, namely, employers and workers. *Id.*

<sup>113</sup> See *id.* at 293 (discussing the ILO's strategy to preserve its sphere of influence as an international leader).

<sup>114</sup> *Id.* at 313.

Nevertheless, during the drafting of ILO Convention 169 from 1986–1989, some indigenous peoples' organizations were permitted to participate indirectly through the attainment of "observer status," and indigenous peoples also participated directly in discussions either as representatives of employers' or workers' organizations.<sup>115</sup>

More specifically, the first forum of discussion for revisions to ILO Convention 107 occurred in a 1986 Meeting of Experts.<sup>116</sup> While this meeting produced a consensus that the overarching integrationist policy of ILO Convention 107 should be rejected, it failed to produce an alternate overarching policy for guiding the revision process culminating in ILO Convention 169.<sup>117</sup> A representative from the World Council of Indigenous Peoples and a representative from Survival International, international NGOs advocating on behalf of indigenous peoples, were invited to participate in the meeting as observers.<sup>118</sup> Those representatives proposed that self-determination should serve as an umbrella principle for the elaboration of particularized rights in ILO Convention 169.<sup>119</sup> While the experts present at the meeting agreed with the indigenous peoples' representatives, the ILO Secretariat ultimately considered a discussion of self-determination outside the scope of the "technical" revision process.<sup>120</sup> This meeting engendered controversy regarding the limited channels of participation, and impact of, indigenous peoples in the development of ILO Convention 169. It ultimately concluded with a request that the ILO "take all possible measures to ensure the participation of indigenous and tribal representatives in the process leading to the revision of . . . Convention [No 107]."<sup>121</sup>

Thereafter, efforts included attendance by the ILO official responsible for the revision process at the U.N. Working Group on

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<sup>115</sup> *Id.* at 314–16.

<sup>116</sup> *Id.* at 295.

<sup>117</sup> *See id.* at 296–97. Rather, the ILO revision processes drew mainly from the discourse of development "with its emphasis on 'participatory development' or 'ethnodevelopment.'" *Id.* at 299.

<sup>118</sup> *Id.* at 313 n.118.

<sup>119</sup> *Id.* at 296.

<sup>120</sup> *Id.* at 293. Rodriguez-Piñero proposes that "[i]n this way, the eventual UN Declaration on indigenous rights should articulate the 'highest ideals and maximum aspirations of indigenous peoples,' while the ILO had a 'more technical but no less important task.'" *Id.*

<sup>121</sup> *Id.* at 314.

Indigenous Populations' annual sessions and the granting of "observer status" to several NGOs representative of indigenous peoples' interests.<sup>122</sup> While the ILO official encouraged indigenous peoples to support the revision process during the U.N. Working Group's annual sessions, there was not a meaningful consultation process with indigenous peoples regarding the substantive scope of the revisions.<sup>123</sup> The most significant form of participation by indigenous peoples occurred indirectly through the involvement of several NGOs that were granted "observer status" at various ILO meetings and conferences.<sup>124</sup> Even this form of participation, however, "provide[d] a 'limited opportunity . . . to consult directly the representatives [of] the groups concerned.'"<sup>125</sup> The ILO Office did circulate written comments from indigenous peoples' organizations during Conference sessions and indigenous peoples' concerns and demands were reflected in various comments submitted by governments or workers in response to the Office's preparatory questionnaire.<sup>126</sup> Nevertheless, while indigenous peoples' participation in the revision of ILO Convention 107 occurred within the existing structural and procedural constraints of the ILO framework, "the level of participation allowed in the drafting of a legally-binding convention has been unmatched . . ."<sup>127</sup>

Ultimately, scholars have proposed that core normative precepts expressed in ILO Convention 169 reflect a crystallization of customary international law regarding indigenous peoples' rights,<sup>128</sup> and the Convention has been referenced in this context by the Inter-American Court of Human Rights.<sup>129</sup> Indeed, despite its controversial origins, ILO Convention 169 became a catalyst for

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<sup>122</sup> *Id.* at 313.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 314.

<sup>125</sup> *Id.* at 315.

<sup>126</sup> *Id.* at 316.

<sup>127</sup> *Id.* at 319.

<sup>128</sup> See Anaya, *supra* note 77, at 9-10; Anaya & Williams, *supra* note 38, at 53-54.

<sup>129</sup> See *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni Case*] (referencing the precepts found in ILO Convention 169 as significant to interpreting the scope and meaning of the term "property" in the American Convention).

legislative and constitutional reforms in ratifying states<sup>130</sup> as well as for further developments regarding a body of customary international law specific to indigenous peoples.

Second, indigenous peoples have also contributed to the production of "soft" international law through advocacy before formal, institutional bodies charged with norm-generation and decision-making. Specifically, they have channeled their contributions through advocacy before United Nations institutional bodies, human rights treaty compliance bodies, and human rights commissions and courts. Advocacy before these bodies has enabled indigenous peoples to draw upon and upload the knowledge produced by transnational networks and NGOs regarding indigenous peoples' subordination, marginalization, and discrimination as well as the core normative precepts and values arguably representative of indigenous distinctiveness.

For example, indigenous peoples have participated in United Nations institutional forums such as the United Nations Permanent Forum on Indigenous Issues and the United Nations Working Group on Indigenous Populations. In 2000, the United Nations Permanent Forum on Indigenous Issues was established to give indigenous peoples a greater voice within the U.N. system.<sup>131</sup> The Permanent Forum is composed of sixteen members with expertise on indigenous issues, eight of which are nominated by governments and elected by the United Nations Economic and Social Council ("ECOSOC"), and eight of which are appointed by ECOSOC on the basis of consultation with indigenous peoples' organizations.<sup>132</sup> The eight members appointed by ECOSOC on the

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<sup>130</sup> See RODRÍGUEZ-PINERO, *supra* note 5, at 325-28 (discussing the importance of ILO Convention 169 in the development of both domestic and international laws and practices that recognize the rights of indigenous peoples).

<sup>131</sup> See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 53-54 (2004) ("The U.N. Permanent Forum on Indigenous Issues, which was established to give indigenous peoples a greater voice within the U.N. system, and which is constituted in part by indigenous persons, is now perhaps the principle manifestation of general acceptance of indigenous participation within relevant international spheres."); *About Us/Mandate*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, [http://www.un.org/esa/socdev/unpfii/en/about\\_us.html](http://www.un.org/esa/socdev/unpfii/en/about_us.html) (last visited Oct. 30, 2010) (describing the purpose and role of the Permanent Forum and the group's mandate).

<sup>132</sup> Establishment of a Permanent Forum on Indigenous Issues, E.S.C. Res. 2000/22, U.N. Doc. E/RES/2000/22 (July 28, 2000), available at <http://www.un-documents.net/e2000r22.htm>. More specifically, in determining which eight members should be appointed by ECOSOC on the basis of consultation with

basis of consultation with indigenous peoples' organizations represent the following seven socio-cultural regions: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, the Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific—with one additional rotating seat among the three first listed above.<sup>133</sup> Accordingly, indigenous peoples are broadly represented and possess permanent and official participation capabilities.

More specifically, the Permanent Forum on Indigenous Issues is involved in the following activities: (1) discussing indigenous issues within the mandate of ECOSOC relating to economic and social development, culture, environment, education, health and human rights; (2) giving advice to ECOSOC on economic and social issues as they relate to indigenous peoples; (3) coordinating, as part of the United Nations Department of Economic and Social Affairs, the implementation of the Second Decade of the World's Indigenous Peoples; (4) organizing expert meetings as approved by ECOSOC; and (5) submitting annual reports to ECOSOC including recommendations and matters for consideration by the United Nations system.<sup>134</sup>

In an effort to discuss indigenous issues, the Permanent Forum holds an annual conference each year during which input on thematic topics related to indigenous peoples' concerns and rights is received from indigenous participants.<sup>135</sup> Through such gatherings, indigenous peoples and their representative bodies have had opportunities to share their local experiences and to advocate for redress. These annual conferences culminate in a report that is presented to ECOSOC. Therefore, through its activities, the Permanent Forum raises awareness of indigenous

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indigenous peoples' organizations, ECOSOC takes into account "the diversity and geographical distribution of the indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all indigenous people, including internal processes, when appropriate, and local indigenous consultation processes . . ." *Id.* para. 1.

<sup>133</sup> *Structure within ECOSOC*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/structure.html> (last visited Oct. 30, 2010).

<sup>134</sup> *Matrix on United Nations Mechanisms and Bodies on Indigenous Peoples*, U.N. ECON. & SOC. COUNCIL, HUMAN RIGHTS COUNCIL, Dec. 6–7, 2007, U.N. Doc. IMWGIP/2007/CRP.1 (2007), available at <http://www2.ohchr.org/english/issues/indigenous/docs/informal/crp-1-e.doc>. [hereinafter *U.N. Matrix*].

<sup>135</sup> See Coulter, *International Human Rights Mechanisms*, *supra* note 13, at 578–79.

issues and offers avenues for norm-generation regarding transnational indigenous identity and indigenous rights.<sup>136</sup>

The Working Group on Indigenous Populations, which was established in 1982 as a subsidiary body of ECOSOC and abolished in 2007, performed the mandate of dealing exclusively with problems concerning observance of indigenous peoples' rights around the world.<sup>137</sup> During its existence, the Working Group on Indigenous Populations:

[P]repared thematic studies on indigenous peoples' human rights . . . discussed contemporary human rights issues relating to indigenous peoples . . . presented annual report to [the former Sub-Commission on Human Rights] summarizing discussions and making recommendations . . . [and] elaborated standards and guidelines in particular the draft of the United Nations Declaration on the Rights of Indigenous Peoples[.]<sup>138</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> See *Working Group on Indigenous Populations*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm> (last visited Oct. 30, 2010) (outlining the resolutions and actions of the Working Group). More specifically, the Working Group on Indigenous Populations was charged with "reviewing developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations" and giving "special attention to the evolution of standards concerning the rights of indigenous populations [while] taking into account . . . both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world." *U.N. Matrix, supra* note 134. The Working Group on Indigenous Populations "became directionless" after the establishment of the Permanent Forum on Indigenous Issues in 2002 and, therefore, was abolished in 2007. *Informal Meeting to Discuss the Most Appropriate Mechanisms to Continue the Work of the Working Group on Indigenous Populations*, U.N. ECON. & SOC. COUNCIL, HUMAN RIGHTS COUNCIL, Dec. 6-7, 2007, U.N. Doc. No. IMWGIP/2007/CRP.9 (2007), available at <http://www2.ohchr.org/english/issues/indigenous/docs/informal/crp.9.doc>.

<sup>138</sup> *U.N. Matrix, supra* note 134. For an overview of the procedures enabling the participation of indigenous peoples' organizations in the Working Group's elaboration of the Declaration on the Rights of Indigenous Peoples, see Programme of Activities for the International Decade of the World's Indigenous People, G.A. Res. 50/157, Annex pt. B, U.N. Doc. A/RES/50/157 (Feb. 29, 1996), available at <http://www.un.org/documents/ga/res/50/ares50-157.htm>. Ultimately, through their participation in the Working Group, more than 100 indigenous organizations participated in the Declaration's drafting process. See generally *About UNPFII*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/history.html> (last visited Oct. 30, 2010).

Although the participation of indigenous peoples was restricted to an informal consultative status and limited to representatives of indigenous NGOs, the Working Group actively solicited the participation of indigenous peoples' representatives in their information-seeking, policy-shaping, and standard-setting work.<sup>139</sup> The annual sessions of the Working Group functioned as an open forum that enabled indigenous peoples to present their grievances against national governments and to participate, even if only indirectly, in the Working Group's development of standards specific to indigenous peoples.<sup>140</sup> Prior to being abolished, the Working Group prompted the General Assembly to adopt a resolution in January of 2005 for the commencement of the "Second International Decade of the World's Indigenous Peoples."<sup>141</sup> This resolution specifically encourages indigenous peoples' further participation in designing the substantive content

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<sup>139</sup> Official membership in the Working Group was limited to five human rights experts that were members of the former Sub-Commission on Human Rights. See Lâm, *supra* note 13, at 620 ("Culturally, socially, and professionally, Working Group members generally [had] far more in common with representatives of states and NGOs than they [did] with indigenous spokespersons. For example, not a single indigenous lawyer, [despite the fact that] there [were] many the U.N. could have chosen, s[a]t on the Working Group."). However, governments, United Nations bodies, non-governmental organizations, and representatives of indigenous peoples, communities, and organizations were granted observer status. U.N. Matrix, *supra* note 134. Indigenous peoples' participation in the Working Group was most evident through the drafting process of the Declaration on the Rights of Indigenous Peoples. Erica-Irene A. Daes, Chairperson/Rapporteur of the Working Group, described how the legislative history of the Draft Declaration demonstrated the "important and substantive contributions . . . made by indigenous people themselves . . . . The drafts of principles . . . were circulated to indigenous peoples and governments for written comments and suggestions each year from 1989 to 1992." Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations-Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 494-99 (1995).

<sup>140</sup> As a means of fostering the participation of indigenous peoples at such annual sessions, the Working Group established a fund to subsidize the costs of attendance by indigenous peoples' representatives. See U.N. Secretary-General, *United Nations Voluntary Fund for Indigenous Populations*, Rep. of the Econ. and Soc. Council, U.N. Doc. A/43/706, para. 2 (Oct. 14, 1988) (depicting the makeup of the Voluntary Fund for Indigenous Populations, as well as its board, method for raising funds, and the funds received).

<sup>141</sup> See generally U.N. Secretary-General, *Draft Programme of Action for the Second International Decade of the World's Indigenous Peoples: Rep. of the Secretary-General*, U.N. Doc. A/60/270 (Aug. 18, 2005).

of international law and in decision-making processes that directly, or indirectly, impact their way of life.<sup>142</sup>

The most recent standard-setting document, the United Nations Declaration on the Rights of Indigenous Peoples, represents over twenty years of work that began in the United Nations Working Group on Indigenous Populations in 1985 and was subsequently concluded by the Working Group on the U.N. Declaration on the Rights of Indigenous Peoples.<sup>143</sup> Notably, during the drafting process, draft principles and working papers were circulated to indigenous peoples and governments for

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<sup>142</sup> Specifically, the Secretary-General's draft programme of action provides:

The five objectives suggested for the Decade are as follows: (i) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects; (ii) Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.

*Id.* para. 9 (emphasis added).

It is recommended that cooperation be developed with the Working Group on the Rights of Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples' Rights with a view to increasing the participation of indigenous peoples from Africa in the implementation of the Second Decade Programme of Action and to enhancing the understanding of indigenous issues in Africa.

*Id.* para. 48.

It is recommended that Governments should support and broaden the mandate of existing national machineries for the promotion of equal rights and prevention of discrimination, so that they will include promotion of the rights of indigenous peoples. Legal centres could be established by national authorities to inform and assist indigenous people regarding national and international legislation on human rights and fundamental freedoms, to carry out activities for protecting those rights and freedoms and to promote the capacity-building and participation of indigenous peoples.

*Id.* para. 55.

It is recommended that programmes and projects planned on traditional indigenous territories or otherwise affecting the situation of indigenous peoples should foresee and respect the full and meaningful participation of indigenous peoples.

*Id.* para. 62.

<sup>143</sup> See generally UNDRIP, *supra* note 65.

written comments and suggestions.<sup>144</sup> These working groups actively solicited the participation of indigenous peoples in the drafting of the U.N. Declaration on the Rights of Indigenous Peoples. The former chairperson of the Working Group on Indigenous Populations hailed the “substantive contributions made by indigenous peoples” because, through every step of its development, indigenous peoples were deeply involved in discussions and negotiations with states.<sup>145</sup> The Declaration serves a bill of rights for indigenous peoples and covers rights related to the preservation of cultural identity,<sup>146</sup> the protection of traditional lands and resources,<sup>147</sup> and the right to pursue development in keeping with a community’s own needs and aspirations.<sup>148</sup>

Furthermore, indigenous peoples have shared their normative perspectives with human rights treaty compliance bodies such as the Committee on the Elimination of Racial Discrimination and the Human Rights Committee. For example, indigenous organizations have been given the opportunity to submit written reports and to present short formal briefings to the Human Rights Committee as a means of assisting the Committee in its review of state compliance.<sup>149</sup> Indigenous peoples have also engaged complaint procedures when available, and through such advocacy, have contributed to the Committee’s nuanced interpretation of rights in the context of indigenous claims.<sup>150</sup>

Moreover, indigenous peoples have shared their normative perspectives with the Inter-American Commission and Court. They have sought recourse before these bodies, and through their advocacy, have contributed to the development of jurisprudence that specifically addresses indigenous claims.<sup>151</sup>

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<sup>144</sup> Daes, *supra* note 139, at 494–99.

<sup>145</sup> *Id.*

<sup>146</sup> *E.g.*, UNDRIP, *supra* note 65, arts. 8, 9, 11–16, 31, 33–35.

<sup>147</sup> *E.g.*, *id.* arts. 8(2)(b), 10, 25, 26, 27, 28, 29(1)–(2), 30, 32.

<sup>148</sup> *E.g.*, *id.* arts. 3, 4, 18, 19, 20, 23, 32.

<sup>149</sup> Coulter, *International Human Rights Mechanisms*, *supra* note 13, at 581.

<sup>150</sup> *See, e.g.*, *Länsmann v. Finland*, Views, Human Rights Comm., 52d Sess., No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Views, Human Rights Comm., 38th Sess., No. 267/1984, U.N. GOAR, 45th Sess., Supp. No. 40, (Vol. 2), U.N. Doc. A/45/40, Annex IX (1990); *Lovelace v. Canada*, Views, Human Rights Comm., No. 24/1977, U.N. GOAR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, Annex XVIII, at 166 (1981).

<sup>151</sup> *See, e.g.*, *Aboriginal Cmty. of Lhaka Honhat v. Argentina*, Petition 12.094, Inter-Am. Comm’n H.R., Report No. 78/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1

### 3.4. Contributions to the Design of a Transnational Indigenous Identity and the Substantive Contours of Indigenous Rights

Through participation in such informal and formal norm-building and decision-making processes, indigenous peoples have contributed to the substantive design of the legal category "indigenous peoples" and to the creation of a well-established body of international human rights specific to indigenous peoples. These processes have offered indigenous peoples opportunities to share on-the-ground experiences and to articulate norms and values that highlight distinctive attributes of their communities—such as norms of communal association and existence, as well as norms of cultural and religious ties to ancestral lands and resources. Indigenous peoples have been able to engage in an uploading of such norms as a means of triggering, and reformulating, the application of human rights.

First, indigenous peoples' substantive contributions are evident with respect to the legal category termed "indigenous peoples." Indigenous peoples needed to create a transnational legal identity in order to trigger the recognition or application of particularized rights. Of course, just like any legal category capable of redistributing political or economic capital, the substantive scope of such category was not produced without controversy.<sup>152</sup>

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(2007), available at <http://www.cidh.org/annualrep/2006eng/ARGENTINA.12094eng.htm>; *Cmtys. in Alcantara v. Brazil*, Petition 555-01, Inter-Am. Comm'n H.R. Report No. 83/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2007), available at <http://www.cidh.org/annualrep/2006eng/BRAZIL.555.01eng.htm>; *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R. Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/USA.11140.htm>; *Enxet-Lâmenxay & Kayleyphapopyet (Riachito) Indigenous Cmtys. v. Paraguay*, Case 11.713, Inter-Am. Comm'n H.R., Report No. 90/99, OEA/Ser.L./V/II.106, doc. 6 (1999), available at <http://www.cidh.org/annualrep/99eng/Friendly/Paraguay11.713.htm>; *Garifuna Cmty. of Cayos Cochinos v. Honduras*, Petition 1118-03, Inter-Am. Comm'n H.R., Report No. 39/07, OEA/Ser.L./V/II.130, doc. 22 rev. 1 (2007), available at <http://www.cidh.org/annualrep/2007eng/Honduras1118.03eng.htm>; *The Kalina & Lokono Peoples v. Suriname*, Petition 198-07, Inter-Am. Comm'n H.R., Report No. 39/07, OEA/Ser.L./V/II.130, doc. 22 rev. 1 (2007), available at <http://www.cidh.org/annualrep/2007eng/Suriname198.07eng.htm>; *Yanomami v. Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

<sup>152</sup> See generally Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998) (discussing definitions of "indigenous peoples" found in texts by the U.N., ILO, and the World Bank and analyzing whether the legal category of "indigenous

Pressing questions arose: Who exactly could be considered “indigenous?” Who exactly could be considered a distinct “people?” Could a collective identity be the source of collective rights? The construction of a transnational indigenous peoples’ identity ultimately reflects a recognition of inherent difference from dominant religious, cultural, political, and associational structures.<sup>153</sup> Indeed, claims by indigenous peoples that are tied to

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peoples” should apply in the context of Asia); Will Kymlicka, *The Internationalization of Minority Rights*, 6 INT’L J. CONST. L. 1 (2008) (describing the U.N.’s distinction between minorities and indigenous peoples and noting that the U.N. views the “crucial feature of indigenous peoples, which distinguishes them from minorities in general, [as] their strong attachment to a traditional territory that they view as their historic homeland”); Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT’L L. 55 (2003) (describing varying definitions of “indigeneity,” including: first occupancy, which defines “indigenous peoples” as “the descendants of the first human inhabitants of a land,” and prior occupancy, which defines “indigenous peoples” as the “descendants of those who inhabited the land at the time of European colonization”). The scope and impact of an “indigenous peoples” category under international law continues to be debated. See John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT’L L. 185, 211–13 (2007) (describing the objections of the United States, Australia, and New Zealand to the U.N. Declaration on the Rights of Indigenous Peoples, particularly the absence of a “scope of application” or definition of “indigenous peoples,” since “separatist or minority groups, with traditional connections to the territory where they live—in all regions of the globe—could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources”).

<sup>153</sup> See RODRÍGUEZ-PIÑERO, *supra* note 5, at 340. Luis Rodríguez-Piñero has instructively observed the following regarding the development of an “indigenous peoples” category under international law:

[T]he ‘anthropological’ definition of indigenusness articulated in the 1957 ILO instruments has, ironically, the virtue of putting the emphasis on the cultural distinctiveness of indigenous societies and the maintenance of their social, legal, and political institutions as the fundamental defining criterion, and depicting history as a relevant factor in explaining indigenous peoples’ distinctiveness *vis-à-vis* the dominant societies now encapsulating them—but not as the ultimate source of indigenous rights . . .

Indigenous peoples thus emerged in modern international law as a result of their subjectivization by social sciences. But this subjectivization provided the conditions for the possible re-appropriation of this category as a vehicle of resistance for the subjects it constructed. In this respect, the emergence of the modern regime on indigenous rights was the result of the increasing mobilization of the international indigenous movement constituting a privileged example of what Foucault conceptualized as the ‘tactical polyvalence of discourses’: namely, the turning of a disciplining discourse into a liberating discourse by the same social groups subject to and constructed by that disciplining.

religious, cultural, political, and associational differences have become more commonplace than claims of geographical difference.<sup>154</sup>

Indigenous peoples have contributed to this legal category in three primary ways: (1) determining the substantive scope of the term "indigenous"; (2) determining the substantive scope of the term "peoples"; and (3) perpetuating an open-ended meaning rather than a specifically tailored definition. The suggestion here is that there has been a significant appropriation of meaning by indigenous peoples themselves. Certainly, the particularities of such appropriation by indigenous peoples are not devoid of debate or lack of consensus.

This referential category became a salient part of international discourse during the 1980s.<sup>155</sup> Through their participation in norm-generating and decision-making processes, indigenous peoples appropriated the term "indigenous" as a means of distinguishing their claims from those of groups that could be classified under international law as "minorities."<sup>156</sup> The acknowledgement and endurance of the term "indigenous" reflects an incorporation of indigenous communities' core normative precepts. It strategically marks differences between groups that could be considered "indigenous" and other groups that may bear similar indicia of colonization, subordination, and marginalization.<sup>157</sup> The difference marker is an asserted distinctiveness in terms of religious, cultural, political, and associational structures.<sup>158</sup> In particular, such

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*Id.*

<sup>154</sup> See NIEZEN, *supra* note 56, at 6. Beyond its existence as a constructed legal category, the term "indigenous peoples" does have traction as a reference point and symbol for indigenous communities with respect to their shared experiences.

Today, the term is both a fragile legal concept and the indefinite, unachievable sum of the historical and personal experiences of those gathered in a room who share, at the very least, the notion that they have all been oppressed in similar ways for similar motives by similar state and corporate entities.

*Id.* at 4.

<sup>155</sup> *Id.* at 2-3.

<sup>156</sup> See Kymlicka, *supra* note 152, at 4 (referencing the U.N. Working Group on Minorities and Working Group on Indigenous Populations' explanation that "indigenous peoples," as opposed to "minorities," seek "institutional separateness," the assertion of "collective rights," and "self-government").

<sup>157</sup> *Id.*

distinctiveness is highlighted in the context of indigenous peoples' communal, religious, and cultural ties to their ancestral lands and resources.<sup>159</sup>

Through their participation, indigenous peoples have also appropriated the term "peoples." During the ILO process of revising ILO Convention 107, state representatives particularly contested references to the term "peoples."<sup>160</sup> However, during the drafting of ILO Convention 169, indigenous peoples advocated for use of the term "peoples" versus "populations" because the term "peoples" represented a sense of collective identity shared by such communities.<sup>161</sup> State governments, however, objected to the term "peoples" because it was tied to the concept of self-determination under the international law of decolonization, which allowed for independent statehood.<sup>162</sup> In the context of ILO Convention 169, the debate resulted in compromise: the term "peoples" was adopted with the caveat that it would not trigger the rights traditionally accorded to "peoples" under international law.<sup>163</sup>

Nevertheless, use of the term "peoples" today reflects the original intent of many indigenous advocates: it reflects core

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<sup>158</sup> See also Amelia Cook & Jeremy Sarkin, *Who is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93, 106 (2009) (noting that while defining who constitutes indigenous peoples is a complex and difficult question, common usage generally refers to a subset of culturally distinct persons who share a similar background, religion, sense of kinship and ties to ancestral lands).

<sup>159</sup> See Kymlicka, *supra* note 152, at 4 (quoting Erica-Irene Daes's description of the "ideal" indigenous group as one that is aboriginal to the land they currently occupy, perpetuating a distinct cultural, social, and political identity); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/2000/10 (July 19, 2000) (prepared by Asbjorn Eide & Erica-Irene Daes), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2000.10.En?Opendocument> (asserting that "rights to land and natural resources" are "core elements" in defining the rights of "indigenous peoples," whereas they do not pertain to "minorities").

<sup>160</sup> See ANAYA, *supra* note 4, at 59-60 (noting that state governments contested using the term "peoples" to identify the beneficiaries of ILO Convention No. 169 because of its connection with the doctrine of self-determination under international law, "which in turn has been associated with a right of independent statehood").

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See RODRÍGUEZ-PINERO, *supra* note 5, at 317 (noting that "sensitive issues such as the compromise over the term 'peoples' . . . were negotiated in private, in closed-door sessions from which indigenous representatives were barred").

normative values of collective identity and continued communal existence and survival. The substantive scope of the term has been differentiated from its remedial prescriptions under the international law of decolonization: constituting an indigenous "peoples" need not necessarily effectuate the remedial prescription of independent statehood.<sup>164</sup> Rather, an indigenous community may exercise self-determination collectively as a matter of human rights. In this context, the exercise of self-determination is much more fluid and context-specific; it ranges from the exercise of internal, communal decision-making to territorial secession.<sup>165</sup> What is ultimately being protected through the right to self-determination is indigenous peoples' way of life, including the range of indigenous peoples' religious, cultural, political, and associational orders and practices.

Finally, indigenous peoples have advocated for purposeful ambiguity in the application of the "indigenous peoples" category.<sup>166</sup> Whether the category should be subject to a tailored definition that specifies circumstances of applicability has been the subject of debate.<sup>167</sup> Some indigenous advocates have proposed that leaving the category purposefully ambiguous reflects indigenous peoples' communal ability to self-identify and preserves respect for such determinations.<sup>168</sup> Ultimately, reference to the contemporary "indigenous peoples" category presently appears in binding conventions,<sup>169</sup> standard-setting documents,<sup>170</sup>

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<sup>164</sup> See ANAYA, *supra* note 4, at 60 (discussing the comprise to use the term "peoples" to indentify the beneficiaries of ILO Convention 169 with the caveat that a provision be added so that such term would not confer a right of independent statehood).

<sup>165</sup> See *generally id.* at 97-184 (discussing the principle of self-determination).

<sup>166</sup> See NIEZEN, *supra* note 56, at 18 (proposing that "[i]ndigenous delegates to international meetings have often expressed the idea that a precise, legal definition of the term 'indigenous' would impose standards or conditions for participation in human rights processes that would be prejudicial to their interests").

<sup>167</sup> See Wiessner, *supra* note 38, at 110-15 (discussing the debate over whether the category "indigenous people" should reflect a more flexible standard and if the absence of a formal definition is desirable); Karin Lehmann, *To Define or To Not Define – The Definitional Debate Revisited*, 31 AM. INDIAN L. REV. 509 (2007) (presenting the arguments for and against creating a definition, and examining the difficulties inherent in the process of defining "indigenous peoples").

<sup>168</sup> See ANAYA, *supra* note 4, at 60 (noting that use of the term "peoples" did not "limit the meaning of the term") (internal quotation marks omitted).

<sup>169</sup> See, e.g., ILO Convention 169, *supra* note 54, at 1384, pmbl. ("Considering . . . developments in the situation of indigenous and tribal peoples

reports of various human rights treaty compliance bodies,<sup>171</sup> and in the decisions of the Inter-American Commission on Human Rights<sup>172</sup> and the Inter-American Court of Human Rights.<sup>173</sup> Whether in these or additional documents, the term bears indicia of what indigenous peoples have identified as their own core norms and values. It serves as a point of departure for the triggering of indigenous peoples' human rights.

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in all regions of the world . . . and . . . [r]ecognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development . . .").

<sup>170</sup> See, e.g., Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. Comm'n H.R., 1333rd mtg., 95th sess., OEA/Ser.L/V/II.95, doc. 6 (1997), available at <http://www.cidh.org/annualrep/96eng/chap.4.htm> (revising the scope of the declaration to indigenous peoples); UNDRIP, *supra* note 65, pmbl. (recognizing and reaffirming "the urgent need to respect and promote the inherent rights of indigenous peoples"). For a current record of the status of the Proposed American Declaration on the Rights of Indigenous Peoples, see *Working Group to Prepare the Draft American Declaration on the Rights of Indigenous People*, PERM. COUNCIL OF THE ORG. OF AM. STATES, <http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp> (last visited Oct. 30, 2010).

<sup>171</sup> See, e.g., U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People, 14th sess., July 29–Aug. 2, 1996, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (recommending that a fair-minded body be entrusted to implement a declaration of indigenous peoples' rights); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People – New Developments and General Discussion of Future Action, 13th sess., July 24–28, 1995, U.N. Doc. E/CN.4/Sub.2/AC.4/1995/3 (June 21, 1995) (noting that "historically speaking, indigenous peoples have suffered from definitions imposed by others" and providing that the objective and subjective criteria identified by Martinez Cobo in his Study of the Problem of Discrimination Against Indigenous Populations, "are sufficient to determine whether a person or a community is indigenous or not"); Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals and Recommendations*, para. 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (March 1987) (by José R. Martínez Cobo) (providing a preliminary, working analysis of the concept of indigenous peoples and commenting that "[i]ndigenous communities, peoples and nations are those which [have] a historical continuity with pre-invasion and pre-colonial societies that developed on their territories").

<sup>172</sup> See, e.g., cases cited *supra* note 151 (citing various petitions by indigenous peoples to the Inter-American Commission on Human Rights).

<sup>173</sup> See generally *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (involving a petition by indigenous communities to enjoin construction and logging "exploitation" on indigenous lands).

Second, indigenous peoples have also contributed substantively to the creation of a well-established body of indigenous peoples' international human rights. Indigenous peoples have been able to translate contemporary claims into human rights through their engagement of human rights discourse.<sup>174</sup> They have participated in informal and formal norm-generating and decision-making processes that impact the substantive contours of human rights.<sup>175</sup>

More specifically, there are two related veins in which an acknowledgement of indigenous peoples' distinctiveness serves to translate indigenous peoples' claims into human rights. In one vein, indigenous peoples' distinctive attributes are joined with precepts of non-discrimination as a basis for recognizing indigenous peoples' rights to self-determination and other rights necessary to otherwise protect the survival and flourishing of indigenous peoples' way of life.<sup>176</sup> Examples of such particularized rights include rights to maintain religious and cultural traditions, rights to maintain distinct governance structures, and rights to maintain distinct associational structures. In a related vein, indigenous peoples' distinctiveness also serves as a basis for recognizing their rights to traditional lands and resources.<sup>177</sup> Certainly, indigenous peoples' ability to own, occupy, control, and use their traditional lands and resources may protect the survival and flourishing of their way of life. However, indigenous peoples' claims of distinctiveness in this vein also serve as a basis for independently recognizing indigenous peoples' ability to own, occupy, control, and use their traditional lands and resources.

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<sup>174</sup> See *supra* notes 73–79 and accompanying text (recounting how indigenous peoples have utilized human rights as a platform for their claims).

<sup>175</sup> See *supra* Part 3.3 (providing evidence of indigenous peoples' participation in the creation of "hard" and "soft" law).

<sup>176</sup> See Anaya, *supra* note 77, at 29–38 (applying the universal right of self-determination to indigenous peoples and noting that many states have "resisted an express association of the term 'self-determination' with indigenous peoples in standard-setting exercises in the U.N. and ILO"); Iorns, *supra* note 77, at 289, 306–07 (analyzing the status of indigenous peoples according to positive international law and the implications of both the instrumental and inherent theories of self-determination).

<sup>177</sup> See Anaya, *supra* note 69, at 240–43 (suggesting that human rights arguments and accounts of "illegitimate wresting of historical sovereignty" have ultimately "forge[d] an understanding that indigenous peoples have suffered, not just discrete episodic acts of neglect or even brutality by state actors, but also more systemic oppression as a result of state institutional arrangements that have been imposed on them and have failed to accommodate their cultural patterns").

Because indigenous peoples have identified a distinctive communal, cultural, and spiritual relationship with the land they have occupied since time immemorial, they possess a human right to own, occupy, control, and use such land and its resources.

Particularly in this latter vein, where indigenous peoples' distinctiveness serves as a basis for the recognition of their human right to communally own, occupy, control, and use traditional lands and resources, grafting of the core normative precepts identified by indigenous peoples into human rights law is evident. A stark example of indigenous peoples' strategic identification of core normative precepts and uploads of such precepts into international human rights law is present in the decisions emanating from the Inter-American Commission on Human Rights and Inter-American Court of Human Rights regarding indigenous peoples' human right to property.<sup>178</sup> These bodies have asserted that, when applied to indigenous peoples, both substantive and procedural aspects of the human right to property must be based on the recognition of indigenous peoples' own land tenure systems.

For example, in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights found that Nicaragua violated the rights of the Awas Tingni to use and enjoyment of their property under Article 21 of the American Convention by "grant[ing] concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled [as Awas Tingni lands]."<sup>179</sup> In reaching this conclusion, the Court recognized that the Awas Tingni's rights to ownership, occupancy, use, and development of their ancestral lands and resources stemmed from the Awas Tingni's own land tenure systems:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival . . . . [R]elations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy,

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<sup>178</sup> See, e.g., *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, para. 153 (Aug. 31, 2001).

<sup>179</sup> *Id.* para. 153.

even to preserve their cultural legacy and transmit to future generations.<sup>180</sup>

Likewise, in the case of *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission on Human Rights incorporated its earlier analyses and those of the Court regarding the distinctive core normative precepts associated with indigenous peoples' land tenure systems:

[I]ndigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.<sup>181</sup>

Furthermore, in the more recent case of *Saramaka People v. Suriname*, the Inter-American Court of Human Rights again acknowledged the core normative precepts that inform indigenous peoples' land tenure systems: "Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence."<sup>182</sup>

Therefore, it is undeniable that the category "indigenous peoples" and its derivative human rights framework have been shaped by the transnational participation of communities of first peoples. Indigenous peoples have strategically infused international human rights law with an alternative world-view. Multiple international bodies that address human rights generally have developed and addressed human rights norms specifically applicable to indigenous peoples. These bodies include the United Nations Human Rights Council (previously Commission), the

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<sup>180</sup> *Id.* para. 149.

<sup>181</sup> *Maya Indigenous Communities of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II/122, doc. 5, ¶ 114 (2004) (footnotes omitted).

<sup>182</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶64 (Nov. 28, 2007) (footnotes omitted).

United Nations Human Rights Committee, the United Nations Committee on the Elimination of Racial Discrimination, the Organization of American States Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. These bodies have reaffirmed the individual and collective rights of the world's indigenous peoples, and ultimately acknowledged the need to protect their way of life.

#### 4. IMPLICATIONS OF INDIGENOUS PEOPLES' PARTICIPATION IN INTERNATIONAL LAWMAKING

For the most part, analyses of non-state actor participation in international lawmaking focus on the implications of such participation with respect to the international legal regime. However, conceptualizing indigenous peoples' participation in international lawmaking as participation by a traditionally marginalized community in identity building and rights formation broadens the scope of normative inquiry beyond what such participation does to, or for, international law to what such participation does to, or for, indigenous peoples. Indigenous peoples' participation not only prompts normative questions regarding the relationship between such participation and the constitution of international law, but also raises normative questions regarding the relationship between such participation and the continued advancement of indigenous peoples' claims.

##### *4.1. Implications for International Law*

Indigenous peoples' participation, like the participation of other non-state actors in international lawmaking, contests a state-centered narrative and thereby raises normative questions regarding the proper formation and content of international law. Specifically, an acknowledgement of indigenous peoples' participatory role in international lawmaking raises the following normative questions: (1) Who ought to participate in international lawmaking? On what basis is indigenous peoples' participation in international lawmaking processes justified? (2) What normative precepts should be reflected in the content of international law? Should the core normative precepts strategically identified by indigenous peoples be incorporated in the formulation of international human rights as applicable to indigenous peoples?

Indigenous peoples' participation challenges the orthodox, state-centered narrative of international lawmaking. It illustrates

how international norm-building and decision-making processes that shape the content of international law are not merely functions of state input and consent. Indigenous peoples' participation contributes a discrete piece to broader understandings of how international lawmaking occurs. Indigenous peoples participate in international lawmaking by way of uploading local communal norms and values. Such uploading takes place through participation in informal and formal human rights norm-generating and decision-making processes.<sup>183</sup>

An acknowledgement of indigenous peoples' participatory role prompts normative questions regarding the proper formation and substantive content of what could bear the emblem of international law. One justification for non-state actor participation in the formation of international law is that such participation may contribute to greater democratic global governance, which is often tied to notions of "good governance" and "legitimacy" in governance.<sup>184</sup> Democratic global governance involves, in part, the decentralization of the state in norm and law creation, and thereby, a facilitation of input by non-state actors.<sup>185</sup> In the context of human rights, principles of democratic global governance reflect an acknowledgment that the creation or modification of legal precepts that guide state behavior regarding the observance of human dignity should, at least in part, involve consideration of the views of those communities the principles are designed to impact.

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<sup>183</sup> See *supra* notes 25, 38–40 and accompanying text (discussing the role of indigenous peoples in international lawmaking and the concept of "bottom-up" lawmaking); see also Miranda, *supra* note 8, at 423 (proposing that "indigenous peoples have been successful in strategically identifying core normative precepts derived from their traditional land tenure systems and uploading such precepts at the international scale").

<sup>184</sup> See Falk, *supra* note 61, at 250 (discussing the idea of global governance and, in part, the role of civil society in its achievement); Mertus, *Transnational Civil Society*, *supra* note 11, at 1351–53 (distinguishing the concept of "governance" from "government," and discussing indicia of "good governance").

<sup>185</sup> See GOVERNANCE: THE WORLD BANK'S EXPERIENCE vii (1994) ("Good governance is epitomized by predictable, open and enlightened policy making (that is, transparent processes); a bureaucracy imbued with a professional ethos . . . and a strong civil society participating in public affairs; and all behaving under the rule of law."); see also STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW: THE ROLE OF NON-STATE ACTORS 3 (2007), available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Paper-Wheatley.pdf> ("The democratic deficit of global governance is not narrowed by electoral contestation for office and power, but by the application of the principles of inclusion, participation and accountability.").

Furthermore, in such context, principles of democratic global governance also address problems associated with states that serve as proxies for the interests of elites, or more generally, problems associated with the power imbalance between states and sub-national communities. When viewed through this lens, the participation of indigenous peoples and the incorporation of their core normative precepts can be justified as a means of promoting democratic global governance.<sup>186</sup> Essentially, indigenous peoples' participation in international human rights lawmaking potentially increases the legitimacy of international human rights law and lawmaking processes. Regardless of the debate surrounding the propriety or challenges of exercising democratic global governance,<sup>187</sup> and regardless of other possible justificatory bases for allowing indigenous peoples' participation in international lawmaking,<sup>188</sup> indigenous peoples' participation is likely to be perceived and analyzed, at least in part, as contributing some level of legitimacy to international human rights law and lawmaking processes.<sup>189</sup>

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<sup>186</sup> Arguably, indigenous peoples' core normative precepts could be taken into account in defining the content of customary international law. See Ochoa, *supra* note 11, at 143-44 (noting that individuals are "increasingly demanding a voice in decisions that affect and determine their own value systems").

<sup>187</sup> See Mertus, *Transnational Civil Society*, *supra* note 11, at 1384-86 (proposing that greater participation of voices increases democratic global governance, but that participation in and of itself may not reflect democratic principles of inclusivity, transparency, and accountability); Alvarez, *Governing the World*, *supra* note 11, at 607-10 (acknowledging the potential governance gaps engendered by inter-state organization participation).

<sup>188</sup> See Bluemel, *supra* note 13, at 57-58 (arguing that "improperly allowing participation may serve to negatively impact the regime as well as the localized ethnic group"). Furthermore:

[p]articipation should be highly context-dependent and cannot be based on a simple analysis of the functional needs of a regime, but must evaluate the ability of the group to meet those functional needs and other normative values held by the regime which might counsel civil society participation beyond the mere functional needs of the regime.

*Id.* at 61.

<sup>189</sup> Arguments can be made, however, that indigenous peoples' participation constitutes an illegitimate attempt at engaging the international system when efforts at the national level have proved unsuccessful. In other words, indigenous peoples' participation may be perceived and analyzed as an inappropriate "second bite" at the apple. Furthermore, the incorporation of indigenous peoples' core normative precepts into human rights law may be perceived and analyzed as leading to the inappropriate acknowledgment of "special rights." Nevertheless, given the continuously increasing status and rights of indigenous peoples' under international law, it is unlikely that these and other similar arguments will bear

#### 4.2. *Implications for the Continued Advancement of Indigenous Peoples' Claims*

The consequences of indigenous peoples' participatory role in international lawmaking are overwhelmingly positive with respect to the continued advancement of indigenous peoples' claims. While not a perfect process, indigenous peoples' participation in international lawmaking has resulted in the reconstitution of human rights precepts when applied to indigenous peoples' circumstances.

It is difficult to suggest that such substantive reformulation of human rights precepts as applied to indigenous peoples is simply symbolic. It is even more difficult to assert that the reformulation of these precepts is a diversion without any material impact—that the human rights discourse and its system of implementation and enforcement is incapable of producing any meaningful progressive social change. Furthermore, it would be a stretch to pronounce that the reformulation of human rights precepts is simply a rehash of traditional liberal ideology with a new gloss that ultimately will continue to undermine the position of indigenous peoples.

However, it is equally difficult to celebrate the phenomenon of a traditionally marginalized community's participation in international lawmaking without a measure of pause. The moment of pause is not so much a moment of paralyzing skepticism, but rather a moment of reflection regarding the continuing challenges to actualizing the full potential of such a phenomenon. The infusion of an "indigenous peoples" category into international law and the uploading of indigenous peoples' core normative precepts into international human rights law continue to be constrained by limits inherent in the discourse of human rights and by the structural limitations of the human rights framework. There continues to be a gap between the participatory efforts of indigenous communities at the international level and the realization of their claims on-the-ground claims.<sup>190</sup> This is not a critique of indigenous peoples' decision to participate in international human rights lawmaking, but rather an assessment of how the human rights discourse and framework of

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significant traction. See Cook and Sarkin, *supra* note 158, at 111-13 (exploring the debate of whether "indigenous rights represent 'special privileges'").

<sup>190</sup> See *id.* at 98 (proposing that "advances in rhetoric have not led to improvements in the ability of indigenous groups worldwide to benefit from the protections that international law supposedly affords them").

implementation and enforcement may place some limits on the ability of indigenous peoples to reap on-the-ground benefits of such participation.<sup>191</sup>

At this juncture, how can the human rights program serve to propel a more comprehensive operationalization of claims? How can the success that has been achieved be capitalized upon for even greater long-term gains? These questions are not meant to detract from the immense progress that has been made by, and on behalf of, indigenous peoples. While indigenous peoples have reaped positive consequences from their participatory role in shaping the substantive contours of international human rights norms, it is nevertheless important to reflect on the possible challenges in the continued path toward progress.

Certainly, the participation of indigenous peoples in international human rights lawmaking has had positive implications for the continued advancement and realization of indigenous peoples' claims. First, the creation of an indigenous identity and the translation of claims into human rights has normalized and provided moral bite to local activism and resistance from indigenous communities. Second, the infusion of international law with an "indigenous peoples" category and indigenous peoples' normative precepts has triggered the recognition of important rights, such as indigenous peoples' right to self-determination<sup>192</sup> and indigenous peoples' rights to ownership, occupancy, control, and use of their traditional lands and resources.<sup>193</sup> The recognition of such rights has enabled

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<sup>191</sup> See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 107-25 (2002) (identifying and addressing the potential "down sides" of the human rights project).

<sup>192</sup> See UNDRIP, *supra* note 65, arts. 3-4 (recognizing indigenous peoples' rights to self-determination and self-government); see also Anaya, *supra* note 77, at 29-30 ("[S]elf-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm).").

<sup>193</sup> See UNDRIP, *supra* note 65, arts. 10, 25-29 (declaring that indigenous peoples may not be removed or relocated from their land without "free, prior and informed consent," "just and fair compensation," and preferably, "the option of return"); see also ANAYA, *supra* note 4, at 141-48 (discussing developments in international law—particularly the standards embraced by ILO Convention 169—affecting the treatment of indigenous peoples' rights to lands and resources); Anaya & Williams, *supra* note 38, at 41-48 ("[T]he existence of indigenous property regimes does not depend on prior identification by the state, but rather may be discerned by objective evidence that includes indigenous peoples' own accounts of traditional land and resource tenure."); Wiessner, *supra* note 38, at 109 (concluding that indigenous peoples are, "in principle, entitled to demarcation,

indigenous peoples to seek recourse at the international level, which, at times, has resulted in the operationalization of claims. Third, at a minimum, indigenous peoples' participation has created opportunities for conversation between indigenous peoples and state representatives regarding indigenous peoples' claims.

Nevertheless, indigenous peoples' participation sheds light on the constraints within which indigenous peoples—and potentially other traditionally marginalized communities—operate for recognition of claims under international law. As a means of analyzing the limits inherent in the discourse of international human rights and the structural limitations of the human rights framework, this part focuses on indigenous peoples' claims to ownership, occupancy, use, and control of their ancestral lands and resources. Discursive and structural limitations are more probable and problematic where the human rights discourse operates to allocate lands and resources.

Indigenous peoples' engagement in the discourse of human rights has resulted in the translation of indigenous peoples' claims to ownership, occupancy, use, and control of their traditional lands and resources into particularized rights. These particularized rights include:

- 1) the right to legal recognition, demarcation, and titling of lands that indigenous peoples traditionally occupy;
- 2) the right to use, enjoyment, control, and development of such lands irrespective of formal title;
- 3) the right, at a minimum, to the use of natural resources associated with such lands;
- and 4) the right, at a minimum, to prior meaningful consultation when a state government seeks to engage in activities upon such lands or in activities that affect indigenous rights over such lands.<sup>194</sup>

Indigenous peoples, through the processes described, have contributed to the identification and substance of these rights. These rights acknowledge the need to protect indigenous peoples' distinct communal, spiritual, and cultural ties to their ancestral lands and resources. They are reflected in multiple documents, including the U.N. Declaration on the Rights of Indigenous

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ownership, development, control, and use of the lands which they have traditionally owned or otherwise occupied and used"); Miranda, *supra* note 56, at 148–50 (discussing the development of indigenous peoples' land rights).

<sup>194</sup> Miranda, *supra* note 56, at 149–50 (footnotes omitted).

Peoples.<sup>195</sup> Moreover, these rights are now arguably part of customary international law.<sup>196</sup> Nevertheless, in the context of extractive industry projects, such as oil drilling or mining, these rights are often violated by collaborative ventures between states and transnational corporate actors.<sup>197</sup>

Indeed, the human rights program has evolved to take into account indigenous peoples' claims to their traditional lands and resources. Human rights bodies emphasize indigenous peoples' distinctiveness as a group as a reason for adapting human rights of general applicability to protect indigenous peoples' ties to their lands and resources. In effect, the discourse operates to allocate those lands and resources to indigenous communities *vis-à-vis* claims by states or non-state actors.

Specifically, there are three primary discursive limitations to the continued advancement and realization of indigenous peoples' claims. First, the engagement of the human rights discourse has the potential of leading to an essentialized indigenous identity. Because the human rights discourse is not directly aimed at addressing the oppressive vestiges of colonization, indigenous peoples have had to formulate claims stemming from their status as colonized peoples into arguments for the recognition and protection of human rights. Efforts to maximize the gains of human rights arguments that advance the claims of indigenous peoples as a whole have the potential of leading to the conflation of local realities and essentialization of local diversity. Over the long term, such a result could hinder the operationalization of indigenous peoples' claims to the extent that global advocacy efforts and platforms for the continued advancement of indigenous peoples' claims fail to be reflective of, and accountable to, local diversity. In other words, how can discursive gains continue to be helpful if, over time, real diversity among local communities fails to be reflected? Ultimately, over the long term, continuing advocacy efforts should maximize the gains already made to account for diversity among local indigenous communities.

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<sup>195</sup> See UNDRIP, *supra* note 65, arts. 10, 25–29 (referencing indigenous peoples' rights to their traditional lands and resources).

<sup>196</sup> See Miranda, *supra* note 56, at 148–50.

<sup>197</sup> See *id.* at 154–60.

Second, the engagement of the human rights discourse may promote a fixed indigenous identity.<sup>198</sup> Pursuant to the human rights discourse, indigenous peoples are not recognized as possessing attributes of inherent sovereignty pre-dating the modern nation-state, but rather, are recognized as deserving human rights protection because of their distinct religious, cultural, and political ways of life.<sup>199</sup> This result raises the issue of whether it will be sufficient for indigenous peoples to continue to gain redress through human rights arguments that may be implicitly couched in fixed notions of religious, cultural, and political difference. In other words, will indigenous peoples be perpetually called upon to perform a fixed identity in order to pursue contemporary claims? For example, the continued realization of indigenous peoples' contemporary claims to ownership, occupancy, use, and control of ancestral lands and resources may become problematic where an indigenous community seeks to benefit from commercial activities that may not be in line with conceptions of their religious and cultural ties to those lands. Accordingly, in moving forward, particular attention should be devoted to how arguments that translate indigenous peoples' contemporary claims into human rights can accommodate a more fluid conception of indigenous difference.

Third, engagement of the human rights discourse may promote imagined or real struggles for a scarcity of resources among different identity groups in a given locality.<sup>200</sup> Because pursuant to the human rights discourse, indigenous peoples are recognized as deserving human rights protection because of their distinct religious, cultural, and political way of life, indigenous peoples'

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<sup>198</sup> My argument is not that indigenous peoples actually have a fixed identity, or that indigenous peoples themselves should not be the ultimate decision-makers with respect to the development of their culture. Rather, my argument is a critique regarding the potential of international human rights discourse to force indigenous communities into advocacy positions that require an emphasis on seemingly static and one-dimensional religious and cultural ties to ancestral lands.

<sup>199</sup> See RODRIGUEZ-PINERO, *supra* note 5, at 340 (suggesting that indigenous peoples' cultural distinctiveness constitutes a source of indigenous peoples' rights); see also ANAYA, *supra* note 4, at 141-42 (emphasizing that "property is a human right" and "the fundamental norm of nondiscrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples").

<sup>200</sup> My argument is not that indigenous peoples are bearers of some kind of "special privilege." Rather, my argument critiques the potential of the human rights discourse to create an *illusion* of special privilege.

access or rights to land and surface or sub-surface resources are based on their distinct religious and cultural ties to land. Because the human rights discourse is not equipped to answer the question of what constitutes a just allocation of scarce resources, the recognition of indigenous peoples' distinct rights to such resources creates an *illusion* of "special privilege" *vis-à-vis* other marginalized local groups (ethnic or racial minorities, the rural poor, refugees) that could ignite a struggle for such resources. This result is merely an illusion of "special privilege" because the protections offered by the human rights discourse to indigenous peoples are in line with what non-marginalized communities consider a given—security over lands and resources. It raises the issue of whether it will be sufficient for indigenous peoples to continue to gain redress through human rights arguments that may seemingly pit indigenous peoples against other traditionally marginalized communities. In other words, is this potential opposition simply an inevitable externality of producing a legal construction that functions within an already limited model of rights for traditionally marginalized communities? How can indigenous peoples capitalize on the human rights discourse while perhaps leaving open opportunities for coalition building with other traditionally marginalized communities? Therefore, in moving forward, particular attention should be paid to how advocacy efforts can address a potential illusion of special privilege. Indigenous advocacy efforts could engage other traditionally marginalized communities, and even states, in a dialogue about the just allocation of scarce resources, in ways that nevertheless account for indigenous peoples' history, preservation of human dignity, and continued cultural survival.

Furthermore, there are structural limitations to the continued advancement and realization of indigenous peoples' claims. First, indigenous peoples' participatory role in international lawmaking within the human rights regime continues to take place within a fragmented lawmaking framework. Even if contradictory, pre-existing international norms could be reconciled with the contemporary indigenous rights framework, the international lawmaking machinery continues to operate within separate, often impermeable, boxes. Accordingly, because indigenous peoples do not have significant access to participate in international lawmaking within what have been structured as independent spheres of international law, the on-the-ground impact of their international human rights lawmaking may be somewhat limited.

This broader contradiction within distinct realms of international law may continue to pose limits to indigenous peoples' on-the-ground progress.

For example, in the context of extractive industry projects on indigenous lands, indigenous peoples' human rights over their ancestral lands and resources often collide with pre-existing international law norms and other norms that continuously evolve under international trade and investment law.<sup>201</sup> Indigenous peoples' rights over ancestral lands and resources exist outside of, and arguably in subordination to, other norms of international law such as state sovereignty over natural resources and states' rights to development. Moreover, corporate actors that benefit from state-granted concessions may be considered to have more rights over lands and resources than indigenous peoples that occupy such lands. Accordingly, advocacy efforts should also take the form of greater participation in other international lawmaking forums, particularly those forums that include norm-generation and decision-making regarding matters tied to international economic transactions.<sup>202</sup>

Second, while indigenous peoples' lawmaking takes place at the international level, implementation and enforcement remains mediated through the state. It may be more feasible for states to accede to indigenous peoples' participatory role in international lawmaking than for states to implement and enforce the resulting legal principles, especially when such principles are at odds with the state's other international obligations. Although various non-state actors may participate in international lawmaking, in different spheres and in contradictory ways, the state remains largely at the center of implementation and enforcement of international legal principles. In the context of extractive industry projects, the state must reconcile its own interest in economic development, and sometimes even contradictory obligations to the corporate actor involved in the extractive industry project, with indigenous peoples' rights to their ancestral lands and resources. As a consequence of states' continued mediation of human rights implementation and enforcement, there is often a disconnect

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<sup>201</sup> See notes 142–46 and accompanying text.

<sup>202</sup> For an example demonstrating that indigenous advocacy has already started to take shape, see Application for Leave to File a Non-Party Submission, *Glamis Gold Ltd. v. United States* (NAFTA Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/52531.pdf>.

between indigenous peoples' participatory role in international human rights lawmaking and on-the-ground results.

Third, as a pragmatic matter, the construction of indigenous identity and the production of knowledge regarding indigenous identity and rights have the potential of being managed by bureaucratic structures at the macro-level. Some have argued that bureaucratic structures that not only control money and resources, but also the production of knowledge and the generation of ideologies need to be accountable. How can these bureaucratic structures democratically control the means of knowledge production and contribute equally to diverse "indigenous" voices? Efforts to align indigenous peoples' participation with principles of democratic governance that focus on questions of inclusivity within the group, transparency of group activity, and accountability of the group may ultimately facilitate the continued advancement of indigenous peoples' claims.

Thus, while capitalizing on the gains already made, continued advocacy efforts should reflect upon the potential discursive and structural challenges to engaging the human rights regime in the continued advancement of indigenous peoples' contemporary claims.

## 5. CONCLUSION

While the resistance offered by the transnational movement of indigenous peoples need not be cabined exclusively within the discourse of human rights, the use of such discourse evidences an acceptance of the discourse's limits in light of potentially valuable strategic gains. Indeed, the recognition of an "indigenous peoples" category and of a derivative framework of indigenous peoples' human rights offers a refreshing account of rights recognition for a traditionally marginalized community. It is also a positive account of solidarity, intra-coalition building, and strategic prowess. Nevertheless, imperfect implications resulting from the limits inherent in the discourse of human rights and structural challenges of seeking on-the-ground gains through the human rights framework pose serious questions.

Indeed, there is a potential dissonance between the benefits of indigenous peoples' participation to the international law regime and the benefits of their participation to the continued advancement and realization of their claims. Indigenous peoples' participation may serve to lend greater legitimacy to international

human rights law and lawmaking processes but may not, in turn, consistently and effectively deliver the material gains that should follow. This result is particularly problematic in the context of indigenous peoples' participation because such participation is not focused on the creation of regulations, but rather on the formulation of rights that may ultimately serve to shift power structures in ways that alleviate conditions of subordination. Accordingly, the continued path to progress requires further reflection on how to alleviate such dissonance through meeting the outlined, and possibly additional, discursive and structural challenges.

One possible path may involve the nature of advocacy that continues to shape international human rights law applicable to indigenous peoples. To that end, as an initial matter, indigenous peoples' advocacy efforts that engage the discourse of human rights may benefit from argumentation that recognizes the potential essentializing function of human rights discourse or the potential of such discourse to promote a fixed indigenous identity. Also, advocacy efforts that engage the discourse of human rights may also benefit from addressing broader normative questions regarding a just allocation of land and natural resources that impact other traditionally marginalized communities. Additionally, indigenous advocacy efforts should not only continue to focus on shaping the discourse of human rights, but should also address other discourses that intersect with, and at times may be at odds with, the discourse of human rights. Furthermore, indigenous peoples may turn their attention to playing an increasingly greater role in not only the processes of international lawmaking, but also in the processes of implementation and enforcement. Moreover, as indigenous peoples continue to participate in the production of a body of international norms and practices regarding their contemporary status and rights, attention should also be given to maintaining structures that allow diverse indigenous "voices" to participate in such processes.

While building on the gains already made through indigenous peoples' participation in international lawmaking, identifying and working through these challenges is one further step in the continued path toward progress. Ultimately, an account of indigenous peoples' participation that reflects on these challenges perhaps holds some promise for the use of international human rights law as a meaningful tool of social transformation.