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Participation in International Governance and the Logic of Self-Determination

Pursuant to the universal application of the right of self-determination . . . we call for, at a minimum, permanent observer status within the United Nations system, enabling our direct participation through our own Governments and parliaments. . .

–Alta Outcome Document, 2013[1]

1.1 THE NATURE OF SELF-DETERMINATION

The lack of clarity in the law of self-determination is irksome in many respects. But it can also be perceived as its greatest strength, for ambiguity permits scope for contestation, flexibility, and interpretation through which the law can accommodate unforeseen circumstances.[2] This does not imply, however, that the law can be interpreted to mean anything one likes, nor that it is hopelessly indeterminate. On the contrary, by tracing the development of the law of self-determination, we can isolate four, interconnected, and overlapping characteristics that inform us as to how self-determination may develop in future.[3]

1.1.1 *Self-Determination as Dynamic*

First, the law of self-determination is *dynamic*. This is evident in its transformations throughout the last hundred years and across several dimensions. The most basic evolution has been its shift in status from a political principle into

[1] Alta Outcome Document, in UN General Assembly, 'Letter dated 10 September 2013 from the Permanent Representatives of the Plurinational State of Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru to the United Nations addressed to the Secretary-General' (13 September 2013) UN Doc A/67/994, Annex, 7, 9.

[2] James Summers, *Peoples and International Law* (2nd ed., Leiden: Martinus Nijhoff, 2014), 39.

[3] The intention here is to sketch the shape of the law, rather than to exhaustively recount it.

one of law. While from the eighteenth century onwards, self-determination was promulgated as a political principle with a variety of meanings,[4] it was not considered a principle of international law during the post-World War I settlements,[5] and its transformation into a principle of law occurred only with the adoption of the UN Charter.[6] Moreover, this legal principle was not initially accompanied by rights or obligations: it was an aspirational goal rather than an operative principle.[7] The Charter primarily envisaged self-determination as contributing to one aim of the UN and did not impose related obligations on member states.[8]

Self-determination came to be associated with a legal right – the right of peoples subjected to colonial rule to freely determine their international status – in the political and historical context of decolonization:[9] The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (the Colonial Declaration)[10] framed self-determination in universalist language, as a right of 'all peoples', while specifying that the populations of trust and non-self-governing territories 'or all other territories which have not yet attained independence' were entitled to 'complete independence'.[11] The UN General Assembly soon afterwards clarified, in Resolution 1541, the nature of the basic colonial unit and the non-self-governing territory

[4] Including by Woodrow Wilson and Vladimir Lenin: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 14–23.

[5] *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs* (April 1921) League of Nations Doc. B7 [C] 21/68/106, 27. However, the principle was 'crucial for the legitimacy of states and their boundaries' and thus 'shaped the content of the law': Summers, *Peoples and International Law*, 179.

[6] Charter of the United Nations (signed 26 June 1945 and entered into force 24 October 1945) 1 UNTS 26, art 1(2).

[7] Allan Rosas, 'Internal Self-Determination' in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff 1993), 225–252, 225.

[8] Cassese, *Self-Determination of Peoples*, 43. Indeed, many states stressed that the inclusion of self-determination was not to be construed as a right to secession, independence, or democracy: Summers, *Peoples and International Law*, 198–199.

[9] *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 paras. 55 and 59. Patrick Macklem, 'Self-Determination in Three Movements' in Fernando R. Tesón (ed.), *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016), 94–119, 99–104.

[10] UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV) ("Colonial Declaration").

[11] Colonial Declaration, paras. 4–5.

entitled to independence, as well as the means by which they could attain self-government.[12]

A further shift has occurred from a legal right to a human right, marked by Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights.[13] Some even situate self-determination as a necessary precondition for, and means to, the realization of all other human rights.[14] Moreover, Common Article 1 provided for new dimensions of self-determination: the right to control natural wealth and resources;[15] non-interference between states in general;[16] and the right of a people of a state to freely choose their rulers.[17] Indeed, this latter development heralded the expansion to what many have called the internal dimension of self-determination, the migration of the right 'from the international to the domestic realm'.[18] Internal self-determination is the right of peoples to enjoy the freedom of authentic self-government, which may entail autonomy vis-à-vis other entities in the state.[19] The internal dimension encompasses a right to equitable representation in legislative, executive, and judicial institutions[20] and is also said to enable peoples to freely choose their political and economic regimes and enjoy related rights, such as the right to vote, the right of peaceful assembly, and the freedom of expression.[21] While the expansion from external to internal did not necessarily exclude the continued application of external aspects of self-determination, it evidences the flexibility and dynamism of the principle and its ability to adapt to respond to new situations as they occur.

[12] UNGA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV). Also see the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/2625 (XXV).

[13] International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966 and entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966 (adopted 16 December 1966 and entered into force 3 January 1976) 993 UNTS 3. See Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43(4) *International & Comparative Law Quarterly*, 857–885.

[14] McCorquodale, 'A Human Rights Approach', 872.

[15] See Cassese, *Self-Determination of Peoples*, 55–56.

[16] Ibid., 55.

[17] Ibid., 52–55.

[18] Macklem, 'Three Movements', 108.

[19] On internal self-determination, see, for example, Cassese, *Self-Determination of Peoples*, 101.

[20] *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* [1998] 2 SCR 217 (Supreme Court of Canada), para. 136.

[21] James Crawford, *The Creation of States in International Law* (2nd ed., Oxford: Oxford University Press, 2007), 25.

Another broad shift in the law of self-determination has been the gradual expansion in the identity of the holders of the right: from the aggregate populations of states, to the peoples of colonized territories, to peoples under occupation and other forms of alien domination, to Indigenous peoples. The reference to the self-determination of "peoples" in the UN Charter was apparently not intended to be understood as conferring rights to minorities or peoples in any ethno-cultural meaning of the term, nor to colonized peoples: "peoples" were to be regarded as the entire populations of states rather than sub-segments of states, and as such, the principle pertained only to relationships between states.[22] In the decolonization period, as outlined above, territorial considerations proved paramount in limiting who could hold the right.[23] Self-determination attached to the entire populations of colonial territories, rather than peoples within a colonized territory, even though the externally imposed colonial boundaries tended to group together several cultural and ethnic groups.[24] Although states did not widely contemplate that peoples would continue to have a right to self-determination after the completion of decolonization, with references in the 1960 Colonial Declaration and the 1970 Friendly Relations Declaration to 'peoples under alien subjugation, domination and exploitation',[25] it became arguable that self-determination extended beyond the overseas colonialism of Western states to, for instance, peoples under racist regimes, occupied peoples, and the people of Palestine.[26]

With the adoption of the UNDRIP,[27] it became clear that Indigenous peoples were also "peoples" entitled to self-determination.[28] The 2007

[22] Mattias Åhren, *Indigenous Peoples' Status in the International Legal System* (Oxford: Oxford University Press, 2016), 28–29; Cassese, *Self-Determination of Peoples*, 39–43; Crawford, *Creation of States*, 112–114.

[23] There is a consensus that colonized peoples have the right to self-determination; see, for example, Summers, *Peoples and International Law*, 45–436; Cassese, *Self-Determination of Peoples*, 71; Crawford, *Creation of States*, 127. On territorial interpretations, see UNGA Res 1541, Principles IV and V.

[24] Åhren, *Indigenous Peoples' Status*, 31, 35; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2008), 56–57; Cassese, *Self-Determination of Peoples*, 141–146; Summers, *Peoples and International Law*, 305.

[25] Also see UNGA, Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/CONF.157/23.

[26] On peoples under racist regimes, see UNSC Res 581 (13 February 1986) UN Doc S/RES/581, para. 7. On occupation, see, for example, *Case Concerning East Timor (Portugal v. Australia)* (Judgment) [1995] ICJ Rep 90, para. 90; UNGA Res 42/15 (10 November 1987) UN Doc A/RES/42/15. On Palestine, see, for example, *Wall Advisory Opinion*, para. 118; UNGA Res 3236 (XXIX) (22 November 1974) UN Doc A/RES/3236(XXIX).

[27] UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

[28] See, for example, S. James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds.), *Making the*

Declaration, as the first widespread recognition by states that self-determination was not confined to colonial peoples, was a significant development in the evolution of the law of self-determination. Although Indigenous peoples are inherently strongly connected to land and place, not all have a fixed or exclusive territory: they may be geographically dispersed in the manner of a minority group throughout a more diverse population.[29] Previously, peoples had been exclusively understood as aggregate populations of states or territories; the decolonization regime had bypassed Indigenous peoples, who merely 'became the subjects of new forms of colonization'.[30] That peoples can now 'in addition be defined in terms of common ethnicity and culture is at least arguably a new feature in international law'.[31]

Thus, while the core meaning of self-determination has become solidified and entrenched – that all peoples should be able to control their own destinies under conditions of equality[32] – the fluid nature of self-determination means that the principle has supported various specific legal rules over the course of its history. Nothing in this history suggests that the law of self-determination cannot continue evolving, as political circumstances develop, well into the future.

1.1.2 *Self-Determination as Multifaceted*

The second aspect of the law that I wish to highlight thus flows from the first. Self-determination is *multifaceted*: it has multiple expressions with different meanings in different situations.[33] It is not synonymous with colonial

Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples (Copenhagen: IWGIA, 2009), 184–199, 185; Marc Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)' in Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous People: A Commentary* (Oxford: Oxford University Press, 2018), 115–149, 146.

[29] Joshua Castellino and Cathal Doyle, 'Who Are 'Indigenous Peoples'? An Examination of Concepts Concerning Group Membership in the UNDRIP' in Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous People: A Commentary* (Oxford: Oxford University Press, 2018), 7–37, 32–36.

[30] Åhren, *Indigenous Peoples' Status*, 35.

[31] Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments' in Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous People: A Commentary* (Oxford: Oxford University Press, 2018), 63–86, 63.

[32] Adopted from S. James Anaya, *Indigenous Peoples in International Law* (2nd ed., Oxford: Oxford University Press, 2004), 74. This was chosen from the multiplicity of (similar) formulations in the literature as it seems to accurately capture the intent and spirit of the law.

[33] Caroline Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *European Journal of International Law*, 141–157, 143;

independence, or with secession, or with what is known as "internal self-determination." So much is clear from the above account of its development. Helpful in this regard is Antonio Cassese's conceptualization of self-determination as consisting, firstly, of a general principle, which Cassese formulates as 'the need to pay regard to the freely expressed will of peoples' when their fates are at issue.[34] This principle, according to Cassese, 'sets out a general and fundamental standard of behaviour' that 'governments must not decide the life and future of peoples at their discretion'; rather, peoples 'must be enabled freely to express their wishes in matters concerning their condition'.[35] Like any principle, self-determination is 'general, loose and multifaceted', lending itself to 'various and even contradictory applications', and with 'great normative potential and dynamic force'.[36] From the broad principle, then, one can deduce specific customary rules where 'a broader measure of agreement has emerged among States as to … proper conduct'.[37] The principle indicates the method of exercising self-determination, can act as a standard of interpretation where a customary rule is unclear or ambiguous, and can be useful in cases not covered by specific rules.[38] The specific manifestations of self-determination already mentioned here, such as the right of peoples to exercise control over natural resources or the external self-determination of colonized peoples, can be thought of as specific rules under the heading of this broader principle.

1.1.3 *Self-Determination as Relational*

So much, so clear. But if self-determination has multiple aspects that develop over time, what principles unite its disparate elements and explain its evolution? Going some way to answer this question is self-determination's *relational* nature. Self-determination fundamentally concerns the relationships between a people and others – states, empires, governments, and other peoples.[39] As evident from its development, it is a specific kind of relationship – one of dominance, subjugation, or exploitation of a people by a state or other

Alexandra Tomaselli, 'The Right to Political Participation of Indigenous Peoples: A Holistic Approach' (2014) 24 *International Journal on Minority and Group Rights*, 390–427, 403–404.

[34] Cassese, *Self-Determination of Peoples*, 126–127. See also *Western Sahara*, para. 59.

[35] Cassese, *Self-Determination of Peoples*, 128.

[36] Ibid., 128–129.

[37] Ibid., 129.

[38] Ibid., 131.

[39] Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Claims in International and Comparative Law' (2001) 34 NYUJILP, 189–250, 223.

entity – that both give rise to exercises of self-determination and constitute such exercises. All peoples that exercise their right to self-determination do so in relation to another unit, typically a state, and that unit holds reciprocal obligations towards that people throughout the exercise. This is evident on the face of the language of the relevant instruments. For instance, the Colonial Declaration's condemnation of '[t]he subjection of peoples to alien subjugation, domination and exploitation'[40] immediately raises the question: subjugation *by who*? Domination *by who*? To speak of 'dependent peoples' fundamentally assumes a relationship between the people subjected to subjugation, domination and exploitation, and the entity that is doing the subjecting – in this case, colonizing states. The Declaration goes on to impose duties: it states that 'armed action or repressive measures of all kinds directed against dependent peoples shall cease',[41] again presupposing the existence of a certain relationship between a dependent people and the entity applying such measures. It prescribes the future nature of the relationship: '[i]mmediate steps shall be taken' by the colonial states 'to transfer all powers' to the dependent peoples 'in accordance with their freely expressed will and desire'.[42] Thus, in the Colonial Declaration, it is the colonial relationship of "alien subjugation, domination, and exploitation" between the colonial state and the colonized people that both give rise to an entitlement to self-determination and define the consequent obligations of the colonial state. The same lens can be applied to other relevant international instruments, as well as judicial decisions.[43]

1.1.4 *Self-Determination as Remedial*

The final aspect that helps to explain the law's logic is the *remedial* nature of the specific legal rules that have developed under the umbrella of self-determination: specific legal rules have emerged in a remedial manner so as to provide redress for ongoing situations of domination, subjugation, or exploitation. Self-determination is a continuous process whereby the law forms new remedies when so required. This can be illustrated by reference to the development of the rules on decolonization. The colonization process and the international law that accompanied and justified it denied countless non-European peoples recognition and the ability to determine their own

[40] Colonial Declaration, para. 1.
[41] Ibid., para. 4.
[42] Ibid., para. 5.
[43] For instance, judicial decisions on the *erga omnes* nature of self-determination assume a relation between a people and all other states.

futures.[44] The Colonial Declaration itself, adopted in large part due to the work of the then blooming decolonization movement,[45] recognized this and explicitly offered itself as a remedy. The preamble, recognizing 'the passionate yearning for freedom in all dependent peoples' and noting that 'the continued existence of colonialism ... impedes the social, cultural and economic development of dependent peoples', proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'.[46] The Colonial Declaration thus 'treats the right of self-determination as an instrument that addresses international law's complicity with colonialism'.[47] The right of colonial peoples to determine their own territorial status did not emerge on its own; rather, it was the response of the expanding international community to the colonial relationship between colonial powers and colonized peoples that undermined self-determination. It would not make any sense isolated from that historical and political context. Therefore, we can say that while the principle of self-determination was the entry point and legal catalyst, although the right of colonized peoples and nations to independence was regarded at the time as synonymous with the right of self-determination[48] decolonization procedures 'did not of themselves embody the substance of the right ... rather, they were measures to remedy a *sui generis* violation of the right that existed in the prior condition of colonialism'.[49]

Similarly, the international law on the rights of Indigenous peoples, including self-determination, can also be viewed as a remedy for a *sui generis* violation of self-determination. This stems from Indigenous peoples' exclusion from the decolonization processes of the mid-twentieth century. The "salt water" doctrine in Resolution 1541 formally linked the right of colonized peoples to independence to Western overseas colonial dominions, which implied 'the exclusion of Indigenous peoples clustered within independent States' boundaries from the scope of application of the principle of self-determination'.[50] In addition, the doctrine of *uti possidetis* preserved the

[44] On this, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 13–29, 32–33, 43, 48–49, 53, 61–62; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 72–75, 113–115, 126–168.

[45] Summers, *Peoples and International Law*, 203, 209.

[46] Third, seventh, and twelfth recitals.

[47] Macklem, 'Three Movements', 100.

[48] Summers, *Peoples and International Law*, 205 n 64.

[49] Anaya, 'Post-Declaration Era', 189.

[50] S. James Anaya and Luis Rodríguez-Piñero, 'The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous People: A Commentary* (Oxford: Oxford University Press, 2018), 38–62, 40.

former colonial boundaries, meaning that Indigenous peoples within a former colony that had gained independence experienced only a change in ruler.[51] Thereby Indigenous peoples were continually excluded from determining their own destiny. This continued omission 'lies at the heart of Indigenous peoples' expression of their demands in terms of self-determination'.[52] Viewed in this light, the UNDRIP, adopted following decades of global Indigenous peoples' activism,[53] is 'essentially a remedial instrument' based on the identification of a long-standing *sui generis* violation of self-determination.[54] It was required to remedy the systemic inequality and injustice arising from international law's failure to recognize Indigenous peoples' sovereignty and self-determination over the course of centuries.[55] The Declaration represents a step towards rectifying 'the adverse consequences of how international law validate[d] morally suspect colonization projects that participated in the production of the existing distribution of sovereign power'.[56] This is, essentially, a different angle on the "historical sovereignty" argument made by some Indigenous scholars.[57]

Under a relational, remedial account, then, 'the law of self-determination is the law of remedies for serious deficiencies of freedom and equality'.[58] Self-determination is a continuous, ongoing process – a 'constant entitlement'[59] – in which new remedies come to be required by law.[60] Just as decolonization procedures were not the substance of the right, but rather measures to remedy what the international community had come to recognize as a violation of the rights of colonized peoples, the rules on the self-determination of Indigenous peoples reflected in the UNDRIP are also remedial measures for a *sui generis* situation of domination, subjugation, or exploitation.

[51] Anaya, *Indigenous Peoples*, 54.
[52] Anaya and Rodríguez-Piñero, 'The Making of the UNDRIP', 140.
[53] See Sheryl R. Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016), 34–38, 43. See also UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study of the Problem of Discrimination against Indigenous Populations' UN Doc E/CN.4/Sub.2/1986/7 & Adds.1–4, 1987 ("Martínez Cobo report").
[54] Anaya, 'Post-Declaration Era', 190.
[55] Charters, 'A Self-Determination Approach', 228.
[56] Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30 *Michigan Journal of International Law*, 177–210, 179.
[57] See, for example, Claire Charters, 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making' (2010) 17 *International Journal of Minority & Group Rights*, 215–240.
[58] Kingsbury, 'Reconciling Five', 232.
[59] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995), 120.
[60] On self-determination as an ongoing process, see Higgins, 'Problems and Process', 120.

1.2 STRUCTURAL RELATIONS BETWEEN PEOPLES, STATES, AND INTERNATIONAL ORGANIZATIONS

Self-determination, then, rather than being synonymous with colonial independence, is a right capable of being realized in multiple ways and has evolved considerably over time to provide redress in circumstances where a particular kind of relationship is present. A people self-determines only in relation to others, who then tend to hold correlative obligations. Thus if novel or different arenas of domination, subjugation, or exploitation, or novel actors involved in perpetuating such a relationship, were to emerge, a new rule would be justified under the auspices of the principle of self-determination to remedy the situation. As James Anaya put it:[61]

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

I propose that we should consider, in addition to the well-known position of domination, subjugation, or exploitation that a state may hold over a people, the less-considered relationship between a *group of states* collectively pursuing some objective, or an *intergovernmental organization*, and a people or peoples. I argue that a people's ability to self-determine can be adversely affected not only by a state that has colonized, occupied, or is otherwise dominating, subjugating, or exploiting it. Rather, a people's self-determination can also be undermined by groups of states that act collectively to make and implement international law and policy through international organizations or other intergovernmental fora, as well as by international organizations themselves insofar as they are autonomous actors capable of making law, policies, and decisions and carrying out activities.[62] I will make this case by, first, outlining how states and international organizations exercise public authority, before turning to specific ways in which collectives of states and international

[61] Anaya, 'Post-Declaration Era', 189.

[62] Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010); Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, and Euan MacDonald, *Global Administrative Law: The Casebook* (3rd ed., Rome: Irpa, 2012).

organizations exercise public authority in ways capable of undermining the self-determination of peoples. I will argue that this relationship is one of domination, of the kind implicated by the law of self-determination.

1.2.1 *The Exercise of Public Authority through Treaty-Making and International Organizations*

It is trite to say that states collectively exercise broad powers through the making of treaties, pooling their sovereignty at the inter-state level in order to meet some shared objective, for instance, in the making of plurilateral or "megaregional" trade and investment agreements.[63] This can be seen as groups of states exercising public authority in a shared or collective manner. The making of megaregional trade agreements, for instance, is an act that may affect individuals and communities within the states parties (as well as outside the states parties), and this effect may be seen to stem from the joint act of the states parties rather than only from the state in which an individual finds themselves.

In addition to bilateral or plurilateral settings, states make international law, make policy and set standards through intergovernmental organizations, and at times assign such functions to those organizations themselves. But states are not always, or necessarily, the only agents. The growth of international organizations – and the expansion of their powers 'through informal processes of discourse, practice and (re)interpretation' – is well documented.[64] International organizations, enabled by the doctrine of implied powers,[65] among other factors, have come to exercise extensive powers with far-reaching impacts on individuals, communities, and domestic societies,[66] through their

[63] On 'megaregional' economic agreements, see Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz, and Atsushi Sunami, *Megaregulation Contested: Global Economic Ordering after TPP* (Oxford: Oxford University Press 2019).

[64] Guy Fiti Sinclair, 'State Formation, Liberal Reform and the Growth of International Organizations' (2015) 26 *European Journal of International Law*, 445–469, 446. See, for example, Eyal Benvenisti, *The Law of Global Governance* (Leiden: Brill Nijhoff 2014), 25–69.

[65] Under which IOs are held to have, in addition to the powers explicitly granted by member states, those necessary for their effective functioning. See generally Viljam Engström, *Understanding Powers of International Organizations: A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism* (Åbo: Åbo Akademi University Press, 2009).

[66] See, for example, Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28(1) *European Journal of International Law*, 115–145, 116.

ability to make laws,[67] set standards,[68] make decisions and recommendations,[69] and disseminate information.[70] These activities can be viewed as the exercise of public authority.[71] To a certain extent, and in some cases, international organizations may be said to exercise these broad powers in their own right;[72] at the same time, in some circumstances, the exercise of public authority by an organization may be attributed to the collective member states of an organization.[73] The limitations of what had been the default response of international law to the rise of organizations – a functional approach that tended to shield international organizations themselves from external legal scrutiny or accountability and has regarded organizations as mere agents of their collective principal member states – have been widely recognized.[74] International organizations are now seen, at least under some approaches, as autonomous global actors in their own right: 'not . . . neutral arenas for the

[67] José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2006).

[68] See, for example, Kevin Davis, Angela Fisher, Benedict Kingsbury, and Sally Engle Merry (eds.), *Governance by Indicators: Global Power through Classification and Rankings* (Oxford: Oxford University Press, 2012); Jürgen Friedrich, 'Legal Challenges of Non-Binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' in von Bogdandy et al. (eds.), *Exercise of Public Authority*, 511–540.

[69] This is illustrated in, for example, Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in von Bogdandy et al. (eds.), *Exercise of Public Authority*, 165–194.

[70] See, for example, Bettina Schöndorf-Haubold, 'The Administration of Information in International Administrative Law – The Example of Interpol', in von Bogdandy et al. (eds.), *Exercise of Public Authority*, 229–268.

[71] See, for example, Richard B. Stewart and Michelle Ratton Sanchez-Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law' (2011) 9(3–4) *International Journal of Constitutional Law*, 556–586, 557. One definition of an exercise of international public authority is 'the adoption of an act that affects the freedom of others in pursuance of a common interest': von Bogdandy, Goldmann, and Venzke, 'Public International to International Public', 117.

[72] Jan Klabbers, 'Sources of International Organizations Law: Reflections on Accountability' in Jean D'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press 2017), 987–1006, 988.

[73] Also known as a "principal-agent" or "vertical approach": Jan Klabbers, 'International Organizations in the Formation of Customary International Law' in Enzo Cannizzaro and Paolo Palchetti (eds.), *Customary International Law on the Use of Force: A Methodological Approach* (Leiden: Martinus Nijhoff 2005), 179–195, 183.

[74] Eyal Benvenisti, 'Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29(1) *European Journal of International Law*, 9–82, at 10–12, 16–30. On functionalism and its limitations, see generally Jan Klabbers, 'The Transformation of International Organizations Law' (2015) 26(1) *European Journal of International Law*, 9–82.

solution of common problems but rather sites of power, even of dominance'.[75] This book is, in part, situated in the vein of international legal scholarship that has thus turned to critiquing international organizations' lack of accountability to those affected by their activities – those 'disempowered disparate domestic electorates, who could not benefit from the traditional constitutional checks and balances found in many democracies intended to limit executive discretion'[76] – and studying ways in which they can be held to account.[77]

1.2.2 *A Relationship of Domination*

Rather than further expound upon the ways in which the activities of international organizations and state collectives may affect vulnerable or marginalized groups in general, or the global public at large, I will here elaborate on the ways in which international organizations and collectives of states exert power over Indigenous peoples. I will suggest that this exhibits the qualities of a relationship of the kind self-determination is concerned with: that is, one of alien domination, subjugation, or exploitation. While different from the formally colonial relationship between a people and a state, this relationship is such as to justify the application of the law of self-determination.

Before moving to specific examples, it is helpful to understand the relationship between international organizations and collectives of states on the one hand, and Indigenous peoples on the other, as structural, arising from the public or regulatory authority situated in international organizations. In the language of self-determination, an international organization, or a group of states acting collectively, can "dominate" an Indigenous people, interfering with its ability to determine its own destiny. Under the definition of domination developed by Philip Pettit and Iris Marion Young, an agent dominates another 'when the agent has power over that other and is thus able to interfere with the other *arbitrarily*'; interference is when 'one agent blocks or redirects the action of another in a way that worsens that agent's choice situation by

[75] Andrew Hurrell, 'Power, Institutions, and the Production of Inequality' in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance* (Cambridge: Cambridge University Press 2005), 33–58, 56.

[76] Benvenisti, 'Upholding Democracy', 13.

[77] See, for example, August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7(2) *Global Governance*, 131–149; Devika Hovell, 'Due Process in the United Nations' (2016) 110(2) *American Journal of International Law*, 1–48; Richard B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law*, 211–270, 221.

changing the range of options', and it is "arbitrary" 'when it is chosen or rejected without consideration of the interests or opinions of those affected.[78] An entity may therefore dominate another without ever actually interfering with it; domination 'consists in standing in a set of relations which makes an agent *able* to interfere arbitrarily with the actions of others'.[79] International organizations and collectives of states acting together are manifestly able to interfere with other agents, including peoples; they wield public authority in a way that can directly or indirectly change the range of options available to peoples. It is this structural possibility of interference – which may be positive or negative – that constitutes domination.

The remainder of this section illustrates this point by reference to actual examples of domination and interference, in the sense meant by Pettit and Young, in the realm of state collectives and international organizations carrying out law-making, standard-setting, and policymaking activities that affect peoples. This is not the only field of activity that is relevant: decision-making, for instance, regarding development projects and finance, international territorial administration, and other activities of international organizations and state collectives are also pertinent. While not exhaustive, this section is intended to contain sufficient detail to demonstrate that international organizations, and states acting collectively, have exercised power through the making of standards and policies affecting peoples in myriad fields of activity.

International organizations and other intergovernmental bodies have on several occasions been fora for the setting of standards that have defined the rights and self-determination of Indigenous peoples in general. Examples of such instruments include the UNDRIP, which self-evidently goes to the heart of Indigenous peoples' affairs and concerns, and its development by states and UN organs clearly demonstrates the power the latter exercise over Indigenous peoples.[80] Similar instruments on Indigenous peoples' rights developed in international fora include the American Declaration on the Rights of Indigenous Peoples, the International Labour Organization (ILO) Convention No. 169, and the Draft Nordic Sámi Convention.[81]

[78] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 258.
[79] Young, *Inclusion*, 258–259.
[80] Of course, the Declaration was developed with high levels of participation by Indigenous peoples themselves.
[81] American Declaration on the Rights of Indigenous Peoples (15 June 2016) OAS Doc AG/RES.2888 (XLVI-O/16); Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989 and entered into force 5 September 1991) 1650 UNTS 383; for the draft of the Nordic Saami Convention in English, see https://sametinget.se/105173.

Other international organizations have developed, or are in the process of developing, policies and standards on topics that by their nature affect or have the potential to affect Indigenous peoples' self-determination. For instance, WIPO develops laws and policies relating to intellectual property,[82] including standard-setting activities affecting Indigenous peoples in respect of their traditional knowledge. Recognition that the WIPO framework is unable to provide protection to many forms of traditional knowledge, which are left vulnerable to misappropriation and "biopiracy,"[83] led to the establishment in 2000 of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[84] Since then, the IGC has been undertaking textual negotiations on draft instruments related to traditional knowledge, traditional cultural expressions, and genetic resources.[85] It has produced Draft Articles on the Protection of Traditional Knowledge, the Protection of Traditional Cultural Expressions, and a consolidated document relating to intellectual property and genetic resources.[86] There is a great deal at stake for Indigenous peoples in these negotiations: '[f]or a people whose relationship of dependence with their ecosystem is first nature and a basis for their knowledge and socioeconomic and cultural life . . . intellectual property's role in knowledge enclosure is a fundamental human rights issue bordering on life and survival'.[87] The IGC process has the potential to address Indigenous peoples' 'claims for cultural recognition' and 'significantly accommodat[e] an alternative indigenous understanding of knowledge'.[88] The conclusion of international agreements on genetic resources, traditional knowledge, and traditional cultural expressions 'would

[82] Convention Establishing the World Intellectual Property Organization (adopted 15 July 1967 and entered into force 26 April 1970) 828 UNTS 3, arts 3 and 4.

[83] On misappropriation, see, for example, Sumathi Subbiah, 'Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge' (2004) 27(2) *Boston College International & Comparative Law Review*, 529–559.

[84] Established in 2000 by the WIPO General Assembly: WIPO, 'WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, Report' (3 October 2000) WIPO Doc WO/GA/26/10, para. 71.

[85] WIPO, 'Assemblies of the Member States of WIPO, Fifty-Seventh Series of Meetings, October 2 to 11, 2017, Summary Report, Addendum, Item 18 of the Consolidated Agenda', (11 October 2017) WIPO Doc A/57/11/Add.6.

[86] For the most up-to-date versions of these drafts, see www.wipo.int.

[87] Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (New York: Routledge 2012), 81.

[88] Franziska Boehme, Lindsay Burt, Patricia Goff, and Audie Klotz, 'Cultural Diversity and the Politics of Recognition in International Organizations' (2018) 9 *Journal of International Organizations Studies*, 27–41, 30.

be a landmark in international law and in IP law, and could potentially contribute to the prevention of their misappropriation'.[89]

The traditional knowledge and self-determination of Indigenous peoples are also implicated in activities under the Convention on Biological Diversity (CBD). The CBD itself recognizes 'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources',[90] and its Article 8(j) obliges states parties to respect, maintain, and preserve this knowledge. However, the establishment of protected areas (under Article 8) has sometimes served as an instrument, intentionally or not, for the exclusion of Indigenous peoples from their traditional lands and territories.[91] The Nagoya Protocol on Access and Benefit-Sharing, developed under the CBD's auspices, has implications for the protection of Indigenous traditional knowledge, innovations, and practices associated with genetic resources.

Further examples of international organizations affecting Indigenous peoples include the FAO, which through its Committee on Food Security develops policy recommendations and guidance on food security and nutrition;[92] the UN Educational, Educational and Scientific Organization (UNESCO), which engages in standard-setting activity and in so doing 'addresses key concerns of indigenous peoples such as endangered languages, mother tongue education, education for sustainable development, indigenous knowledge in scientific and environmental decision-making, and building knowledge societies';[93] the International Maritime Organization, through which states set standards on topics, including, of particular relevance to Indigenous peoples, rules on heavy fuel oil, the avoidance of marine mammals, greenhouse gases and black carbon, underwater noise, sewage

[89] Daniel F. Robinson, Pedro Roffe, and Ahmed Abdel-Latif, 'Introduction: Mapping the Evolution, State-of-play and Future of the WIPO IGC' in Daniel F. Robinson, Ahmed Abdel-Latif, and Pedro Roffe (eds.), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (New York: Routledge, 2017), 3–9, 3.

[90] Convention on Biological Diversity (adopted 5 June 1993 and entered into force 29 December 1993) 1760 UNTS 79, Preamble, twelfth recital.

[91] Paige West, James Igoe, and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2005) 35 *Annual Review of Anthropology*, 251–277, 258.

[92] Constitution of the United Nations Food and Agriculture Organization, reprinted in FAO, Basic Texts of the Food and Agriculture Organization of the United Nations (FAO 2017), art IV.9.

[93] UNESCO, Policy on Engaging with Indigenous Peoples (9 August 2017) UNESCO Doc 202 EX/9, para. 15.

and grey water discharge, and invasive species;[94] and the International Seabed Association, which makes rules, regulations, and procedures relating to prospecting, exploration, and mining of mineral resources in the seabed, ocean floor, and subsoil thereof beyond the limits of national jurisdiction[95] – rules that are likely to disproportionately affect Indigenous peoples living traditional lifestyles on coasts and islands.[96]

In addition to broad standard-setting affecting Indigenous peoples in general, international organizations may make policies that impinge on the self-determination of a specific people or peoples. One example of this are the decisions of the European Union (EU) to ratify agreements with Morocco on trade and fisheries and to implicitly accept their application to Western Sahara, which specifically affect the Sahrawi people.[97] Another is the effect of EU legislation on Arctic Indigenous peoples' communities.[98] European Directive 83/129/EEC of 1982 prohibited the importation into the European Economic Community of skins and other products derived from seal pups.[99] While the makers of the directive did not appear to expect any adverse effects on Indigenous peoples, and indeed the directive in its preamble recalled that traditionally practised hunting does not harm seal pups and is 'a natural and legitimate occupation, conducted with due respect for the balance of nature, and part of indigenous peoples' traditional way of life and economy', the ban in fact triggered the collapse of the EU market for seal furs.[100] In turn, this affected the Inuit economy, which depended on the cash income from the fur market. Although a later version of the directive made an exception for Inuit

[94] See International Maritime Organization, 'Marine Environment Protection Committee, 70th session, Agenda Item 17, Any other business, Arctic indigenous food security and shipping, submitted by FOEI, WWF and Pacific Environment' (19 August 2016) IMO Doc. MEPC 70/17/10, paras. 3–14.

[95] See, for example, International Seabed Association, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (22 July 2013) ISA Doc. ISBA/19/C/17.

[96] Julie Hunter, Pradeep Singh, and Julian Aguon, 'Broadening Common Heritage: Addressing Gaps in the Deep Sea Mining Regulatory Regime' (2018) *Harvard Environmental Law Review* (online), https://harvardelr.com/2018/04/16/broadening-common-heritage/ (noting that deep sea exploration has already had adverse impacts on Indigenous peoples' livelihoods due to disturbances of fish populations and detriments to water quality).

[97] For example, Euro-Mediterranean Agreement between the European Communities and their Member States and the Kingdom of Morocco (adopted 26 February 1996) OJ 2000 L 70. See Case T-512/12 *Front Polisario v. Council of the European Union*, Judgment of the General Court, Eighth Chamber, ECLI:EU:T:2015:953.

[98] See generally Federica Scarpa, 'The EU, the Arctic, and Arctic Indigenous Peoples' (2014) 6 (1) *The Yearbook of Polar Law Online*, 427–465.

[99] Council Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36.

[100] Scarpa, 'The EU, the Arctic', 428.

hunting, Canadian Inuit were still disproportionately affected, and in any case, the market had long since collapsed.[101] This example shows that the regulatory acts of international organizations may affect not only peoples within their member states but also peoples who are "distant strangers" or "global others" due to being located in a state or states that are not members of the organization.[102]

The other side of this coin is that – as Indigenous peoples have known as long as international organizations have existed – international organizations can be vehicles for emancipation. The same power and international public authority that means that international organizations' activities can negatively impinge on the exercise of self-determination also means, at least in theory, that international organizations could be vehicles to hold states to account and that Indigenous peoples by becoming members of such organizations could shape and influence international governance.

1.3 EXISTING LAW DOES NOT ADEQUATELY REMEDY THE RELATIONSHIP

Because Indigenous peoples, and international organizations and groups of states, exist in a relationship of domination of the former by the latter – that is, the kind of relationship that the law of self-determination is concerned with – it can be argued that the law of self-determination is called on to evolve to provide a remedy. However, before jumping to such a conclusion, we must examine whether an adequate remedy is already found in existing law. I will assess the existing law on internal self-determination, as well as emergent norms and practice regarding civil society participation, particularly through NGOs.

1.3.1 *Internal Self-Determination and Domestic Political Participation*

It may be tempting to imagine that the self-determination of Indigenous peoples with respect to international organizations and groups of states can be realized simply via Indigenous peoples' political participation on the domestic plane. One element of the internal aspect of self-determination is the right of a people to participate in the political affairs of the state in which it

[101] Ibid., 429.

[102] On the accountability of states to "strangers," see Sivan Shlomo Agon and Eyal Benvenisti, 'The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication' (2018) 68(4) *University of Toronto Law Journal*, 598–660.

is located. Thus if a people is well represented in the relevant domestic government(s), such an argument would run, additional rights at the international level are not necessary. Rather, it is for the state to balance competing domestic interests. Indeed, to enable Indigenous peoples' voice in both domestic and international fora – "two bites of the apple,"[103] so to speak – could give them *too* much influence over international regulation.[104]

It is true that in some cases a state may be able to represent an Indigenous people at the international level so as to protect the latter's right to self-determination – such as when the interests of the state and the people broadly overlap on a given issue and the Indigenous people have provided their free, prior, and informed consent, or where they hold a dominant, rather than marginal place in domestic society. In such situations, the Indigenous people would not require an additional voice on the global stage.

However, in most cases, participatory rights at the domestic level are not enough. Often the interests of a people do not align with those of the relevant state, meaning that the state's position in an international forum will necessarily be at odds with the interests of the Indigenous people, even taking into account the people's right to participate within the state.[105] Of course, for any position a government takes on the international stage, there will invariably be some group of people who do not agree. It is in the nature of a diverse democracy that competing domestic interests must be balanced.[106] But an Indigenous people, by virtue of its right to self-determination, is different from other domestic actors: it is not equivalent to a trade union, or an interest group, or a political party. Of course, it is not here suggested that such interest-based constituencies should not have a voice. The point is that the right to self-determination distinguishes Indigenous peoples from the (valid) reasons to participate possessed by other domestic constituencies.[107] To deny them a

[103] The phrase "two bites of the apple" is borrowed from August Reinisch and Christina Irgel, writing in the context of NGO participation: 'The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System' (2001) 1(2) *Non-State Actors & International Law*, 127–151, 132.

[104] Erik B. Bluemel, 'Separating Instrumental from Intrinsic Rights: Towards an Understanding of Indigenous Participation in International Rule Making' (2005) 30(1) *American Indian Law Review*, 55–132, 75.

[105] Navajo Nation Council, *Adopting and Recommending Position Statements Regarding the United Nations Recognition for the Navajo Nation* (22 July 2009) NNHRC/Report 03/2009, 22–23.

[106] Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1 *Constellations* 1–10, at 5.

[107] Timo Koivurova and Leena Heinämäki, 'The Participation of Indigenous Peoples in International Norm-Making in the Arctic' (2006) 42 *Polar Record*, 101–109, 102.

right to participate at the international level would be to, by default, crush their interests under the weight of majoritarian concerns.

Second, in many states, it is the executive branch of government, rather than the legislature, which determines foreign policy and represents a state in international organizations. Although the legislature may have input on decisions of considerable domestic importance, forms of internal self-determination that provide for participation in the electoral process or for a level of autonomous self-government will not provide for the accountability to peoples of the state's delegates who will take the political decisions in inter-governmental fora.[108] Although this executive-led approach could conceivably have advantages, including that executives are in principle able to protect minority interests since they are not bound to make majoritarian decisions,[109] in practice there are risks associated with the isolation of the conduct of international relations from accountability to minority groups.

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

Fourth, some peoples exist across state boundaries. For instance, the Sámi extend across parts of Norway, Sweden, Finland, and Russia, and the territory of the Inuit encompasses part of Russia, the United States, Canada, and Denmark-Greenland.[110] In cases like these, it is unlikely that any one state can effectively represent the interests of the transnational Indigenous people at the international level. The Indigenous people may not be able to exercise its right to internal self-determination within all of the relevant states, and it is even less likely that the interests of the people and all of the relevant states will coincide.[111]

Relatedly, different Indigenous peoples located in different states often share common interests. In this situation, a domestic balancing of interests

[108] Anne Peters, 'International Organizations in International Law' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), 33–59, 46.

[109] Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, 'Democracy Enhancing Multilateralism' (2009) 63(1) *International Organization*, 1–31.

[110] Timo Koivurova, 'Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous Peoples in a World of Sovereign States' (2010) 12(2) *International Community Law Review*, 191–212, 204.

[111] This point was made with respect to transnational interests generally in Reinisch and Irgel, 'Participation of Non-Governmental Organisations', 132.

within each state will tend to mean that the shared interest is systematically obscured from view at the international level.

Sixth, international organizations themselves delegate authority to organs, such as executive boards or secretariats, in which not all member states are included, so that even if a state is a member of an international organization, it does not necessarily have a voice in all activities carried out within that organization. While such a delegation of powers can be practical,[112] it means that these organs, which 'act on behalf of the international entity, and are not to be equated with the (collectivity of) states',[113] are less accountable to states and by extension those within them. Secretariats, generally speaking, are capable of exercising considerable bureaucratic power independently of their member states, for instance, by steering or manipulating the decision-making of states through the management and organization of information.[114] If a secretariat's activities affect an Indigenous people, a state may not necessarily be able to effectively represent that people, even if their positions align. A secretariat should, in theory, be accountable to member states, but in practice this may not happen.[115]

Similarly, boards can exercise executive functions, and even independent governing and legislative functions within an institution.[116] The activities of executive boards, such as those in charge of allocating financing, can impact on strangers to the organization.[117] In addition, while the boards of some organizations are constituted of the representatives of several member states, other boards, such as the European Commission and the Executive Council

[112] Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (Leiden: Martinus Nijhoff 2011), 307–308.

[113] Ramses A. Wessel, 'Executive Boards and Councils' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), 802–821, 804.

[114] Touko Piiparinen, 'Secretariats' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), 839–858, 839–840, 843.

[115] See, for example, J. Benton Heath, 'SARS, the "Swine Flu" Crisis and Emergency Procedures in the WHO' in Cassese et al., *Global Administrative Law*, chapter I.B.10.

[116] Wessel, 'Executive Boards and Councils', 814–820.

[117] See, for example, the Executive Board of the World Health Organization: Abigail C. Deshman, 'International Organizations and Horizontal Review: The World Health Organisation, the Parliamentary Council of Europe, and the H1N1 Pandemic' in Cassese et al., *Global Administrative Law*, chapter I.E.9, and the European Commission: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 13 December 2007 and entered into force 1 December 2009) 2702 UNTS, arts 106(3) and 45(3)(d).

of the African Union, hold responsibility for specific policy areas;[118] still others, such as the Executive Board of UNESCO, sit as individual experts rather than state representatives.[119] For an Indigenous people affected by the activities of a board to have a voice only within its own state is manifestly inadequate.

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

1.3.1 *Civil Society Participation in Intergovernmental Fora*

Is civil society participation a potential remedy?[120] Since the 1990s, civil society participation in international organizations has proliferated.[121] The UN Economic and Social Council (ECOSOC) has provided for consultative status since its inception,[122] and in the late twentieth century, the number of NGOs taking up that status vastly increased.[123] NGOs have played influential roles in a number of international law-making processes.[124] The importance of public participation in, *inter alia*, decision-making relating to the environment has been progressively recognized.[125] A considerable bulk of literature

[118] Treaty on European Union (adopted 7 February 1992 and entered into force 1 November 1993) 1755 UNTS, art 17(3); Constitutive Act of the African Union (adopted 11 July 2000 and entered into force 26 May 2001) 2158 UNTS 3, art 14.

[119] Constitution of the United Nations Educational, Scientific and Cultural Organization (adopted 16 November 1945 and entered into force 4 November 1946) 4 UNTS 52, art V(2).

[120] Here the terms "civil society" and "NGO" are used interchangeably: For a fuller discussion of these terms and their differences, see Sabine Lang, *NGOs, Civil Society, and the Public Sphere* (Cambridge: Cambridge University Press, 2013) chapters 2 and 3.

[121] Holly Cullen and Karen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1(1) *Non-State Actors & International Law*, 7–39.

[122] UN Charter, art 71.

[123] Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39(2) *Cornell International Law Journal*, 243–284, 245.

[124] For accounts of such processes, see, for example, K. Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations, and the Idea of International Civil Society' (2000) 11(1) *European Journal of International Law*, 91–120; Cynthia Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly*, 137–147.

[125] See, for example, World Commission on Environment and Development, *Our Common Future* (1987), para. 107; UNGA, Rio Declaration on Environment and Development (13 June 1992) UN Doc A/CONF.151/26, Principle 10; Convention on Access to

advances both intrinsic and instrumental justifications for NGO participation in global governance: civil society participation is said to combat the democratic deficit, improve international organizations' legitimacy,[126] provide unique technical and practical expertise and information not otherwise available, increase the variety of political options, improve the quality of outcomes, and build domestic public support for such policies.[127] Legally, it has been proposed that participation in international law-making is an individual human right, derived from Article 25 of the International Covenant on Civil and Political Rights – the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives' – and that this right should in practice be exercised through NGO participation.[128] One could argue that NGO participation, then, solves the problem outlined above: Indigenous peoples may engage through NGOs, within existing NGO participation mechanisms, to have their voices heard at the intergovernmental level.

I suggest otherwise. Although NGO participation founded on an individual human right to participate in international organizations and other intergovernmental fora is certainly valuable as well as legally justifiable for the reasons referred to above, it is not sufficient to remedy the problem of the domination of peoples by international organizations and groups of states, nor to enable peoples the full exercise of self-determination. Beyond the obvious point that NGOs, unlike peoples, do not have the right to self-determination, this is so for two reasons, one theoretical and one practical: systems of participation founded solely on individual human rights tend to result in the disregard of (marginalized) groups, and in practice, Indigenous peoples' organizations and representative institutions are not necessarily compatible with international organization mechanisms for the accreditation of civil society, as Indigenous advocates have stressed. Let us expand on each of these in turn.

The first objection can be understood by reference to (liberal) political theory. In domestic societies, it has long been recognized that formally democratic arrangements tend to undermine the interests of non-dominant

Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (concluded 25 June 1998 and entered into force 30 October 2001) 2161 UNTS 447.

[126] Steve Charnovitz, 'The Illegitimacy of Preventing NGO Participation' (2011) 36(3) *Brooklyn Journal of International Law*, 891–910, 894–895, 904ff.

[127] Kal Raustiala, 'States, NGOs, and International Environmental Institutions' (1997) 41(4) *International Studies Quarterly*, 719–740; Peter Van den Bossche, 'NGO Involvement in the WTO: A Comparative Perspective' (2008) 11(4) *Journal of International Economic Law*, 717–749, 720.

[128] Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) *European Journal on International Law*, 89–113.

societal groups.[129] Minority groups that have distinct interests from, but are numerically outweighed by, the rest of the population are persistently outvoted and hence under-represented. They are 'in a very real sense political captives of the majority', who may monopolize political power with barely more than half of the votes.[130] Where structural inequalities exist, 'formally democratic procedures are likely to reinforce them'.[131] While scholars initially conceived of this problem as relating to so-called classical ethnic, religious, and national minorities,[132] it is equally applicable to peoples such as Indigenous peoples. In many states, Indigenous peoples constitute a numerical minority or are otherwise a non-dominant societal group. In other words, individual civil and political rights do not suffice to protect the interests of Indigenous peoples, nor those of other marginalized groups. To correct for this problem, many states have instituted minority rights and Indigenous peoples' rights in national and international law,[133] including minority rights and Indigenous peoples' rights to participation in domestic public affairs, as well as mechanisms such as weighted voting,[134] political and associational institutions designed specifically to increase the representation of minorities or Indigenous peoples,[135] seats in parliaments designated for members of minorities or peoples,[136] and other types of 'political consociationalism'.[137] In this way, the universal, individual human right to take part in the conduct of public affairs,[138] which on its

[129] See generally, Vernon Van Dyke, 'Human Rights and the Rights of Groups' (1974) 28(4) *American Journal of Political Science*, 725–741; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995).

[130] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31(4) *New York University Journal of International Law and Politics*, 843–854, 848–849.

[131] Young, *Inclusion*, 34. An important caveat is that a group that is in the numerical minority is not always powerless; indeed, a powerful minority may be the dominant societal group: See, for example, Eric Kaufmann and Oded Haklai, 'Dominant Ethnicity: From Minority to Majority' (2008) 14 *Nations and Nationalism*, 743–767, 747–753.

[132] Van Dyke, 'Human Rights' 32; Kymlicka, *Multicultural Citizenship*, 52.

[133] See, for example, Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995 and entered into force 1 February 1998) CETS No. 157; Article 27, International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) UNTS 171.

[134] Montserrat Guibernau, 'Nations without States: Political Communities in the Global Age' (2004) 25(4) *Michigan Journal of International Law*, 1251–1282.

[135] Young, *Inclusion*, 141.

[136] Andrew Reynolds, 'Reserved Seats in National Legislatures: A Research Note' (2005) 30(2) *Legislative Studies Quarterly*, 301–310.

[137] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977). Examples of consociational states include Belgium and Burundi: René Lemarchand, 'Consociationalism and Power Sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo' (2006) 106(422) *African Affairs*, 1–20.

[138] International Covenant on Civil and Political Rights, art 25.

own would tend to reinforce structural inequalities, is supplemented by group rights.

Returning to the international realm, an analogous argument can be made. An individual human right to participation in international organizations, on its own, tends to reproduce existing structural global inequalities. Such inequalities in access and participation are well documented. Individuals and groups who are already marginalized globally find themselves disregarded in the intergovernmental sphere.[139] This is observable, for example, in relation to civil society observer participation in international organizations, where many more NGOs from the Global North participate than NGOs from the Global South.[140] An individual right to participation in IOs, exercisable through NGO participation, must be supplemented by an equivalent right of peoples – just as individual political participation rights on the domestic plane need to be complemented by minority rights to political participation and the so-called internal aspects of self-determination of peoples.[141] The argument here is not that participation is unimportant or undesirable in itself. Rather it is that, in a system characterized by NGO participation and lacking recognition of the procedural rights of groups, the voices and interests of peoples who occupy marginalized positions in the global order, including Indigenous peoples, tend to get lost.

At a more practical level, there is a mismatch between the structure and organization of NGOs and that of Indigenous peoples, which limits the extent to which Indigenous peoples are able to fit within existing procedures for the accreditation of NGOs to participate in international organizations. Indigenous peoples' organizations may have been constitutionally, legally, or politically recognized by the relevant state.[142] Many Indigenous peoples' organizations exercise self-governance functions over peoples and territories; hence they are loath to identify themselves as "non-governmental" organizations in order to seek accreditation.[143] Moreover, taking the criteria for consultative status with the ECOSOC as an example, NGOs are required to

[139] Stewart, 'Remedying Disregard'.

[140] Jackie Smith and Dawn West, 'The Uneven Geography of Global Civil Society: National and Global Influences on Transnational Association' (2005) 84(2) *Social Forces*, 621–652.

[141] Of course, this raises the question of whether a right of national minorities to participate in international law-making exists. Due to the so-called firewall between the law applicable to "minorities" and that applying to "peoples," this question is not appropriate for further consideration here.

[142] Human Rights Council, 'Ways and means of promoting participation at the United Nations of indigenous peoples' representatives on issues affecting them: Report of the Secretary-General' (2012) UN Doc A/HRC/21/24, para. 8.

[143] Ibid., para. 9.

have an established headquarters with an executive officer and provide a copy of its constitution, charter, or statutes, as well as a certificate of registration, and a financial statement.[144] An NGO must also have 'recognized standing'.[145] In addition, NGOs in consultative status with ECOSOC must be broadly representative of major segments of society in a large number of countries in different regions of the world.[146] By contrast, many Indigenous peoples' organizations are not recognized by the state in question. They may not have a headquarters, nor an "executive officer," and may function on the basis of oral traditions rather than written documentation; moreover, they rarely represent a major segment of society.[147] While there are limited exceptions,[148] in general these accreditation requirements limit civil society participation from being a remedy to the relationship of domination.

Might NGOs that fit the accreditation requirements – regardless of whether or not they are Indigenous peoples' representative institutions[149] – be able to effectively represent the voices of peoples regardless? Scholars have documented how "affected persons' organizations" and NGOs may fruitfully form alliances, whereby an NGO provides its expertise and organizational, operational, and financial support to an affected persons' organization that may be less experienced and resourced, while centering the concerns of the affected group.[150] Hence one can imagine that in individual cases an Indigenous people might partner with an NGO to, for instance, send its representatives to international meetings using the NGO's existing accreditation, funding, and advocacy support networks. However, this cannot be viewed as a general solution.

1.4 TOWARDS A RIGHT OF PEOPLES TO PARTICIPATE

We have seen that existing law does not adequately remedy the issue of international organizations' and state collectives' domination over

[144] ECOSOC res 1996/31, principle 10.
[145] Ibid., principle 9.
[146] Ibid., principle 22.
[147] Human Rights Council, 'Ways and Means', para. 10.
[148] For instance, several Indigenous peoples' organizations have ECOSOC status, including the Saami Council, the Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation (RAIPON), the Asia Indigenous Peoples Pact (AIPP), the Assembly of First Nations, and the International Indian Treaty Council (IITC).
[149] Noting that some ECOSOC-accredited Indigenous peoples' organizations are not necessarily representative.
[150] Annette Schramm and Jan Sändig, 'Affectedness Alliances: Affected People at the Centre of Transnational Advocacy' (2018) 3(5–6) *Third World Thematics*, 664–683.

Indigenous peoples. Civil society participation, underpinned by an individual human rights-based approach, does not account for group interests; nor is it well suited in practice for Indigenous peoples' organizational forms. Meanwhile, Indigenous peoples' participation on the domestic level, even where this occurs, is not necessarily enough to protect their right to self-determination.

Under the logic of self-determination, a remedy is warranted to fill the gap: a right of Indigenous peoples to participate in intergovernmental and international organizations' activities that concern their self-determination, including law-making, policymaking, decision-making, and standard-setting. This remedy, this rule, would co-exist with other rules of the law of self-determination and would not preclude, in appropriate circumstances, their application.[151]

We have identified a gap in the law of self-determination within which a right of Indigenous peoples to participation in global governance could fit. But this necessarily leads to the question of where is the rule located, and how can it be justified, within the positive sources of international law.

[151] As Xanthaki notes, states are 'eager to 'fill' the meaning of the right to self-determination with democracy and participation, as an attempt to set the external aspect of the right – and secession – aside': Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge: Cambridge University Press, 2010), 162.