INDIGENOUS PEOPLES' PROCEDURAL ENVIRONMENTAL RIGHTS AND TRANSNATIONAL INDIGENOUS ADVOCACY NETWORKS

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by

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ABSTRACT

This thesis analyzes the central question: whether, by engaging with states and extractive multinational corporations (MNCs) within the international system, transnational Indigenous advocacy networks (TIANs) can promote the development and implementation of international legal norms relating to the rights of Indigenous peoples to participate and access information in environmental decision-making. It examines Indigenous peoples' leadership and contributions to the development of international Indigenous rights norms and their continued roles in advancing the development and realization of their procedural environmental rights.

For context, this thesis examines Indigenous peoples' collaborations that shaped the development of the United Nations Declaration on the Rights of Indigenous Peoples, to exemplify Indigenous peoples' influence in international law. It identifies and responds to some of the shortcomings of Indigenous rights movements and organizations without discounting their efforts and achievements. Thus, by modifying and adapting Keck and Sikkink's analysis of transnational advocacy networks, this thesis introduces and explores a structure I term TIANs. TIANs will comprise webs of established Indigenous rights organizations operating internationally and seeking to initiate or maintain connections with domestic groups.

Constructivist international relations insights on the norm life cycle inform this thesis' analysis of the potential roles of TIANs as norm entrepreneurs with the requisite organizational platform. International legal norms on Indigenous peoples' procedural environmental rights have not been established in specific international rules, and domestic pressure is still being asserted for these rights to be respected. Hence, this thesis argues that these norms are at the first stage of the norm life cycle, and establishes the need for an international law instrument that unequivocally affirms

and protects these rights. It analyzes four distinguishing and interrelated potential characteristics of TIANs that respond to the particularities of Indigenous rights advocacy: spheres of operation, shared principled ideas, advocacy strategies, and information strategies. These attributes will make TIANs well-positioned to bridge the gap between international and domestic Indigenous rights advocates, optimize transnational Indigenous alliances, and foster the actualization of international Indigenous environmental rights principles domestically. Essentially, TIANs are suitable to engage with states and MNCs to shape their actions regarding developing and implementing the emerging norms.

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DEDICATION

This thesis is dedicated to the memory of my parents:

Stephen Alabi Oluyinka Akinbami

and

Victoria Adekunbi Akinbami

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CHAPTER 1: INTRODUCTION AND CONCEPTUAL FRAMEWORK

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I. General Introduction

This doctoral thesis addresses the central question – whether transnational Indigenous advocacy networks (an Indigenous advocacy structure introduced and proposed in this thesis) can promote the development and implementation of international legal norms on the procedural environmental rights of Indigenous peoples by actively engaging with other international actors, particularly states and extractive multinational corporations (MNCs). This introductory chapter provides background information about this study, lays out the methodologies to be adopted, and provides context on some terms that are employed in this thesis. It also provides a general overview of the literature and principal ideas on the rights and recognition of Indigenous peoples in international law and transnational advocacy networks. Furthermore, this chapter presents the scholarly significance of the research and the outline of the thesis.

This thesis' analysis is situated within the broader framework of Indigenous peoples' influence on the development of international law on Indigenous peoples' rights. Against the backdrop of international human rights law and constructivist international relations (IR) theory, this thesis analyzes the importance of Indigenous peoples' transnational engagement with states and MNCs in the global system. It relies on constructivist IR insights on the life cycle of norms[1] and transnational advocacy networks[2] to explore the potential roles and suitability of a concept referred to in this thesis as "transnational Indigenous advocacy networks" (TIANs). These insights also inform the analysis of the interactions between Indigenous peoples and other actors in the international system and how these interactions may influence the development of international

[1] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Org. 887 (Finnemore & Sikkink).
[2] Margaret Keck & Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998) (Keck and Sikkink, *Activists Beyond Borders*).

legal norms relating to the procedural environmental rights of Indigenous peoples through the development of a United Nations (UN) General Assembly Declaration.

Indigenous peoples have been on the vanguard of advocating for international Indigenous rights. Past Indigenous engagements and achievements in the international system, particularly during the development of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP or Declaration),[3] exemplify Indigenous peoples' influence in shaping the development of international Indigenous rights law. By relying, for context, on the records of Indigenous peoples' involvement in the global system to promote their rights, this thesis underscores how Indigenous peoples and groups from different corners of the world joined forces to drive the development of an international law instrument that unequivocally affirms their individual and collective rights – the UNDRIP.

The "gradual and challenging process"[4] of forming the Indigenous global movement has yielded the UNDRIP and secured a place for Indigenous peoples as international actors with influence on international human rights law. Now that Indigenous activists have achieved a significant part of their initial goals internationally, this thesis turns attention to the actualization of international Indigenous rights standards locally. It aims to address some of the shortcomings of international Indigenous rights organizations in ensuring the implementation of international standards at the national and communal levels, with a focus on procedural environmental rights.

This thesis extrapolates Keck and Sikkink's insights on transnational advocacy networks and modifies and adapts the concept within the context of Indigenous advocacy through a concept that

[3] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 2 October 2007, A/RES/61/295.
[4] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge, 2016) at 98 (Barelli, *Seeking Justice*).

this thesis refers to as TIANs. The idea of transnational advocacy gained popularity after Keck and Sikkink applied the term in their analysis of a type of pressure group that operates across national boundaries.[5] This thesis takes the conversation further by conceptualizing and analyzing transnational Indigenous advocacy through the concept of TIANs.

TIANs are not just transnational advocacy networks involved in Indigenous causes but will also have distinct characteristics that respond to the particularities of Indigenous peoples and Indigenous rights advocacy.[6] Keck and Sikkink argue that transnational advocacy networks emerge from the "boomerang pattern" – when domestic activists seek assistance from international allies after failed attempts to prevent or mitigate their government's disregard for human rights standards.[7] Contrariwise, TIANs will be made up of webs of *established Indigenous rights advocates operating internationally* and seeking to initiate or maintain connections with domestic groups. They are drawn together by the shared idea of promoting and protecting Indigenous rights through active and concurrent involvement in international and domestic politics.

TIANs, as designed in this thesis, are distinct from other advocacy networks, as they will operate with the indispensable involvement of Indigenous peoples and organizations and on the foundation of fundamental Indigenous values. Although Indigenous peoples are not one homogenous group, values that resonate across Indigenous research ethics include "honour, trust, honesty, humility,…commitment to the collective and respectful relationship with the land."[8] One of the underlying principles of TIANs will be the acknowledgement and respect for Indigenous values.

[5] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 2.
[6] A detailed analysis of TIANs and their four distinctive characteristics is presented in chapter five of this thesis.
[7] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 2 at 36.
[8] Dianne Biin et al, *Pulling Together: A Guide for Researchers, Hilḵala* (Victoria: BC Campus 2021) at 39.

Some authors argue that historically, Indigenous traditions were founded on eco-centric values,[9] and spiritual and respectful relationships with the environment.[10] Irrespective of globalization and threats to Indigenous cultural sustainability, the literature suggests that many Indigenous societies still hold these values globally.[11] Therefore, TIANs must be attentive to Indigenous environmental values to successfully influence the development and implementation of Indigenous peoples' procedural environmental rights.

Transnational alliances among Indigenous groups are not new. As analyzed in chapter four of this thesis, collaborations among Indigenous advocates, groups and allies were visible and compelling during the drafting process of the UNDRIP. However, it is challenging, and sometimes considered unacceptable, to classify Indigenous peoples acting within the international sphere under some existing representative structures. Indigenous peoples are considered "peoples" or "nations" seeking to attain equal status as states internationally. While the state model might be applicable, Indigenous peoples do not have the characteristics or privileges of states in international law.[12]

On the other hand, some Indigenous representatives oppose the categorization of Indigenous representatives as "civil society".[13] For instance, during the Organization of American States

[9] Nicole Graham, "Ecological Conceptions of Property" in Peter Burdon, ed, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Kent Town: Wakefield Press, 2011) 259; Shé Mackenzie Hawke, "Water Literacy: An 'Other Wise', Active and Cross-Cultural Approach to Pedagogy, Sustainability and Human Rights" (2012) 26:2 Continuum 235.
[10] Monica Gratani et al, "Indigenous Environmental Values as Human Values" (2016) 2:1 Cogent Social Sciences 1.
[11] See for example, Ana Manero, "A Systemic Literature Review of Non-Market Valuation of Indigenous Peoples' Values: Current Knowledge, Best Practices and Framing Questions for Future Research" (2022) 54 Ecosystem Services 101416; Christoph Woiwode et al, "Inner Transformation to Sustainability as a Deep Leverage Point: Fostering New Avenues for Change Through Dialogue and Reflection" (2021) Sustainability Science 841; Philip Costigan, "The Role of Spirituality in the Development of an Eco-Centric Culture" (2007) 26:3 Social Alternatives 41; Christoph Woiwode et al, "Inner Transformation to Sustainability as a Deep Leverage Point: Fostering New Avenues for Change Through Dialogue and Reflection" (2021) Sustainability Science 841.
[12] Barelli, *Seeking Justice, supra* note 4 at 96.
[13] Civil society is a collective term for organizations and groups that are independent of governments and represent and promote the interests and concerns of their members and others. They include NGOs, INGOs and social movements.

(OAS) Seminar on Mechanisms for Participation, the representative of Indigenous organizations and peoples of Abya Yala, stressed that "we, the Indigenous peoples, are not civil society; we are peoples, as recognized by international law."[14] The Indigenous representatives resolved that the applicable OAS resolution that established the guidelines for civil society participation should be amended to include guidelines for the participation of Indigenous peoples.[15] Likewise, the idea of non-governmental organizations (NGOs) representing Indigenous interests was rejected and perceived as confining "Indigenous Peoples into an NGO system and away from…Nationhood."[16]

This thesis does not support the exclusion or denunciation of non-Indigenous allies or organizations advocating for Indigenous rights. On the contrary, it promotes the collaboration of Indigenous and non-Indigenous advocates in a structure that aligns with Indigenous values.[17] However, much caution must be exercised in classifying Indigenous peoples under any existing nomenclature representing Indigenous interests internationally.

Generally, Indigenous representation in the international community is through individuals, groups or organizations that identify as communal leaders, national groups, social movements, NGOs, and international non-governmental organizations (INGOs). These representative structures have contributed immensely to the development of international Indigenous rights law, but they have their inherent shortcomings that limit their influence in the development and implementation of Indigenous peoples' procedural environmental rights.

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[14] Organization of American States, "Participation of Indigenous Peoples in the Inter-American System: Mechanisms and New Tools Proposed", Declaration of The Indigenous Peoples' Representatives in The Framework of The Seminar on The Mechanisms of Indigenous Peoples Participation In The Organization Of American States, online: <https://www.oas.org/dil/indigenous_peoples_publications_participation_inter-american_system.pdf> at 14.
[15] *Ibid* at 15.
[16] Sharon Venne, "NGOs, Indigenous Peoples and the United Nations" in Aziz Choudry and Dip Kapoor, eds, *NGOization: Complicity, Contradictions and Prospects* (London: Zed Books, 2013) 75 at 75.
[17] As discussed in chapter five, Indigenous peoples have shown willingness to collaborate with non-Indigenous allies on several issues including environmental protection.

During the development of the UNDRIP, Indigenous groups, NGOs and social movements played a significant role in shaping the language of the Declaration.[18] Particularly, the international movement of Indigenous peoples was involved in the drafting process of the UNDRIP since the 1970s[19] and was instrumental in promoting Indigenous causes. However, there has been slow actualization of international human rights standards at the national and communal levels. The gaping distance between international Indigenous rights activists and local groups calls for a fluid structure that can bridge the divide and disparate realities between domestic and transnational Indigenous groups.

Against this backdrop, this thesis proposes TIANs as structures, composed of Indigenous peoples, Indigenous organizations, and non-Indigenous allies, with distinct characteristics and logical operation strategies, aptly suited to represent Indigenous peoples' interests internationally. TIANs will act differently from other mainstream civil society organizations as their constituents will be connected and invigorated on the shared principled values of protecting and promoting Indigenous peoples' rights and ensuring the realization of international Indigenous rights standards nationally and locally. TIANs' constituents will be *advocates* working internationally, with domestic connections, under the umbrella of a durable, strategic, and inclusive structure that can bridge the gap between international and national organizations.

Some Indigenous-interest organizations exhibit some of the distinctive features of TIANs, as delineated in this thesis, and some of such organizations are discussed in chapter five of this thesis.

[18] Indigenous peoples' influence in shaping the language and adoption of the UNDRIP is explored extensively in chapter four of this thesis. For a detailed analysis of Indigenous peoples' influence in shaping the language of the UNDRIP, see Lola Ayotunde, "Evaluation of Indigenous Peoples' Influence During the Drafting Process of UNDRIP" in Dwight Newman, ed, *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar Publishing, 2022) 56.

[19] Augusto Willemsen-Diaz, "How Indigenous Peoples' Rights Reached the UN" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous* Peoples (Copenhagen: IWGIA, 2009) 16 at 30 (Augusto Willemsen-Diaz).

However, this author is unaware of any coalition of Indigenous rights advocates that have applied *all four* distinguishing characteristics of TIANs: sphere of operation, shared principled ideas, advocacy strategies, and information strategies.

Aside from the four distinguishing elements of TIANs that will be summarized shortly, the emergence of TIANs will differ from the boomerang pattern of TANs. As mentioned earlier, Keck and Sikkink assert that TANs usually emerge from the boomerang pattern "when domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside."[20] TIANs differ from TANs in this regard as they will emerge conversely – through international Indigenous rights advocates connecting with domestic Indigenous groups and representatives to build sustained collaborative relationships. As demonstrated in chapter four of this thesis, Indigenous peoples have gained substantial influence in international law politics and were instrumental in shaping the language and adoption of the UNDRIP. Due to the slow implementation of international human rights standards at the domestic level, TIANs are proposed as structures for well-positioned international Indigenous players to collaborate with domestic sources.

In addition to the differentiating emergence of TIANs, they will be founded on four distinguishing factors. First, TIANs' sphere of operation will be fluid, cutting across international, national, and local spheres. TIANs are designed to target international politics by engaging internationally and domestically. Therefore, one of the significant factors in actualizing TIANs' objective of implementing Indigenous peoples' participatory environmental rights is their international engagements and sustained connections to domestic and international players. Second, TIANs are

[20] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 2 at 12.

developed and must operate on the underlying and shared principled idea that the rights of Indigenous peoples should be protected and promoted in international law. As applied in this thesis, the shared principled idea of TIANs will be the implementation of Indigenous peoples' participatory environmental rights.

Third, the principal strategies of TIANs are their *network* of *advocates* and information politics. Advocacy by "outsiders" is a factor that distinguishes TIANs from other forms of Indigenous international representations. TIANs, as envisioned in this thesis, must be flexible and open to non-Indigenous allies, committed to their shared values. The constituents will be webs of individuals and organizations brought together under the umbrella of TIANs with endorsed tactics for political actions to further protect and promote Indigenous peoples' rights. The fourth distinguishing characteristic of TIANs is their strategic use of information to promote their cause. With the diversity of their constituents and the leverage of information and resource sharing among international and domestic members, TIANs can influence international Indigenous rights law through the methodical framing and dissemination of information within the international system.

Other Indigenous rights organizations have contributed immensely to the development of international Indigenous rights law and can coexist with the proposed TIANs or operate under the umbrella of TIANs. Two prominent structures that represent Indigenous interests internationally are social movements and INGOs. However, they have some limitations that may impede their role in developing and implementing Indigenous peoples' procedural environmental rights.

First, social movements are webs of informal collaborations based on shared identities between individuals, groups, or organizations involved in political or cultural struggles.[21] They are usually

[21] Mario Diani and Ivano Bison, "Organizations, Coalitions, and Movements" (2004) 33:3 Theory and Society 281 at 282.

composed of people or organizations with common beliefs, working on contentious issues and using different forms of demonstrations.[22] Social movements differ from other civil society organizations due to their transient lifespan. They are created with the hope of achieving specific goals, and once they achieve their objectives, or fail, they cease to exist. The continuity of social movements is tied to the persistence of their objectives or engagement in other related agendas.[23] Furthermore, social movements usually have unusual objectives that challenge established standards, and their members have shared collective identities.[24]

The international movement of Indigenous peoples (also referred to as the global Indigenous movement) operated within the social movement framework during the drafting process of UNDRIP.[25] The movement comprises Indigenous communities and organizations from different parts of the globe representing the Indigenous agenda at the international level. The movement grew stronger during the UNDRIP drafting process and aimed to ensure that the international community acknowledged Indigenous peoples' rights, especially their collective rights.[26]

The movement has made significant contributions to global politics, but there has been a slow realization of the international efforts and strategies locally.[27] Joji Carino, the Director of the Forest Peoples Programme, highlighted the gaps in international Indigenous rights activism and domestic

[22] Donatella della Porta and Alice Mattoni, "Social Movements" in Gianpietro Mazzoleni et al, eds, *The International Encyclopedia of Political Communication* (New York: John Wiley & Sons, 2015) 1496.
[23] See Doowon Suh, "What Happens to Social Movements After Policy Success? Framing The Unintended Consequences and Changing Dynamics of the Korean Women's Movement" (2014) 53:1 Social Science Information 3.
[24] Cristina Flesher Fominaya, "Collective Identity in Social Movements: Assessing the Limits of a Theoretical Framework" in David Snow, Sarah Soule, and Hanspeter Kriesi, eds, *The Blackwell Companion to Social Movements* (Massachusetts: Blackwell, 2018) 429.
[25] Mauro Barelli, *Seeking Justice, supra* note 4 at 97-98.
[26] Augusto Willemsen-Diaz, *supra* note 19 at 18.
[27] See Irene Bellier and Martin Preaud, "Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples" (2011) 16:3 International Journal of Human Rights 474.

implementation of international principles. Carino stressed the need to re-strategize and focus on domestic issues.[28]

Sometimes, international Indigenous rights movements are quite focused on making impacts at the international level without adequate attention to domestic Indigenous issues. Despite the contributions of these movements to international Indigenous rights law, they lack the capability to secure some fundamental domestic changes. For example, they cannot guarantee the kind of national revolution that the principle of self-determination demands, such as resilient support from a significant number of domestic actors.[29]

As Tarrow and della Porta observe, the lasting impact of transnational activism depends on "the implosion of international issues into domestic politics through the multiple belongings and flexible identities of…rooted cosmopolitans."[30] An international movement of Indigenous peoples' focus on international politics has consequences on domestic Indigenous groups. There is an increasing internationalization of Indigenous movements so much that "some movements have now withdrawn from state politics for fear of losing their identity in the labyrinthine interests of state power."[31] Numerous communal movements have merged with regional or international movements engaged in agendas beyond the scope of the state.[32] Although the expansion of international Indigenous rights movements is progressive, the domestic gap is an indication of the systemic shortfalls of the movements. Indeed, there is a call for Indigenous movements to focus

[28] Holly Eva Ryan, "The Global Indigenous Movement: Past Achievements, Future Challenges" (2015) Forest Peoples Programme, Event Report 1.
[29] Irène Bellier and Martin Préaud, "Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples" (2011) 16:3 International Journal of Human Rights 474 at 485.
[30] Sidney Tarrow and Donatella della Porta, "Conclusion: ""Globalization," Complex Internationalism, and Transnational Contention" in Sidney Tarrow and Donatella della Porta, eds, *Transnational Protest and Global Activism: People Passions and Power*, (Lanham: Rowman & Littlefield, 2005) 227 at 238.
[31] Priti Singh, "Global Configurations of Indigenous Identities, Movements and Pathways" (2018) 145:1 Thesis Eleven 10 at 20.
[32] *Ibid*.

more on communal issues now that some formally aspirational rights are affirmed in the UNDRIP.[33]

International Indigenous movements have been accused of neglecting pertinent issues, such as women's rights, like states.[34] The significance of domestic politics to the Indigenous agenda, both locally and internationally, cannot be overemphasized. This is a factor that is duly addressed by the proposed fluid operational jurisdiction of TIANs. After crossing the hurdle of the development of UNDRIP, transnational Indigenous organizations need to re-strategize and work with national groups to project local realities to the international community, provide guidance and collaborate in addressing national impediments to the implementation of UNDRIP.

Furthermore, Indigenous rights movements are usually founded on the common identity of members. Members are often drawn together by the commonality of their histories and aspirations. This factor sometimes restricts the membership of Indigenous rights movements to people who claim Indigenous ancestry. Non-Indigenous individuals and groups have also contributed to international Indigenous rights law development, but they are sometimes considered outsiders to the movements. Including other people with the same aspirations but different historical experiences could help amplify the knowledge of the members of the movements and encourage reciprocity and camaraderie with other groups.[35]

Second, many Indigenous NGOs and INGOs were involved during the development of the UNDRIP, like the social movements. Indigenous NGOs and INGOs are organizations structured

[33] Rebecca Hardin and Kelly Askew, "Claims, Rights, Voices, and Spaces in the Global Indigenous Peoples Movement" (2016) 2 Journal of Law, Property, and Society 49.
[34] Rauna Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34 Human Rights Quarterly 225 at 237-238.
[35] For the advantages of diversity of membership in movements, see Julien Talpin, "Creating Social Capital Through Deliberative Participation: The Experience of the Argentine Popular Assemblies" in Derrick Purdue, ed, *Civil Societies and Social Movements: Potentials and Problems* (London: Routledge, 2007) 203 at 218.

around Indigenous issues and operated by people with the common objective of promoting Indigenous peoples' rights and opposing discriminatory practices against Indigenous communities. Several Indigenous INGOs are involved in promoting and protecting Indigenous peoples' rights in environmental decision-making because of the direct implications of the environment on the enjoyment of Indigenous rights. Indigenous INGOs involved in environmental rights organize around the braided issues of cultural, social, and ecological well-being. They sometimes work in partnership with institutions and non-Indigenous bodies, depending on the enormity of projects or organizational vision.[36]

However, their collaboration with other organizations is external and temporal. INGOs are not structures for the internal collaboration of multiple actors or organizations, including Indigenous and non-Indigenous activist groups. Although INGOs sometimes collaborate in furtherance of Indigenous rights causes, their membership is based on the shared identities of their members. That is, they are only open to Indigenous groups. Additionally, they operate transnationally with limited domestic involvement and are not engaged in the acquisition, interpretation, and strategic broadcasting of Indigenous information politics.

Unlike Indigenous INGOs and social movements, TIANs will comprise different interrelated constituent organizations, fused by the common principled idea of promoting Indigenous peoples' rights. The collaboration of organizations within TIANs will be internal and long-term. Additionally, the membership of TIANs is anticipated to be enduring and unrestricted to people claiming Indigenous ancestry, but amenable to non-Indigenous allies. The restricted membership, temporal collaborations, and transient lifespan of some place-based Indigenous representative

[36] For example, the International Work Group for Indigenous Affairs (IWGIA) collaborates with other Indigenous and non-Indigenous organization in furtherance of the objective of promoting and protection Indigenous peoples' rights. IWGIA, "IWGIA's Global Network" online: <https://www.iwgia.org/en/network.html>.

mechanisms may undermine their roles in promoting Indigenous peoples' procedural environmental rights. Hence, TIANs are explored as an alternative in response to some of the identified shortfalls of other Indigenous structures. This thesis investigates TIANs' roles in bridging the gap between international and local Indigenous groups with a focus on the development and implementation of the procedural environmental rights of Indigenous peoples, particularly the rights to participation and access to information. It also considers the potential issues that might limit the practicality and Indigenous peoples' acceptance of TIANs in the concluding chapter. The identified limiting factors include the probable colonial undertone of advocacy networks such as TIANs and doubts about the viability of international human rights law.

Procedural environmental rights include the rights to access environmental information, participation in environmental decision-making processes, and access to remedies and justice when environmental rights are violated. These rights are critical components of Indigenous peoples' environmental rights and have significant implications on their other rights. Without discounting the importance of the right to access environmental remedies and justice, this thesis focuses on two interrelated procedural environmental rights aspects: rights to access environmental information and participate in environmental decision-making. All the components of procedural environmental rights are critical for Indigenous peoples' environmental protection and sustainable development. They all serve distinct and complementary purposes and differ in scope and focus.

Indigenous peoples' right to access environmental remedies and justice ensures they have access to the legal system to enforce their rights and seek remedies for environmental harm. On the other hand, Indigenous peoples' rights to access information and participate in environmental decision-making are the starting points for the actualization of environmental rights. They ensure the

democratic legitimacy of environmental decisions and better accountability for all stakeholders,[37] including states and extractive companies. These two rights are essential for ensuring that Indigenous peoples have the necessary information and opportunity to effectively engage in and influence environmental decisions. In order to adequately address the thesis questions within a reasonable scope, this thesis' analysis of Indigenous peoples' procedural environmental rights centres on their rights to access environmental information and participate in environmental decision-making.

II. Thesis Questions

This thesis addresses the following principal question:

Can transnational Indigenous advocacy networks promote Indigenous peoples' interests in the development and implementation of international legal norms relating to the rights of Indigenous peoples to participate and access information in environmental decision-making through active interactions with states and extractive MNCs within the international system? This question is assessed in light of an analysis of records of Indigenous international advocacy where Indigenous peoples have sought to shape the development of international Indigenous rights law. To answer the research question, this thesis addresses the following sub-questions:

1. How have Indigenous peoples influenced the development of international Indigenous rights law? To address this sub-question, the thesis focuses on one example of an attempt to influence international law on the rights of Indigenous peoples and examines the roles of Indigenous representatives in shaping the language of the UNDRIP during the drafting

[37] For an analysis of how public participation in environmental management results in democratic legitimacy, see Sherif Zakhour, "The Democratic Legitimacy of Public Participation in Planning: Contrasting Optimistic, Critical, and Agnostic Understandings" (2020) 19:4 Planning Theory 349.

process between 1985 and 2007.[38] The findings on the influence of Indigenous peoples during the UNDRIP drafting process will demonstrate the past achievements of Indigenous peoples in international law and the possibility of furthering the development and implementation of legal norms on the procedural environmental rights of Indigenous peoples through advocacy networks.

2. Can Indigenous peoples' engagement with states and extractive MNCs through the proposed structure, transnational Indigenous advocacy networks, shape the development and implementation of international legal norms on the rights of Indigenous peoples to participate and access information in environmental decision-making?

As this thesis will discuss further, there are limitations to Indigenous peoples' representation by communal leaders, national groups, social movements, and NGOs. In light of these limitations, it introduces and proffers TIANs as alternative structures for promoting Indigenous peoples' procedural environmental rights through active engagements with other international actors. To achieve this broad objective, this thesis firstly analyzes Indigenous peoples' influence in shaping international Indigenous rights law in the past. Secondly, it examines the potential of the interactions of TIANs with states and extractive MNCs in the international system and how such interactions can inform other actors' decisions despite the diversity of actors' interests.

International "interaction" as applied in this thesis, means "the myriad ways in which people, things, information, and ideas intersect across and within borders…Interactions occur whenever people come into contact, whenever they share ideas or whenever they exchange objects with

[38] The Working Group on Indigenous Populations of the Sub-Commission commenced the initial draft of UNDRIP in 1985 and the final draft was adopted by the UN General Assembly in September 2007. The language of the UNDRIP was drafted and reviewed during this period.

others."[39] International interactions include social, political, and economic interactions.[40] This thesis does not attempt to explore the meaning or concept of international interactions. That is beyond the scope of this research.[41] In this thesis, international actors' interaction means social interactions, including cooperation among actors. That is, interactions between two or more actors in "joint pursuit of agreed-on goal(s) in a manner corresponding to a shared understanding about contributions and payoffs."[42] In context, the interactions of TIANs with states and extractive MNCs will imply cooperation among the actors to develop and implement international legal norms on Indigenous peoples' procedural environmental rights.

III. Why Procedural Environmental Rights?

Considering international law's colonial antecedents,[43] the global thirst for natural resource exploitation, the severe impact of environmental decisions on Indigenous peoples,[44] and past Indigenous engagements in the international system, this thesis underscores the importance of an influential and durable collaborative structure in representing Indigenous peoples' interests in the development and implementation of procedural environmental rights. Indigenous communities are most affected by resource extraction projects because a significant proportion of the world's

[39] Barry Driscoll and Scott Straus, *International Studies: Global Forces, Interactions and Tensions* (London: Sage, 2018) at 4 – 5.
[40] *Ibid* at 5.
[41] For discussions on international interactions, see Michaël Aklin and Johannes Urpelainen, "The Global Spread of Environmental Ministries: Domestic-International Interactions" (2014) 58:4 International Studies Quarterly 764; Fioravante Patrone and Ariel Dinar, "Strategic Behaviour in Global and International Interactions" (2012) 14:4 International Game Theory Review 1240001.
[42] Xavier Castañer and Nuno Oliveira, "Collaboration, Coordination, and Cooperation Among Organizations: Establishing the Distinctive Meanings of These Terms Through a Systematic Literature Review" (2020) 46:6 Journal of Management 965 at 966.
[43] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, New York: Cambridge University Press 2004) at 13.
[44] Aside from Indigenous communities, economically deprived countries are also vulnerable to the environmental decisions of western countries, such as the United States of America. See Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford: Oxford University Press, 2014) at 5 – 8.

untapped natural resources are within these communities.[45] Some Indigenous communities have welcomed natural resource development,[46] but many communities resist natural resource extraction and other major development projects because they are the leading causes of human rights violations and environmental degradation in Indigenous territories.[47]

As the need for oil and other resources increases, states and investors turn their attention to different territories with natural resources, thereby encroaching on Indigenous communities that are mostly situated in rural and protected areas.[48] Considering Indigenous peoples' ways of life depend on the environment and the sustainable use of natural resources,[49] resource extraction and environmental degradation usually have a direct and grievous impact on them.[50] Thus, the lack of a direct and enforceable international legal mechanism for regulating MNCs hinders Indigenous peoples from enforcing extractive MNCs' human rights responsibilities and exacerbates Indigenous communities' human rights challenges.

Environmental challenges threaten the actualization of Indigenous peoples' rights and limit Indigenous communities' ability to thrive and enjoy human rights.[51] The ecological issues

[45] Stefania Errico, "The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights" in Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart, 2011) at 329-330.
[46] For instance, some Indigenous communities in Saskatchewan welcome natural resource development within their communities while protecting their rights and title. See Johnson Shoyama Graduate School of Public Policy, "First Nations Helping to Drive Natural Resource Development: Embracing Opportunity While Protecting Aboriginal Rights and Aboriginal Title" (August 2019) Policy North (North-West Saskatchewan Policy Unit) 1.
[47] Thomas Hall and Fenelon James, *Indigenous Peoples and Globalization: Resistance and Revitalization* (New York: Routledge, 2015); Dan Brockington, Rosaeen Duffy and Jim Igoe, *Nature Unbound: Conservation, Capitalism and the Future of Protected Areas* (London: Earthscan, 2008); James Anaya, "Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law" (2006) 22 Wash. U. J.L & Pol'y 107.
[48] It is reported that Indigenous peoples live within about fifty percent of protected areas. Janis Alcorn, "Indigenous Peoples and Conservation" (April 2010) Macarthur Foundation Conservation White Paper Series.
[49] United Nations Economic and Social Council, "Lands, Natural Resources Represent Life for Indigenous Peoples, Not Mere Commodities" (16 April 2018) HR/5387 Permanent Forum on Indigenous Issues, Seventh Session.
[50] David Lertzman & Harrie Vredenburg, "Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach" (2005) 56:3 Journal of Business Ethics 239.
[51] Paul Mohai, David Pellow & J. Timmons Roberts, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405.

besetting the planet earth worsen the challenges Indigenous communities are already experiencing.[52] There is a connection between climate change and the main aspects of "vulnerability, social justice, and equity."[53] Indigenous peoples represent a high percentage of the world's vulnerable groups, as about eighteen percent of the world's extremely poor are Indigenous.[54] More so, the less developed communities suffer more from environmental challenges.[55] As vulnerable minorities with significant attachment to their land and resources, Indigenous peoples are excessively saddled with the consequences of environmental degradation. Gilio-Whitaker explains that "Indigenous peoples' pursuit of environmental justice requires the use of a different lens, one with a scope that can accommodate the full weight of the history of settler colonialism, on one hand, and embrace differences in the ways Indigenous peoples view land and nature, on the other."[56]

The importance of procedural environmental rights has been acknowledged at both international[57] and national fora.[58] Procedural environmental rights serve as an assurance of substantive

[52] United Nations Department of Economic and Social Affairs, "Climate Change" (2008) United Nations – Indigenous Peoples Paper.
[53] Robin Mearns & Andrew Norton, "Equity and Vulnerability in a Warming World: Introduction and Overview", in Robin Mearns and Andrew Norton, *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World, New Frontiers of Social Policy* (Washington DC: World Bank, 2010) 1 at 1.
[54] International Labour Organization, "Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future" (2019) ILO Publication CH-1211 at 20.
[55] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (London: Harvard University Press, 2011).
[56] Dina Gilio-Whitaker, *As Long as Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock* (Boston, Massachusetts: Beacon Press, 2019) at 3-4.
[57] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process. United Nations, Treaty Series, vol. 2161, p. 447. See Lynda Collins, "Are We There Yet? The Right to Environment in International and European Law" (2007) 3 McGill Int'l J. Sust. Dev. L. & Pol'y 119.
[58] An example of a national procedural environmental initiative is Costa Rica's State of the Nation Report which provides annual independent environmental and developmental data and promotes informed public participation in environmental decision-making. Costa Rica State of the Nation Program, "Sustainable Human Development: Learn What We Do" online: <https://estadonacion.or.cr/>. At the provincial level, Ontario's legislation, *The Environmental Bill of Rights,* gives residents of Ontario the right to participate in environmental decision-making. Part II, Government of Ontario, *Environmental Bill of Rights* (1993) S.O. 1993, c. 28. For an overview of environmental initiatives, see Chris Jeffords & Joshua Gellers, "Constitutionalizing Environmental Rights: A Practice Guide" (2017) 9:1 Journal of Human Rights Practice 136-145.

environmental rights and tools to ensure stakeholder participation in environmental protection. Essentially, procedural environmental rights are important tools in monitoring compliance with and enforcement of environmental law. The impetus for focusing on procedural environmental rights stems from the gap in international law in regulating businesses' activities, especially the ineffective enforcement of the human rights responsibilities of extractive MNCs and the implications of this gap on the enjoyment of Indigenous peoples' rights. To respond to this gap as it affects Indigenous peoples' environmental rights, this thesis evaluates the significance of their engagement with states and extractive MNCs in furtherance of international environmental rights. The imperativeness of the right to participation in environmental decision-making and access to environmental information has been articulated in the literature. Brisman explains that:

> While access to information, public participation in decision-making regarding public policy, and access to an effective remedy are integral to the legitimacy and effective operation of a democratic government, they are also necessary for safeguarding human rights and protecting the environment…Denial of fundamental rights such as the right to public participation endangers the protection of substantive rights and increases the likelihood of environmental degradation and the chances that such damage will be reversible.[59]

International law has begun to address many Indigenous issues, including exploitation of their traditional lands and self-determination.[60] But considering the particular position of Indigenous peoples on environmental sustainability and the preservation of their connection to the

[59] Avi Brisman, "The Violence of Silence: Some Reflections on Access to Information, Public Participation in Decision-Making, and Access to Justice in Matters Concerning the Environment" (2013) 59:3 Crime, Law, and Social Change 291 at 292. For more on the importance of procedural environmental rights, see Chiara Armeni, "Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms" (2016) 28:3 Journal of Environmental Law 415; Nino Gokhelashvili, "The Role of the Public in Environmental Decision-Making" American Journal of Environmental Protection 4:3 (2015) 1; Benjamin Richardson and Jona Razzaque, "Public Participation in Environmental Decision-Making" (2006) 6 Environmental Law for Sustainability 165.

[60] Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22:1 European Journal of International Law 121.

environment, they continue to push for their participation in environmental decision-making.[61] Thus, the international community is taking steps to engage with Indigenous peoples on ecological issues.[62] Indigenous environmental perspectives can be understood with due appreciation of Indigenous historical, cultural, and communal backgrounds.

Hence, this thesis highlights the inadequacy of the general international rights to participation and access to information in addressing the peculiar circumstances of Indigenous peoples. It provides insight into the issues besetting Indigenous representatives in articulating their environmental concerns and provides an alternative means for presenting these concerns in a manner that maximizes Indigenous influence on the development of international law relating to Indigenous peoples' procedural environmental rights.

IV. Methodology of the Thesis

Although the issues this thesis investigates have interdisciplinary allegiances to international law and international relations, much attention is given to legal analysis. As described in this section, the thesis adopts historical and analytical legal research methodologies in responding to the thesis questions.

The historical legal research approach reveals how legal frameworks develop and evolve over time.[63] A historical account of how a legal framework develops within the context of different

[61] See David Schlosberg and David Carruthers, "Indigenous Struggles, Environmental Justice, and Community Capabilities" (2010) 10:4 Global Environmental Politics 12; Ciaran O'Faircheallaigh, "Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making" (2010) 30:1 Environmental Impact Assessment Review 19.

[62] Ethan Shenkman et al, "Engaging Indigenous Peoples on Environmental Justice at the UN Permanent Forum" (2017) Environmental Protection Agency, 15th Permanent Forum on Indigenous Issues.

[63] For a detailed analysis of historical legal research approaches, see David Ibbetson, "Historical Research in Law" in Mark Tushnet and Peter Cane, eds, *The Oxford Handbook of Legal Studies* (New York: Oxford University Press, 2005) 864. The historical legal research methodology has been explored and applied in several legal literature including: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, New York: Cambridge University Press 2004); Bryan Wagner, "Historical Method in the Study of Law and Culture" in Markus

timeframes provides an understanding of significant facts and factors that inform the creation of law. In response to the first thesis question, which assesses how Indigenous peoples have shaped international Indigenous rights law, this research utilizes the historical approach to assess Indigenous peoples' interactions within the global system and their participation in the development of UNDRIP between 1985 and 2007.[64]

This thesis uses the historical legal research approach to trace the history of Indigenous peoples' attempts at gaining the audience of the League of Nations, the different stages of Indigenous peoples' recognition within the international system and how they eventually became international human rights lawmakers. An analysis of the trajectory of Indigenous peoples in global politics "reveals the complexities of international relations, evolution of international institutions, and justifications for international legal principles"[65] relating to the promotion and protection of Indigenous peoples' rights. This historical legal research approach helps to explain how past Indigenous interactions within the global order are assessed and how sources such as UN reports and texts on Indigenous peoples' participation during the development and adoption of UNDRIP are "analyzed, inferred from, or made sense of."[66]

Dubber and Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (New York: Oxford University Press, 2018) 193; David Ibbetson, "Comparative Legal History: A Methodology" in Anthony Musson and Chantal Stebbings, eds, *Making Legal History: Approaches and Methodology* (Cambridge: Cambridge University Press, 2012) 131. The historical legal research approach has also been applied within the context of Indigenous rights law. See for example, Bjørg Evjen and David Beck, "Growing Indigenous Influence on Research, Extended Perspectives, and a New Methodology: A Historical Approach" in Kathryn Shanley and Bjørg Evjen, *Mapping Indigenous Presence: North Scandinavian and North American Perspectives* (Tucson: University of Arizona Press, 2015) 27.

[64] The relevant reports of the UN Department of Economic and Social Affairs (UNDESA) and the UN Permanent Forum on Indigenous Issues (Permanent Forum) on the negotiation and adoption process of UNDRIP are accessed through the UN Digital Library. United Nations, "The United Nations Digital Library" online: <digitallibrary.un.org>.

[65] Ishwara Bhat, *Idea and Methods of Legal Research* (New Delhi: Oxford University Press, 2019) at 210 (Bhat, *Ideas and Methods*)

[66] *Ibid* at 203.

The adoption of the UNDRIP was a noteworthy accomplishment for Indigenous peoples who worked hard to influence the Declaration's drafting, negotiation, and adoption processes. The UNDRIP establishes a universal framework for the minimum Indigenous rights standards. By expounding on existing human rights principles and fundamental freedoms within the context of Indigenous peoples' realities, the UNDRIP responds to Indigenous peoples' human rights concerns.[67] Considering the significance of the UNDRIP as a fundamental framework to guide the protection, respect, and actualization of the rights of Indigenous peoples, this thesis analyzes the drafting process of the Declaration to exemplify the influence of Indigenous peoples in international human rights law. The adoption of the UNDRIP marked "a historic moment when UN Member States and Indigenous peoples reconciled with their painful histories and resolved to move forward together on the path of human rights, justice and development for all."[68] This thesis recognizes the historical significance of the UNDRIP and the essential and unprecedented roles of Indigenous peoples in the development and adoption of the Declaration. Hence, the historical account of Indigenous peoples' roles in the development of the UNDRIP will illustrate the influence of Indigenous peoples in shaping international Indigenous rights law to respond to their concerns.

Considering a significant part of this research involves examining primary and secondary materials, such as international human rights instruments and scholarly works on international law and international relations, the thesis applies analytical methodology, which helps to elucidate the law and legal concepts by examining their origin, their interrelationship with norms at different

[67] United Nations Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples" online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.
[68] United Nations Department of Economic and Social Affairs, "Statement Attributable to the Spokesperson for the Secretary-General on the Adoption of the Declaration on the Rights of Indigenous Peoples" (13 September 2007) online: <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement-SG-IDWIP-2007.pdf>.

levels, and the influence behind them.[69] The analytical approach significantly helps with this thesis' exploration of existing laws and concepts. This methodology is applied to this research's "exposition of law and legal concepts by looking at its source, the power behind it, the interconnections with norms at different hierarchies, and the force behind it which may reflect social recognition."[70] This thesis employs analytical methodology to analyze international legal instruments[71] and judicial decisions relating to human rights, Indigenous peoples' rights, and environmental rights. Primary sources of international law provide the legal basis and current international law position on the rights to participation and access to information, generally and within the context of environmental matters.

Secondary international law and IR sources also provide insights for this research. Scholars have explored the patterns of non-state actors' interactions within the global system and how actors' engagements have changed and continue to inform the development of international law.[72] This thesis uses analytical methodology in applying constructivist IR insights to the second thesis sub-question, that is, the analysis of the proposed TIANs as structures representing Indigenous peoples' interests in the development and implementation of international norms on Indigenous peoples' procedural environmental rights.

[69] Bhat, *Ideas and Methods, supra* note 65 at 169.
[70] *Ibid*.
[71] Relevant conventions include United Nations Economic Commission for Europe, "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" (30 October 2001) Treaty Series Volume 2161 at 447; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, at 195 (entered into force 4 January 1969).
[72] Examples of such scholars are Rajagopal, Slaughter Burley, and Cali. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World* (Cambridge: Cambridge University Press, 2003); Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 AJIL 205; Basak Cali, *International Law for International Relations* (Oxford: Oxford University Press, 2010).

Constructivist IR theory provides the theoretical foundation for this thesis' analysis of Indigenous peoples' interactions within the international system and the factors that influence their interactions with other actors within that system.[73] Essentially, the theory provides insights on the importance of material structures such as TIANs and the place of history, identity, and interest in how Indigenous peoples act or how other actors engage with Indigenous peoples within the international system. This research utilizes constructivist IR theory to analyze state behaviour patterns in the development of international law and the motives for the activities of institutions and actors that impact international law.[74]

To assess the roles of TIANs, as introduced and expounded in this thesis, in the development and implementation of international legal norms on the procedural environmental rights of Indigenous peoples, this research applies Finnemore and Sikkink's constructivist insights on the norm life cycle in analyzing how different actors' identity and interest inform their actions at different levels of norm development.[75] The norm life cycle explains the different stages of norm development and how ideational changes occur during norm emergence, norm acceptance, and norm internalization.[76] This theory is applied to this thesis' analysis of actors' roles at different stages of norm development and how actors' interactions and interests shape their actions. The norm life

[73] See chapter two for the theoretical framework of the thesis.
[74] For an explanation of the interdependence of international relations and development of international law, see Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 AJIL 367 at 384.
[75] Chapter five of this thesis examines and applies the norm life cycle in detail. The norm life cycle has been applied to environmental risk reduction, human rights in targeted killings, politics of environmental norm and race anti-discrimination, among others. For examples of the application of the norm life cycle theory, see generally, Justin Alger and Dauvergne Peter, "The Translocal Politics of Environmental Norm Diffusion" (2020) 14:2 Environmental Communication, 155; Betcy Jose, "Not Completely the New Normal: How Human Rights Watch Tried to Suppress the Targeted Killing Norm" (2017) 38:2 Contemporary Security Policy 237; Nicole Deitelhoff and Lisbeth Zimmermann, "Norms Under Challenge: Unpacking the Dynamics of Norm Robustness" (2019) 4:1 Journal of Global Securities Studies 2; Krook Mona and True Jacqui, "Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality." (2012) 18:1 European Journal of International Relations 103; Hope Babcock, "Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm" (2009) 33 Harvard Environmental Law Review 117.
[76] Finnemore & Sikkink, *supra* note 1.

circle theory responds to the analysis of the diversity of international actors' interests and its probable impact on TIANs' interactions with states and extractive MNCs.

This research focuses on the development and implementation of legal norms. Generally, legal norms are mandatory standards or principles that regulate actions and relationships. Legal norms can be drawn from sources such as treaties and judicial precedents.[77] Essentially, international law embodies norms that prescribe general rules of conduct and guide the behaviour of different actors.[78] While international hard law creates legally binding obligations, soft law includes non-binding agreements, declarations, and principles. Soft law norms are often utilized in international law because they are easier to create without some of the elements of legalization,[79] and they facilitate collaboration between different actors with diverse interests and principles.[80] This thesis presents the position that even if only for a start, soft law, such as a UN General Assembly declaration,[81] is an acceptable option for protecting and promoting the procedural environmental rights of Indigenous peoples considering the dynamics of procedural environmental rights, the multiplicity of actors involved, the need for actors to learn about the implications of the norm over time, and the hurdle of attaining legalization.[82]

[77] Shecaira explains the distinction between sources of law and legal norms. Fabio Perin Shecaira, "Sources of Law Are Not Legal Norms" (2015) 28:1 Ratio Juris. 15.
[78] For a description of the different ways international law is created, see Hans Kelsen and Stanley Paulson, "The Concept of the Legal Order" (1982) 27:1 American Journal of Jurisprudence 64 at 73 – 74.
[79] According to Abbott et al, elements of legalization are obligation, precision and delegation. Kenneth Abbott et al, "The Concept of Legalization" (2000) 54:3 International Organization 401 at 401.
[80] Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 International Organization 421 at 422-423.
[81] See chapter five for the discussion on the suggested option of soft law and a UN General Assembly declaration.
[82] *Ibid* at 423.

V. Terms And Concepts

The following sub-sections provide context on some terms or concepts that run across this thesis and explain how they are applied in this research.

A. Indigenous Peoples

While there is no generally accepted definition of the term "Indigenous peoples," it is imperative to contextualize the term and how it is applied in this thesis. This thesis does not attempt to define the concept of "Indigenous peoples" or engage in related debates about the necessity of a definition or otherwise. This is beyond the scope of this research. Since many international rights and corresponding responsibilities of states are directly connected to the status of indigeneity, the term "Indigenous peoples" has increasingly acquired much significance in international law and IR. Despite the term's acquired relevance in global practice and politics, it has not received any generally recognized meaning. The positivist approach promotes the precise description of the term Indigenous peoples in order to determine the "scope of application" of applicable laws.[83] Conversely, the constructivist approach takes the concept of Indigenous peoples as "embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies."[84]

The *definition* of the concept of Indigenous peoples was a controversial issue during the drafting process of the UNDRIP. While many states argued that a clear description of the concept is a prerequisite for the application and scope of Indigenous peoples' rights, Indigenous representatives

[83] Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92:3 American Journal of International Law 414 at 414.
[84] *Ibid* at 415.

expressed their staunch unwillingness to be subjected to outside definitions.[85] Some African and Asian government representatives insisted on the inclusion of the meaning of Indigenous peoples in the UNDRIP. Some observers believed that some states insisting on the inclusion of the definition of Indigenous peoples were more interested in a definition that could be applied to exclude Indigenous peoples within their states from the scope of the UNDRIP.[86] The UN Special Rapporteur on Indigenous Peoples, Erica Daes, argued against the imposition of a definition because Indigenous peoples have suffered from the definitions imposed by others in the past.[87]

The implications of leaving out the definition of the concept of Indigenous peoples in international law remain debatable.[88] Scholars have attempted to define, or at least provide factors that delineate, Indigenous peoples. From the historical perspective, Anaya defines the term "Indigenous" broadly as "the living descendants of pre-invasion inhabitants of lands now dominated by others."[89] He went on to describe Indigenous peoples, nations, or communities as:

> culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest…They are Indigenous because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise

[85] Erica-Irene Daes, "The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous* Peoples (Copenhagen: IWGIA, 2009) 48 at 54 – 55 (Erica-Irene Daes, Contribution of WGIP).
[86] John B. Henriksen, "The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous* Peoples (Copenhagen: IWGIA, 2009) 78 at 79.
[87] Erica-Irene Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations" (2008) 21:1 Cambridge Review of International Affairs 7 at 8 – 9.
[88] Scholarly works that discuss the implications of the definition of the concept of Indigenous peoples include, Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2013) at 33- 60; Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22:1 Journal of International Law 121; Patrick Macklem, "Indigenous Recognition in International Law: Theoretical Observations" (2008) 30:1 Michigan Journal of International Law 177 at 203 – 209.
[89] James Anaya, Indigenous Peoples in International Law (Oxford: Oxford University Press, 2004) at 3 (Anaya, *Indigenous Peoples)*.

> distinct communities with a continuity of existence and identity that links them to the communities, tribes or nations of their ancestral past.[90]

Some scholars have proposed criteria that delineate Indigenous peoples.[91] However, none of the prescriptions is generally accepted as they are either too inclusive or restrictive.[92] The special rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, Mr. Martinez Cobo, emphasized that no definition is all-inclusive and Indigenous peoples should be allowed to decide the appropriate definition.[93] Instead, he outlined objective criteria applicable in identifying Indigenous peoples. For international decisions that may impact the future existence of Indigenous peoples, Cobo characterizes Indigenous communities, peoples and nations as:

> [T]hose which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[94]

The self-identification approach aligns with Indigenous peoples' argument that the concept of Indigenous peoples should be free from any definition.[95] Self-identification is a fundamental criterion for delineating the recipients of international Indigenous rights because "the concept of 'Indigenous' is not capable of a precise, inclusive definition which can be applied in the same

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[90] *Ibid* at 3.
[91] See for example, Amelia Cook and Jeremy Sarkin, "Who Is Indigenous? Indigenous Rights Globally, in Africa and Among the San in Botswana" (2010) 18 Tul. J. Int'l & Comp. L. 93; Martin Scheinin, "What are Indigenous Peoples" in Nazila Ghinea and Alexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination* (Boston: Nijhoff, 2004) 3; Jerry Firestone, Jonathan Lily and Isable Torres de Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law" (2005) 20:2 American University International Law Review 219.
[92] Cher Weixia Chen, "Indigenous Rights in International Law" (2014) 1 Oxford Research Encyclopedia of International Studies 1 at 5.
[93] Josè Martinez Cobo, "Study of the Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals and Recommendations" (1987) Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations Publication E/CN.4/Sub.2/1986/7/Add.4 at para 367 - 369 (Cobo, Study).
[94] *Ibid* at para 379.
[95] Erica-Irene Daes, Contribution of WGIP, *supra* note 85 at 54 – 55.

manner to all regions of the world."[96] While self-identification is promoted as the international law standard, there is a need to counter unfounded propositions by groups claiming to be Indigenous. To weed out such unsubstantiated claims, international instruments generally enumerate common objective traits of Indigenous peoples in addition to self-identification.[97] One objective criterion that is usually emphasized is the special and spiritual connection to ancestral lands.[98]

Although there is still no generally accepted definition of the concept of Indigenous peoples, it could be deciphered through three approaches – "chronological, relational, and normative."[99] The chronological approach defines Indigenous peoples as the earliest occupants of parts of the world forcefully overtaken by Europeans, while the relational approach focuses on the social and economic deprivations of Indigenous peoples.[100] The normative approach defines Indigenous peoples as "people who feel rooted in their surroundings, entertain a custodial sense about their territory and resources, are bound together primarily through moral bindings and entertain a sense of reciprocity and mutuality reinforced by egalitarian ethos."[101] While Anaya's definition cited above is akin to the chronological approach, Cobo's definition is normative.

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[96] Erica-Irene Daes, "Working Paper by the Chairperson-Rapporteur on the Concept of 'Indigenous Peoples'" (1996) Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 at para 34. See also, Erica-Irene Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations: United Nations Working Group on Indigenous Populations (1984-2001)" (2008) 21:1 Cambridge Review of International Affairs 7.

[97] Cobo, Study, *supra* note 93, para. 379-380; World Bank Group, "Indigenous Latin America in the Twenty-First Century" (2015) International Bank for Reconstruction and Development / The World Bank 98544; Jeff Corntassel, "Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity" (2003) 9:1 Nationalism and Ethnic Politics 75; Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian controversy" (1998) 92:3 American Journal of International Law 414 at 453-455.

[98] Cobo, Study, *supra* note 93, para. 380; United Nations, Office of the High Commissioner, Human Rights, "Indigenous Peoples and the United Nations Human Rights System" (2013) Fact Sheet no. 9/Rev. 2.

[99] Burman Roy, "Indigenous and Tribal Peoples in World System Perspective" (2003) 1:1 Studies of Tribes & Tribals 7 at 8.

[100] *Ibid* at 8 -9.

[101] *Ibid* at 9.

The chronological and relational approaches have some inherent shortcomings. They focus on specific and limited traits of Indigenous peoples without adequate consideration for other pertinent characteristics. These limited approaches may result in the erroneous inclusion of some groups that share the identified characteristics of Indigenous peoples. For instance, Pacific Islanders who immigrated to the United States have identities rooted in numerous locations, eras and traditional structures.[102] Pacific Islanders have some of the traits of the chronological and relational approaches, but some of them do not identify as Indigenous Americans.[103] However, the normative approach defines Indigenous peoples "not as an exclusivist concept but an inclusive project."[104] This thesis adopts the normative approach in delineating Indigenous peoples because this approach does not focus on Indigenous peoples' economic or historical challenges. It avoids some of the shortcomings of the chronological and relational approaches and adequately recognizes Indigenous peoples' relationship with their environment and community. Essentially, this thesis applies the often-referenced description prescribed by Cobo.

B. Representation of Indigenous Peoples in the International System

Indigenous peoples have been unrelenting in advocating for their collective rights as distinct international law actors, fighting to protect their rights and promoting the application of international human rights, especially concerning Indigenous peoples. From the first international Indigenous rights breakthrough of 1957 to the development of the Indigenous and Tribal Peoples

[102] Meripa Godinet, Halaevalu Vakalahi, and Noreen Mokuau, "Transnational Pacific Islanders: Implications for Social Work" (2019) 64:2 Social Work 113 at 115.
[103] United States of America Department of Education, "White House Initiative on Asian Americans and Pacific Islanders" online: <www.ed.gov/category/keyword/white-house-initiative-asian-americans-and-pacific-islanders>. For detailed analysis about Pacific Islanders in the US and accounts from several Pacific Island groups, see Meripa Taiai Godinet and Halaevalu Vakalahi, "The Drums of Our Ancestors" in Halaevalu Vakalahi and Meripa Taiai Godinet, eds, *Transnational Pacific Island Americans and Social Work: Dancing to the Beat of a Different Drum* (NASW Press: Washington DC, 2014) at 1.
[104] *Ibid* at 9.

Convention, C169 (ILO Convention 169),[105] and the adoption of the UNDRIP[106], Indigenous peoples have played pivotal roles in articulating their concerns to the international community. As Indigenous engagement in international law intensified, there was a consequent surge in the related normative discourse on Indigenous peoples' rights, which also influenced other international actors and organizations. The increasing global attention garnered by Indigenous advocates reshaped how international human rights were applied to Indigenous peoples and have consequently helped in the development of international Indigenous rights law.

Nevertheless, Indigenous representations in the international system are usually through various Indigenous groups from different communities and countries.[107] Since 1969 when the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities received a study that focused partly on the mechanisms for protecting Indigenous peoples,[108] Indigenous activism in international law has increased. Despite the recognition of the importance of Indigenous peoples' participation in environmental issues, the actualization of their true involvement and access to information is flawed.[109] Active and impactful engagement in the international community requires time and financial investment. Marginalized communities are often saddled

[105] International Labour Organization (ILO), "Indigenous and Tribal Peoples Convention, C169" (27 June 1989) entered into force 5th September 1991.
[106] *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295.
[107] This thesis substantiates this argument by examining past Indigenous engagements within the international system in chapter four.
[108] In 1969, the UN instructed the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to study the issues concerning the protection of the rights of Indigenous peoples. The Special Rapporteur on Racial Discrimination, Hernán Santa Cruz, submitted a report to the Sub-Commission on the measures that should be implemented to protect the rights of Indigenous peoples. United Nations Economic and Social Council, "Special Study of Racial Discrimination in the Political, Economic, Social, and Cultural Spheres: Interim Report Submitted by the Special Rapporteur, Mr. Hernán Santa Cruz" (24 June 1969) Commission on Human Rights, 22nd Session, E/CN.4/Sub .2/301.
[109] For a detailed report on the importance of Indigenous participation in environmental management, see Center for International Environmental Law, "Indigenous Peoples and Traditional Knowledge in the Context of the UN Framework Convention on Climate Change Compilation of Decisions and Conclusions Adopted by the Parties to the Convention - 2019 Update" (2019) CIEL: International Indigenous Peoples' Forum on Climate Change.

with persistent local issues that distract them from international engagements and limit the impact of their participation.

Additionally, some factors impede the participation of Indigenous groups in international fora. Knowledge gaps, lack of access to information, and administrative hurdles prevent Indigenous groups from engaging with other international actors.[110] For instance, some Indigenous representatives' inability to secure visas for international meetings prevents them from having adequate representation.[111] Sometimes, Indigenous groups, particularly small and financially incapacitated groups, are overwhelmed by the procedures and requirements of active international engagements.[112] More so, the lack of mentorship from groups with more international exposure and experience limits some Indigenous groups' ability to prepare better when given their initial opportunity to participate in international discourse.

The disconnected representation of the Indigenous agenda in the international community by multiple groups limits Indigenous peoples' ability to make a significant impact. Indigenous representation within states is usually through communal leaders, Indigenous groups, and other representatives with some form of legitimacy from the community or a group of Indigenous peoples. However, as Indigenous peoples become more involved in global politics, their representatives' legitimacy comes to bear. The legitimacy of representation has developed beyond authorized or random representation to a "claim-based approach to representation"[113] or "self-authorization". Representation has expanded to connote "a dialectic of performative practices

[110] Nels Paulson, "Indigenous Peoples' Participation in Global Conservation: Looking beyond Headdresses and Face Paint" (2012) 21:3 Environmental Values 255 at 267 – 268.
[111] *Ibid*.
[112] For more on factors that hinder effective participation, see Frans Coenen, *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-Making* (Enschede: Springer, 2009).
[113] Michael Saward, "Representation, Legitimacy and Democracy" (2006) 5:3 Contemporary Political Theory 297 at 306.

between representatives and their real or imagined constituencies."[114] Legitimacy, in this instance, is determined by a number of factors, including the representatives' commitment, the nature of the cause being represented or factors that ensure that the representative acts, to some extent, in the interests of the represented. Due to the dynamics of global politics, different actors are assuming representative roles in various capacities, thereby redefining the idea of the legitimacy of representation. Human rights NGOs and civil society organizations are international actors that have assumed representation in global politics and gained legitimacy without authorization.[115]

Pitkin offers a comprehensive analysis of the concept of representation and identifies four different views of representation – "formalistic representation, symbolic representation, descriptive representation, and substantive representation."[116] Within the context of this thesis, the representation of Indigenous peoples by TIANs will be akin to substantive representation. This form of representation "requires independent action in the interest of the governed, in a manner at least potentially responsive to them, yet not normally in conflict with their wishes."[117] TIANs as substantive representatives of Indigenous peoples will "take actions on behalf of, as an agent of, and as a substitute for the represented."[118]

The implicit standard for assessing substantive representation is "by the extent to which policy outcomes advanced by a representative serve the best interests of their constituents."[119] TIANs, as introduced and analyzed in this thesis, are unified agents of the peoples they represent, and their objective is to promote the collective aspirations of Indigenous peoples. While communal leaders,

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[114] Anna Holzscheiter, "Representation as Power and Performative Practice: Global Civil Society Advocacy for Working Children" (2016) 42:2 Review of International Studies 205 at 205.
[115] Kristina Hahn and Anna Holzscheiter, "The Ambivalence of Advocacy: Representation and Contestation in Global NGO Advocacy for Child Workers and Sex Workers" (2013) 27:4 Global Society 497.
[116] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967) at 11-12.
[117] *Ibid* at 222.
[118] Suzanne Dovi, "Political Representation" (2018) Standard Encyclopedia of Philosophy 1 at 4.
[119] *Ibid* at 4-5.

national groups, social movements, and NGOs usually represent Indigenous agendas at national and international levels, this thesis proposes an alternative – the representation of Indigenous interests through advocacy networks. This research initiates and offers TIANs as structures for the collaboration of efforts and ideas since more can be achieved when there is a synergy of efforts. Mainly, this thesis examines the roles of Indigenous representatives in the development of the UNDRIP to demonstrate the significance of Indigenous representation in the development of international law. It proposes TIANs as agents that will act on behalf of Indigenous peoples and promote Indigenous peoples' rights to access environmental information and participate in environmental decision-making. It explores TIANs as alternative and unconventional representatives of Indigenous peoples (compared to representation by national groups, social movements and NGOs) in relation to promoting their procedural environmental rights.

VI. Scholarly Context

This section involves an engagement with the literature that provides the foundational and theoretical context for this research under two distinct themes: rights and recognition of Indigenous peoples in international law and transnational advocacy networks. By analyzing the research field and the connections between different concepts, this section presents what other scholars have identified and proffered and highlights the scholarly gap that this thesis intends to fill. This section of the chapter reveals a dearth of discourse on the influence of Indigenous networks and how they shape international human rights and environmental rights laws.

A. Rights and Recognition of Indigenous Peoples in International Law

This thesis' investigation of Indigenous peoples' engagement in the international system necessitates an appreciation of how the present Indigenous participation in global affairs was achieved and the factors that shape Indigenous peoples' rights and recognition in international law.

Scholars attribute the development of international Indigenous rights law to various advocacy groups and organizations, particularly Indigenous representatives and activists.[120] While the emergence of international Indigenous rights law was influenced significantly by the active involvement of Indigenous peoples and advocates, authors such as Coumans, Short and Lennox, Rugendyke, and Bryant acknowledge that other non-state actors supported Indigenous peoples' achievements in international law.[121] Furthermore, NGOs' roles in developing and sustaining international Indigenous rights law have been well documented.[122]

ILO Convention 169 is one of the international instruments linked to early Indigenous engagements in the development of international human rights law that bear on the rights of Indigenous peoples.[123] The more recent adoption of the UNDRIP is a landmark in international law's response to Indigenous concerns. UNDRIP, an expression of "internationally recognized Indigenous legal protections,"[124] significantly responds to the human rights concerns of Indigenous peoples. Accounts of the drafting process of UNDRIP inevitably involve the crucial roles of

[120] Philip Alston, "Peoples' Rights: Their Rise and Fall" in Philip Alston, ed, *Peoples' Rights* (Oxford: Oxford University Press, 2001) 259 (Alston, Peoples' Rights); Anaya, *Indigenous Peoples*, *supra* note 89 at 47.
[121] Catherine Coumans, "Realising Solidarity: Indigenous Peoples and NGOs in the Contested Terrains of Mining and Corporate Accountability" in Ciaran O'Faircheallaigh and Saleem Ali, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Sheffield: Greenleaf Publishing Ltd. 2008) 42; Damien Short & Corinne Lennox, *Handbook of Indigenous Peoples' Rights* (New York: Routledge, 2016); Barbara Rugendyke, *NGOs as Advocates for Development in a Globalising World* (New York: Routledge, 2007); Raymond Bryant, "Non-Governmental Organizations and Governmentality: Consuming Biodiversity and Indigenous People in the Philippines" (2002) 50:2 Sage Journals 268-292.
[122] Examples of literature that underscore the roles of NGOs in the development of Indigenous rights law include, Jutta Brunnee & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, England: Cambridge University Press, 2010); Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 European Journal of International Law 141-163.
[123] *Indigenous and Tribal Peoples Convention, c169*, International Labour Organization, 27 June 1989 (entered into force 5 September 1991). Though the ILO Convention No. 107 is the pioneer international instrument that focused on the human rights of Indigenous peoples, much credence is given to the ILO Convention No. 169 of 1989 because the ILO Convention No. 107 hindered the integration of Indigenous peoples. Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (London; New York: Routledge, 2015). The ILO Convention No. 169 introduced the word "peoples" and took the concept of rights beyond individual rights by taking Indigenous values into account. Alston, Peoples' Rights, *supra* note 120 at 259.
[124] Developments in Law, "The Double Life of International Law: Indigenous Peoples and Extractive Industries" (2016) 129 Harvard Law Review 1755-1778 at 1755.

Indigenous peoples throughout the process. Scholars such as Lightfoot and Barelli recognize the important role of the global Indigenous movement in the development of the UNDRIP.[125] Barelli adopts the "social movement framework" in analyzing the global movement of Indigenous peoples and the foundation of the political power of Indigenous representatives during the drafting of the UNDRIP.

Despite the feat achieved over the years by Indigenous peoples and advocates in international Indigenous rights law, the impact of environmental injustice on Indigenous peoples remains a lingering problem. Some substantive human rights that are closely connected to environmental concerns are the right to life, right to health, and right to culture.[126] International response to Indigenous struggles necessitates tailoring existing international human rights principles within the context and distinctiveness of Indigenous concerns. This research takes the conversation further by analyzing Indigenous collaboration through the active engagement of the proposed TIANs with states and extractive MNCs in the international system to shape legal norms on the procedural environmental rights of Indigenous peoples.

B. Transnational Advocacy Networks

The idea of TANs gained popularity after Keck and Sikkink applied the term in their analysis of a type of pressure group that operates across national boundaries.[127] TANs are platforms for the collaboration of NGOs, civil society associations, and trade groups with the aim of influencing

[125] Barelli, *Seeking Justice*, *supra* note 4 at 111-112; Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (London: Routledge, 2016).
[126] Dinah Shelton, "Environmental Rights" in Philip Alston, ed, *Peoples Rights* (Oxford: Oxford University Press, 2001) 185.
[127] Keck and Sikkink, Activists Beyond Borders, *supra* note 2.

global politics. Although TANs are significant transnationally and domestically, they are pertinent international players seeking to influence the actions of states and international organizations.[128]

Several scholars have contributed to the discourse about TANs with diverse views on the effectiveness of such networks in shaping the international system.[129] Discussions about TANs' potential in shaping international law often acknowledge the proliferation of non-state actors in the international system and how non-state actors apply human rights standards and laws to promote equality and justice.[130] Scholars such as Martin,[131] Stroup,[132] Steffek and Hahn[133] recognize the significance of advocacy networks, NGOs, INGOs, and MNCs in shaping the development and outcomes of international policies. However, this does not imply that states'

[128] *Ibid* at 2.

[129] The concept of TANs has been applied to different issues, including gender equality advocacy, global tobacco advocacy, human trafficking, global environmentalism, and climate change activism. See the following for examples of scholarly analysis and application of TANs. Jennifer Hadden and Lorien Jasny, "The Power of Peers: How Transnational Advocacy Networks Shape NGO Strategies on Climate Change" (2019) 49:2 British Journal of Political Science 637; Maria Martin De Almagro, "Lost Boomerangs, the Rebound Effect and Transnational Advocacy Networks: A Discursive Approach to Norm Diffusion" (2018) 44:4 Review of International Studies 672; Tatiana Andia and Nitsan Chorev, "Making Knowledge Legitimate: Transnational Advocacy Networks' Campaigns against Tobacco, Infant Formula and Pharmaceuticals" (2017) 17:2 Global Networks 255; Maria Guadalupe Moog Rodrigues, *Global Environmentalism and Local Politics: Transnational Advocacy Networks in Brazil, Ecuador, and India* (New York: State University of New York Press, 2012); Pulver McAteer, "The Corporate Boomerang: Shareholder Transnational Advocacy Networks Targeting Oil Companies in the Ecuadorian Amazon" (2009) 9 Environmental Politics 1; Jens Lerche, "Transnational Advocacy Networks and Affirmative Action for Dalits in India" (2008) 39:2 Development and Change 239; Shae Garwood, "Politics at Work: Transnational Advocacy Networks and the Global Garment Industry" (2005) 13:3 Gender & Development 21; Victor Asal, Brian Nussbaum and William Harrington, "Terrorism as Transnational Advocacy: An Organizational and Tactical Examination" (2005) 30:1 Studies in Conflict & Terrorism 15; Michele Betsill and Harriet Bulkeley, "Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program" (2004) 48:2 International Studies Quarterly 471; Kathrin Zippel, "Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment" (2004) 11:1 Social Politics: International Studies in Gender, State & Society 57; Susan Park, "The Role of Transnational Advocacy Networks in Reconstituting International Organization Identities" (2004) 5 Seton Hall J. Dipl. & Int'l Rel. 79.

[130] Margaret E. Keck and Kathryn Sikkink. "Transnational Advocacy Networks in International and Regional Politics" (1999) 51:159 International Social Science Journal 89; LaDawn Haglund & Robin Stryker, *Closing the Rights Gap: From Human Rights to Social Transformation* (Oakland, California: University of California Press, 2015) at 319.

[131] Pamela Martin, *The Globalization of Contentious Politics: The Amazonian Indigenous Rights Movement* (New York & London: Routledge Series, 2003) (Martin, *The Globalization of Contentious Politics)*.

[132] Sarah Stroup, *Borders among Activists: International NGOs in the United States, Britain and France* (Ithaca and London: Cornell University Press, 2012).

[133] Jens Steffek & Kristina Hahn, *Evaluating Transnational NGOS: Legitimacy, Accountability, Representation"* (New York: Palgrave Macmillan, 2010) (Steffek & Hahn, *Evaluating Transnational NGOS*).

power in the international system is diminishing. The literature suggests that activists collaborate to be better positioned to influence policies.[134]

Scholars have debated the effectiveness of TANs[135], focusing on the Global South[136] or particular countries.[137] Some of the identified advantages of TANs are the aggregation of people with a common interest, the opportunity for more experienced groups to mentor upcoming and new groups, support for diverse groups, and the expansion of power due to strength in numbers.[138] For instance, considering the shortcomings of current national and international responses to climate change issues, transnational coalitions are proffered as a valuable strategy for challenging international organizations to acknowledge human rights concerns and petition for greater climate justice for affected communities.[139]

Studies that evaluate the impacts of advocacy networks and their achievements in the international system are significant to this research. Despite the body of literature on TANs, the term "transnational" remains a debatable phenomenon. Writers such as Gilson warn of the misrepresentation or overbroad application of the term.[140] This thesis does not discuss the scalar

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[134] Martin, *The Globalization of Contentious Politics, supra* note 131 at 134.
[135] Shayna Plaut, "Cooperation is the Story: Best Practices of Transnational Indigenous Activism in the North" (2012) 16:1 International Journal of Human Rights 193; Derrick Cogburn, *Transnational Advocacy Networks in the Information Society: Partners or Pawns* (New York: Palgrave Macmillan, 2017); Maria G Rodrigues, "Rethinking the Impact of Transnational Advocacy Networks" (2017) 5:2 New Global Studies 1124; Joachim, Jutta and Birgit Locher. *Transnational Activism in the UN and the EU: A Comparative Study* (New York: Routledge, 2009); Jonathan James, *Transnational Religious Movements: Faith's Flow* (Thousand Oaks: Sage, 2017).
[136] Kemi Fuentes-George, *Between Preservation and Exploitation: Transnational Advocacy Networks and Conservation in Developing Countries* (Cambridge: MIT Press, 2016).
[137] Andrew Yeo & Danielle Chubb, eds, *North Korean Human Rights: Activists and Networks* (Cambridge University Press, 2018); Maria Rodrigues, *Global Environmentalism and Local Politics: Transnational Advocacy Networks in Brazil, Ecuador, and India* (New York: SUNY Press, 2004); Sarah Stroup, *Borders among Activists: International NGOs in the United States, Britain, and France* (London: Cornell University Press, 2012).
[138] Derrick Cogburn, *Transnational Advocacy Networks in the Information Society: Partners or Pawns?* (New York: Palgrave Macmillan, 2017) at 265 – 266.
[139] Tracey Skillington, "Climate Change and the Human Rights Challenge: Extending Justice Beyond the Borders of the Nation State" (2012) 16:8 International Journal of Human Rights 1196 at 1208.
[140] Julie Gilson, "Transnational Advocacy: New Spaces, New Voices" (2011) 36:4 Alternatives: Global, Local, Political 288.

classification of the term 'transnational,' but it is worth mentioning that transnationalism in TANs remains a contested word.

This thesis adopts Keck and Sikkink's explanation of the term "transnational." They apply the nuanced approach by describing "transnational" in light of the actors and sites of negotiation. Keck and Sikkink focus on "international interactions involving non-state actors…with multiple channels of contact among societies."[141] With regard to sites of negotiation, they clarify that these networks are not "one-way streets whereby activists in one country 'help' victims in another, but part of an interactive process by which people in far-flung places communicate and exchange beliefs, information, testimony, strategy, and sometimes services."[142]

TANs provide structures for activists that collaborate domestically and transnationally to influence policies, discourse, and behaviours. TANs usually emerge in response to failed attempts to effect the desired change domestically or when transnational allies are necessary for their campaigns.[143] Additionally, when the international community creates platforms for developing new networks, TANs will use this opportunity to their advantage.[144] TANs draw from different resources with the end goal of influencing states' practices.[145] Thus, TANs aim to alter the interests, identities, and actions of powerful institutions.[146]

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[141] Keck and Sikkink, Activists Beyond Borders, *supra* note 2 at 29.
[142] *Ibid* at 178-179.
[143] Keck and Sikkink, Activists Beyond Borders, *supra* note 2 at 10-12.
[144] Kathryn Sikkink, "Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition" in Donatella della Porta and Sidney Tarrow, eds, *Transnational Protest and Global Activism* (Lanham: Rowman and Littlefield, 2005) at 151.
[145] Emile Hafner-Burton, Miles Kahler and Alexander Montgomery, "Network Analysis for International Relations" (2008) 63 International Organization 559.
[146] Sanjeev Khagram, James Riker and Kathryn Sikkink, "From Santiago to Seattle: Transnational Advocacy Groups Restructuring World Politics" in Sanjeev Khagram, James Riker and Kathryn Sikkink, *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis & London: University of Minneapolis Press, 2002) at 3.

Although there are several scholarly contributions on the importance of advocacy networks, their shortfalls have also been identified. One of the identified shortfalls of transnational advocacy is the misguided impression created by "professional Western advocates" who are more interested in conflicts outside their countries or regions.[147] Such advocacy groups tend to trivialize other advocacy groups' efforts dedicated to a cause and are actively involved in attaining set objectives. Some of the suggested values of TANs are the empowerment of local actors being represented by the networks, understanding the complexity of (human rights) issues to have practical responses to issues, the inclusion of affected stakeholders, and the promotion of diverse representations.[148]

Even though Indigenous peoples' roles in shaping international Indigenous rights law have been significantly recognized and the contributions of advocacy networks have been explored, no literature known to this author explores the collaboration of Indigenous groups through advocacy networks with a focus on the development of legal norms on the procedural environmental rights of Indigenous peoples. This research aims to fill these gaps in the literature. Drawing from Keck and Sikkink's insights on TANs, this thesis modifies and adapts this concept within the framework of Indigenous advocacy and adopts the term – transnational Indigenous advocacy networks. Chapter five of this thesis explores the idea of TIANs extensively and examines their role as Indigenous rights advocates.

VII. Scholarly Significance

Many scholars have analyzed the roles of different actors in the international system, including Indigenous peoples' influence on the development of international instruments that address

[147] Alex De Wall, *Advocacy in Conflict: Critical Perspectives on Transnational Activism* (London: Zed Books, 2015).
[148] *Ibid* at 271-272.

Indigenous rights.[149] More so, there are discussions about the impacts of environmental degradation on Indigenous peoples and the need to promote environmental rights. Nevertheless, there is a dearth of literature on Indigenous representation through transnational advocacy networks focusing on the promotion of procedural environmental rights.

This thesis contributes to the literature by extrapolating and adapting Keck and Sikkink's work on TANs and exploring the concept referred to as TIANs. It discusses the distinct characteristics of TIANs to respond to the shortcomings of other forms of Indigenous representation. This thesis proposes TIANs as alternative structures well suited to promote Indigenous peoples' procedural environmental rights through engagements with states and extractive MNCs. It applies constructivist IR theory to the analysis of Indigenous peoples' engagements with other actors and the influence of Indigenous peoples on the development of international Indigenous rights law. Additionally, this thesis applies constructivist IR theory to the development of international Indigenous rights law in a way the theory has not been applied before, to the writer's knowledge.

This research's impetus stems from the interconnection of Indigenous and environmental rights issues, the contemporary proliferation of non-state actors in the international system, and the shift away from state-centric international law. This study contributes to the advancement of knowledge regarding how Indigenous peoples' roles can be assessed through structures that integrate Indigenous peoples' efforts and resources. It advances the literature by providing insight into how

[149] Such scholarly works include, Anaya, *Indigenous Peoples*, *supra* note 89; Jack Donnelly and Daniel Whelan, *International Human Rights* (New York: Routledge, 2020); Alan Bloomfield, "Norm Antipreneurs and Theorising Resistance to Normative Change" (2016) 42:2 Review of International Studies 310; Kristen Carpenter and Angela Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 Calif. L. Rev. 173; Lillian Aponte Miranda, "Indigenous Peoples as International Lawmakers" (2011) 32 U. Pa. J. Int'l L. 203; Timo Koivurova and Leena Heinämäki, "The Participation of Indigenous Peoples in International Norm-Making in the Arctic" (2013) 42:221 Polar Record 101; Chidi Oguamanam, "Indigenous Peoples and International Law: The Making of a Regime" (2005) 30 Queen's Law Journal 348.

Indigenous peoples' environmental concerns can be addressed through Indigenous engagement with states and extractive MNCs.

Indigenous peoples' past involvement and achievements within the international system propelled the investigation into how Indigenous peoples can make significant contributions to the development and implementation of international legal norms on the procedural environmental rights of Indigenous peoples. The thesis investigates the importance of Indigenous groups' organizational alignment as a model for addressing Indigenous environmental concerns. It contributes to the existing literature by exploring the influence of the proposed TIANs as representatives of Indigenous peoples in their engagements with states and extractive MNCs to promote and implement Indigenous peoples' rights to access information and participate in environmental decision-making.

VIII. Thesis Outline

This thesis is divided into seven chapters that analyze and respond to the thesis question and proffer responses to the identified issues. This first chapter has provided the background of the research and outlined the research questions. Chapter one has also presented the research methodology, engaged with scholarly conversations that provide the foundation for the thesis, explained some terms that are applied throughout the thesis, and highlighted the research's originality.

Chapter two explores the theoretical and methodological perspectives that this thesis is founded on. It engages in an extensive discussion of international law on the right of Indigenous peoples. Relevant international law provisions are examined to demonstrate how international Indigenous rights law has evolved since the ILO Convention 107 was adopted in 1957 until the adoption of the UNDRIP. The relevant provisions of the Declaration that underscore the participatory rights

of Indigenous peoples in environmental decision-making are discussed, including the right to self-determination, right to equality and non-discrimination, and land, resource, and cultural rights.

While this thesis relies on relevant international law provisions that set the standards for regulating international actors, it also draws from IR theory to explain actors' interactions and actions in the global space. The thesis relies on constructivist IR theory, so the second chapter identifies and analyzes the theory's insights and applies them to the issues raised in the research.

Chapter three focuses on the concept of international environmental justice and examines the legal basis for the participatory rights of Indigenous peoples. After presenting a historical account of the environmental justice movement, it explains the concept of environmental justice. Since there is no generally accepted definition of environmental justice, this thesis applies the taxonomic approach and examines four categorizations of the concept - distributive justice, corrective justice, social justice, and procedural justice. Chapter three also presents the legal basis for Indigenous peoples' procedural rights, particularly the right to participation and access to information in environmental matters. The chapter discusses the public international law bases for these rights by examining various applicable international law instruments and identifies the necessity for an international law instrument that unequivocally affirms Indigenous peoples' procedural environmental rights.

Chapter four provides a detailed historical account of Indigenous engagement with other actors in the international system, starting with Chief Levi General Deskaheh's attempt to institute a hearing before the League of Nations in 1923. The chapter illustrates how the involvement of Indigenous peoples in international politics has transitioned over time and how they have influenced international human rights law. It also expounds on the concept of "influence." It applies Arts and Verschuren's methodological triangulation approach to assessing influence in determining

Indigenous peoples' influence, particularly during the drafting process of the UNDRIP. In addressing the thesis' first sub-question, chapter four presents a detailed account of the drafting process of UNDRIP to demonstrate Indigenous peoples' influence in shaping the language of the Declaration. The assessment of Indigenous peoples' influence on the language and adoption of the UNDRIP exemplifies their influence on other international actors, especially regarding international Indigenous rights law.

After a broader analysis of Indigenous engagement in the international system, chapter five explores Indigenous peoples' roles as norm entrepreneurs. Although Indigenous peoples have shaped international Indigenous rights law through the representation of organizations such as social movements and NGOs, the fifth chapter discusses the limitations of these organizations and proffers a representative structure, referred to as TIANs, for the development and implementation of legal norms on the procedural environmental rights of Indigenous peoples. The chapter modifies and adapts Keck and Sikkink's insights on TANs, conceptualizes, and initiates the representative structure, TIANs. The fifth chapter presents the four-fold distinct and interrelated components of TIANs – sphere of operation, shared principled ideas, advocacy strategies, and information strategies, and explains the significance of these elements to the development and implementation of legal norms on the procedural environmental rights of Indigenous peoples. The chapter also situates Indigenous peoples in the norm life cycle theory as procedural environmental norm entrepreneurs. It aims to examine the potential roles and influence of TIANs in response to the second sub-question of this thesis.

The sixth chapter centres on Indigenous peoples' engagement with extractive MNCs in international law and how the diversity of their interests may impact the development and implementation of procedural environmental norms. The chapter discusses the role of MNCs as

international law actors and international law's attempts to regulate MNCs. It also clarifies how the actions of extractive MNCs affect the actualization of Indigenous peoples' rights and why MNCs and Indigenous peoples are often conflicting actors in international law. Despite the differences in the actors' interests, the sixth chapter provides rationales for the future collaboration of MNCs and TIANs toward developing and implementing legal norms on the procedural environmental rights of Indigenous peoples.

The concluding chapter summarizes and reflects on the research findings, drawing from the prescriptions of the theoretical frameworks for this study and the dictates of international human rights law. It underscores pragmatic ways TIANs can inform the implementation and enforcement of Indigenous peoples' procedural environmental rights. In addition to summing up the theoretical findings of the preceding chapters, chapter seven lays out the practical implications and possible limitations to the realization of the thesis' findings.

CHAPTER 2: THEORETICAL UNDERPINNINGS OF RESEARCH

I. Introduction

II. International Law on the Rights of Indigenous Peoples

- A. Right to Self-Determination
- B. Right to Equality and Non-Discrimination
- C. Land, Resource and Cultural Rights

III. International Relations Theories and International Law

- A. Constructivist Conception of International Relations
  - i. Emphasis on Normative Structures and Socialization
  - ii. Identities Shape Interests and Actions
  - iii. Historical Construction of Interests
- B. Finnemore and Sikkink's Norm Life Cycle Theory
  - i. Norm Emergence
  - ii. Norm Acceptance
  - iii. Norm Internalization

IV. Conclusion

I. Introduction

This chapter provides the theoretical perspectives that this thesis relies on. As mentioned in the preceding chapter, the theoretical foundation of this research is interdisciplinary, drawing from international law and international relations (IR) theory. This chapter relies on the disciplinary cooperation between international law and IR scholars and how their conversations account for actors' interactions across borders, actors' behaviour in global politics,[1] and actors' response to international norms.[2] While international law (as discussed in the second section of this chapter) prescribes the standards that regulate states' relationships, IR (as discussed in the third section of this chapter) explains actors' behaviour and interactions in the global domain.[3] This chapter sets the theoretical foundations of this thesis by analyzing and relying on constructivists' insights and the relevant provisions of international human rights law.

Although international law enabled Indigenous peoples' prejudicial treatment during and after the colonial era,[4] Indigenous peoples have taken advantage of the international legal system to fight against suppression and dominant economic structures.[5] Indigenous advocacy and the recognition of Indigenous peoples' distinctiveness are shaping the development and application of international

[1] See Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 Yale J. of Int'l L. 335; Robert O. Keohane, "International Relations and International Law: Two Optics" (1997) 38 Harv. Int'l L.J. 487; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 American Journal of International Relations Theory 205.

[2] See Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, England: Cambridge University Press, 1999); Anne-Marie Slaughter, Andrew Tulumello & Stepan Wood "International Law and International Relations Theory: A New Generation of International Scholarship" (1997) 92 American J. of Int'l Law 367.

[3] See generally, Jeffery Dunoff and Mark Pollack, "International Law and International Relations: Introducing an Interdisciplinary Dialogue" in Jefferey Dunoff and Mark Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 3 – 32.

[4] Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (New York: Cambridge university Press, 2003) at 87 – 91. For discussions on the effects of early European contacts on Indigenous peoples during and after the colonial era, see generally, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (New York: Routledge, 2015).

[5] See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 2012) at 107 – 114.

human rights law.[6] Indigenous peoples have proliferated in the meetings and discussions of global organizations such as the International Labour Organization (ILO) and the United Nations (UN), thereby acquiring some level of influence in global politics that was formally solely for states. Indigenous engagements within the global structure have increased concern for Indigenous peoples and, consequently, promoted normative discourse on international Indigenous rights.

As actors in the international system, Indigenous peoples' identity and interests influence their engagements in the international system. There is a reformed understanding of international human rights principles and how they impact Indigenous peoples; thereby propelling the development of international human rights instruments that address Indigenous concerns. These instruments are analyzed to establish the legal basis for the protection of Indigenous rights in international law. The second section of this chapter discusses how international law has responded to Indigenous peoples' human rights concerns and examines some pertinent collective and individual rights of Indigenous peoples. The legal basis for the participatory rights of Indigenous peoples is discussed in detail in chapter three of this thesis. The third section of this chapter analyzes constructivist IR theory and the norm life cycle theory, a strand of constructivist IR theory, as they provide the theoretical foundation for this thesis.

II. International Law on the Rights of Indigenous Peoples

Before discussing the theoretical background of this thesis in the next section of this chapter, this section briefly presents how international law has responded to Indigenous peoples' concerns. The highlighted international instruments reflect how international Indigenous rights law has evolved since 1957, when the first international instrument that addressed Indigenous peoples'rights was

[6] Kristen Carpenter and Angela Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 Calif. L. Rev. 173 at 185.

adopted. This section further examines the legal basis for the participation of Indigenous peoples in environmental matters by analyzing some pertinent rights.

Shortly after World War II, the International Labour Organization (ILO) initiated the drafting of a binding international instrument that outlines state obligations to Indigenous peoples within their territories.[7] After eleven years of deliberations, the ILO Convention 107 was adopted in 1957.[8] This was the first international instrument to address Indigenous peoples' rights. The ILO Convention 107 provides that "Indigenous and tribal peoples shall enjoy human rights and freedoms without discrimination."[9] The Convention also protects Indigenous peoples' "right of ownership over lands that their populations have traditionally occupied."[10] However, some of the terms of the Convention reinforced the subjugation of Indigenous peoples. For instance, the Convention described Indigenous peoples are "less advanced"[11] and permitted the displacement of Indigenous peoples from their historical territories for national economic and security reasons.[12] Indigenous groups condemned many of the provisions of the ILO Convention 107. The ILO later concluded that the integrationist perspective of the Convention was archaic, and its implementation was disadvantageous in the contemporary world.[13]

[7] Peter Bille Larsen, "The 'New Jungle Law': Development, Indigenous Rights and ILO Convention 169 in Latin America" (2016) 7:1 International Development Policy 7; Chandra Roy and Mike Kaye, "The International Labour Organization: A Handbook of Minorities and Indigenous Peoples" (2002) Handbook for Minorities and Indigenous Peoples 1 at 4; Jasmien Van Daele, "The International Labour Organization (ILO) in Past and Present Research" (2008) 53 International Institute for Labour Studies 485.
[8] *Indigenous and Tribal Peoples Convention, c169,* International Labour Organization, 27 June 1989 (entered into force 5 September 1991).
[9] *Ibid* at Article 3.
[10] *Ibid* at Article 11.
[11] *Ibid* at Article 1.
[12] *Ibid* at Article 12.
[13] International Labour Organization, "Understanding the Indigenous and Tribal Peoples Convention, 1989 (No.169)" (2013) Handbook for ILO Tripartite Constituents, International Labour Standards Department.

Considering the shortfalls of the ILO Convention 107, the Indigenous and Tribal Peoples Convention, 1989 (No. 169)[14] was created to revise the ILO Convention 107. The ILO Convention 169, the only international treaty that provides exclusively for the rights of Indigenous peoples, is binding within the states that ratified it.[15] Unlike the ILO Convention 107, which projected assimilationist objectives and presented indigenous cultures as inferior to European values, the ILO Convention 169 recognizes Indigenous peoples' right to self-determination, socio-cultural and political rights.[16] Notably, the ILO Convention 169 recognizes Indigenous peoples' right to participation through their representative institutions,[17] the right to own and possess traditionally occupied land,[18] the right to participate in the use, management and conservation of natural resources linked to their land,[19] and protection of Indigenous territories.[20]

Compared to the ILO Convention 107, ratified by 27 states, the ILO Convention 169 was ratified by 23 states. Some states did not agree with the inclusion of the right to self-determination because they believed it undermined their sovereignty.[21] Like other treaties, ratification of the ILO Convention 169 is voluntary for states, but those that ratify it are obligated to implement it in good faith. The ILO Convention 169 is a ground-breaking international instrument that recognizes the institutions of Indigenous peoples and their right to participate in decisions that affect them.[22] Despite ratification by a limited number of states, the ILO Convention 169 is a significant

[14] *Indigenous and Tribal Peoples Convention*, International Labour Organization, 27 June 1989, C169 (ILO C169).
[15] *Ibid* at Article 38(1).
[16] John Henriksen, "Key Principles in Implementing ILO Convention No.169" (2008) Research on Best Practices for Implementation of the Principles of ILO Convention No.169, Case Study 7.
[17] ILO C169 at Article 6.
[18] *Ibid* at Article 14.
[19] *Ibid* at Article 15.
[20] *Ibid* at Article 7.
[21] Indigenous Foundations, "ILO Convention 169" (2011) First Nations and Indigenous Studies, University of British Columbia, online: <https://indigenousfoundations.arts.ubc.ca/ilo_convention_169/>.
[22] ILO C169 at Articles 6, 15, 17, 22, 27 and 28.

international instrument that protects the human rights of Indigenous peoples.[23] Beyond the ratifying states, the Convention has become a reference point globally, with citations and applications by different UN entities, regional human rights organizations and judicial systems.[24]

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[25] is also a crucial instrument that protects Indigenous peoples' rights extensively. The UNDRIP is a non-binding international instrument that affirms Indigenous peoples' individual and collective rights. Although United Nations (UN) "declarations are not legally binding, however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles."[26] In the same light, the UNDRIP sets standards for protecting Indigenous peoples' rights and eliminating discriminatory practices. Additionally, the UNDRIP significantly highlights the participatory rights of Indigenous peoples and delineates how states should engage with Indigenous peoples, particularly in decision-making that directly impacts their communities. The UNDRIP protects Indigenous cultural rights, participatory rights, the right to self-determination, economic and social rights and the right to equality. Arguably, the UNDRIP has substantial legal credence in international human rights law concerning Indigenous

[23] Peter Bille Larsen and Jérémie Gilbert, "Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future" (2020) 24:2 International Journal of Human Rights 83.
[24] International Labour Office, "Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)" (2013) International Labour Office, CH-1211, 1 at 5.
[25] *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).
[26] United Nations Permanent Forum on Indigenous Issues, "Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples" (2012) online: <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

peoples' rights.[27] The Declaration provides the minimum standards for the acknowledgement and protection of the rights of Indigenous peoples.[28]

Article 1 of the UNDRIP provides that "Indigenous peoples have the right to the full enjoyment, as collective or as individuals, of all human rights and fundamental freedoms."[29] The unprecedented confirmation of Indigenous peoples' collective rights in the UNDRIP indicates that the international system recognizes the applicability of international human rights principles to Indigenous peoples, individually and collectively. Newman describes collective rights as:

> [r]ights held by collectivities rather than by individuals…A collectivity is a collection of persons such that one would still identify it as the same collectivity were some or all of the included persons to change (provided some other conditions were met) and such that the included persons properly identify themselves non-trivially as members of this collectivity.[30]

Some states opposed the inclusion of collective rights in the UNDRIP during the drafting process as misfits in international law, potentially discriminatory and an affront to the "universality of human rights."[31] However, Indigenous movements contended for the collective rights of

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[27] Sylvanus Gbendezhi Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law" (2017) 6 International Human Rights Law Review 242 at 261. For more on the status of the UNDRIP in international law, see Martin Scheinin and Mattias Ahren, "The UNDRIP's Relationship to Existing International Law: Relationship to Human Rights, and Related International Instruments" in Jessie Hohmann and Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) 63; Federico Lenzerini, "Implementation of the UNDRIP Around the World: Achievements and Future Perspectives: The Outcome of the Work of the ILA Committee on the Implementation on the Rights of Indigenous Peoples" (2019) 23:1 International Journal of Human Rights 51.

[28] Oonagh Fitzgerald and Larry Chartrand, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Law* (Waterloo: Centre for International Governance Innovation, 2018) at 18; Brenda Gunn, "Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook" (2011) *Indigenous Bar Association & The University of Manitoba* 1 at 29.

[29] UNDRIP, *supra* note 25.

[30] Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart, 2011) at 2. See also Dwight Newman, "Collective Rights" (2007) 48:3 Philosophical Books 221.

[31] Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 European Journal of International Law 141 at 149. See Peter Jones, "Human Rights and Collective Self-Determination" in Adam Etinson, *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018) at 441; Matthias Koenig, "Institutional Change in the World Polity: International Human Rights and the Construction of Collective Identities" (2008) 23:1 International Sociology 95; Austin Badger, "Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples" (2010) 26 Am. U. Int'l L. Rev. 485.

Indigenous peoples on the premise that, due to the individualistic nature of the international human rights framework, it cannot effectively address their atypical circumstances.[32]

The affirmation of the collective rights of Indigenous peoples in international instruments, confirmation by international human rights bodies that Indigenous peoples hold rights, and decisions of inter-American human rights institutions explicitly upholding the collective rights of Indigenous peoples are indications of international law's evolving acceptance of collective rights of Indigenous peoples within the context of international human rights law.[33] As Indigenous peoples' collective rights are becoming more recognized in international law, their implications on individual rights have been questioned.[34] However, Article 46(2) of the UNDRIP states that "in the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected." Additionally, Article 46(3) provides that the interpretation of the Declaration shall be according to the principles of equality and shall not be discriminatory. The caveat prescribed in Article 46 has been interpreted as protecting individual rights when it conflicts with collective rights. Still, it is unclear how much Article 46 gives priority to individual rights over collective rights.[35]

Considering the communal nature of Indigenous ways of living, sometimes individual rights do not adequately address Indigenous concerns. Without collective rights, the existence of the

[32] Allen Buchanan, "Role of Collective Rights in the Theory of Indigenous Peoples' Rights" (1993) 3:1 Transnat'I L & Contemp Probs 89 at 92.
[33] James Anaya, "Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law" (2006) 22 Wash UJL & Pol'y 107 at 112-114.
[34] See especially, Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011). See also, Dwight Newman, "Peoples and Persons in the UNDRIP" in Oscar Pérez De La Fuente, Monique Falcão, and Daniel Oliva Martínez, eds, *Struggles for Recognition: Cultural Pluralism and Rights of Minorities* (Madrid: Dykinson, 2020) 239; Dwight Newman, "Theorizing Collective Indigenous Rights" (2006/07) 31:2 American Indian Law Review 273.
[35] Kirsty Gover, "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26:2 European Journal of International Law 345 at 361 – 362.

traditional and communal well-being of Indigenous peoples may be threatened.[36] Collective rights are essential to protect against the cultural and communal extinction of Indigenous peoples. The collective rights of Indigenous peoples give them the basis to promote, protect and lay claims to their rights as a group.

Some of the significant collective rights of Indigenous peoples relating to their participation in environmental decision-making are discussed below. Firstly, the right to self-determination is examined as justification for Indigenous peoples' participation in environmental matters. Self-determination is the foundational basis for Indigenous peoples' participatory rights and the motivation for their independence and autonomy.[37] Other rights that are applicable to the promotion and protection of Indigenous peoples' participatory rights in environmental decision-making are discussed below to elucidate the legal underpinnings for Indigenous peoples' involvement in environmental matters.

A. Right to Self-Determination

The right to self-determination applies generally, and it is not restricted to Indigenous rights. The *UN Charter*,[38] *International Covenant on Civil and Political Rights* (ICCPR)[39] and *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[40] recognize the right to self-determination. However, Indigenous peoples' right to self-determination was explicitly affirmed

[36] United Nations Human Rights Office of the High Commissioner, "The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions" (2013) HR/PUB/13/2 at 15 (UNDRIP Manual).
[37] Margherita Poto, "Participatory Rights of Indigenous Peoples: The Virtuous Example of the Arctic Region" (2016) 84 Environmental Law and Management 84.
[38] Article 1(2) provides that the objective of the UN is to promote cordiality among nations founded on the principle of "equal rights and self-determination". *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[39] Article 1 asserts that "all peoples have the right to self-determination…The State Parties shall promote the realization of the right of self-determination." *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999 at 171 (entered into force 23 March 1976) (ICCPR).
[40] Article 1 states that "all peoples have the right to self-determination…The State Parties shall promote the realization of the right of self-determination." *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993 at 3 (entered into force 3 January 1976) (ICESCR).

in the UNDRIP. Article 3 of the UNDRIP provides that "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[41] The right to self-determination gives Indigenous peoples "the right to autonomy or self-government in matters relating to their internal and local affairs."[42] Despite the assertion of the right to self-determination in the UNDRIP, the interpretation and applicability of the right are ambivalent.[43] Daes, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, explains that self-determination, as confirmed in the UNDRIP, applies in the internal context and cannot be interpreted as the right to secede.[44]

On the other hand, Anaya clarifies that "the concept of self-determination of peoples is one that envisions an ideal path in the way individuals and groups form societies and their governing institutions."[45] Anaya opposes the notion that the right to self-determination, when applied generally, is the right to form an autonomous state, but when applied in the context of Indigenous peoples, it is accorded an inferior meaning.[46] Arguably, Indigenous peoples have the right to internal self-determination,[47] but the applicability of the right to external self-determination that may result in secession has been curtailed by Article 46 of the UNDRIP.

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[41] *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).
[42] Article 4 of UNDRIP *supra* note 25.
[43] See generally, Dorothée Cambou, "The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective" (2018) 23:1 International Journal of Human Rights 34.
[44] Erica-Irene Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations" (2008) 21:1 Cambridge Review of International Affairs 7 at 18.
[45] 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 Work: The United Nations Declaration on the Rights of Indigenous Peoples* (New Jersey: IWGIA, 2009) 184 at 188.
[46] *Ibid* at 188-189.
[47] Claudia Dessanti, "Indigenous Peoples' Right to Self-Determination in International Law" (2015) 1:1 Intra Vires 45 at 48.

Anaya delineates five international norms that elaborate the characteristics of self-determination – "non-discrimination, cultural integrity, land and resources, social welfare and development and self-government."[48] Although all the rights affirmed in the UNDRIP are interconnected and indivisible, the right to self-determination provides the basis for the applicability of the other rights.[49] Anaya explains that:

> A number of groups, particularly indigenous peoples, are pursuing spheres of autonomy over a range of policy and administrative matters, while at the same time enhancing their effective participation in all decisions affecting them left to the larger institutions of government…The norm of self-determination, therefore, promotes an ongoing condition of freedom and equality among and within peoples in relation to the institutions of government under which they live, a condition today substantially defined by precepts of democracy and cultural pluralism.[50]

During the drafting process of the UNDRIP, some states and Indigenous representatives were on conflicting ends about the inclusion of the right to self-determination. Some states believed the right threatened their sovereignty and needed a caveat protecting their territorial integrity.[51] Article 46 stresses the territorial integrity of states by excluding any interpretation of the Declaration that may "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states"[52] This implies that Indigenous peoples unequivocally have the right to self-determination that cannot amount to secession.[53]

The UNDRIP, to some extent, clarifies the applicability of the right to self-determination to Indigenous peoples. Earlier in the *Nicaraguan Population of Miskito Origin case*, the Inter-

[48] James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004) at 97-98.
[49] United Nations Human Rights Office of the High Commissioner, "Indigenous Peoples and the United Nations Human Rights System" (2013) Fact Sheet No. 9/Rev.2 at 5.
[50] James Anaya, "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs. 131 at 155-156.
[51] Cher Weixia Chen, "Indigenous Rights in International Law" (2014) 1 Oxford Research Encyclopedia of International Studies 1 at 7 (Chen, Indigenous Rights).
[52] Article 46 of UNDRIP *supra* note 25.
[53] Alexandra Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments" (2009) 10:1 Melbourne Journal of International Law 27 at 30.

American Commission on Human Rights (the Commission) held that although the ethnic groups of Nicaragua have cultural and social rights, according to the international law standards at the time of the hearing, the ethnic groups did not have the right to self-determination and political autonomy.[54] With the adoption of the UNDRIP, the position taken by the Commission no longer subsists, and it is clear that Indigenous peoples in international law have the right to self-determination and political autonomy.

The right to self-determination is interconnected with Indigenous peoples' right to participate in decisions that affect them, the right to free, prior and informed consent and the right to promote and protect their culture, environment and natural resources. Even so, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights" through their representatives.[55] Environmental sustainability, preservation of traditional life and spiritual connection to nature are issues that affect the rights of Indigenous peoples. Thus, they have the right to participate in environmental decision-making, among other issues. The right to self-determination provides the foundation for the enjoyment of other rights for Indigenous peoples because it creates the freedom for Indigenous peoples to control and determine their future and assert their other rights.[56] International law's assertion of Indigenous peoples' right to self-determination provides the foundation for protecting their other rights through autonomous institutions.

[54] *Nicaraguan Population of Miskito Origin* (1983), Inter-Am Comm HR, OEA/Ser.L./V.II.62, doc. 10 rev. 3.
[55] Article 18 of UNDRIP, *supra* note 25.
[56] United Nations General Assembly, "Self-Determination Integral to Basic Human Rights, Fundamental Freedoms, Third Committee Told as It Concludes General Discussion" (5 November 2013) 68th General Assembly, 3rd Committee, 40th Meeting GA/SHC/4085.

B. Right to Equality and Non-Discrimination

The right to equality and non-discrimination are fundamental principles of international law enshrined in binding international instruments such as the UN Charter,[57] *Universal Declaration of Human Rights*,[58] ICCPR,[59] ICESCR,[60] and *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).[61] Equality and freedom from discrimination are essential foundations for the enjoyment of other rights, such as political, cultural, economic, civil and social rights.[62] The *Universal Declaration of Human Rights* is the first international instrument to affirm that "all human beings are born free and equal in dignity and rights."[63]

Specifically, the ILO Convention No. 169 provides that "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."[64] The UN has identified the human rights violations and discriminatory practices confronting Indigenous peoples since the first Decade to Combat Racism Discrimination 1973-1982.[65] Considering the historical discrimination experienced by Indigenous peoples, the right to equality and freedom from discrimination is essential for exercising other rights, both collective and individual rights. Therefore, equality and freedom from discrimination are the fundamental

[57] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[58] *Universal Declaration of Human Rights*, United Nations General Assembly, 10 December 1948, 217 A (III).
[59] *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999 at 171 (entered into force 23 March 1976).
[60] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993 at 3 (entered into force 3 January 1976)
[61] *International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations General Assembly, 21 December 1965, Treaty Series, vol. 660, at 195 (entered into force 4 January 1969).
[62] Bertrand Ramcharan, "Equality and Non-discrimination" in Stephanie Farrior, ed, *Equality and Non-Discrimination under International Law* (London, New York: Routledge, 2015) 53.
[63] *Universal Declaration of Human Rights*, United Nations General Assembly, 10 December 1948, 217 A (III) (UDHR) at Article 1.
[64] Article 3 of the ILO Convention No. 169, *supra* note 14. See International Labour Organization, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (Geneva: ILO, 2003) at 78.
[65] United Nations Human Rights Office of the High Commissioner, "Combating Discrimination against Indigenous Peoples" online: <https://ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx>.

foundations of the ILO Convention No. 169 and the UNDRIP.[66] The UNDRIP affirms that "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular, that based on their indigenous origin or identity."[67]

The right of Indigenous peoples to equality and non-discrimination requires a two-pronged approach. First, protection and support for the conditions required for Indigenous ways of life. Second, eradication of practices that side-line or marginalize Indigenous peoples from others.[68] The rights to equality and non-discrimination are the catalysts for acknowledging other Indigenous peoples' rights, both collective and individual. The Inter-American Court applied the equality and non-discrimination approach by holding that Indigenous peoples' rights to their land and resources are the same and deserve the same protection as the common notion of property ownership.[69] Like every other member of society, Indigenous peoples have the right to enjoy their collective and individual rights, including the right to maintain their way of life, protect their community from extinction, preserve their land and natural resources, and equal participation in environmental decision-making.

C. Land, Resource and Cultural Rights

Indigenous peoples' rights to their lands, territories and resources are fundamental to the attainment of their environmental sustainability, preservation of their cultural ideals and economic and socio-development. The international human rights principles of cultural integrity, social, economic, political and civil rights grounded in the ICCPR and ICESCR are essential for the

[66] United Nations Human Rights Office of the High Commissioner, "Indigenous Peoples and the United Nations Human Rights System" (2013) Fact Sheet No. 9/Rev.2 at 8.
[67] Article 2 of the UNDRIP, *supra* note 25.
[68] UNDRIP Manual, *supra* note 36 at 10.
[69] *Sawhoyamaxa Indigenous Community v Paraguay* (2006), Inter-Am Comm HR Series C, No. 146 at 120.

enjoyment of Indigenous rights. Typically, the issues of economic, social and cultural rights of Indigenous peoples have been linked to their rights over their land and natural resources.[70] In the case of *Ominiyak v Canada*, the UN Human Rights Committee found that Canada breached their duty to protect the way of life and culture of the Lubicon Lake Band as protected by Article 27 of the ICCPR when the Federal Government of Canada allowed the government of Alberta to grant leases for a project within the Band's territory.[71] Hence, cultural rights have been linked to Indigenous peoples' rights over their lands, territories and resources.[72] Furthermore, the ICERD prohibits discrimination in the enjoyment of "the right to own property alone as well as in association with others."[73]

The ILO Convention No.169 and the UNDRIP affirm Indigenous peoples' rights to social, economic and cultural rights.[74] More so, the UNDRIP asserts that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[75] The recognition of the rights to lands, territories and resources is a requisite for the sustainable development of Indigenous communities.[76] Indigenous peoples' rights to resources can only be exercised collectively through their representatives. This is one of the

[70] Chen, Indigenous Rights, *supra* note 51 at 9.
[71] *Lubicon Lake Band v Canada (1990) Communication No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) at 33* at 33.
[72] Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22:1 European Journal of International Law 121.
[73] Article 5(v), *International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations General Assembly, 21 December 1965, Treaty Series, vol. 660, at 195 (entered into force 4 January 1969).
[74] Articles 3 and 5 of UNDRIP; Articles 2(2)(b), 5(a), 7(1).
of the ILO Convention No, 169.
[75] Article 26 of UNDRIP, *supra* note 25.
[76] Deborah McGregor, "Living Well with the Earth: Indigenous Rights and the Environment" in Corinne Lennox and Damien Short, eds, *Handbook of Indigenous Peoples' Rights* (London: Routledge, 2016) 167; Birgitte Feiring, "Indigenous Peoples' Rights to Lands, Territories and Resources" (2013) International Land Coalition 1; International Fund for Agricultural Development, "Indigenous Peoples' Collective Rights to Lands, territories and Natural Resources: Lessons from IFAD-Supported Projects" (2018) IFAD.

implications of Indigenous peoples' collective rights, and it confers them with the power to determine their future and maintain their way of life.

Many Indigenous people consider their relationship to their lands and resources fundamental to their culture, and considering the significance of culture to Indigenous identity, the UNDRIP prohibits the obliteration of their culture or forced integration.[77] The Inter-American Court of Human Rights in the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* explains that:

> The 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. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[78] Indigenous peoples' land rights have also been affirmed in other cases.[79]

The growing international discourse about Indigenous cultural rights is shaping, in many ways, international environmental law discourse. Scholars are paying attention to the connection between Indigenous peoples' way of life, Indigenous knowledge and environmental sustainability.[80] Conversations about Indigenous peoples' cultural rights now engender consideration about their

[77] Article 8 of UNDRIP, *supra* note 25.
[78] IACHR Series C No 79, [2001] IACHR 9 at 149.
[79] *Kaliña and Lokono Peoples v Suriname*, (2015) IACTHR, Series C, No. 309; *Saramka People v Suriname* (2007) IACTHR, Series C, No. 172; *Moiwana Village v Suriname*, IACTHR (2005) Series C, No. 124.
[80] For scholarly discussions on the interconnections between Indigenous culture, knowledge, and environmental protection, see – Stephen Garnett et al, "A Spatial Overview of the Global Importance of Indigenous Lands for Conservation" (2018) 1:7 Nature Sustainability 369; Maria Tengö et al, "Weaving Knowledge Systems in IPBES, CBD, and Beyond – Lessons Learned for Sustainability" (2017) 26 Current Opinion in Environmental Sustainability 17; Jay Johnson et al, "Weaving Indigenous and Sustainability Sciences to Diversify Our Methods" (2016) 11:1 Sustainability Science 1; Ulia Popova, "Conservation, Traditional Knowledge and Indigenous Peoples" (2014) 58:1 American Behaviour Scientist 197; Rosemary Hill et al, "A Typology of Indigenous Engagement in Australian Environmental Management: Implications for Knowledge Integration and Social-Ecological System Sustainability" (2012) 17:1 Ecology and Society 1; Clarence Alexander et al, "Linking Indigenous and Scientific Knowledge of Climate Change" (2011) 61:6 BioScience 477; Das Gupta, "Does Indigenous Knowledge Have Anything to Deal With Sustainable Development" (2011) 7:1 Journal of Anthropology 57; Clinton Beckford et al, "Aboriginal Environmental Wisdom, Stewardship and Sustainability: Lessons From The Walpole Island First Nations, Ontario, Canada" (2010) 41:4 Journal of Environmental Education 239.

relationship to nature and environmental protection. The UN Conference on Environment and Development spurred investigations into the interconnectivity of Indigenous peoples' rights and environmental sustainability.[81] Indeed both the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights have established the effect of environmental degradation on Indigenous peoples' rights.[82]

The nexus between Indigenous rights and environmental sustainability can be comprehended in two ways – the impact of Indigenous rights on the environment and the impact of the environment on Indigenous rights. The impact of environmental sustainability on the enjoyment of Indigenous rights has been established. In October 2021, the UN Human Rights Council adopted a momentous resolution recognizing a healthy and sustainable environment as a human right. The resolution emphasizes the needs of Indigenous peoples and other vulnerable groups in environmental actions.[83] Likewise, the impact of the Indigenous way of life on environmental sustainability has been confirmed.[84] The UNDRIP affirms that "respect for indigenous knowledge, cultures and

[81] Deborah McGregor, "Living Well with the Earth: Indigenous Rights and the Environment" in Corinne Lennox and Damien Short, eds, *Handbook of Indigenous Peoples' Rights* (London: Routledge, 2016) at 167; Günther Handl, "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992" (2012) 11 United Nations Audiovisual Library of International Law 1.

[82] United Nations General Assembly, "Analytical Study on the Relationship Between Human Rights and the Environment" (16 December 2011) Report of the United Nations High Commissioner for Human Rights 19th session, agenda items 2 and 3, A/HRC/19/34 at 34 – 36.

[83] United Nations Human Rights Council, "The Human Right to a Safe, Clean, Healthy, and Sustainable Environment" (5 October 2021) 48th Session, Agenda Item 3, A/HRC/48/L.23/Rev.1. For literature on the impact of the environment on Indigenous peoples' rights, see generally, Rebecca Witter and Terre Satterfield, "The Ebb and Flow of Indigenous Rights Recognitions in Conservation Policy" (2019) 50:4 Development and Change 1083; Marcela Torres Wong, *Natural Resources, Extraction and Indigenous Rights in Latin America: Exploring the Boundaries of Environmental and State-Corporate Crime in Bolivia, Peru, and Mexico* (New York: Routledge, 2018); Catherine Magallanes, "Improving the Global Environmental Rule of Law by Upholding Indigenous Rights: Examples from Aotearoa New Zealand (2018) 7:1 Global Journal of Comparative Law 61; Libby Porter and Janice Barry, *Planning for Coexistence? Recognizing Indigenous Rights Through Land-Use Planning in Canada and Australia* (New York: Routledge, 2016).

[84] For discussions on how Indigenous knowledge and traditional way of life contributes to environmental sustainability, see generally International Indigenous Peoples' Forum on Climate Change, "Indigenous Peoples and Traditional Knowledge in the Context of the UN Framework Convention on Climate Change: Compilation of Decisions and Conclusions adopted by the Parties to the Convention" (2019) Center for International Environmental Law Update 1; Jay Johnson et al, "Weaving Indigenous Sustainability Sciences to Diversify Our Methods" (2016)

traditional practices contributes to sustainable and equitable development and proper management of the environment."[85] The international system appreciates Indigenous knowledge and involves Indigenous peoples in environmental management.[86]

The contemporary legal framework for international Indigenous rights is a product of three processes – first, the application of international human rights law to Indigenous issues with consideration for the dynamics of Indigenous attributes and concerns. Second, is the development of international instruments that specifically affirm Indigenous rights. Third, litigation processes and decisions of international courts and quasi-judicial institutions.[87] Likewise, this thesis proposes the development of international legal norms on the procedural environmental rights of Indigenous peoples through the adoption of a UN General Assembly Declaration[88] and judicial processes to assert Indigenous peoples' rights.[89]

This section has provided the legal frameworks for the rights of Indigenous peoples – the international instruments promoting and protecting Indigenous rights, court decisions affirming these rights and corresponding state practices that indicate that the rights of Indigenous peoples are widely acknowledged at both international and national levels.[90] These rights provide the legal

11:1 Sustainability Science 1; Giorgia Magni, "Indigenous Knowledge and Implications for the Sustainable Development Agenda" (2017) 52:4 European Journal of Education 437; Bradford Morse, "Indigenous Rights as a Mechanism to Promote Environmental Sustainability" in Laura Westra, Klaus Bosselmann and Richard Westra, eds, *Reconciling Human Existence with Ecological Integrity: Science, Ethics, Economics and Law* (London: Earthscan, 2008) 159.

[85] Preamble, UNDRIP *supra* note 25.

[86] For instance, the United Nations Environment Programme involved Indigenous peoples in the Global Biodiversity Assessment Project. OHCHR, "Indigenous Peoples and the Environment" (1995) Leaflet No. 10. XXX. For more on integration of Indigenous knowledge in environmental management, see James Ford et al, "Including Indigenous Knowledge and Experience in IPCC Assessment Reports" (2016) 6:4 Nature Climate Change 349.

[87] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (New York: Routledge, 2011) at 153 -155.

[88] See chapter five of this thesis on the proposal for a UN General Assembly declaration.

[89] As discussed in chapter six of this thesis, the anticipated roles of TIANs in the implementation of legal norms on the procedural environmental rights of Indigenous peoples include supporting judicial processes against violators of the procedural environmental rights of Indigenous peoples.

[90] Katja Göcke, *Indigenous Peoples in International Law* (Göttingen: Göttingen University Press, 2013) at 29.

basis for Indigenous peoples' participation as actors in environmental decision-making. On the other hand, this thesis draws from IR theory, particularly constructivist IR theory, to analyze international actors' interactions. Constructivist IR theory explanations of international actors' engagements provide insights into this thesis' investigation of the past interactions of Indigenous peoples with other international actors and how their sustained engagements with states and extractive multinational corporations (MNCs) can propel their participatory environmental rights.

III. International Relations Theories and International Law

International law and IR are two distinct but related scholastic fields with different theoretical perspectives, methodologies, and research outcomes.[91] IR theories provide different perspectives on world politics and practices. The various theories give different conceptions of how the international system works and how actors engage within the system. Generally, IR theorists explain actors' past actions, behaviour, or interests within the global order and make predictions about state and non-state actors' responses to different issues or specific circumstances.[92] On the other hand, international law is a body of rules and norms that shape and regulate world governance. States agree to these rules and norms to govern their interactions.[93] It "defines the legal responsibilities of states in their conduct with each other, and their treatment of individuals

[91] Ku explains the distinctiveness and interconnection between international law, international relations and global governance. Charlotte Ku, *International Law, International Relations and Global Governance* (New York: Routledge, 2013) (Ku, *International Law*).
[92] See Paul Viotti and Mark Kauppi, *International Relations Theory* (Lanham: Rowman & Littlefield, 2019) at 5 – 6.
[93] Walter Baber & Robert Bartlett, "The Role of International Law in Global Governance" in John Dryzek, Richard Norgaard & David Schlosberg, eds, *The Oxford Handbook of Climate Change and Society* (Oxford: Oxford University Press, 2011) 653.

within state boundaries."[94] Scholars of both fields understand and are beginning to accept the importance of the other and the interconnection of both fields.[95]

Political scientists were drawn to international law since the inception of the academic discipline, but things fell apart after World War II because international law and international organizations failed to avert the war and its consequent cruelties.[96] Although the post-World War II realities sparked the divide between international law and IR, the divergence of orientations and disparate research perspectives widened the divide.[97] As international law and IR scholarships developed separately, academics on both sides of the aisle saw the need for collaboration and called for a reconciliation of both sides. Kenneth Abbott's oft-cited publication,[98] encouraging international lawyers to take a cue from their political science counterparts, was followed by other scholars promoting the interdisciplinary agenda for both fields.[99]

With the increasing recognition of the interconnection between international law and IR, scholars on both sides are leaning toward the other and developing an interdisciplinary conception of the study of world politics and how actors within the system shape international law and international politics. There are many strands of IR theory, including realism, liberalism, English school,

[94] United Nations, "Uphold International Law: What is International Law?" online: <https://www.un.org/en/our-work/uphold-international-law>.
[95] Christopher Joyner, "International Law Is, As International Relations Theory Does?" (2006) 100:1 American Journal of International Law 248.
[96] Adam Irish, Charlotte Ku & Paul F. Diehl, "Bridging the International Law-International Relations Divide: Taking Stock of Progress" (2013) Georgia Journal of International and Comparative Law 357 at 361.
[97] See Ku, *International Law supra* note 91.
[98] Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus in Retrospect and Prospect" (1989) 14 Yale Journal of International Law 335. See also David Cox and Andrew O'Neil, "The Unhappy Marriage between International Relations Theory and International Law" (2008) 20:2 Global Change, Peace & Security 201.
[99] Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92:3 American Journal of International Law 367; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87:2 American Journal of International Law 205. For explanation on the importance of IR to the implementation of international law, see Robert Beck, "International Law and International Relations: The Prospects for Interdisciplinary Collaboration" (1995) 1 Journal of International Legal Studies 119.

constructivism, Marxism, critical theory, feminism, post-colonialism, and green theory. This thesis applies the constructivist IR theory.

A. Constructivist Conception of International Relations

There are different variants of constructivism IR theory, even though constructivists like Reus-Smit believe categorizations of the theory are unnecessary.[100] Fearson and Wendt categorize constructivism into three strands – "positivist, interpretivist, and postmodern"[101] while Hopf portends that there are two variants – conventional and critical.[102] Despite the distinct strands within constructivism, notable theoretical assumptions run across all of them.[103] While the diverse threads within constructivist approach to IR are recognized, this thesis draws from the school of thought's general assumptions without reliance on any particular variant of the theory.

Before exploring the fundamental assumptions of constructivist IR theory, it is important to briefly discuss the approach's emergence. Nicholas Onuf introduced the word "constructivist" IR theory in 1989,[104] but the theory became prominent after the Cold War because the dominant realism and liberalism theories failed to account for the international politics of that time. After the Cold War, IR analysis of global politics was diversified to provide other approaches different from the existing major theories. Constructivist schools of thought emerged to portend a different perspective of world politics which was not centred on states like the dominant theories. Some

[100] Richard Price and Christian Reus-Smit, "Dangerous Liaisons? Critical International Theory and Constructivism" (1998) 4:3 European Journal of International Relations 259.
[101] James Fearson and Alexander Wendt, "Rationalism v. Constructivism: A Skeptical View" in Walter Carlsnaes, Thomas Risse and Beth Simmons, eds, *Handbook of International Relations* (London: Sage Publications, 2005) 52.
[102] Ted Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23:1 International Security 171. While conventional constructivism seeks to develop new perception of global politics founded on "minimal foundationalism" by acknowledging the possibility and essentiality of "contingent universalism", critical constructivism seeks a path to human freedom by uncovering established order and disproportionate power relations in the international system. Hoyoon Jung, "The Evolution of Social Constructivism in Political Science: Past to Present" (2019) 9:1 SAGE 1 at 3.
[103] Hoyoon Jung, *Ibid* at 3.
[104] Nicholas Onuf, *World of Our Making* (Columbia: University of South California Press, 1989).

scholars believed that the Cold War ended due to the actions of non-state agents and saw the need for a different assessment of IR that captures the dynamic world politics and the unprecedented role of non-state actors.[105]

Reus-Smit observes that the prominence of constructivism can be traced to four circumstances. First, there was a move from a theoretical critique of other theories to substantive IR analysis because constructivists were interested in reaffirming the superiority of their view of global politics. Second, the failure of neo-realists and neo-liberals to predict the end of the Cold War and capture systemic revolutions reforming the international system at the time weakened their claims. Third, the end of the Cold War motivated new scholars, who agreed with most of the assumptions of the critical international theory but were also interested in innovative theoretical investigations, to reconsider questions that were formerly explored through the neo-liberal and neo-realist theorists. Fourth, scholars were unsatisfied with the shortcomings of dominant rationalist theories and were eager to welcome the new idea, thereby propelling constructivism to the limelight of IR theoretical analysis.[106]

Constructivism developed through different traditions but with the same idea that international politics is socially constructed. The different traditions focused respectively on norms, rules and identity.[107] These traditions created norm constructivism, rules constructivism and identity constructivism. The relevance or influence of these three strands of constructivism on contemporary IR theory remains debatable. Nevertheless, constructivist IR theory introduced a

[105] Sarina Theys, "Constructivism" in Stephen McGlinchey, Rosie Walters and Christian Scheinpflug, eds, *International Relations Theory* (Bristol: E-International Relations Publishing, 2017) 36 (Theys, Constructivism).
[106] Christian Reus-Smit, "Constructivism" in Scott Burchill et al, eds, *Theories of International Relations* (New York: Palgrave Macmillan, 2005) 188 at 195-196 (Reus-Smit, Constructivism).
[107] Samuel Barkin and Laura Sjoberg, *International Relations' Last Synthesis? Decoupling Constructivist and Critical Approaches* (New York: Oxford University Press, 2019) at chapter 3.

different viewpoint by investigating interactions within the global system and how actors' identities shape their interactions. Despite the disparity of opinions within the approach, constructivists are unanimous on the core assumption that global politics is socially constructed.

Furthermore, different constructivists are unanimous about the ontological hypothesis of the social construction of global politics.[108] Essentially Wendt expresses two assumptions of constructivism that are increasingly acceptable by IR scholars – "that the structures of human association are determined primarily by shared ideas rather than material forces, and that the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature."[109] This thesis relies on these constructivist assumptions, which are discussed further below.

i. Emphasis on Normative Structures and Socialization

First, constructivist IR theory is applied to distill the significance of both ideational and material structures in international socialization. This assumption aligns with this thesis' assessment of the systems of shared ideas and values that Indigenous peoples have developed over time in global politics and how those normative structures have influenced the international social and political climate, particularly during the drafting process of the UNDRIP. On the other hand, constructivists recognize the equal significance of material structures, such as the proposed TIANs, as social structures that can be shaped by the common ideas of Indigenous peoples and influence the actions of other actors. Constructivist emphasis on social construct supports this thesis' investigation of Indigenous peoples' interactions within the global domain and how their social interactions may influence the behaviour of states and extractive MNCs.

[108] *Ibid.*
[109] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 1.

Equally, the norms and ideas of institutions shape the identities and interests of actors. Established norms and ideas "define the meaning and identity of the individual actor and the patterns of appropriate economic, political, and cultural activity engaged in by those individuals."[110] Constructivists explain how generally accepted norms and ideas shape international actors' preferences and decisions in different circumstances. Normative and ideational structures are of the same significance as material structures because structures influence the actions of both social and political actors, states or individuals by shaping their identities and interests.[111]

Institutionalized norms and ideas shape actors' identities and interests through "imagination, communication, and constraints."[112] Therefore, established norms with moral force determine what states, Indigenous peoples, and extractive MNCs consider practically and ethically attainable. Such norms condition each international player's interests and actions, which they assume as limitations on their actions and the strategies for attaining their objectives.[113] For instance, the third chapter of this thesis discusses the international human rights legal norms that provide the legal justification for the rights of Indigenous peoples to participate and access information in environmental matters. These norms will shape Indigenous peoples' interactions, through TIANs, with other actors.

Constructivists believe that structures, such as advocacy networks, shape social and political behaviour, and Wendt explains that structures have three elements – they "share knowledge, material resources and practices."[114] The fifth chapter of this thesis examines how the constituents

[110] Reus-Smit, Constructivism, *supra* note 106 at 197.
[111] *Ibid* at 196. Martha Finnemore and Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4 Annu. Rev. Polit. Sci. 391.
[112] Reus-Smit, Constructivism, *supra* note 106 at 198.
[113] *Ibid*.
[114] Alexander Wendt, "Constructing International Politics" (1995) 20:1 International Security 71 at 73.

of TIANs would hold common principled ideas, share material and non-material resources and work together to achieve a set objective: to promote Indigenous peoples' procedural environmental rights.

Thus constructivists place much importance on structures because they believe that – first, social structures are shaped by common notions, anticipations and understanding. Second, material assets can only influence human decisions "through the structure of shared knowledge in which they are embedded."[115] Third, social structure can only exist in practice.[116] Therefore, actors' behaviour towards things and other actors is based on the meaning they attach to that thing or actor. Indeed, considering that the world is socially fabricated, practices and relationships are subject to the different meanings attached to them, but they are not static.[117] Constructivists give a different perspective of world politics that is socially construed and contingent on historical interactions and ideas, identities and interests formed in the process.

International governance is shaped not by individual ideas but by ideas shared among different people and articulated as practices and identities, that is, institutionalized ideas. Hence, ideas shared by Indigenous peoples about their environmental rights and expressed through their interactions with other international actors can influence the development and implementation of international environmental law. Legro explains that ideas are entrenched in government policies, educational institutions and government speeches.[118] Constructivists shifted the perspective of IR from materialism to social concept by emphasizing that principles, anticipations and meanings

[115] *Ibid* at 73-74.
[116] *Ibid*.
[117] Ian Hurd, "Constructivism" in Christian Reus-Smit and Duncan Snidal, eds, *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008) at 300.
[118] Jeffrey Legro, *Rethinking the World, Great Power Strategies and International Order* (Ithaca: Cornell University Press, 2005) at 6.

attached to objects are fundamental in analyzing international politics. While social relations may propel or restrain actors,[119] the changes to actors' behaviour depend on the variable of past relationships with other objects involved. This makes constructivist IR theory suitable for this thesis' analysis of Indigenous peoples' interactions with states and extractive MNCs and how such interactions may shape or alter the actors' perception of the environment and the participation of Indigenous peoples in environmental decision-making.

Essentially, constructivism captures the interconnection between normative and material structures in the international system. Constructivist analysis explains the role of norms, such as the procedural environmental norms examined in this thesis, in shaping actors' behaviour. By recognizing the multiplicity of actors in the international system and how their social interactions inform identity and interests, this thesis draws from constructivist perspectives in investigating the interactions of the multiple actors it explores – Indigenous peoples, states and extractive MNCs.

ii. Identities Shape Interests and Actions

Second, constructivists' focus on shared identities explains how Indigenous peoples' identities within the international system have changed over time – from a group of people subjugated by states to international actors with influence on the development of international human rights law. Constructivists argue that to comprehend global politics, it is essential to appreciate how shared ideas shape actors' identities because identities define interest, and interest informs actions.[120] Considering that identities inform interests and actions, constructivists emphasize the significance of identities, that is, actors' perception of who they are. As a result, states are believed to always act in accordance with their identity.[121] Also, Indigenous peoples' interests and actions are

[119] Audie Klotz, "Moving Beyond the Agent-Structure Debate" (2006) 8:2 International Studies Review 355 at 355.
[120] Reus-Smit, Constructivism, *supra* note 106 at 197; Peter Katzenstein, Robert Keohane and Stephen Krasner, "International Organization and the Study of World Politics" (1998) 52:4 International Organization 645.
[121] Theys, Constructivism, *supra* note 105 at 37.

propelled by their shared ideas and identities. With the shared history of colonization and injustices against their communities, Indigenous peoples are motivated by the common interest of promoting and protecting their rights and preventing the injustices and struggles experienced by their communities.

Identity is not static but subject to change, and it is closely related to an actor's cultural, historical, political and social background.[122] Relatively, interests are informed by identity and formed within a social context while defining incidences.[123] This implies that interests are not constant but developed or changed in the process of defining an occurrence. Actors' identities and interests are formed over time based on historical experiences with other actors or individuals. Therefore, a state's actions in the international system will depend on how it perceives itself in the particular situation, the state's interest and past experiences with objects connected to the issue in question. Likewise, Indigenous peoples' interactions with states and extractive MNCs are largely influenced by their past experiences dealing with these actors and the actors' interests in the environment and natural resources. However, through social interactions, Indigenous peoples may influence the actions of states and extractive MNCs. Hence, constructivist IR theory provides insights into this thesis' analysis of the sustained interactions of these three international players.

Wendt clarifies that it is "through reciprocal interaction that we create and instantiate the relatively enduring social structures in terms of which we define our identities and interests."[124] IR variables such as norms, actors' identities and interests are not fixed, but they develop and change in

[122] Alexander Wendt, "Constructing International Politics" (1995) 20:1 International Security 71. See also, Rogers Brubaker and Frederick Cooper, "Beyond Identity" (2000) 29:1 Theory and Society 1.
[123] Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 International Organization 391 at 397 (Wendt, Anarchy).
[124] *Ibid* at 406.

response to social interactions.[125] Through interactions, constrictions and imagination, non-material structures (institutionalized norms and ideas) inform actors' identities, interests and what they perceive as essential and attainable in the international system.[126] In the same light, identities and interests make up institutions. Institutions are organized by prescribed guidelines and rules, driven by actors' interactions and involvement in shared knowledge. Therefore, institutions are inherently founded on actors' notions of global politics and represent an "internalization of new identities and interests."[127] Hence, constructivist IR theory supports this thesis' position on the significance of social interactions, the shared ideas of promoting environmental rights held by Indigenous peoples, their shared pasts and identities and how these ideas and identities shape their interest/efforts in promoting and protecting their rights to access information and participate in environmental matters.

iii. Historical Construction of Interests

Third, constructivist IR theory explains the causal influence of historical discursive practices on actors' established behaviour and practices. Indigenous peoples' way of life is embedded in historical practices of environmental conversation, spiritual connection to the environment and communality. The lifelong struggle to preserve this way of life and international law's role in sanctioning Indigenous peoples' subjugation influences Indigenous peoples' perception of global politics and its actors.[128] The past matters in constructivist analysis. To understand the interests

[125] Ronan Palan, "A World of Their Making: An Evaluation of the Constructivist Critique of International Relations" (2000) 26:4 Review of International Studies 575.
[126] Martin Carstensen and Vivien Schmidt, "Power Through, Over and in Ideas: Conceptualizing Ideational Power in Discursive Institutionalism" (2015) 23:3 Journal of European Public Policy 318.
[127] Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 International Organization 391 at 399.
[128] See generally, Jefferey Dunoff, Steven Ratner and David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (New York: Wolters Kluwer Law, 2015); Jordan Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion" (2010) 51 Va. J. Int'l L. 977; Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

and actions of Indigenous peoples as contemporary international players and adequately position them in the global environmental discourse, their history must be acknowledged. Historical interactions "socialized actors toward certain conceptions of self and others."[129] For constructivists, actors' interests and decisions are historically constructed and dependent.[130] Cultures are products of dynamic historical processes that shape actors' ideas.[131]

However, culture is not static. As a product of established historical social practices, culture, and invariably ideas and interests, are subject to change.[132] Constructivists' explanation of actors' interest in history informs the analysis of how the colonial foundation of interactions with Indigenous peoples in the international system influences Indigenous peoples' actions towards other actors, how other actors engage with Indigenous peoples, the role of Indigenous identity in influencing their actions and their connection to the environment. Essentially, constructivism provides the mechanism for analyzing Indigenous peoples' historical experiences in the international system and how such experiences inform their identity and interests. This thesis explores the creation of new collective ideas for Indigenous peoples through active interactions with states and extractive MNCs in order to address longstanding conflicts about environmentalism.

Constructivism gives an analytical context of IR different from the dominant neo-realist and neo-liberal theories. By emphasizing the social construction of international politics, constructivists

[129] Dale Copeland, "The Constructivist Challenge to Structural Realism: A Review Essay" (2000) 25:2 International Security 187 at 205.
[130] *Ibid* at 191.
[131] Christine Agius, "Social Constructivism" in Alan Collins, ed, *Contemporary Security Studies*, 4th ed, (Oxford: Oxford University Press, 2016) 70 at 74 – 75. See generally, Vivien Schmidt, "Reconciling Ideas and Institutions Through Discursive Institutionalism" in Daniel Beland and Robert Henry Cox, eds, *Ideas and Politics in Social Science Research* (Oxford: Oxford University Press, 2011) 47.
[132] Copeland observes that "[b]y engaging in new practices, states can instantiate new ideational structures that help actors transcend collective-action problems and historical mistrust." Dale Copeland, "The Constructivist Challenge to Structural Realism: A Review Essay" (2000) 25:2 International Security 187 at 196.

revived the discourse on the history of global politics. The importance of community and actor's identity in shaping international politics was redefined by revisiting IR's historical underpinnings.[133] Constructivism captures the diversity of actors and their different experiences. More so, constructivists' emphasis on the influence of ideas, values and norms on global politics spurred normative discourse in IR analysis.[134] Contrary to other theories, constructivism diverted the attention from materialism to non-material factors such as norms, ideas and actors' interactions.

Despite the considerable contributions of constructivist theory to IR, it is not devoid of shortfalls. One of the resounding critiques of constructivism is the bias toward good norms and lack of explanation about other vital issues.[135] Constructivists emphasize norms but have not successfully explained the independent impact of norms.[136] Second, realists contend that everything is not as unclear and unstable in global politics as constructivists present. Material structures such as power[137] and capitalism are international empirical factors that social interactions cannot easily influence.[138] While non-material structures are essential in shaping actors' behaviour, a material structure cannot be easily displaced. Third, although constructivist IR theory is profoundly engaged in how states change their behaviour, it fails to explain how change eventually happens.[139] Lastly, constructivist IR theory has been criticized for its ambiguous empirical investigations and

[133] Richard Ned Lebow, "Thucydides the Constructivist" (2001) 95:3 American Political Science Review 547 at 559.
[134] Reus-Smit, Constructivism, *supra* note 106 at 207.
[135] Jonathan Havercroft, "Social Constructivism and International Ethics" in Brent Steele and Eric Heinze, eds, *Routledge Handbook of Ethics and International Relations* (London: Routledge, 2018) 116 at 122 - 123.
[136] Annika Björkdahl, "Norms in International Relations: Some Conceptual and Methodological Reflections" (2010) 15:1 Cambridge Review of International Relations 9.
[137] For an analysis of different forms of power and how they influence international politics, see Michael Barnett and Raymond Duvall, "Power in International Politics" (2005) 59:1 International organization 39.
[138] John Mearsheimer, "A Realist Reply" (1995) 20:1 International Security 82. See also, Martha Finnemore and Judith Goldstein, "Puzzles about Power" in Martha Finnemore and Judith Goldstein, eds, *Back to Basics: State Power in a Contemporary World* (Oxford, New York: Oxford University Press, 2013) 1.
[139] Ronen Palan, "A World of Their Making: An Evaluation of the Constructivist Critique in International Relations" (2000) 26:4 Review of International Studies 575 at 577.

failure to predict how trends in the international system can be sustained.[140] These issues continue to draw skepticism about the theoretical approach of constructivism.

Although constructivist theory has inherent deficiencies like other theoretical perspectives, it provides an adequate theoretical foundation for this thesis, coupled with the international law framework provided earlier in this chapter. Constructivist viewpoint of IR explains how Indigenous peoples' identity and environmental interests may shape international institutions and motivate the development and implementation of environmental legal norms. Additionally, constructivist IR theory focuses on the "importance of normative as well as material structures, on the role of identity in shaping political action and on the mutually constitutive relationship between agents and structures."[141] Thus constructivist IR theory provides insights on the importance of material structures such as TIANs initiated in this thesis and the place of history, identity, and interests in defining how Indigenous peoples act or how other actors engage with Indigenous peoples within the international system.

This thesis investigates how the interactions of the focus actors can shape the development and implementation of international procedural environmental legal norms. Constructivist assumption that actors' identities and interests are developed in response to social interactions provides a suitable premise for this analysis. However, considering this research's focus on actors' interaction in the international system and the role of Indigenous peoples as norm entrepreneurs, it is imperative to engage with discussions that focus on these issues. Therefore, the remainder of this

[140] Richard Ned Lebow, "IR Theory as Identity Discourses" in Ken Booth and Toni Erskine, eds, *International Relations Theory Today* (Cambridge: Polity Press, 2016) 53.
[141] Christian Reus-Smit, "Constructivism" in Scott Burchill et al, eds, *Theories of International Relations* (Hampshire, New York: Palgrave Macmillan, 2005) at 188. Kingsbury briefly applies the constructivist analysis to the definition of Indigenous peoples. The positive and constructivist approach to the concept of Indigenous peoples is examined and the constructivist approach describes Indigenous peoples as a process in the international system. Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 American Journal of International law 414.

chapter explores the norm life cycle theory. Finnemore and Sikkink, the proponents of the theory, are notable constructivists whose work borrows from the rationalist idea. The norm life cycle theory is discussed in a separate section because it provides IR ideas that are important to this thesis' analysis of the development of norms.

B. Finnemore and Sikkink's Norm Life Cycle Theory

This research applies Finnemore and Sikkink's conceptualization of the international norm life cycle in exploring the development and implementation of procedural environmental norms. While this theory is discussed briefly in this chapter, a more robust engagement with the theory is presented in chapter five, when TIANs are situated within the norm life cycle to delineate the roles of Indigenous representatives in shaping international law.

The insights provided by Finnemore and Sikkink on the different stages of international norm development clarify the roles of different actors at different stages of norm development. This theory is applied to the discussion on the roles of Indigenous peoples as norm entrepreneurs and their interactions with other actors to support the emerging legal norm on the right of Indigenous peoples to participate and access information on environmental matters. Notably, the norm life cycle theory explains how and why ideational changes occur and reveals the similarity between social construction and strategic negotiations within the international system. Drawing from two international discourse areas, women's rights advocacy and laws of war, Finnemore and Sikkink portend the three stages of norm development – "norm emergence, norm acceptance and norm internalization."[142] Considering that different stages of the cycle are propelled and dominated by

[142] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887 at 895 (Finnemore and Sikkink, International Norm).

different actors, this theory explicates the implications of actors' social interactions and how identity and interests shape actors' behaviour.

i. Norm Emergence

Norms are birthed by "norm entrepreneurs with organizational platforms" who hold strong convictions about particular principles or actions they believe to be ideal for society.[143] New norms gain attention through the critical works of norm entrepreneurs like Indigenous peoples, who apply persuasive mechanisms to gain the attention of state actors. Norm entrepreneurship at the international level requires organizational backing from new or existing platforms.[144] While TIANs can be viable platforms, Indigenous peoples require the support of other organizations such as UN bodies. By attaching nomenclatures to issues, norm entrepreneurs frame ideas in a way that is easily comprehensible to the public.[145] Also referred to as "transnational moral entrepreneurs," norm entrepreneurs apply different strategies, including lobbying and broadcasting their opinions to advance norms mostly related to how states and other actors treat individuals.[146] Norms usually emerge in response to how individuals are treated and seldom as a result of how a state is treated by another.

Norm entrepreneurs are often confronted with other established norms that create different views of "appropriateness and interest."[147] Promoting a new idea may imply the violation of established norms, which comes at some cost to norm entrepreneurs. Considering the unpleasant cost of norm entrepreneurship which may include imprisonment, social castigation and retributive actions, norm

[143] *Ibid* at 896.
[144] *Ibid* at 899.
[145] Alexandra Gillies, "Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm" (2010) 54:1 International Studies Quarterly 103.
[146] Chapters five and six discuss these strategies. Ethan A. Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society" (1990) 44:4 International Organization 479 at 525.
[147] Finnemore and Sikkink, International Norm, *supra* note 142 at 897.

entrepreneurs have deep convictions about the norm they advocate. Such ingrained ideas about the advent of norms are propelled by "altruism, empathy or ideational commitment."[148] In context, the legal norm on the rights of Indigenous peoples to participate and access information in environmental matters aligns with existing international norms on procedural rights. Therefore, the proposed norm is not in contradiction with existing international norms.

For any norm to scale through the initial stage of the cycle successfully, the organization promoting the norm requires, first, the backing of states through the inclusion of the norm in state interactions and, second, in most cases, the institutionalization of the norm.[149] Norm entrepreneurs persuade states to adopt the norm, include the norm as a discussion item in state gatherings and possibly debate the content and possibility of implementing the norm. In some instances, the identity and status of the entrepreneur may influence the success or otherwise of an emergent norm, especially when the norm questions established foreign policy and principles.[150] For instance, the identity of Indigenous peoples may influence the success of environmental norms considering existing international norms on the human rights of Indigenous peoples and the growing acceptance of Indigenous knowledge in environmentalism.

Just as entrepreneurs' identity may influence norm cascading, states' propensity to norm adoption may determine the level of support from states. Past experiences show that at least one-third of all states are required for norm cascading. Bearing in mind the unequal normative influence of states, the support of "critical states" is more impactful.[151] More than any other stage of the norm life

[148] *Ibid* at 898.
[149] *Ibid* 900. See generally, Annika Björkdahl, *From Idea to Norm. Promoting Conflict Prevention* (Lund: Lund University, 2002).
[150] Sara E. Davies and Jacqui True, "Norm Entrepreneurship in Foreign Policy: William Hague and the Prevention of Sexual Violence in Conflict" (2017) 13 Foreign Policy Analysis 701 at 716.
[151] Finnemore and Sikkink, International Norm, *supra* note 142 at 901.

cycle, the participation of domestic advocates is essential at the norm emergence stage. Domestic advocates devise various means to persuade the government and other actors to support the new idea. Gaining the support of other non-state actors, such as non-governmental organizations and corporations, impress more pressure on states to consider the emergent norm and include it in their international discourse until the norm scales through to the next stage.

ii. Norm Acceptance

At the stage of norm cascading, state and non-state actors are involved in convincing other actors to support the norm. In this phase, Indigenous peoples socialize with states, human rights bodies, and other international players to obtain their buy-in on the emerging environmental norm. States, networks, and international organizations socialize within the international system to pressure particular organizations, states, or groups to compel them to endorse new norms.[152] Another mechanism employed at this stage is monitoring other actors to ensure they conform to international standards. There is no clear yardstick for determining when a norm has been accepted. While some scholars believe that norm acceptance occurs when it receives "political and cultural validation,"[153] others believe that norm cascading occurs when there is "widespread acceptance around the essential nature of the norm."[154] Finnemore and Sikkink emphasize the survival of the norm, which requires ongoing socialization between networks of norm entrepreneurs and international organizations.[155]

[152] *Ibid* at 902.
[153] Chiara De Franco, Christoph Meyer and Karen Smith, "'Living by Example?' The European Union and the Implementation of the Responsibility to Protect (R2P)" (2015) 53:5 Journal of Common Market Studies 994 at 996.
[154] Andy Knight, "The Development of the Responsibility to Protect – From Evolving Norm to Practice" (2011) 3:1 Global Responsibility to Protect 3 at 19.
[155] Finnemore and Sikkink, International Norm, *supra* note 142 at 902.

Constructivist IR theory stipulates that actors' identities, that is, the perception of who they are, inform interest and interest shapes behaviours.[156] States' identities come to bear at the norm-cascading stage. Subject to the social context informing states' identity, interests and actions in light of the emerging norm, they may endorse the new norm to align their actions with their identity. Three identified motivations for giving in to pressure from actors at this stage are – legitimation, conformity, and esteem. States seek international legitimation as it reflects on their domestic legitimacy and influences their political agenda. For instance, some governments' decision to endorse the UNDRIP may have been impelled by pressure from their citizens and the need to maintain domestic and international legitimacy.

While Finnemore and Sikkink emphasize the roles of states at the norm acceptance stage, the components of states' decision-making process influence states' decisions. "State's decision-making function is composed of a myriad collection of bureaucracies, ministries, and governmental elites."[157] Considering the impact of these factors on domestic policymaking, they determine whether government support will be achieved or not. The inclination of political leaders and their agents to international norms is shaped by their beliefs and decision-making styles. Leaders with undemocratic decision-making styles with a thirst for power and domination are more inclined to oppose international norms that threaten their power or question their decisions.[158] The process of norm cascading could be devious and uncertain as state actors are propelled by their diverse interests and identities, which may or may not favour the emerging norm.

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[156] Reus-Smit, Constructivism, *supra* note 106 at 197; Peter Katzenstein, Robert Keohane and Stephen Krasner, "International Organization and the Study of World Politics" (1998) 52:4 International Organization 645.
[157] Justin Gest et al, "Tracking the Process of International Norm Emergence: A Comparative Analysis of Six Agendas and Emerging Migrants' Rights" (2013) 19:2 Global Governance 153 at 167.
[158] Vaughn Shannon and Jonathan Keller, "Leadership Style and International Norm Violation: The Case of the Iraq War" (2007) 3:1 Foreign Policy Analysis 79.

States also adopt new norms to conform with other states. States often strive to conform, particularly when an international norm has been widely adopted by a majority of other states, including critical states. Political leaders willing to build a better reputation for themselves may decide to adopt a norm for their fulfillment and to be portrayed in better light nationally and internationally. The continuity of social norms depends, to a large extent, on "feelings of embarrassment, anxiety, guilt, and shame that a person suffers at the prospect of violating them. A person obeying a norm may also be propelled by positive emotions, like anger and indignation."[159] Whatever the motive behind states' acceptance of a norm, norm entrepreneurs and networks may have to adopt different strategies when persuading or trying to convince states to adopt a norm. Some states have poor human rights reputations in the international system. For such states, norm entrepreneurs, advocacy networks and other international structures may appeal to them on the basis of the need to rectify their international reputation.

iii. *Norm Internalization*

After the norm has been broadly accepted and there is wide compliance, the norm reaches the internalization stage. This is the phase where "inherently contested norms simultaneously enjoy formal validity, social recognition, and cultural validation among stakeholders."[160] At this stage, actors integrate and reiterate actions in accordance with the norm without having to think about or debate it – it is generally accepted as the normal way of life.[161] International and domestic institutions acknowledge the values of an internalized norm without having to debate or pin it against other established norms. For instance, universal participation of all states in international

[159] Jon Elster, "Social Norms and Economic Theory" (1989) 3:4 Journal of Economic Perspectives 99 at 100.
[160] Lucrecia Iommi, "Norm Internalisation Revisited: Norm Contestation and the Life of Norms at the Extreme of the Norm Cascade" (2020) 9:1 Global Constitutionalism 76 at 84.
[161] Finnemore and Sikkink, International Norm, *supra* note 142 at 905. Hun Joon Kim and Jason Sharman, "Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms" (2014) 68:2 International Organization 417.

decision-making[162] and equality of all humans can be taken for granted now, but at some point, norm entrepreneurs introduced this idea to the international system. Domestic and international organizations establish and continue to work towards the universalization of accepted norms through professional development programs, international conferences, setting aside remembrance days and other strategies.[163] Although habits have been established around the norm, procedures to ensure conformity are put in place and actors that violate the norm are rebuked or berated. At this point, violation comes with some form of reprimand, domestically or internationally.

While the norm life cycle theory provides an insightful explanation of the different formation stages of norms and clarifies how diverse actors can be situated within different stages of norm development, the theory fails to explain the place of domestic forces at the second and third stages of the cycle. Domestic actors can influence a state's decision to accept a norm. Much emphasis is placed on states at the norm-cascading stage, but domestic and transnational coalitions are also viable players in bringing up emerging norms for international discourse. To some extent, this thesis fills this gap in the norm life cycle theory by analyzing the roles of domestic Indigenous groups at the first and second stages of the norm life cycle. That is, the roles of domestic Indigenous rights groups, in collaboration with other constituents of transnational Indigenous advocacy networks, in promoting the acceptance of the norms on the procedural environmental rights of Indigenous peoples.

Indeed, different stages of norm development are not as linear as presented by Finnemore and Sikkink. Norms are contested at different stages. While some states may have internalized some

[162] Martha Finnemore and Michelle Jurkovich, "Getting a Seat at the Table: The Origins of Universal Participation and Modern Multilateral Conferences" (2014) 20 Global Governance 361.
[163] Martha Finnemore, "International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy" (1993) 47:4 International Organization 565.

norms, others may still be involved in debating the principles of the norms. As actors debate emerging norms, some of the principles of the norms may change or be forfeited.[164] State and non-state actors may have different interpretations of emerging norms, and as they debate the variables of the new norm, common understandings are formed to pave the way for norm acceptance. Regardless, the norm life cycle theory provides a shrewd analysis of how norms are developed in the international system.

IV. Conclusion

A combination of international human rights law and constructivist IR theory provides the theoretical bases for this research. International human rights law provides the legal basis for the inclusion of Indigenous peoples in environmental decision-making. International human rights law has evolved to address the concerns of Indigenous peoples and affirm their rights. While international law provides the principles that promote and protect Indigenous peoples' rights, IR theory expounds on international players' actions.

Constructivist IR theory provides the foundation for analyzing Indigenous peoples as actors in the international community, the implications of international law's colonial past, the variability of actors' ideas, interests and actions, and the inherent influence of socialization on international actors' behaviour. Finnemore and Sikkink's norm life cycle theory clarifies how ideational changes occur at different stages of norm development and the roles of different actors at different stages. This theory captures how social construction and strategic interactions influence norm development and implementation in the international order.

[164] For an analysis of the different stages of international norm changes, see e.g., Wayne Sandholtz, "Explaining International Norm Change" in Wayne Sandholtz and Kendall Stiles, eds, *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 26.

With a focus on Indigenous peoples as non-state actors with distinctive history in the international system, this chapter provides an understanding of the nexus between the cultural underpinnings of shared ideas held by Indigenous peoples and the development of international Indigenous rights norms. This chapter unwraps the international standards on Indigenous peoples' rights, the importance of international actors' interactions, the ideational perspectives in global politics, and factors that inform actors' reactions to emerging norms. This chapter sets out the theoretical framework for addressing the thesis questions.

CHAPTER 3: ENVIRONMENTAL JUSTICE AND PROCEDURAL ENVIRONMENTAL RIGHTS

I. Introduction

II. What Is Environmental Justice?

A. Distributive Environmental Justice

B. Corrective Environmental Justice

C. Social Environmental Justice

D. Procedural Environmental Justice

III. History and Development of Environmental Justice

IV. Legal Basis for Procedural Rights in International Law

A. Right to Participation

B. Right to Access Information

V. Rights To Participation and Access to Information in Environmental Matters

VI. Indigenous Peoples' Rights to Participation and Access to Information in Environmental Matters

VII. Conclusion

I. Introduction

This chapter examines four categories of environmental justice, the origin and expansion of the environmental justice movement, analyzes environmental justice principles, and provides the legal basis for procedural environmental rights. To understand the necessity of this thesis' end goal – the development and implementation of legal norms relating to Indigenous peoples' procedural environmental rights, the source of the problem, that is, environmental injustice, must be addressed. Environmental injustice is a product of social ideologies perpetuating unequal recognition and involvement in environmental matters.[1] The environmental justice movement emphasizes the interrelationship between ecological and social problems and the significance of grassroots participation.[2] Like other social issues, environmentalism can be addressed from sociological and legal perspectives.

One of the environmental justice movement's objectives is to persuade or coerce states to create and enforce laws protecting environmental rights.[3] The environmental justice movement promotes legislative and other measures as governments' response to environmental challenges. They shape the development of environmental law through activism that focuses on localized environmental issues. More so, they highlight the implications of environmental degradation on humans and the nexus between environmental, social and political conditions,[4] thereby revealing the implications

[1] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (New York: Oxford University Press, 2009) at 12 – 15.
[2] Alice Kaswan, "Environmental Justice and Environmental Law" (2017) 24:2 Fordham Environmental Law Review 149 at 149 (Kaswan, Environmental Justice).
[3] *Ibid* at 150. Legal and social scholars are paying attention to the implications of constitutional provisions on environmental rights. See e.g., Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment?" (2015) 13:1 Santa Clara Journal of International Law 31; David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012); Christopher Jeffords, "Constitutional Environmental Human Rights: A Descriptive Analysis of 42 National Constitutions" in Lanse Minkler, ed, *The State of Economic and Social Human Rights: A Global Overview* (Cambridge: Cambridge University Press) 329.
[4] Kaswan, Environmental Justice, *supra* note 2 at 162.

of environmental injustice on the enjoyment of human rights. "The rights-based approach to implementing principles of environmental justice in law emphasizes each individual's right to a certain quality of the environment."[5]

Indigenous peoples are part of the environmental justice movement, and they apply environmental justice principles and themes to promote their cause.[6] Environmental justice is a social discourse that supports equality and fairness in environmental decision-making and risk distribution.[7] On the other hand, environmental justice can be achieved through the creation of legal instruments that create and protect environmental rights, including procedural environmental rights.[8] This chapter focuses on environmental justice to provide context for the proposed procedural environmental rights norms and how they may further the course of the environmental justice movement.

Additionally, this chapter examines the international law standards on the right to participation and access to information and when these rights apply. These rights are discussed generally and within the context of environmental decision-making. The chapter investigates whether existing international instruments protect Indigenous peoples' participatory rights in environmental management. The following section examines four categories of environmental justice.

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[5] Dinah Shelton, "Making Law Out of Principles of Environmental Justice" (2008) online: <https://www.iucnael.org/en/documents/192-dinah-shelton-making-law-out-of-principles-of-environmental-justice/file> at 10.

[6] David Schlosberg and David Carruthers, "Indigenous Struggles, Environmental Justice and Community Capabilities" (2010) 10:4 Global Environmental Politics 12.

[7] Hans Bressers and Walter Rosenbaum, *Achieving Sustainable Development: The Challenge of Governance Across Social Scales* (Connecticut: Praeger Publishers, 2003) at 186 (Bressers & Rosenbaum).

[8] For a quantitative analysis of the interconnection of environmental rights and environmental justice, see Joshua Chad Gellers and Christopher Jeffords, "Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism" (2015) 25 Economic Rights Working Papers 1.

II. What Is Environmental Justice?

The definition of 'environmental justice' is controversial, considering the diverse theoretical perspectives of the concept. Environmental justice is a broad field of study with extensive scholarly contributions. This thesis cannot adequately cover the expanse of opinions on the context and definition of environmental justice.[9] Although there are various environmental and social justice theories with different definitions, the assessment of the different theoretical conceptions and definitions is beyond the scope of this thesis. Hence, this section explores a range of prevalent definitions to provide adequate comprehension of the concept of environmental justice.

The theoretical foundation of environmental justice is founded on the belief that all human beings are equal and should be treated fairly. Hence environmental justice is grounded in the social justice discourse.[10] Generally, environmental justice scholarship centres on equal distribution of exposure to environmental risks.[11] But the idea of environmental justice based on *equal* distribution of environmental burdens or *equal* treatment is problematic. As Faber aptly states, "not all people are polluted equally";[12] therefore, environmental justice does not necessarily imply equal treatment. Instead, environmental justice is about fairness in treating people and their involvement in environmental decision-making. Robert Bullard explains that:

> Environmental justice embraces the principle that all people and communities are entitled to equal protection of environmental and public health laws and

[9] In fact, the ability of environmental movements to capture the multiplicity of environmental interests and identities has been questioned. See David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference of Environmentalism* (Oxford: Oxford University Press, 2002).

[10] Marina de Oliveira Finger and Felipe Bortoncello Zorzi, "Environmental Justice" (2013) 1 UFRGS Model United Nations Journal 222 at 225 (Finger and Zorzi, Environmental Justice). For an analysis of the 'justice' in environmental justice, see David Schlosberg, "Reconceiving Environmental Justice: Global Movements and Political Theories" (2007) 13:3 Environmental Politics 517. Researchers have found that 'justice' provides an apt judgment of people's environmental consciousness even more than self-interest. Susan Clayton, "New Ways of Thinking about Environmentalism: Model of Justice in the Environmental Debate" (2000) 56:3 Journal of Social Issues 459 at 460.

[11] Bressers & Rosenbaum, s*upra* note 7 at 186.

[12] Daniel Faber, *Capitalizing on Environmental Injustice: The Polluter-Industrial Complex in the Age of Globalization* (Rowman & Littlefield Publishers: Lanham, 2008) at 15.

> regulations…*It* is the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[13]

While Bullard's definition focuses on equal protection from regulatory instruments, Schnaiberg and Gould argue that environmental justice is a combination of environmental protection and social equality.[14] The subject of equality differs in the literature. Some scholars underscore the equality of *all human beings*,[15] while some focus on equality between human beings and corporations[16] and human beings and nature.

On the other hand, the borders of the environmental justice field are unclear. A discourse that started with an emphasis on distribution has grown to include other aspects, such as participation.[17] Schlosberg proffers a comprehensive definition – "equitable distribution of environmental risks and benefits; fair and meaningful participation in environmental decision-making; recognition of

[13] Robert Bullard, "Environmental Justice: It's More than Waste Facility Siting" (1996) 77:3 Social Science Quarterly 493 at 493.
[14] Kenneth Gould, Adam Weinberg and Allan Schnaiberg, "Legitimating Impotence: Pyrrhic Victories of the Modern Environmental Movement" (1993) Qualitative Sociology, Special Issue – Social Equity and Environmental Activism: Utopias, Dystopias and Incrementalism 1 at 40.
[15] See for example, Manish Verma, *Globalisation, Environment and Social Justice: Perspectives, Issues and Concerns* (New York: Routledge, 2019); David Naguib Pellow, *What is Critical Environmental Justice?* (Cambridge: Polity Press, 2018); David Schlosberg, *Defining Environmental Justice: Theories Movements and Nature* (New York: Oxford University Press, 2009); Kristin Shrader-Frechette, *Environmental Justice: Creating Equality: Reclaiming Democracy* (New York: Oxford University Press, 2002).
[16] See for example, Pamela Davies, Mònica Pons Hernandez & Tanya Wyatt, "Economy Versus Environment: How Corporate Actors Harm Both" (2019) 27 Critical Criminology 85; Sara Seck, "Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty" (2016) 26 Transnat'l L. & Contemp. Probs. 383.
[17] Schlosberg portends that the "distributive conception of just must embrace notions of justice based in recognition, capabilities and participation. David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford: Oxford University Press, 2009) (Schlosberg, Defining Environmental Justice). Mascarenhas follows the same line of thought by contending that a restrictive definition of environmental justice was having an adverse effect on marginalized groups like the First Nations of Canada. Two related elements of economic and distributive justice are suggested – recognition and involvement in decision making. Michael Mascarenhas, "Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada" (2007) 12:6 Local Environment 565 at 575.

community ways of life, local knowledge, and cultural difference; and the capability of communities and individuals to function and flourish in society."[18]

Although some scholars have called for a well-defined conception and blended framework of environmental justice, others believe that the principles of the justice theory are only suitable for plural conception and are more applicable in different investigative contexts.[19] Thus, the academic divide in the field of environmental justice is not limited to the context of the concept but also applies to the need to align (or not) the context and framework of environmental justice.

Considering the lack of an exhaustive and generally accepted definition of environmental justice, this thesis adopts a taxonomic approach that "offers a method of collapsing the seemingly broad scope of environmental justice and identifying common causes of and solutions to environmental injustice."[20] Therefore, four categorizations of environmental justice are examined below – distributive justice, corrective justice, social justice and procedural justice. Although this thesis focuses on procedural justice, distributive, corrective and social justice are introduced to provide context on the other aspects of environmental justice and how they implicate procedural justice.

A. Distributive Environmental Justice

Environmental challenges have no boundaries, and everyone bears the consequences of industrialization and resource exploitation, but distributive justice questions equality in sharing environmental consequences.[21] Distributive justice is considered the substantive aspect of environmental justice, which focuses on the fair distribution of environmental benefits and

[18] Schlosberg, Defining Environmental Justice, *Ibid* at 43-44.
[19] Shue suggests the distribution of the consequences of environmental degradation among rich and poor nations. Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford: Oxford University Press, 2014) at 27.
[20] Robert Kuehn, "A Taxonomy of Environmental Justice" (2000) 30 Envtl. L. Rep. News & Analysis 10681 at 10682 (Kuehn, Taxonomy).
[21] After exploring climate change as a moral challenge, Roser and Seidel question how the consequences of climate change can be distributed through the intergenerational distributive justice theories. Dominic Roser & Christian Seidel, *Climate Change: An Introduction* (London: Routledge, 2017).

burdens.[22] Principles of distributive justice portend "moral guidance for the political processes and structures that affect the distribution of benefits and burdens in societies."[23] Armstrong clarifies the difference between distributive justice and principles of distributive justice. While distributive justice underscores *how* benefits and burdens are shared, principles of distributive justice suggest how the burdens and benefits ought to be shared.[24]

Distributive justice concentrates on the end goal rather than the process of getting to an outcome.[25] Distributive justice in the environmental context engenders "the *equitable* distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs."[26] Distributive justice does not imply the redistribution of environmental risks or contamination. It implies that everyone is entitled to equal protection from regulatory and policy instruments, the removal of environmental harm from all communities,[27] and fair compensation for environmental harm. On the flip side of equal

[22] For a comprehensive analysis and distinctions of procedural and substantive environmental human rights in accordance with existing international law, see the summary of the 14 reports submitted by John Knox, the Independent Expert on Human Rights and the Environment, to the UN Human Rights Council. United Nations General Assembly, "Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox" (30 December 2013) Human Rights Council, 25th session, agenda item 3, A/HRC/25/53. For a discussion on the four theoretical characteristics of distributive justice, that is, the object, the subject, the prerequisites, and normative implications, see Serena Olsaretti, *The Oxford Handbook of Distributive Justice* (New York: Oxford University Press, 2018). Additionally, collective environmental responsibility (procedural and distributive elements of justice) has been differentiated from individual responsibilities (responsibility to other entities of nature and future generations). Susan Clayton, "New Ways of Thinking about Environmentalism: Models of Justice in the Environmental Debate" (2002) 56:3 Journal of Social Issues 459.

[23] Julian Lamont and Christi Favor, "Distributive Justice" (2017) Stanford Encyclopedia of Philosophy 1 at 1.

[24] Chris Armstrong, *Global Distributive Justice: An Introduction* (Cambridge, GB: Cambridge University Press, 2012) at 12-13. There is a notion that the principles of distributive justice can provide the ethical foundation for collective global action to tackle climate change. See Achala Chandani, "Distributive Justice and Sustainability as a Viable Foundation for the Future Climate Regime" (2007) 1:2 Carbon & Climate Law Review 152.

[25] Peter Meindl, Ravi Iyer and Jesse Graham, "Distributive Justice Beliefs Are Guided by Whether People Think the Ultimate Goal of Society Is Well-Being or Power" (2019) 41:6 Basic & Applied Social Psychology 359.

[26] Kuehn, Taxonomy at 10684 [emphasis added].

[27] Robert Bullard, "Overcoming Racism in Environmental Decision Making" (1994) 36:4 Environment: Science and Policy for Sustainable Development 10 at 43.

distribution of consequences is the equitable allocation of benefits of environmental programs such as clean drinking water, parks, and good drainage systems.[28]

Distributive justice, at the international level, centres on the transboundary impact of environmental actions.[29] In the environmental context, distributive justice contemplates the equitable distribution of the burdens and benefits of industrialization.[30] Hence the redistribution of the benefits of industrialization by compensating states that bear higher environmental burdens. Some scholars argue that the Global South should be compensated for the greenhouse gas reduction procedures it adopts due to efficiency concerns.[31] The realization of distributive justice lies in the mechanisms that make environmental decisions. Therefore, the procedural component of environmental justice provides the foundation for distributive justice.[32]

B. Corrective Environmental Justice

Corrective justice seeks to amend or offset the impact of damages caused. It involves impartiality in taking punitive actions against law violators and how harms perpetrated against persons or

[28] Kuehn, Taxonomy at 10684.

[29] The underlying issues of environmental justice are global, therefore environmental activities and decision usually have global impacts. Richard Schroeder et al, "Third World Environmental Justice" (2008) 21:7 Society & Natural Resources 547.

[30] David Pellow, "The Environmental Justice Movement: Equitable Allocation of the Costs and Benefits of Environmental Management Outcomes" (2001) 14 Social Justice Research 423.

[31] Carsten Helm and Udo Simonis, "Distributive Justice in International Environmental Policy: Axiomatic Foundation and Exemplary Formulation" (2001) 10:1 Environmental Values 5 at 16. Some argue that costs of climate change adaptation and alleviation should be undertaken by countries that contribute the most global gas emissions. Rowena Maguire, "Incorporating International Environmental Legal Principles into Future Climate Change Instruments" (2012) 6:2 Carbon & Climate Law Review 101. Even international attempt and commitment to address environmental degradation is lopsided, for example, the uneven geographic allotment of Clean Development Mechanisms projects within the Global South. See generally, Tomilola Eni-Ibukun, *International Environmental Law and Distributive Justice: The Equitable Distribution of CDM Projects under the Kyoto Protocol* (New York: Routledge, 2014).

[32] In order to secure a healthy and safe environment, the power relations must be ascertained first. Robert Bullard, "Environmental Justice in the 21st Century: Race Still Matters (2001) 49:3/4 Phylon 151. To have a good grasp of environmental justice, it is necessary to acknowledge the connection between distribution and other causes such as political, economic, and social factors. Distributive justice cannot work in isolation, it relies on variables such as political and social structures that may lead to inequality. Alice Kaswan, "Distributive Justice and the Environment" (2003) 81:3 North Carolina Law Review 1031.

communities are redressed.[33] "Corrective environmental justice refers to a system of legal institutions and procedures designed to provide remedies and to facilitate dispute settlement related to environmental harms and conflicts."[34] According to Aristotle, corrective justice is two-fold, punishing the wrongdoer and the responsibility to restore victims to their position before the wrongful act.[35] Corrective justice relates to retributive justice, compensatory justice, restorative justice, and commutative justice. Corrective justice is adopted in the environmental context because environmental justice demands more than punishment and compensation. Environmental justice is broader than Aristotle's idea of rectification. Instead, it seeks that violators be apprehended, reprimanded and not be allowed to gain from disobeying environmental standards. Additionally, harm caused by another's actions, whether the person acted contrary to a legal standard or not, should be remedied and the victims restored.[36] Therefore, corrective justice implicates regulatory enforcement of environmental standards, practices that deter violators from benefiting from violating environmental standards and policies, and equal enforcement of environmental laws irrespective of the community affected and the violator.

The corrective element of environmental justice applies nationally and internationally. For instance, the *Canadian Environmental Protection Act* prescribes punitive and remedial measures for environmental violations.[37] Furthermore, the United States of America (US) *Comprehensive*

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[33] Kuehn, Taxonomy at 10693.

[34] Patricia Galvao Ferreira, "Differentiation in International Environmental Law: Has Pragmatism Displaced Considerations of Justice?" in Neil Craik et al, eds, *Global Environmental Change and Innovation in International Law* (Cambridge: Cambridge University Press, 2018) 21 at 24.

[35] Ronald Sandler and Phaedra Pezzullo, *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (Massachusetts: MIT Press, 2007) at 89. See also, Ernest Weinrib, "Corrective Justice" in Ernest Weinrib, ed, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 56.

[36] Robert Kuehn, "Environmental Justice" in Michael Reisch, ed, *Routledge International Handbook of Social Justice,* (London: Routledge, 2014) 319 at 329.

[37] Section 95, 148, 272 of the *Canadian Environmental Protection Act,* SC 1999, c.33. The Government of Canada is in the process of developing a process guide for correcting environmental damages. National Energy Board, "Remediation Process Guide: Draft" (2019) online: <https://www.cer-rec.gc.ca/sftnvrnmnt/nvrnmnt/rmdtnprcssgd/rmdtnprcssgddrft-eng.pdf>.

Environmental Compensation and Liability Act (CERCLA) provides standards for closed and abandoned waste sites, accountability for hazardous waste dumping and remedial responses.[38]

At the international level, there are conversations about punitive measures for non-compliance with international environmental instruments.[39] However, ineffective compliance enforcement impedes corrective justice in international environmental cases. Corrective injustice is evident in the incapability of small island states to remedy the impact of climate change-induced flooding.[40] The regulatory gaps in international environmental law limit the Global South from achieving corrective justice. In contrast, the global north benefits from economic policies that have adverse social and environmental effects on the south.[41]

Communities on the receiving end of environmental degradation express the need to remediate the environmental damages caused at the national and international levels. For example, there is a call to remediate environmental harm caused to Indigenous peoples.[42] Legal precedents reveal that Indigenous peoples have been left defenceless several times in their attempts to seek remedies for the environmental harms caused by corporations and government agencies.[43] In the long run, operational corrective justice will ensure that environmental violators are punished and victims are put in a position they would have been without the harm or close if restitution is unrealistic.

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[38] *Comprehensive Environmental Compensation, and Liability Act (CERCLA),* 1980 U.S. House of Representatives Code – Title 42.
[39] Jutta Brunnée, "Enforcement Mechanisms in International Law And International Environmental Law" in Ulrich Beyerlin, Peter-Tobias Stoll, and Rudiger Wolfrum, eds, *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Leiden: Martinus Nijhoff, 2006) 1.
[40] Maxine Burkett, "Climate Reparations" (2009) 10 Melb. J. Int'l L. 509 at 513-514.
[41] Carmen Gonzalez, "Environmental Justice, Human Rights and the Global South" (2015) 13 Santa Clara Journal of International Law 151 at 158.
[42] Deborah McGregor, "Reconciliation and Environmental Justice" (2018) 14:2 Journal of Global Ethics 222.
[43] Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (London: Earthscan, 2008) at 71-78.

C. Social Environmental Justice

The concept of social justice refers to the just and equitable interactions between people and their society. The concept is sometimes used in the context of individuals undertaking their responsibilities to society while society provides them with what they deserve in return.[44] The literature emphasizes creating opportunities for individuals to achieve better economic status, economic equality, and access to social welfare when needed.[45] Environmental justice has been depicted as a fusion of both social justice and environmental movements.[46] "Environmental justice's focus on social justice reflects reality… disadvantaged communities do not separate problems because their quality of life as a whole is suffering and the political, economic and racial causes are likely interrelated."[47]

Marginalized communities are disproportionately affected by environmental challenges. The failure to close the socio-economic gaps has been linked to vulnerable communities' inability to build resistance to environmental problems.[48] Due to the socio-economic challenges of Indigenous communities, they are disproportionately impacted by climate change.[49] Social, economic, and

[44] Mary Clark, "Augustine Justice" in Teresa Delgado, John Doody and Kim Paffenroth, eds, *Augustine and Social Justice* (Maryland: Lexington Books, 2015) 3 at 9.
[45] Kaan Agartan, "Globalization and the Question of Social Justice" (2014) 8:6 Sociology Compass 903. For the impact of globalization on social justice and social insurance, see generally, Gavin Kitching, *Seeking Social Justice Through Globalization: Escaping a Nationalist Perspective* (Pennsylvania: Penn State Press, 2010).
[46] See for example, Debra Salazar and Donald Alper, "Justice and Environmentalisms in the British Columbia and U.S. Pacific Northwest Environmental Movements (2011) 24:8 Society and Natural Resources 767; Dorceta Taylor, "The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses" (2000) 43:4 American Behavioural Scientist 508. Additionally, environmentalism has been linked to social justice and civil rights. Robert Bullard and Glenn Johnson, "Environmentalism and Public Policy: Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making" (2002) 56:3 Journal of Social Issues 555.
[47] Kuehn, Taxonomy at 10699.
[48] United Nations Department of Public Information, "Sustainable Development Goals: Inequality Exacerbate Climate Impacts on Poor" (2016) UN Report #wess2016.
[49] United Nations Economic and Social Council, "Indigenous Peoples Disproportionately Impacted by Climate Change, Systematically Targeted for Defending Freedoms, Speakers Tell Permanent Forum" (18 April 2018) Permanent Forum on Indigenous Issues, Seventh Session HR/5389. Indigenous peoples are affected by extractive operations within their communities which have cumulative effects on their economy, social construct and culture coupled with human rights violations. Abigail Anongos et al, *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (Philippines: Tebtebba Foundation, 2012).

racial prejudices impede the actualization of environmental justice. Therefore, access to environmental justice necessitates "the fair and consistent distribution of environmental benefits and burden, without discrimination on the basis of socio-economic status, race, ethnic origin, or residence on an Indigenous reserve."[50]

D. Procedural Environmental Justice

Although procedural environmental justice is distinct from substantive (distributive) justice, it is closely related and impacts the other aspects of environmental justice.[51] Procedural justice is "concerned with the means by which social groups (including governments, private institutions, and families) institutionalize the application of requirements of corrective and distributive justice to particular cases."[52] That is, procedural justice is the establishment of a system or mechanism to ensure fairness in the process of achieving a set objective or standard. Procedural environmental justice implies that the process of making environmental decisions is open and fair. Procedural environmental justice, also referred to as "procedural equity" means fairness, that is, "the extent that governing rules, regulations, evaluation criteria and enforcement are applied in a non-discriminatory way."[53] Contrary to distributive environmental justice which focuses on outcome, procedural environmental justice centres on the fairness of the decision-making process. Considering that environmental oppression is grounded in unfair decision-making processes,[54]

[50] Shirley Thompson, "Flooding of First Nations and Environmental Justice in Manitoba: Case Studies of the Impacts of the 2011 Flood and Hydro Development in Manitoba" (2015) 38 Man L.J. 220 at 222.
[51] Derek Bell and Jayne Carrick, "Procedural Environmental Justice" in Ryan Holifield, Jayajit Chakraborty and Gordon Walker, eds, *The Routledge Handbook of Justice* (New York: Routledge, 2018) 101.
[52] Lawrence Solum, "Procedural Justice" (2004) 23 Legal Theory Lexicon 1 at 1.
[53] Robert Bullard, "Overcoming Racism in Environmental Decision Making" (1994) 36:4 Environment: Science and Policy for Sustainable Development 10 at 12.
[54] James Heydon, "Sensitising Green Criminology to Procedural Environmental Justice: A Case Study of First Nation Consultation in the Canadian Oil Sands" (2018) 7:4 International Journal of Crime, Justice and Social Democracy 67 at 67.

procedural environmental justice seeks fairness in deliberation procedures to attain an outcome that is acceptable by participating parties.

The prerequisite of a fair decision-making process is the ability of all affected parties to access information, communicate their views and influence decisions.[55] Procedural justice is composed of two interrelated elements. First, the quality of the decision-making process – whether citizens are allowed to participate and fairness in resolving issues. Second, evaluating how individuals were treated during the process – whether individuals or participants are treated with respect and dignity.[56] In context, procedural environmental justice implicates the unbiased involvement of individuals and communities affected by environmental decisions and the fair treatment of process participants with respect and dignity.

Environmental injustice has been linked to particular undemocratic political processes and policies.[57] For instance, Indigenous communities' inability to participate in and influence decisions relating to projects within their communities is analogous to environmental injustice.[58] Indeed, procedural environmental justice calls for power balances between the decision-maker and community representatives, the adequacy of participation in decision-making, access to legal remedies and access to critical information for all stakeholders. Procedural environmental justice goes beyond creating avenues for individuals to participate. It also includes providing financial, technical, and legal support to enable productive participation, early access to necessary

[55] Hanne Svarstad et al, "Three Types of Environmental Justice: From Concepts to Empirical Studies of Social Impacts of Policy Instruments for Conservation of Biodiversity" (2009) 1 Policymix Report FP7-ENV-2009-1, 1 at 9.
[56] Sarah Bennett, Lorelei Hine and Lorraine Mazerolle, *Procedural Justice* (New York: Oxford University Press, 2018) at 2-3.
[57] Jayajit Chakraborty, "Focus on Environmental Justice: New Directions in International Research" (2017) 12:3 Environmental Research Letters 1.
[58] Leith Deacon, "No Opportunity to Say No: A Case Study of Procedural Environmental Injustice in Canada" (2013) 56:5 Journal of Environmental Planning and Management 607.

information, access to decision-makers and liberty to participate freely in a process that is easily comprehensible to all participants.

In conclusion, this section explains the distributive, corrective, social and procedural aspects of environmental justice. The distinct features of environmental justice discussed above reveal this concept's scholarly underpinnings and practicality and how environmental decisions and actions impact different communities in different ways. Aside from achieving the objective of environmental equality, the process of attaining this goal also matters. Procedural environmental justice provides the necessary foundation and linkage for the actualization of other aspects of environmental justice. However, procedural environmental rights are legal mechanisms created and enforced to promote and protect participatory democracy in environmental decision-making. In this light, this thesis investigates the development and implementation of international legal norms on Indigenous peoples' procedural environmental rights. The following section presents the historical foundation of environmental justice, as it is imperative to appreciate the historical origin of environmental injustice in order to address the causal issues.[59]

III. History and Development of Environmental Justice

Most scholarly accounts of environmental justice trace the root of the concept to the US. It is quite interesting that the dominant narrative about the origin of environmental justice focuses on its emergence in the US. In fact, many historical accounts of environmental justice indicate that the *concept* emerged in the US. The America-focused perspective abounds in the literature with minimal attention to the early contributions of Indigenous peoples to promoting environmental justice. Meanwhile, Indigenous peoples have always contributed to environmental protection and

[59] Carmen Gonzalez, "Environmental Justice and International Environmental Law" in Shawkat Alam, ed, *Routledge Handbook of International Environmental Law* (New York: Routledge, 2013) 77.

advocated for the sustainable use of natural resources. Indigenous peoples around the world have always had connections to their ancestral lands and persistently challenged environmental injustices against their communities.

Although Indigenous peoples' primeval efforts to achieve fair treatment, protect their communities from environmental hazards, and participate in environmental decision-making may have been ignored in the literature, the fact is that Indigenous peoples experienced "environmental racism" and were involved in the struggle for "environmental justice" before the concepts were invented.[60] Robinson portends that environmental racism "is a manifestation of historic racial oppression. It is merely old wine in a new bottle."[61] Indigenous peoples have always contributed to the course of environmental justice in different ways, but there is a scarcity of reports on Indigenous environmental justice activism before the 1980s – 90s, when Indigenous peoples began to gain recognition in the international system.[62] This is a grievous gap in the literature that might be an illustrious research undertaking going forward.

In different parts of the world, Indigenous environmentalists and groups contributed significantly to environmental activism. For instance, through Indigenous peoples' activism in Australia, there was an increased consciousness and concern for Indigenous traditions and environmental

[60] Gilio-Whitaker criticizes the modern conservation movement views for ignoring Native American's concepts of land and environmental stewardship. See Dina Gilio-Whitaker, *As Long as Grass Grows: The Indigenous Fight for Environmental Justice, From Colonization to Standing Rock* (Boston: Beacon Press, 2019).
[61] Deborah Robinson, "Environmental Racism: Old Wine in a New Bottle" (2000) Food Security Section 75 at 76.
[62] Lawrence Watters, "Indigenous Peoples and the Environment: Convergence from a Nordic Perspective" (2002) 20:2 UCLA Journal of Environmental Law and Policy 237.

sustainability.[63] Australia's environmental movement became influential in the 1980s, and by the late 1980s, environmental movements started engaging in political activities.[64]

There are reports of Indigenous environmental activism in Canada also with a focus on specific communities. Canada's Indigenous peoples are prominent environmental justice advocates who continue to challenge governments and corporations for degrading the environment and natural resources. For instance, in 1986, the Pictou Landing First Nations opposed the treatment facility from which liquid waste was discharged into Boat Harbour, a body of water within the Pictou County. After a lawsuit and several peaceful protests, the Band and the government reached an agreement that the treatment facility would be shut down in 2020.[65]

The collaborative works of Indigenous environmental movements include participation in law reform, grassroots institution development, judicial process initiation, and participation in public processes.[66] By the late 1980s, grassroots Indigenous groups started organizing, and in 1990, the Indigenous Environmental Network (IEN) was formed. The IEN is located in the US, and its mandate is to support Indigenous communities in creating mechanisms for preserving their sacred land and natural resources.[67] Also, within the US, the Indigenous Environmental Movement

[63] Jenny Pickerill, "Black and Green: The Future of Indigenous-Environmentalist Relations in Australia" (2018) 27:6 Environmental Politics 1122. For more on the environmental activism of Indigenous peoples in Australia, see Eve Vincent and Timothy Neale, *Unstable Relations: Indigenous People and Environmentalism in Contemporary Australia* (Crawley: UWA Publishing, 2016).
[64] Thomas Dunlap, Drew Hutton, and Libby Connors, "A History of the Australian Environment Movement" (2000) 105:5 American Historical review 1721.
[65] Ingrid Waldron, *There's Something in the Water: Environmental Racism in Indigenous and Black Communities* (Winnipeg: Fernwood Publishing, 2018).
[66] Kyle Whyte, "Indigenous Environmental Movements and the Function of Governance Institutions" in Teena Gabrielson et al, eds, *The Oxford handbook of Environmental Political Theory* (Oxford: Oxford University Press, 2016) 563 at 565.
[67] Indigenous Environmental Network, "Our History", official website, online: <https://www.ienearth.org/>.

created a broad grassroots network of over two hundred Indigenous environmental justice groups collaborating on protecting reservations and the surrounding environment.[68]

Considering the gaps in the mainstream account of the *concept* of environmental justice, scholars have called for a distinctive formulation of Indigenous environmental justice.[69] As mentioned earlier, analyses of environmental justice trace their root to the US, but the concept has gained footing in other parts of the world.[70] Although the environmental justice discourse became popular in the 1980s, the US environmental justice movement originated in the 1960s when Carson's *Silent Spring* book spurred an unprecedented worldwide discourse and political response about the environmental dangers of pesticide misuse.[71] By the end of the 1960s, there was extensive knowledge and interest in environmental issues, and environmental movements were getting more organized and active in the US.[72]

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[68] Brett Clark, "The Indigenous Environmental Movement in the United States: Transcending Border in Struggles Against Mining, Manufacturing, and the Capitalist State" (2002) 15:4 Organization & Environment 410 at 412.

[69] For example, see Deborah McGregor, Steven Whitaker, and Mahisha Sritharan, "Indigenous Environmental Justice and Sustainability" (2020) 43 Environmental Sustainability 35; David Schlosberg and David Carruthers, "Indigenous Struggles, Environmental Justice, and Community Capabilities" (2010) 10:4 Global Environmental Politics 12.

[70] Upon discovering the commonality of their experiences and challenges, environmental justice movements started interacting with other groups across the globe. For instance, Farmworker Association of Florida collaborated with farmers in Brazil and the Global Alliance for Incinerator Alternatives with headquarters in Philippines now has about 77 members that share information, strategy and conduct joint trainings, among other collective activities. Luz Claudio, "Standing on Principle: The Global Push for Environmental Justice" (2007) 115:10 Environmental Health Perspectives 500 at 502.

[71] Rachel Carson, 1907-1964 *Silent Spring* (Boston: Houghton Mifflin, 2002). Carson's *Silent Spring* caught the attention of President John F. Kennedy and after further research by his Science Advisory Committee, the conclusions of the book were found to be true. Lawrence Culver, Christof Mauch and Katie Ritson, "Rachel Carson's Silent Spring: Encounters and Legacies" (2012) Rachel Carson Center for Environment and Society 1; Lynn Epstein, "Fifty Years Since Silent Spring" (2014) 52 Annual Review of Phytopathology 377. There was an upsurge of environmental statutes shortly after the book was published, including the Clean Air Act, the Water Pollution Control Act and National Environmental Policy Act. See Eric Koester, *Green Entrepreneur Handbook: The Guide to Building and Growing a Green and Clean Business* (London, New York: CRC Press 2011) at 6.

[72] By the end of the 1960s, the public was well aware of the environmental consequences of industrial pollution and motivated to speak out against environmentally damaging activities. In January 1969, the Santa Barbara oil well spill was condemned, and this led to reforms in the energy sector. National Oil Spill Commission, "Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling" (January 2011) Report to the President, BP Deepwater Horizon Oil Spill and Offshore Drilling 1 at 28-29. The environmental movement's pushback against the extractive industry after the Santa Barbara oil spill and the swift political response and industrial clean-up is one of the pieces of puzzle that led to environmentalism in America and other parts of the world. Jillian Genaw, "Offshore Oil Drilling in the United

Internationally, a ground-breaking event of the 1970s was the first world conference on the environment, held in 1972 at Stockholm (Stockholm Conference).[73] The Stockholm Conference was the first time the environment was the primary issue at a world conference. The conference participants adopted a number of principles for effective management of the environment, including the Stockholm Declaration.[74] The United Nations Environment Programme (UNEP) was one of the significant outcomes of the Stockholm Conference. UNEP oversees and responds to environmental issues and supports the execution of the environmental aspects of sustainable development within the UN.[75]

Over the decades, environmental justice has evolved beyond activism to scholarly investigations, political discourse, and international agendas. By the time the first UN Conference on Environment and Development (Earth Summit) took place in Rio de Janeiro in June 1992, states were mindful of the planet's environmental challenges.[76] They committed to implementing economic projects in ways that would protect the environment and non-renewable resources.[77] The momentum created by the Earth Summit of 1992 was a powerful force in integrating global economic development and environmental protection discourse.[78] Indeed, the first Earth Summit created an indelible mark

States and the Expansion of Cuba's Oil Program: A Discussion of Environmental Policy" (2010) 20:1 Indiana International & Comparative Law Review 47.

[73] United Nations, "United Nations Conference on the Human Environment, Stockholm" (5-16 June 1972) online: <https://www.un.org/en/conferences/environment/stockholm1972>.

[74] *Ibid*.

[75] United Nations Environment Programme, "About UN Environment Programme" online: <https://www.unep.org/about-un-environment>.

[76] There was an unprecedented attendance of over one hundred world leaders at the conference which suggested significant interest in the agenda – environment and development. Derek Osborn and Tony Bigg, *Earth Summit II* (London: Earthscan, 2009). Indeed, some activists present at the Earth Summit in 1992 translated the Seventeen Principles of Environmental Justice adopted at the First National People of Colour Environmental Leadership Summit of 1991, Washington D.C., USA, and shared them with local community leaders. Luz Claudio, "Standing on Principle: The Global Push for Environmental Justice" (2007) 115:10 Environmental Health Perspectives 500.

[77] *Ibid*.

[78] See generally, Felix Dodds and Toby Middleton, *Earth Summit 2002: A New Deal* (New York: Earthscan, 2001); Peter Doran, "The Earth Summit" (UNCED) Ecology as Spectacle" (1993) 7:1 Journal of Interdisciplinary International Relations 55.

in the formation and development of international environmental discourse.[79] Some of the Summit's landmark events include the creation of two international organizations for sustainable development, the adoption of two environmental treaties, and the first participation of non-state actors such as non-governmental organizations, corporations, Indigenous peoples, and trade unions in a UN conference.[80]

A decade after the Rio Summit, the World Summit on Sustainable Development was held in Johannesburg, South Africa, where world leaders officially recognized the challenge of environmental inequality.[81] By the new millennium, environmental justice was a widely recognized international discourse and was on the primary agenda of several international conferences.[82] Environmental justice has become a global concern, but the discourse is still an evolving political, academic and policy issue. So far, several international and national laws have been created to prescribe environmental sustainability standards and protect procedural and

[79] Rachel Wynberg, "A Decade of Biodiversity Conservation and Use in South Africa: Tracking Progress from Rio Earth Summit to the Johannesburg World Summit on Sustainable Development: Review Article" (2002) 98:5 South African Journal of Science 233.

[80] Pamela Chasek and Lynn Wagner, "An Insider's Guide to Multilateral Environmental Negotiations since the Earth Summit" in Pamela Chasek and Lynn Wagner, eds, *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiations* (New York: RFF Press) 1 at 1-2. A fundamental principle that was established at the Earth Summit in 1992 is that sustainable development is about the protection of the people's right to healthy and productive life and the need to live in harmony with nature in order to attain these objectives. Andy Haines et al, "From the Earth Summit to Rio+20: Integration of Health and Sustainable Development" (2012) 379 The Lancet 2117.

[81] Hari Osofsky, "Defining Sustainable Development After Earth Summit 2002" (2004) 26 Loy. L.A. Int'l & Comp. L. Rev. 111. One of the offshoots of the Rio Summit 1992 is the World Business Council for Sustainable Development (WBCSD). In preparation for the Earth Summit 2002, WBCSD sought to underscore the roles of corporations in protecting the environment and the business case for improvement of quality of life. World Business Council for Sustainable Development, "The Business Case for Sustainable Development: Making a Difference towards the Earth Summit 2002 and Beyond" (2002) 9:3 Corporate Environmental Strategy 226.

[82] Some of the international conferences that addressed environmental issues include the United Nations Conference Against Racism which was attended by human rights and environmental justice leaders. The conference objective was to "establish environmental racism as a human rights violation. Other international gatherings include the Environmental Justice Forum attended by over 300 environmental justice advocates and the World Summit on Sustainable Development Preparatory Committee IV meeting. Robert Bullard, "Equity, Unnatural Man-Made Disasters, and Race: Why Environmental Justice Matters" in Robert Wilkinson and William Freudenburg, eds, *Equity and the Environment* (Amsterdam: JAI Press, 2008) 51 at 66-67.

substantive environmental rights. The following section evaluates the legal foundation for Indigenous peoples' procedural environmental rights.

IV. Legal Basis for Procedural Rights in International Law

There is a growing consensus on the interrelationship between environmental justice and human rights.[83] One of the approaches adopted to advance environmental claims is within the human rights framework. However, this approach is not generally accepted. Ecologists and eco-feminists have vigorously denied it because rights are "perceived as absolute, static, individualistic and deeply embedded in the anthropocentric paradigm."[84] On the other hand, some scholars suggest that human rights approaches may be assimilated into a broader environmental discourse that captures the inherent value of nature.[85] This implies that the human rights approach will constitute an addendum to the environmental tool without dominating other frameworks. Proponents of the human rights approach to the environment defer on this strain of thought.[86] For instance, Shelton, a strong proponent of this intellectual tradition, argues that "in reality, the apparent conflict

[83] Scholarly discussions that draw connections between environmental justice and human rights include: Carmen Gonzalez, "Environmental Justice, Human Rights, and the Global South" (2015) 13 Santa Clara J. Int'l L. 151; David Seamon, "Lived Bodies, Places, and Phenomenology: Implications for Human Rights and Environmental Justice" (2013) 4:2 Journal of Human Rights and the Environment 143; Bridget Lewis, "Human Rights and Environmental Wrongs: Achieving Environmental Justice Through Human Rights Law" (2012) 1:1 International Journal for Crime and Justice 1.

[84] Klaus Bosselmann, "Human Rights and the Environment: Redefining Fundamental Principles?" in Brendan Gleeson and Nicholas Low, eds, *Governing for the Environment: Global Problems, Ethics and Democracy* (Hampshire: Palgrave, 2001) 118 at 126.

[85] *Ibid* at 125; See also, Simon Caney, "Climate Change, Human Rights, and Moral Thresholds" in Stephen Gardiner et al, eds, *Climate Ethics: Essential Readings* (Oxford: Oxford University Press, 2010) 163.

[86] Boyle portend that there are three approaches to the connection between human rights and the environment – first, by applying existing human rights laws to access remedy for environmental violations; second, by applying procedural rights to environmental issues; and third, recognition of substantive environmental rights. Alan Boyle, "Human Rights or Environmental Rights? A Reassessment" (2006) 18:3 Fordham Environmental Law Review 471. See e.g., James May, "Constituting Fundamental Environmental Rights Worldwide" (2006) 23 Pace Environmental Law Review 113; Dinah Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals" in Romina Picolotti and Jorge Daniel Taillant, eds, *Linking Human Rights and the Environment* (Tucson: University of Arizona Press, 2010) 105; Jona Razzaque, *Environmental Governance in Europe and Asia: A Comparative Study of Institutional and Legislative Frameworks* (New York: Routledge, 2013) at 66.

between human utility and intrinsic value of the environment does not exist because it is impossible to separate the interests of mankind from protection of the environment."[87]

A momentous attempt to connect human rights to the environment, particularly climate change, was the Inuit Petition to the Inter-American Commission on Human Rights (the IACHR) to contest the US's failure to take actions to mitigate climate change.[88] Considering the IACHR has a reputation for protecting human rights, especially the rights of Indigenous peoples, Ms. Sheila Watt-Cloutier, the Chair of the Inuit Circumpolar Conference (ICC), made a petition to the IACHR. She sought relief from the infringement of Inuit people's human rights resulting from global warming caused by greenhouse gas emissions emanating from the US. She requested that the IACHR recommend that the US adopt binding mechanisms to restrict its greenhouse gas (GHG) emissions, address the consequences of GHG on the Arctic, develop and execute an action plan to protect the traditions and resources of the Inuit peoples and provide the resources necessary for the Inuit people to adjust to the unavoidable consequences of climate change.[89] Ms. Watt-Cloutier argued that numerous international law principles are standards for applying human rights concerns.[90]

The IACHR declined to process the petition on the basis that the information provided by the petitioner was insufficient "to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[91] Although the petition was denied, a

[87] Dinah Shelton, "Human Rights, Environmental Rights and the Right to Environment" (1991) 28:1 Stanford Journal of International Law 103 at 109 (Shelton, Human Rights).
[88] Inter-American Commission on Human Rights, "Petition on Violations Resulting from Global Warming Caused by the United States" (December 7, 2005) online: <https://secureservercdn.net/104.238.71.250/hh3.0e7.myftpupload.com/wp-content/uploads/finalpetitionicc.pdf>.
[89] *Ibid*.
[90] *Ibid* at 5.
[91] Organization of American States, "Petition on Violations Resulting from Global Warming Caused by the United States: Decision" (16 November 2006) Petition No P-1413-05, Decision AA-3276727.

special hearing concerning the petition was subsequently held. This attempt by the ICC reinforces the link between human rights and environmental protection. In this case, ICC's advocacy approach reveals the possibility of human rights petitions in protecting the environmental rights of Indigenous peoples.[92] Integrating human rights into environmental advocacy creates the opportunity to apply human rights principles to combat environmental degradation. The human rights mechanism can advance environmental protection. Three potential outcomes of applying human rights to environmental degradation have been identified in the literature – the acknowledgement of environmental shortcomings of subsisting human rights instruments, the establishment of procedural environmental rights and acceptance of the distinct right to the environment.[93]

Although the connection between human rights and the environment has been explored in the literature, this connection has been articulated in different terminologies – environmental human rights,[94] environmental rights,[95] substantive right to a healthy environment,[96] and greening human rights.[97] These terms have different legal implications, but the most generally applied rights in litigation are procedural environmental rights, that is, the rights to participation and access to

[92] Hari Osofsky, "Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights" (2007) 31 American Indian Law Review 675. For a comparison of the Inuit Petition and the Athabaskan Petition, which was initiated about a decade later, see e.g., Don McCrimmon, "The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change" (2016) 6:2 The Polar Journal 398.
[93] Dinah Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals" in Romina Picolotti and Jorge Daniel Taillant, eds, *Linking Human Rights and the Environment* (Tucson: University of Arizona Press, 2010) 105.
[94] See for example, Malgosia Fitzmaurice, "Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law" (2002) 2 Non-State Actors and International Law 1.
[95] See for example, Avi Brisman, "Environmental and Human Rights" in Gerben Bruinsma and David Weisburd, eds, *Encyclopedia of Criminology and Criminal Justice* (New York: Springer, 2014) 18.
[96] See for example, Michael Burger, "Bi-Polar and Polycentric Approaches to Human Rights and the Environment" (2003) 28 Colum. J. Envtl. L. 371.
[97] See for example, Karrie Wolfe, "Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment" (2003) 9 Appeal: Rev. of Current L. & L. Reform 45.

information and remedies.[98] This thesis adopts the human rights approach to environmental protection with a focus on two aspects of procedural environmental rights – the right to participation and access to information.

There is a consensus on the efficiency of the procedural approach to environmental discourse.[99] Procedural environmental rights involve an application of existing instruments on rights to participation, access to information and access to justice in environmental matters. This thesis focuses on the rights to participation and access to information in an attempt to explore the contributions of the procedural approach to address the environmental challenges of Indigenous peoples. John Knox, the first UN Independent Expert on human rights and the environment, explains the significance of procedural environmental rights thus:

> Duties to provide information and to facilitate public participation in decision-making are often considered to correspond to civil and political rights, such as the right to freedom of expression and the right to take part in the government of one's country. But in the environmental context, these duties have been derived from the full range of human rights whose enjoyment is threatened by environmental harm, including rights to health, food, and water. In other words, human rights bodies have said that in order to protect rights to a healthy environment, to life, to health, to property, to an adequate standard of living, it is necessary to protect the environment; and to protect the environment, it is necessary to provide rights of access to information about the environment, to participation in environmental decision-making, and to remedies for environmental harm.[100]

Procedural human rights prescribe the process for democratic, transparent, and fair governance by giving everyone affected and interested the avenue to be involved in decision-making processes

[98] Sumudu Atapattu, "Comments on Environmental Justice, Human Rights and the Global South by Professor Carmen Gonzalez" (2015) 13:1 Santa Clara Journal of International Law 197 at 199-200.
[99] United Nations Human Rights Office of the High Commissioner, "Human Rights and the Environment: Procedural Rights Related to Environmental Protection" (2013) Consultation Report, United Nations Compound. For scholarly discussions on the importance of procedural approach to environmental rights, see for example, Tseming Yang et al, *Comparative and Global Environmental Law and Policy* (New York: Wolters Kluwer, 2020); Jerzy Jendroska and Magdalena Bar, *Procedural Environmental Rights: Principle X in Theory and Practice* (Cambridge: Intersentia, 2017).
[100] United Nations Human Rights Office of the High Commissioner, "Statement by John H. Knox, Independent Expert on Human Rights and the Environment at "The Development of Environmental Human Rights"" (November 6, 2014) Display News 4th meeting of the focal points appointed by the Governments of signatory countries, OHCHR.

with access to adequate information and the ability to seek redress for human rights violations. In the environmental context, procedural environmental rights identified by the UN and regional human rights organizations are – making environmental information public, creating avenues for public participation in environmental decision-making, and creating access to remedies for environmental violations.[101] These rights have been increasingly recognized in international instruments and integrated into numerous multilateral environmental agreements. For instance, Principle 10 of the Rio Declaration provides that:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[102]

Other international instruments address procedural environmental rights. The next sub-sections discuss the legal framework for rights to participation and access to information.

A. Right to Participation

The right to participation is recognized, within particular contexts, in regional and international instruments. This chapter discusses international legal provisions on the right to participation generally and within the environmental context. Building on Finnemore and Sikkink's norm life cycle theory,[103] the right to participation has passed the first stage of norm emergence. However, within the environmental management context, there is a "widespread acceptance around the

[101] *Ibid*; John Knox, "The United Nations Mandate on Human Rights and the Environment" (2018) 2:1 Chinese Journal of Environmental Law 83.
[102] United Nations General Assembly, "Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development" (1992) A/Conf.151/26 (vol.1).
[103] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887 (Finnemore & Sikkink).

essential nature of the norm," [104] but it is not yet a generally accepted norm.[105] Therefore, the norm requires ongoing socialization among state and non-state actors to pressure defaulting states to act in conformity/compliance with the norm.

Although there is no generally accepted definition of public participation, this thesis refers to public participation as an ongoing process (not a one-time event) of communicating, consulting and collaborating with interest groups, individuals and organizations before making decisions that may impact them. Provision of information after the decision has been concluded is not participation.

The legal basis for public participation is grounded in various international, regional, and national instruments. Notably, international human rights law recognizes the right of everyone to take part in public affairs that impact their interests. The *Universal Declaration of Human Rights* (UDHR) affirms everyone's right to participate, directly or through their democratically elected representatives, in the governance of their state.[106] Before the adoption of the UDHR, a legally non-binding document, there was a popular understanding that after the adoption of the declaration, the rights contained therein would be enshrined in binding treaties. After about twenty

[104] Andy Knight, "The Development of the Responsibility to Protect – From Evolving Norm to Practice" (2011) 3:1 Global Responsibility to Protect 3 at 19.

[105] In his report about the human rights obligations of states relating to healthy and sustainable environment, Knox underscores the procedural obligations of states to enforce community participation in environmental decision making. See United Nations General Assembly, "Report of the Independent Expert on The Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Mapping Report" (2013) Human Rights Council, A/HRC/25/53. A study of the constitutional right to live in a healthy environment reveals that states with constitutional environmental protection have better environmental records and better opportunities for multi-stakeholder participation in environmental decision making. David Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment (Vancouver: UBC Press, 2012). For a record of states with constitutional provisions on healthy environment, see United Nations Environment programme, "What are Your Environmental Rights?" (2017) UNEP, online: <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0>.

[106] *Universal Declaration of Human Rights*, United Nations General Assembly, 10 December 1948, 217 A (III) (UDHR) at Article 21.

years of deliberations, two treaties reflecting almost all the rights in the UDHR were adopted – the *International Covenant on Civil and Political Rights* (ICCPR)[107] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[108] The UDHR, ICCPR (and its first and second Optional Protocols) and ICESCR (and its Optional Protocol) are part of the International Bill of Human Rights.

The ICCPR recognizes the inherent dignity of everyone and requires state parties to promote conditions for the enjoyment of civil and political rights, including the rights to participate in electoral processes, freedom of speech, thought, association and assembly.[109] Article 25 of the ICCPR states that "every citizen shall have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives."[110] While Article 25 rights are related to "the right of peoples to self-determination", they are distinct from Article 1 rights of peoples to self-determination and freedom to choose their political status.[111] Furthermore, Article 25 protects the rights of "every citizen", unlike other rights and freedoms recognized in the ICCPR that apply to every individual. Any restriction to the exercise of the right to participation must be objective and reasonable and must not discriminate based on race, political affiliation, social background or any other status. The UN Human Rights Committee explains that:

> [C]itizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with

[107] *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999 at 171 (entered into force 23 March 1976) (ICCPR).
[108] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993 at 3 (entered into force 3 January 1976).
[109] For a detailed analysis of the ICCPR and comments on the Human's Rights Committee's reports on ICCPR compliance monitoring, see Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (New York: Cambridge University Press, 2020).
[110] ICCPR, *supra* note 107.
[111] United Nations Human Rights Committee, "CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service" (12 July 1996) CCPR/C/21/Rev.1/Add.7. at para. 2.

> government…Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.[112]

On the other hand, the ICESCR ensures the enjoyment of economic, social, and cultural rights, including the rights to fair labour conditions, the most attainable physical and mental health standards, free education, and adequate living conditions.[113] Similar to the ICCPR, the ICESCR describes the right to self-determination as the right for peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[114] The ICESCR obliges state parties to recognize everyone's right to participate in cultural life.[115] The rights to enjoy and participate in cultural life are essentially interconnected to the principles of equality of treatment, freedom of expression, the right to receive and impart information, and the right to the full development of the human personality."[116]

The ICCPR and ICESCR are binding international law instruments that require state parties to develop mechanisms for the enjoyment of the right to participate in public governance and cultural life. The right to public participation can be enjoyed directly or indirectly through elected representatives. Other international instruments affirm the right to participation and prescribe state responsibilities to protect this right in various contexts.

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[112] United Nations Human Rights Committee, "CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service" (12 July 1996) CCPR/C/21/Rev.1/Add.7. at paragraph 6 and 8.
[113] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993 at 3 (entered into force 3 January 1976).
[114] Article 1 of ICESCR.
[115] Article 15(1)(a) of the ICESCR.
[116] United Nations Office of the High Commissioner for Human Rights, "Fact Sheet No. 16 (Rev. 1), The Committee on Economic, Social and Cultural Rights" (May 1996) No. 16 (Rev. 1).

The *United Nations Declaration on the Right to Development* (UNDRD)[117] obliges states to create development policies for all their citizens and all individuals on the "basis of their active, free and meaningful participation."[118] On the 25th anniversary of UNDRD, the High Commissioner for Human Rights expressed the need to ensure that citizens are allowed to gain from natural resources and be involved in meaningful ways in decision-making.[119] Additionally, the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (UNDRPM)[120] focuses on minority groups. The UNDRPM protects the rights of individual members of minority groups to "participate effectively in cultural, religious, social, economic and public life."[121]

Although the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) provides that Indigenous peoples "have the right to participate in decision-making in matters which would affect their rights,"[122] the literature is unclear where the appropriate participation falls on the ladder. While governments and other stakeholders often stop at consultation, scholars contend that Indigenous peoples' right to participation implicates consent and partnership with authorities in decision-making that directly or indirectly impacts their communities.[123]

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[117] *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295.
[118] Article 2 of UNDRD.
[119] United Nations Sustainable Development Goals, "25th Anniversary of the Declaration on the Right to Development" (2011) UN Web Services Section, Department of Public Information.
[120] United Nations General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (18 December 1992) G.A. res. 47/135.
[121] Article 2(2) of UNDRPM.
[122] Article 18, *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP). For a discussion on the right of Indigenous peoples to participation, see Chapter two of this thesis.
[123] See for example, Tara Ward, "The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights Within International Law" (2011) 10 Nw. UJ. Int'l Hum. Rts. 54; Terry Mitchell et al, "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)" (2019) 10:4 International indigenous Policy Journal 1; Kathryn Tomlinson, "Indigenous Rights and Extractive Resource Projects: Negotiations Over the Policy and Implementation of FPIC" (2019) 23:5 International Journal of Human Rights 880; Rita Schwartz,

The right to participation is a fundamental requirement for democratic governance and plays an essential role in public empowerment. As one of the principal elements of the human-rights-based approach aimed at eradicating marginalization and bias, the right to participation is connected to the fulfilment of other fundamental rights, including the right to information and freedom of speech.[124] Aside from states' legal mandates to protect the right to participation, other incentives motivate effectual public involvement. They include minimization of public opposition and better and practical decisions that reflect public interests and opinion. Additionally, participation provides the opportunity to develop stakeholder interactions and relationships, promotes a sense of responsibility and increases the public's willingness to change in accordance with a mutual objective when they are well-informed and participate in the decision-making process.

The right to participation is twofold – the right to political participation and public participation.[125] Although these two contexts of participation rights are interwoven and interdependent, this thesis focuses on the right to public participation. The right to public participation is founded on the assumption that everyone should have the ability to influence decisions that impact their rights and interests. Everyone should be able to speak up to defend their interests and concerns. This is the rationale for public participation in governance, either through elected representatives, individually or through interest groups or associations. Therefore, public participation aims to create an efficient avenue for the involvement of individuals, groups, communities and other

"Realizing Indigenous Rights in International Environmental Law: A Canadian Perspective" (2016) 109 CIGI Papers 1. For an analysis of the interconnections between Indigenous peoples' right to democracy and right to participation, see Catherine J. Iorns Magallanes, "Indigenous Rights and Democratic Rights in International Law: An "Uncomfortable Fit"?" (2010) 15:1 UCLA Journal of International Law and Foreign Affairs 111; Almut Schilling-Vacaflor, "Prior Consultations in Plurinational Bolivia: Democracy, Rights and Real Life Experiences" (2013) 8:2 Latin American and Caribbean Ethnic Studies 202.

[124] United Nations Human Rights, Office of the High Commissioner, "Equal Participation in Political and Public Affairs" (2016) online: <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.

[125] *Ibid.*

entities in the *process* of decision-making that has a direct or indirect impact on them. Public participation is an ongoing process that is not limited to involvement in decision-making but includes the ability to influence decisions. Public participation improves people's trust in democratic processes by holding authorities accountable.[126]

While state responsibilities are clearly delineated in international human rights law, enforcement of participatory rights varies in different parts of the world. Impediments to productive participation include direct or constructive discrimination and socio-economic inequalities.[127] Public participation is a continuous commitment to ensure the public has a reliable avenue to partner with the government in decision-making processes and shape decisions.[128] Adequate representation of the public and public interest is not a privilege; it is the bedrock of democratic governance. This subsection reveals that the right to participate generally in public affairs and processes that affect people's rights is entrenched in various international instruments. The right to participation within the environmental context will be discussed later in this chapter.

B. Right to Access Information

As an offshoot of the right to freedom of expression, the right to access information includes the liberty to request and receive information.[129] Used interchangeably with the terminology "freedom of information," the right to access information promotes transparency and accountability. The right to access information has gained prominence internationally and domestically within the last

[126] Rikki John Dean, "Beyond Radicalism and Resignation: The Competing Logics for Public Participation in Policy Decisions" (2017) 45:2 Policy & Politics 213; Kathryn Quick and John Bryson, "Public Participation" in Christopher Ansell and Jacob Torfing, eds, *Handbook on Theories of Governance* (Cheltenham: Edward Elgar, 2016) 158.
[127] United Nations Human Rights Office of the High Commissioner, "Equal Participation in Political and Public Affairs" (2016) online: <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.
[128] Mary Liston, "Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State's Duty of Public Consultation" (2017) 63:2 McGill Law Journal 375.
[129] Office of the Special Rapporteur for Freedom of Expression, "The Right of Access to Information" (2009) Report, Inter-American Commission on Human Rights, Organization of American States Guidelines 1.

three decades. Domestically, there has been a surge of constitutional protection of the right to freedom of information or similar legal provisions.[130]

The right to access information is at the second stage of the norm life cycle. Many countries have adopted the norm without domestic clamour for change.[131] However, the norm cannot be taken for granted in many countries due to political and administrative reluctance to grant the required access to information, especially to the press. At this stage, states and international organizations socialize to ensure compliance and induce non-complying states to comply.

The right to access information imposes both negative and positive obligations on states. States are obliged to refrain from actions or creating structures that may hinder free access to information without good reasons.[132] At the same time, states have the positive responsibility to "ensure access to information, particularly with regard to information held by government in all types of storage and retrieval system."[133] Initially, the right to freedom of expression was relied on as the legal basis for the right to information,[134] but the right to access information now has its intrinsic significance in international human rights law. Though the right to freedom of expression is usually invoked to protect information providers, the right to access information focuses on potential

[130] Several countries, including those from Global South, have developed freedom of information statutes. As at 1990, only 13 states had legislative protections for the right to freedom of information but as at 2017, there were over 90 legislations in different countries. United Nations Educational, Scientific and Cultural Organization, "Freedom of Information" (2017) UNESCO Communication and Information 1.
[131] Finnemore & Sikkink, *supra* note 103.
[132] Colin Darch and Peter Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Cambridge: Chandos Publishing, 2010) at 151-152.
[133] United Nations Special Rapporteur on Freedom of Opinion and Expression, *Promotion and Protection of the Right to Freedom of Opinion and Expression* (28 January 1998) UN Doc. E/CN.4/1998/40.
[134] The right to freedom of expression was a widely recognized international human right which was recognized in several international treaties. *European Convention on Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, ETS 5 at Article 10; *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999 at 171 (entered into force 23 March 1976) at Article 19 (ICCPR); *American Convention on Human Rights*, Organization of American States, 22 November 1969, B-32 Treaty Series No. 36, 1144 U.N.T.S. 123 at Article 13.

recipients of the information.[135] For instance, the right to freedom of expression comes to bear to protect journalists in broadcasting information.

On the other hand, the right to access information gives the public the right to access or receive some information that may otherwise not be within their reach without prior action from government information repository. The right to access information is a fundamental part of freedom of expression because access to information is a prerequisite for exercising the right to freedom of expression. Expressing opinions based on correct and confirmed information is not feasible without accurate information.

The right to access information is protected under international human rights law, but it is unclear whether it meets the threshold for recognition as a fundamental human right.[136] Article 19 of the ICCPR provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[137] Additionally, Article 19 of the UDHR affirms the right to "seek, receive and impart information."[138] The Human Rights Committee encourages state parties to the ICCPR to broadcast government information that may be of interest to the public, develop procedural mechanisms that will make access to government information fast and easy, and enact legislative instruments that will create easy access to information.[139] General Comment No. 34 provides a practical guide for

[135] Maeve McDonagh, "The Right to Information in International Human Rights Law" (2013) 13:1 Human Rights Law Review 25.
[136] Brittany Grasmick, "Recognizing "Access to Information" as a Basic Human Right: A Necessary Step in Enforcing Human Rights Provisions Within Free Trade Agreements" (2015) 12:2 Loy. U. Chi. Int'l L. Rev. 215.
[137] Article 19(2) of *ICCPR*, *supra* note 134.
[138] Article 19 of UDHR, *supra* note 106.
[139] United Nations Human Rights Committee, "General comment no. 34, Article 19, Freedoms of Opinion and Expression" (September 2011) 102nd Session, CCPR/C/GC/34. Earlier in 1998, the Special Rapporteur on Freedom of opinion and Expression explained that the freedom of information implicates the right to access state information,

protecting Article 19 rights and provides an authoritative context of the right to access information, among others.[140]

The Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression endorsed the collection of principles developed by Article 19 - the International Centre against Censorship, a non-governmental organization (NGO).[141] The principles clarify the implementation of Article 19 rights and delineate best practices on freedom of information legislation. The principles include – an obligation for public bodies to broadcast crucial information, the easy, fast and fair processing of requests for information and whistleblower protection.[142] These principles provide a normative foundation for the right to information and outline the prerequisites for actualizing access to information.

The nexus between the right to access information and public participation is recognized in jurisprudence. The UN Human Rights Committee, in the case of *Gauthier v Canada,*[143] upheld the complaint of a journalist who was denied access to parliament's press facilities. The Committee relied on Article 25 of ICCPR (right to participate in public affairs) in reaching its decision. The Committee stated that "citizens, in particular through media, should have wide access to

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and this implies that the state has a positive responsibility to ensure access to information, especially information within the control of the government. United Nations Special Rapporteur on Freedom of Opinion and Expression, *Promotion and Protection of the Right to Freedom of Opinion and Expression* (28 January 1998) UN Doc. E/CN.4/1998/40.

[140] Joseph Cannataci et al, *Privacy, Free Expression and Transparency: Redefining their New Boundaries in the Digital Age* (Paris: UNESCO Series, 2016) at 69.

[141] United Nations Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, submitted in accordance with Commission resolution 1999/36* (18 January 2000) E/CN.4/2000/63.

[142] For a comprehensive list of the principles, see Article 19, "International Standards: Rights to Information" (2012) online: <https://www.article19.org/resources/international-standards-right-information/>. Article 19 is a London-based international human rights NGO with a mission to promote the freedom of express and public participation with discrimination. This objective is fostered through the promotion of the interrelated rights of freedom of speech and "freedom to know". Article 19, "About Us" online: <https://www.article19.org/about-us/>.

[143] *Robert W. Gauthier v Canada, Communication,* (1999) UNHRC 65th session, No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995.

information and the opportunity to disseminate information about the activities of elected bodies and their members."[144] The right to access information was also affirmed by the UN Human Rights Committee in the case of *Toktakunov v Kyrgyzstan.*[145] The Committee found that the Kyrgyz government infringed on a youth advocacy group's right to access information when the government refused to provide the requested data on the prison population. The Committee explained that the right to access information is not restricted to journalists or media, but private individuals and public groups can also exercise the right on issues of legitimate public concern.[146]

To implement open government approaches and programmes that foster transparency, accountability and reliability, governments must periodically and "proactively make available clear, complete, timely, reliable and relevant public sector data and information that is free of cost, available in an open and non-proprietary machine-readable format, easy to find, understand, use and reuse, and disseminated."[147] While there are restrictions to the enjoyment of the right to access information, the restrictions can only operate in accordance with the law and based on necessities. The right to access information may be restricted to protect another individual's rights, reputation, or public interests.[148] It is not enough for public officials to invoke confidentiality or public interest as reasons for denying access to information. Denial should be justified and rationalized.[149] The Special Rapporteur on toxic substances aptly captured the significance of the rights to information and participation and observed that:

> [T]he right to information and participation are both rights in themselves and also essential to the exercise of other rights, such as the right to life, the right to the

[144] *Ibid* at paragraph 13.4.
[145] *Toktakunov v Kyrgyzstan*, (2011) UN Human Rights Committee, CCPR/C/101/D/1470/2006.
[146] *Ibid* at paragraph 6.3.
[147] Organization for Economic Co-operation and Development, "Recommendation of the Council on Open Government" (14 December 2017) C(2017)140-C/M (2017)22 at paragraph 7.
[148] Article 19(3) of *ICCPR*, *supra* note 134.
[149] Damilola Olawuyi, *The Human Rights Based Approach to Carbon Finance* (Cambridge: Cambridge University Press, 2016) at 243.

> highest attainable standard to health and the right to adequate food, among others. Lack of information denies people the opportunity to develop their potential to the fullest and realize the full range of their human rights.[150]

The rights to participation and access to information play an essential role in ensuring government transparency and accountability.[151] More so, transparency and accountability for human rights violations are essential prerequisites for human rights protection. The rights to participation and access to information are the intrinsic foundation of democratic processes applicable in environmental management. As mentioned earlier, this thesis focuses on two of the focal rights applicable to procedural environmental justice – rights to participation and access to information. The next section discusses rights to participation and access to information in environmental matters.

V. Rights to Participation and Access to Information in Environmental Matters

Procedural environmental rights are recognized in international human rights law, and they have attained extensive applications in the environmental context. Unlike the rights to participation and access to information in the general context, procedural environmental rights prescribe constricted rights and obligations that respond to environmental challenges and attempt to provide an adequate administrative basis for addressing environmental agendas.[152] Procedural environmental rights include the right to participate in decision-making, access to environmental information and access to justice for environmental violations.[153] Procedural environmental rights implicate the application of existing international human rights laws to environmental issues coupled with

[150] United Nations General Assembly, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" (18 February 2008) Human Rights Council, 7th session, agenda item 3, A/HRC/7/21 at 32.
[151] The Carter Center, *Access to Information: Building a Culture of Transparency: Jamaica* (2006) One Copenhill 1.
[152] Ved Nanda and George Pring, *International Environmental Law and Policy for the 21st Century* (Boston: Martinus Nijhoff, 2013).
[153] Lynda Collins, "Are We There Yet – The Right to Environment in International and European Law" (2007) 3 McGill International Journal of Sustainable Development Law and Policy 119 at 129.

evolving international environmental principles. The application of procedural rights to environmental discourse is an international law attempt to respond to environmental issues. Boyle observes that:

> Procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Doing so would build on existing law, would endorse the value of procedural rights in an environmental context, and would clarify their precise content at a global level.[154]

In light of the increasing appreciation for procedural environmental rights, these rights are being adopted into many national constitutions. Compared to contested substantive environmental rights, scholars are largely in agreement about the importance of procedural environmental rights.[155] A study conducted on the impact of national constitutional trends and the connection between procedural environmental rights and environmental justice reveals that states with procedural environmental rights have higher chances of attaining environmental justice than others.[156] Initially, international procedural rights were applied in the environmental context as the legal basis for procedural environmental rights, but these rights have found expression in international law.

Rights of access to information and public participation in environmental decision-making have become a cardinal aspect of environmental regulatory mechanisms globally and within states. Host and impacted communities, groups, and individuals directly or indirectly affected by

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[154] Alan Boyle, "Human Rights and the Environment: Where Next?" (2012) 23:2 European Journal of International Law 613 at 616.

[155] Jona Razzque, "Information, Public Participation and Access to Justice in Environmental Matters" in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (New York: Routledge, 2013) 137 at 138; Jona Razzaque, "Human Rights to a Clean Environment: Procedural Rights" in Malgosia Fitzmaurice, David Ong and Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar Publishing, 2010) 284.

[156] Joshua Gellers and Christopher Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice" (2018) 18:1 Global Environmental Politics 99.

environmental activities articulate their concerns and demand transparency and accountability in environmental decision-making processes.[157] Considering the braided economic, social and environmental considerations involved in environmental protection, public participation, founded on prior and adequate information, creates a balanced benefit and risk assessment of different factors from various actors' perspectives. Thus, public participation and access to information in environmental decision-making create the opportunity for the public and affected groups to establish environmental primacy, particularly when in conflict with economic interests.

The right to access environmental information implies that citizens have the ability to request and receive environmental information in possession of public authorities or anyone acting for and on behalf of public authorities and in a timely and cost-effective manner. This may also imply that public authorities publicize environmental reports periodically. On the other hand, participation in environmental matters implies that the public has the right and opportunity to provide meaningful contributions and influence environmental decision-making processes at different levels. Participation does not stop at stakeholder articulation of their concerns but involves the ability to influence decisions. Aside from emphasizing environmental priority in decision-making, the public may also proffer solutions to environmental challenges and help with the execution of projects.[158] When people can articulate their concerns and influence decisions, it makes governments and institutions more accountable and transparent. Accountability and transparency are factors in attaining environmental sustainability, hence the significance of access to information and public participation in environmental protection.

[157] Benjamin Richardson and Jona Razzaque, "Public Participation in Environmental Decision-Making" (2006) 6 Environmental Law for Sustainability 165 (Richardson and Razzaque, Public Participation).
[158] Ane du Plessis, "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" (2008) 11:2 Potchefstroom Electronic Law Journal 1 at 11-12.

Some international instruments link the rights to participation and access to information to the actualization and successful operationalization of environmental law objectives because of the significance of the rights.[159] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[160] and its Protocol on Pollutant Release and Transfer Registers (PRTRs)[161] provides the legal basis for procedural environmental rights. The preamble of the Aarhus Convention underscores the importance of access to information and public participation in decision-making, which includes improvement of the quality and execution of decisions, enhanced public awareness, the avenue for the public to articulate their concerns and creation of opportunities for public authorities to address the public's concerns.[162]

Although other international instruments assert the right to participation and access to information in environmental decision-making, only the Aarhus Convention centres exclusively on these rights. While the UN Economic Commission developed the Aarhus Convention for Europe, it is accessible to other UN member states, subject to the parties' approval.[163] The Aarhus Convention obliges state parties to provide a mechanism for public participation and access to information in environmental decision-making.[164] The first and second pillars of the Convention are participation in decision-making and access to information within stipulated time frames. The Aarhus

[159] *Ibid* at 13. United Nations Environment Programme, *Global Environment Outlook 3: Past, Present and Future Perspectives* (London: Earthscan Publications Ltd, 2002).
[160] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, Treaty Series, volume 2161 at 447 (Aarhus Convention).
[161] United Nations General Assembly, Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (8 October 2009) Treaty Series, volume 2626 at 119 (PRTRs).
[162] Preamble, Aarhus Convention, *supra* note 160.
[163] Veit Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann, eds, *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007) 179.
[164] Article 6-8 of Aarhus Convention, *supra* note 160.

Convention provides an essential framework for public participation and access to justice within the liberal democratic system.[165] Particularly, Article 7 of the Aarhus Convention provides that:

> Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public…The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.[166]

The procedural provisions of the Aarhus Convention are connected to different legislative and administrative processes. Judicial precedents also emphasize the principles ingrained in the Aarhus Convention.[167] Furthermore, recognizing the interconnection of access to information and public participation, the PRTRs' objective is to enhance the public's access to information in order to expedite public participation in environmental decision-making.[168] Drawing from international law instruments and jurisprudence on environmental rights, providing adequate information to the public is a prerequisite to effective participation and actualization of environmental rights. The Aarhus Convention underscores the need to provide the public with prior information before participation.[169] Principle 10 of the Rio Declaration on Environment and Development: Application and Implementation (Principle 10) also asserts the importance of access to information for effective public participation in environmental issues. It states that:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have

[165] Marianne Dellinger, "Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law" (2012) 23:2 Colo. J. Int'l Envtl. L. & Pol'y 309 at 361.
[166] Article 7 of Aarhus Convention, *Ibid*.
[167] For related case law on the Aarhus Convention, see the UN compilation. United Nations Economic Commission for Europe, "Case Law Related to the Convention" (2021) online: <https://unece.org/environment-policy/public-participation/tfaj/case-law-related-convention>.
[168] Article 1 of the PRTRs, *supra* note 161.
[169] Article 7 of Aarhus Convention, *supra* note 160.

> appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[170]

Principle 10 confirms the fundamental rights of access to information, public participation and access to justice in environmental governance. Other international instruments that protect the rights to participation and access to information in environmental matters include – *UN Framework Convention on Climate Change* (UNFCCC),[171] the *UN Convention on Biological Diversity* (CBD),[172] *Stockholm Convention on Persistent Organic Pollutants* (SCPOP),[173] and *UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (UNCCD).[174]

The UNFCCC states that in order to actualize states' commitments in the Convention, states are required to provide access to information concerning climate change and its effect, create opportunities for public involvement in the process of addressing climate change and developing sufficient responses, and promote extensive public participation in the development of public awareness programs concerning climate change.[175] On the other hand, the CBD states that parties to the Convention are obliged to implement environmental impact assessment procedures and, where appropriate, give the public the avenue to participate in such procedures.[176] Also, the SCPOP underscores the responsibility of state parties to promote and implement measures to

[170] United Nations Economic and Social Council, *Rio Declaration on Environment and Development: Application and Implementation* (April 1997) 5th session of the Commission on Sustainable Development E/CN.17/1997/8.
[171] *United Nations Framework Convention on Climate Change*, 20 January 1994, A/RES/48/189 (UNFCCC).
[172] *Convention on Biological Diversity*, United Nations, 29 December 1993, Treaty Series, Volume 1760 at 79.
[173] *Stockholm Convention on Persistent Organic Pollutants*, 17 May 2004, Treaty Series, Volume 2256 at 119.
[174] *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 26 December 1996, Treaty Series, Vol. 1954, at 3.
[175] Article 4(1)(i) & 6(a) of UNFCCC.
[176] Article 14(1) of *CBD.*

provide all available information to the public concerning persistent organic pollutants, to ensure public participation in addressing persistent organic pollutants, to provide opportunities for the public to provide input on the implementation of the Convention, and to encourage public awareness about organic pollutants.[177] Furthermore, the UNCCD "gives new recognition to the essential roles of both village-level and NGO participation in policy planning and implementation."[178] The Convention affirms the duty of states to facilitate public participation and promote awareness in the attempt to combat desertification and mitigate the consequences of drought.[179]

Procedural environmental rights have emerged as important mechanisms for promoting accountability, transparency and inclusive environmental management.[180] Access to information empowers the public with adequate facts and material to participate in environmental issues. In contrast, public participation has been recognized as a crucial part of resolving environmental challenges and an essential means of implementing environmental policies that adequately capture the concerns of the public.[181] However, implementation of the rights of access to information and participation is subject to robust political backing from states.[182] With the right legislative and administrative mechanisms at the national level, public involvement in environmental decision-

[177] Article 10(1) of *SCPOP*.
[178] Preamble of *UNCCD.*
[179] Article 5 of *UNCCD.*
[180] United Nations Environment Programme, "UNEP Implementing Principle 10 of the Rio Declaration" (19 August 2016) online: <https://www.unenvironment.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration>.
[181] For more on the advantages of access to information and participation in environmental governance, see Gabriella Kiss, "Why Should the Public Participate in Environmental Decision-Making?: Theoretical Arguments for Public Participation" (2014) 22:1 Periodica Polytechnica Social and Management Sciences 13; Nahuel Maisley, "The Case for Large Participatory Conferences as a Means of Decision Making in International Environmental Law" (2013) 25:2 Environmental Claims Journal 111.
[182] Richardson and Razzaque, Public Participation, *supra* note 157 at 175. Political will may drive or hinder the adoption of international principles into national legislations and constitutions. Essentially, constitutional rights that incorporate human rights principles and their provisions can be implemented for the protection of natural resources. Elena Merino Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited, 2011)162.

making based on prior and adequate information improves the legitimacy of environmental decisions and policies. Therefore, states should recognize public participation and access to information not only as legal requirements but also as valuable factors in achieving their environmental objectives.

A review of the implementation of Principle 10, among others, reveals many countries across the world have legislative and administrative mechanisms that protect the rights to access information and participation in environmental matters. However, there are several states without such mechanisms and with impediments to access to information and transparency.[183] At the international level, reports show that since 1992 there has been an upsurge in environmental stakeholder participation in international conferences and negotiations. More so, participation has evolved from stakeholder observation to active involvement through presentations and contributions to formal events.[184]

Considering that a mass of states has adopted procedural environmental rights norms, it can be considered as reaching a tipping point. As discussed above in this section, international organizations and states continue to interact in order to propel compliance from norm-breaking states.[185] However, the norm is a long way from the third stage of the norm-life cycle. Much work is required to ensure compliance by many states, especially within the context of resource development and local communities. Despite the extensive recognition and affirmation of the rights of access to information and participation in environmental matters, the actualization of

[183] Stakeholder Forum for a Sustainable Future, "Review of Implementation of the Rio Principles: Detailed Review of Implementation of the Rio Principles" (December 2011) Sustainable Development in the 21st Century SD21 at 68.
[184] *Ibid* at 68. Some scholars believe that stakeholder involvement and contribution at formal meetings does not suffice, rather there should be public acceptance. Chiara Armeni, "Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms" (2016) 28:3 Journal of Environmental Law 415.
[185] Finnemore and Sikkink, *supra* note 103.

these rights by Indigenous peoples, both internationally and within states, remains far from practical. The second chapter of this thesis generally discusses the legal framework for Indigenous peoples' rights. However, the next section of this chapter centres on Indigenous peoples' rights to access information and participation in environmental matters.

VI. Indigenous Peoples' Rights to Participation and Access to Information in Environmental Matters

International law recognizes that Indigenous peoples should participate in issues directly impacting their individual and communal rights.[186] Similarly, the principle that Indigenous peoples should be involved in environmental decision-making and projects that impact their traditional land can be implied from international Indigenous rights law. Environmental degradation poses a disproportionate threat to Indigenous peoples in many ways because of their reliance on nature and spiritual connection to their land. Indigenous peoples often live and rely on tenuous ecosystems. Therefore, environmental harm has severe effects on Indigenous communities.[187] Environmental degradation deprives Indigenous peoples of the enjoyment of their rights, including the rights to life, health, economic development and self-determination. Although Indigenous peoples are among those who contribute the least to environmental challenges, they are the worst impacted.[188] Thus, the international system has attempted to address Indigenous peoples' environmental concerns, particularly their right to access environmental information and participate in environmental management.

[186] See Chapter two of this thesis.
[187] Jeremy Firestone, Jonathan Lilley and Isabel Torres De Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law" (2005) 20 Am. U. Int'l L. Rev. 219.
[188] United Nations Economic and Social Council, "Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands: Submitted by Victoria Tauli-Corpuz and Aqqaluk Lynge" (2008) Permanent Forum on Indigenous Issues, Items 3 and 4 of the Provisional Agenda E/c.19/2008/10.

Besides the international instruments on the rights to participate and access information in environmental issues, which generally applies to all, including Indigenous peoples, some international Indigenous rights laws can be applied in the environmental context. The International Labour Organization (ILO) Convention No. 169 is one of the instruments that can be interpreted or applied to Indigenous peoples' participatory rights in environmental matters. The Convention provides that states shall "*consult* the peoples concerned" in administrative or legislative deliberations that may impact them directly.[189] Governments are also required to provide opportunities for peoples to *participate* freely in elective and administrative institutions.[190]

Additionally, Article 7 of the ILO Convention No. 169 prescribes that authorities, with the cooperation of the impacted peoples, shall conduct studies to evaluate the "social, spiritual, cultural and environmental impact" of proposed development projects.[191] This article further obliges governments to "take measures, *in co-operation* with the peoples concerned, to protect and preserve the environment of the territories they inhabit."[192] The ILO Convention No. 169 contains components of the concept of Indigenous peoples' participation in various instances with minimal context on the environment. While Article 7 addresses governments' collaboration with Indigenous peoples to preserve their environment, the applicability of the provision to Indigenous peoples' right to participation and access to information is debatable. The interpretation of the word "co-operation" to imply participation and access to information is ambiguous. Therefore, the ILO Convention No.169 provides elements of Indigenous peoples' participatory rights in environmental matters but falls short of unequivocally affirming the rights to participation and

[189] Article 6(1)(a), *Indigenous and Tribal Peoples Convention, c169,* International Labour Organization, 27 June 1989 (entered into force 5 September 1991) (ILO Convention No. 169).
[190] Article 6(1)(b), *Ibid*.
[191] Article 7(3), *Ibid*.
[192] Article 7(4) of the ILO Convention No. 169, *Ibid.*

access to information. More so, the Convention limits Indigenous peoples' participation to consultation within state-controlled structures.

Likewise, the UNDRIP is an international Indigenous rights law[193] that can be applied to the environmental context. The UNDRIP states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights" through their representatives.[194] Rights to ancestral lands and resources are the centre of Indigenous peoples' concerns. Furthermore, environmental protection, cultural preservation and spiritual connection to nature are issues that impact Indigenous peoples' right to self-determination and other rights. Considering the interconnection of environmental protection to the enjoyment of Indigenous peoples' rights, Indigenous peoples have the right to participate and access information relating to environmental issues. Despite the directions of the ILO Convention No. 169 and the UNDRIP on Indigenous peoples' participatory rights, the scope of Indigenous peoples' right to access environmental information and participate in environmental decision-making is unclear.

The UNDRIP reflects the distinction between internal and external decision-making.[195] Is the limit of Indigenous peoples' participation in "external" decision-making national or international? External participation involves decision-making by actors or structures that are not part of

[193] Some scholars argue that some of the rights affirmed in the UNDRIP are part of customary international law and state practice, and opinion juris suggest that Indigenous peoples have the rights to self-determination and their land. Siegfried Wiessner, "United Nations Declaration on the Rights of Indigenous Peoples" (2009) United Nations Audiovisual Library of International Law 1. Other scholars argue that the significant UN General Assembly votes in support of the adoption of the UNDRIP indicate that the Declaration is customary international law. Emmanuel Voyiakis, "Voting in the General Assembly as Evidence of Customary International Law?" in Stephen Allen and Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart, 2011) at 209. See generally, Leena Heinämäki & Alexandra Xanthaki, "Indigenous Peoples' Customary Law, Sámi People and Sacred Sites" in Leena Heinämäki and Thora Martina Herrmann, eds, *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples: The Sacred Arctic* (Cham: Springer, 2017) at 65 – 82.
[194] Article 18 of UNDRIP, *supra* note 122. The UNDRIP specifically affirms the right of Indigenous peoples to access justice for adverse environmental impact of development projects. Article 32(3) of UNDRIP.
[195] Article 5 and 18 of UNDRIP, *Ibid*.

Indigenous communities. Anaya portends that Indigenous peoples' participatory rights are not limited to municipal or national decision-making processes, but he outlines three areas in which external participation applies. First, individual participation in public life; second, Indigenous participation at the international level and third, participation in decision-making processes by states about issues that affect Indigenous peoples' rights and concerns.[196]

Despite the increasing presence of Indigenous representatives in the international system, Indigenous participation in international environmental negotiations and conferences is lacking. Hence, Indigenous peoples are calling for better participation in the negotiation of international environmental agreements.[197] In this light, the Permanent Forum on Indigenous Issues has appealed to the UN Framework Convention on Climate Change (UNFCCC) and member states to create frameworks for the participation of Indigenous peoples in *all* phases of international climate change discourse.[198] Consequently, Indigenous peoples' attendance at the Conference of the Parties of UNFCCC has improved.[199]

Generally, different UN entities and specialized agencies have developed guidelines and policies to provide mechanisms for the implementation and promotion of the rights of Indigenous peoples,

[196] United Nations General Assembly, "Situation of Human Rights and Fundamental Freedoms of Indigenous People" (9 August 2010) 65th session, A/65/264 para. 43-45. In support of his position about the participatory rights of Indigenous peoples at the international level, Anaya made reference to invitations and participation requests sent to Indigenous peoples' representatives by UN bodies and other international organizations during policy development and processes that relate to Indigenous peoples. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004) at 153-154.

[197] Risa Schwartz, "Realizing Indigenous Rights in International Environmental Law: A Canadian Perspective" (October 2016) 109 CIGI Papers 1 (Schwartz, Realizing Indigenous Rights, CIGI Papers).

[198] United Nations Economic and Social Council, "Permanent Forum on Indigenous Issues" (May 2011) Report of the 10th Session, Supplement No.23. E/2011/43-E/C.19/2011/14 at paragraph 21.

[199] Schwartz, Realizing Indigenous Rights, CIGI Papers, *supra* note 197 at 6. The international system is increasingly recognizing the right of non-state actors to participate in decision making at the international level, hence the wide acceptance of public participation in environmental matters. Jonas Ebbesson, "Public Participation" in Daniel Bodansky, Jutta Brunnee and Ellen Hay, eds, *The Oxford Handbook of International Environmental Law* (New York: Oxford University Press, 2012) 681.

in accordance with Articles 41 and 42 of UNDRIP.[200] The creation of a framework for the involvement of Indigenous peoples in decision-making processes is a crucial factor in ensuring that Indigenous peoples' participatory rights are protected.[201] Indigenous peoples' right to participation was promoted further with the inclusion of the principle of free, prior and informed consent (FPIC) in the UNDRIP.

Several scholars have explored the divergent interpretations and implications of the FPIC provisions in the UNDRIP.[202] This thesis is not an attempt to replicate this endeavour. Instead, FPIC is discussed briefly in the context of Indigenous peoples' right to participate in environmental matters. Concerning the rights to traditional land and territories, the UNDRIP prescribes that states shall consult in good faith with representatives of 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."[203] Additionally, the UNDRIP provides that FPIC should be obtained when Indigenous peoples are required to relocate from their land, when hazardous materials are stored or deposited on their land, and before approving resource exploitation projects on their land.[204]

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[200] See United Nations Development Programme (UNDP), "UNDP and Indigenous Peoples: A Policy of Engagement" (2015) online: < https://www.undp.org/sites/g/files/zskgke326/files/publications/UNDP_Policy_of_Engagement_with_Indigenous_Peoples.pdf>; Office of the Director General, United Nations Educational, Scientific and Cultural Organization, "UNESCO Policy on Engaging with Indigenous Peoples" (2018) Programme Document 202 EX/SR.11; Food and Agriculture Organization of the United Nations (FAO), "FAO Policy on Indigenous and Tribal Peoples" (2010) I1857E/1/10.10. The UNDP, FAO and UNEP collaboratively developed a "Guidelines on Free, Prior and Informed Consent" (January 2013) online: < https://www.uncclearn.org/sites/default/files/inventory/un-redd05.pdf>.

[201] John Henriksen, "Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Key Principles in Implementing ILO Convention No. 169" (2008) Programme to Promote ILO Convention No. 169, Case Study 7 at 21.

[202] For a detailed analysis of different interpretations of FPIC and the application of principles of treaty interpretation to FPIC, see Dwight Newman, "Interpreting FPIC in UNDRIP" (2020) 27:2 International Journal of Minority and Group Rights 233. See also Cathal Doyle, *Indigenous Peoples Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge, 2015); Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54.

[203] Article 32(2) of UNDRIP.

[204] Article 10 & 29 of the UNDRIP.

The implications of FPIC in resource management have generated scholarly and political debates since the development process of the UNDRIP.[205] States claim that they can authorize development projects within Indigenous communities without Indigenous peoples' consent based on their authority to manage natural resources for national development goals.[206] Conversely, Indigenous peoples and advocates argue that Indigenous peoples' right to self-determination and right to their ancestral lands extends to the right to resist unwanted projects within their communities. For instance, Anaya argues that the general rule is that FPIC is a requirement for resource extraction within Indigenous communities.[207]

Against the backdrop of these conflicting interpretations of the FPIC, Barelli proposes a flexible approach to FPIC with normative underpinnings in Article 32 of the UNDRIP.[208] "Such a flexible approach excludes that indigenous peoples should have a right to veto in relation to all matters affecting their lands. At the same time, however, it affirms that when a development project is likely to have a serious (negative) impact on the cultures and lives of indigenous peoples, states must obtain their consent before implementing it."[209] In the same light, the UN Special Rapporteur on human rights and the environment acknowledges the *necessity* for states to obtain the FPIC of affected Indigenous communities before adopting or implementing any policy, law, or process that may impact Indigenous communities' lands and territories.[210] However, relocation of Indigenous

[205] For an astute analysis of the debate on the interpretation of the wordings of Article 32 of the UNDRIP, see Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (United Kingdom: Taylor && Francis, 2016) at chapter 2.
[206] *Ibid*.
[207] United Nations General Assembly, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples" (1 July 2013) Human Rights Council, 24 Session, Agenda Item 3, A/HRC/24/41.
[208] Mauro Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead" (2012) 16:1 International Journal of Human Rights 1.
[209] *Ibid* at 17.
[210] John Knox, "Framework Principles on Human Rights and the Environment" (2018) UN Human Rights Special Procedures, Special Rapporteurs, Independent Experts & Working Groups 1 at 22, paragraph 50-51.

peoples is *subject* to their free, prior and informed consent and agreement on fair compensation, with the option to return where feasible.[211]

A holistic interpretation of the FPIC provisions in the UNDRIP is required to apply the principle accurately. In his scholarly discussion about the conflicting positions on the meaning and implications of FPIC, Newman observes that:

> Governments should be clear that FPIC requires the development of good processes of decision-making that have a meaningful role for Indigenous communities. At the same time, governments should communicate that "veto rights" are not embedded in UNDRIP and FPIC and are therefore not a core government commitment… The position that FPIC implies good processes but not total control of decisions by Indigenous communities should be enunciated clearly by governments, without political rhetoric being permitted to contribute to ongoing confusion and inaccurately heightened expectations.[212]

Like other provisions in the UNDRIP, the application of FPIC is subject to Article 46 limitations.[213] Regardless, FPIC is a continuous process of creating and maintaining practices that support the involvement of Indigenous peoples in decision-making. The UNDRIP's FPIC principles can be integrated into developmental project reviews and environmental assessments to ensure productive partnerships between Indigenous communities, governments, and other involved parties.

Aside from the human rights requirements, there are numerous advantages of Indigenous peoples' access to environmental information and participation. First, it allows communities to shape

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[211] *Ibid* at para 51.

[212] Dwight Newman, "Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior, and Informed Consent in Canada" (2017) Macdonald-Laurier Institute Paper Series 1 at 9.

[213] Article 46 of UNDRIP sets the limits of the application of the UNDRIP. The first paragraph of Article 46 states that the Declaration cannot be interpreted to authorize or promote any group or individual to threaten the sovereignty of a state. The second paragraph underscores that the rights of all must be respected in the exercise of the rights in the Declaration. Additionally, legislative restriction of the rights is permitted so far it is not discriminatory. Article 46 provides an important foundation for the interpretation of the UNDRIP. Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich, 2010) 70.

decision-making by contributing their Indigenous knowledge and expertise. Second, a participatory approach to environmental management ensures that environmental protection is not subdued by other competing interests, such as economic gains. Third, the participation of Indigenous peoples in environmental decision-making improves the legitimacy and outcome of the process. Fourth, imbibing the principles of access to information and participation will result in better and more sustainable environmental decisions and policies.[214] Fifth, it increases the transparency and accountability of the government and other stakeholders in environmental matters and gives Indigenous peoples the opportunity to articulate their concerns. Sixth, Indigenous communities' participation in extractive projects within their communities gives corporations the social licence to operate and promotes environmental justice. Indeed, creating effective mechanisms for Indigenous peoples to access environmental information and participate in environmental decision-making is beneficial for all stakeholders involved.

VII. Conclusion

Despite the integration of the environmental justice discourse into international discourse, this chapter highlights the ambiguity of the definition and scope of environmental justice. It adopts the taxonomic approach in analyzing different aspects of environmental justice. This chapter engages with the historical analysis of the environmental justice concept. It reveals the gap in the historical report of the discourse, which does not pay adequate attention to Indigenous peoples' roles in environmental activism.

This chapter discusses the nexus between environmental justice and procedural environmental rights and explores the significance of environmental rights to the environmental justice course.

[214] Rebecca Bratspies, "Using Human Rights to Improve Arctic Governance" in Rebecca Pincus and Saleem Ali, eds, *Diplomacy of the Ice* (New Haven: Yale University Press, 2015) 171 at 172.

Human rights principles provide an effective framework for advancing environmental claims. It argues that human rights mechanisms have the capacity to further the environmental justice cause. International human rights laws on the right to participation and access to information provide the legal basis for the participatory rights of everyone, including Indigenous peoples, in specific contexts. Although the legal basis for Indigenous peoples' involvement in any matter that directly impacts them has been established, the question remains whether there are adequate international legal mechanisms for enforcing these rights in environmental decision-making.

This chapter establishes that irrespective of the various international law instruments that affirm the rights to participation and access to information generally, the lack of an international instrument that specifically affirms and protects Indigenous peoples' procedural environmental rights is a gap in international Indigenous rights law that needs to be addressed. This chapter highlights the need for a universal framework that distinctively establishes minimum standards for Indigenous peoples' involvement in environmental decision-making. An international law framework that expounds on existing human rights principles and precisely applies to Indigenous peoples and their distinct relationship to the environment is necessary to ensure Indigenous peoples' involvement in environmental decision-making and protect other Indigenous rights.

The following two chapters of this thesis examine Indigenous peoples' past involvement in international Indigenous rights lawmaking and how they may inform their procedural environmental rights development and implementation. Specifically, the following chapter discusses the past interactions of Indigenous peoples with different actors within the international system and how Indigenous peoples have shaped international Indigenous rights law.

CHAPTER 4: INDIGENOUS PEOPLES AS INTERNATIONAL LAW-MAKERS

I. Introduction

II. Indigenous Peoples' Influence as International Actors

III. Indigenous Peoples' Interactions in the International System

IV. Indigenous Peoples and the United Nations

   A. International Labour Organization

   B. UN Working Group on Indigenous Populations

   C. Permanent Forum on Indigenous Issues

V. Indigenous Peoples' Participation During the Development of UNDRIP between 1985 and 2007

   A. Revision by the Working Group of the Draft Declaration

   B. Revision by the Human Rights Council and Opposition by the African Group

VI. An Assessment of Indigenous Peoples' Influence During the Drafting Process of UNDRIP between 1985 and 2007

VII. Conclusion

I. Introduction

The preceding chapter establishes that international human rights laws on the right to participation and access to information provide the legal basis for the participatory rights of everyone, including Indigenous peoples, in particular contexts. Chapters two and three also discuss the legal basis for the involvement of Indigenous peoples in matters that have implications on their rights. Previously, international politics was state-centric and did not welcome non-state actors such as Indigenous peoples. Now, Indigenous peoples are considered non-state actors within the global domain with the ability to exercise their participatory rights, to some extent, and participate in international lawmaking. This chapter assesses the implications of Indigenous peoples' participatory rights by analyzing past Indigenous involvement in the international system and how Indigenous peoples have influenced the development of international law, especially on issues that impact them.

As mentioned in chapter one, this chapter applies a historical legal research approach to clarify how international Indigenous rights frameworks have evolved. The same research approach is used to describe significant incidences and factors that informed the actions of international actors, especially states, relating to the affirmation of Indigenous peoples' individual and collective rights. This chapter's historical analysis helps unravel some past legal and structural issues. It also provides directions for this thesis' analysis of how Indigenous peoples can influence the development and implementation of international legal norms regarding their procedural environmental rights in the subsequent chapters.

The discussion in this chapter focuses on the past interactions of Indigenous peoples with other actors in the international system. It explores the relationship between Indigenous peoples' shared ideas, identities, and interests and how these factors influence the development of international Indigenous rights law. Through analysis of past Indigenous interactions in the global system, this

chapter underscores how Indigenous peoples influence other actors' actions and shape the development of international Indigenous rights law through active and sustained participation in international negotiations, discourse, conferences and other international meetings. Significantly, it assesses the roles of Indigenous representatives in the development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or Declaration).[1]

This chapter demonstrates that Indigenous peoples are influential international actors through a historical account of Indigenous peoples' interactions within the international system. Emphasis is placed on Indigenous involvement within United Nations (UN) institutions directly engaged with Indigenous issues. Indigenous peoples have shown the ability to shape the directions of international law, especially international Indigenous rights law.

An analysis of Indigenous peoples' previous engagements within the international system highlights the importance of Indigenous peoples' participation in global politics, shows how they have successfully informed the actions of other international actors, and reiterates the significance of persistent Indigenous international collaboration and advocacy. Considering Indigenous peoples' past successes in shaping international law and their connection to the environment, this thesis makes an essential contribution to the literature by exploring Indigenous peoples' role in the development and implementation of procedural environmental rights norms.

The following section of this chapter expounds on the concept of "influence" and assesses Indigenous peoples' influence as international actors. At the outset, Indigenous peoples were not recognized in global politics and could not influence decisions. This chapter presents an overview of Indigenous peoples' transition from non-recognized international players to influential

[1] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 2 October 2007, A/RES/61/295.

international lawmakers. The third section analyzes Indigenous peoples' initial attempts to gain recognition internationally. The emergence of the UN created a pathway for Indigenous peoples' involvement in international politics, and this chapter discusses the participation of Indigenous peoples within three identified UN agencies. After an extensive analysis of Indigenous peoples' involvement during the drafting process of UNDRIP between 1985 and 2007, the influence of Indigenous peoples in shaping the language of the Declaration is assessed.

II. Indigenous Peoples' Influence as International Actors

The influence of non-state actors,[2] such as corporations, NGOs, international organizations, and advocacy networks, in international governance has been examined in the literature.[3] These studies provide bases for understanding the characteristics and strategies of different actors within the international system.[4] This thesis contributes to the literature by analyzing the "influence" of Indigenous peoples as non-state actors in their interactions within UN entities and during the development of UNDRIP, focusing on the period when the UN Working Group on Indigenous

[2] This thesis adopts the common position that the concept of non-state actors applies to actors in the international system other than states. Markus Wagner, "Non-State Actors" (2013) Max Planck Encyclopaedias of International Law 1. Generally, states are autonomous political units with sovereignty. Merje Kuus and John Agnew, "Theorizing the State Geographically: Sovereignty, Subjectivity, Territoriality" in Kevin Cox, Murray Low and Jennifer Robinson, eds, *The Sage Handbook of Political Geography* (London: Sage, 2008) at 95 – 106. Reference to non-state actors in this thesis applies to actors involved in global politics besides states.

[3] For literature on the influence of various international non-state actors, see generally John Ruggie, "Reconstituting the Global Public Domain: Issues, Actors and Practices" (December 2004) Working Paper of the Corporate Social Responsibility Initiative, Working Paper No. 6 Harvard University, John F. Kennedy School of Government; Sydney Tarrow, "Transnational Politics: Contentions and Institutions in International Politics" (2001) Annual Review of Political Science 1. For discussions on the influence of non-state actors, particularly multinational corporations, see generally, Muhittin Ataman, "The Impact of Non-State Actors on World Politics: A Challenge to Nation-States" (2003) 2:1 Turkish Journal of International Relations 42. John Ruggie also comments on the influence of states on businesses. United Nations General Assembly, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (13 February 2007) 4th session A/HRC/4/35/Add.1.

[4] For influence of NGOs in the international system, see Michelle Betsill and Elisabeth Corell, "NGO Influence in International Environmental Negotiations: A Framework for Analysis" (2001) 1:4 Global Environmental Politics 65.

Populations of the Sub-Commission (WGIP) commenced the initial drafting of the UNDRIP in 1985 until the final draft was adopted in 2007.

Influence is a concept often used in political science literature. Considering the concept's centrality to various studies, it is surprising that many scholars pay no attention to the meaning of influence. Influence is closely connected to power, another concept that is difficult to define,[5] and sometimes, the words are used interchangeably. There are three schools of thought on the concepts of power and influence. The first argues that power and influence are synonymous and cannot be differentiated. Max Weber, the leading proponent of this school, defines power and influence as similar concepts, and they imply "the ability of an individual or group to achieve their own goals or aims when others are trying to prevent them from realizing them."[6] The second school of thought does not believe that power is synonymous with influence. Instead, influence is a change in action caused by another actor. Influence is wielded while power is possessed.[7] The third school of thought claims that power is produced when influence is successfully exerted.[8] Thus, power is described as the expression of influence.

Historically, international relations scholars analyze influence within the context of power, and power is often discussed with a focus on states' power.[9] The three schools of thought discussed above align with this trend. The state-centric explanations fail to capture the influence of non-state actors in the international order. However, the literature recognizes the roles and influence of non-

[5] *Ibid* at 72.
[6] Max Weber, *The Theory of Social and Economic Organization* (New York: The Free Press, 1947) at 152. Another proponent of the school of thought that power and influence are indistinguishable is Robert Dahl. See Robert A. Dahl, *The Concept of Power* (New York: Bobbs-Merrill, 1957).
[7] Dorwin Cartwright, "Influence, Leadership, Control" in James G. March, ed, *Handbook of Organizations,* 20th ed, (New York: Routledge, 2013) 1.
[8] See Ruth Zimmerling, *Influence and Power: Variations on a Messy Theme* (Dordrecht: Springer, 2005) at 99-104.
[9] See Susanna Hast, *Spherses of Influence in International Relations: History, Theory and Politics* (London & New York: Routledge, 2014).

state actors in international governance.[10] Despite acknowledging the influence of non-state actors, many authors avoid delving into what non-state actors' influence means. Due to the complexities of defining and measuring influence, methodological approaches to measuring influence have been proposed, including the "attributed influence approach, process-tracing approach, and degree of preference attainment approach."[11] However, these approaches have intrinsic shortfalls. Hence, scholars have proposed combining more than one approach, that is, "methodological triangulation."[12]

Arts and Verschuren applied methodological triangulation by combining different approaches in their assessment of influence. Their comprehensive definition, which applies to state and non-state actors, is well accepted in literature.[13] They define influence as "the modification of one actor's behaviour by that of another…such modification may be the result of the presence, thoughts and/or actions of (another) actor."[14] This thesis applies Arts and Verschuren's definition of influence but does not engage with the debate regarding different approaches to defining and measuring influence or analyze the methodological triangulation approach.

Usually, the focus is on the decision and not the decision-maker for political processes. The goal is to modify or impact the decision-making process and not necessarily change the decision-

[10] *Supra*, note 3.
[11] Anderson Macedo de Jesus, "Policy-Making Process and Interest Groups: How do Local Government Associations Influence Policy Outcome in Brazil and the Netherlands?" (2010) 4:1 Brazilian Political Science Review 69 at 75 – 76.
[12] Andreas Dür, "Measuring Interest Group Influence in the EU: A Note on Methodology" (2008) 9:4 European Union Politics 559 at 569.
[13] *Ibid* at 569 - 570; Verena Bitzer, Pieter Glasbergen, & Bas Arts, "Exploring the Potential of Partnerships to Improve the Position of Farmers in Global Agrifood Chains: Findings from the Coffee Sector in Peru" (2013) 30 Agriculture and Human Values 5. See also, Henri Goverde et al, eds, *Power in Contemporary Politics: Theories, Practices, Globalizations* (London: Sage Publications, 2000).
[14] Bas Arts and Piet Verschuren, "Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation" (1999) 20:4 International Political Science Review 411 at 412-413 (Arts and Verschuren, Assessing Political Influence).

maker's mind.[15] Arts and Verschuren take the discussion further by defining political influence as "the achievement of (*a part of*) an actor's goal in political decision-making, which is either caused by one's own intervention or by the decision-makers' anticipation."[16] This thesis adopts the comprehensive definition by Arts and Verschuren in assessing the influence of Indigenous peoples in international politics, especially during the drafting process of the UNDRIP.

The actions of different international actors are motivated by their interests and goals. Their ability to achieve their set goals, regardless of opposition from other actors, determines their level of influence.[17] Indigenous peoples' participation in international politics is driven mainly by the protection and promotion of Indigenous rights. The "extent of political influence coincides with the extent to which goal achievement may be ascribed to one's own intervention."[18] The recognition of Indigenous peoples and affirmation of their rights were primarily motivated by the efforts of Indigenous peoples and advocates[19] and can be ascribed to decades of relentless activism. The following sections recount how Indigenous peoples persistently fought to attain their goal of gaining recognition in the international system and how they worked with other international actors to create a pioneer international instrument that affirms their individual and collective rights.

III. Indigenous Peoples' Interactions in the International System

As mentioned in the first chapter of this thesis, European encounters with Indigenous peoples greatly influenced the development of international law. The early encounter with Indigenous

[15] *Ibid* at 413.
[16] *Ibid* at 413 [emphasis added].
[17] Michael Kuchinsky, "Nonstate Actors in International Relations", in John Ishiyama and Marijke Breuning, *21st Century Political Science: A Reference Handbook* (Thousand Oaks: Sage, 2011) 414.
[18] Bas Arts, "Political Influence of NGOs on International Environmental Issues" in Henri Goverde et al, eds, *Power in Contemporary Politics: Theories, Practices, Globalizations* (London: Sage, 2000) 132 at 140 (Arts, Political Influence).
[19] James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004) (*Indigenous Peoples*).

peoples was novel, and the existing legal system could not regulate the relationship between Europeans and Indigenous peoples. Thus, international law emerged as a new system for regulating the relationship between Europeans and Indigenous peoples.[20] The jurisprudential origin of international law can be traced to the Spanish theologians, including Francisco de Vitoria and Bartolomé de las Casas.[21] Although their philosophies entrenched the supremacy of Europeans, they affirmed that Indigenous peoples have rights under natural law and were self-determining communities with ownership of their lands.[22] While the opinions of the Spanish theologians were unpopular during European conquest and colonialization, their recognition of Indigenous peoples' rights during the early development stages of international law "confirms, justifies and supports the claim of Indigenous peoples today."[23]

Scholars such as Anghie and Wiessner have established in their works that the rise of positivism in the 19th century intensified Eurocentrism in international law and advanced the idea that only states could hold rights and duties under international law.[24] Since only state actors were recognized in international law, Indigenous peoples had no standing and could only find recourse within the domestic laws of their states.[25] International law principles were created to entrench Western states' superiority and pave the way for their economic and political aspirations. For

[20] For a detailed historical report of the development of international law, see James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, New York: Cambridge University Press 2004).
[21] Odette Mazel, "The Evolution of Rights: Indigenous Peoples and International Law" (2009) 13:1 Australian Indigenous Law Review 140 at 140 – 141 (Mazel, The Evolution of Rights). There are other accounts of the origin of international law, e.g. the positivist account. See Samantha Besson, "Theorizing the Sources of International Law" in Anthony Carty, ed, *Philosophy of International Law*, 2nd ed, (Edinburgh: Edinbugh University Press, 2017) at 163.
[22] James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).
[23] Greg Marks, "Sovereign States vs Peoples: Indigenous Rights and the Origins of International Law" (2000) 5:2 Australian Indigenous Law Reporter 1 at 8.
[24] Anthony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harvard International Law Journal 3; Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harvard Human Rights Journal 57.
[25] James Anaya, "Indigenous Rights Norms in Contemporary International Law" (1991) 8 Arizona Journal of International and Comparative Law 1 (Anaya, Indigenous Rights Norms).

instance, the positivist doctrine of *terra nullius*, which implied that no one had ownership of Indigenous peoples' land, was applied to justify the forceful acquisition of these lands.

International law evolved around principles that instilled the superiority of the European colonizers and asserted their sovereignty over Indigenous peoples.[26] Indigenous peoples sought to regain ownership of their lands and enforce their rights at different forums. It was pointless for Indigenous peoples to seek redress against the states before national courts and legislatures of government involved in the violations against them. After World War I, the development of the League of Nations created the much-awaited opportunity for Indigenous peoples to bring their concerns before the international community. However, the ability of the members of the League of Nations to refuse access to unrepresented peoples was a significant impediment to Indigenous interactions at the international level.[27] The lack of Indigenous recognition at the international forum hindered their access to recourse against states.

Chief Levi General Deskaheh made the first attempt to obtain recognition for Indigenous peoples at the international level. In 1923 he travelled with his attorney, George Decker, to Geneva, Switzerland, to institute a hearing before the League of Nations about a dispute between Canada and a group known as Six Nations over tribal self-government.[28] Although Chief Deskaheh was not given an audience at the League of Nations before returning home in 1925, his efforts encouraged other Indigenous advocates to follow his stride. In 1925, Tahupōtiki Wiremu Ratana, a religious leader, embarked on the same journey to Geneva. He sought to protest the breaking of the Treaty of Waitangi executed by New Zealand with the Maori people. Ratana and his delegation

[26] Mazel, The Evolution of Rights, *supra* note 21 at 141. *Ibid* at 2.
[27] Ronald Niezen, "Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples" (2000) 42:1 Comparative Studies in Society and History 119 at 123 (Niezen, Recognizing Indigenism).
[28] *Ibid* at 123.

were also denied access to the League of Nations.[29] The efforts of Chief Levi General Deskaheh and Tahupōtiki Wiremu Ratana created the groundwork for the recognition of Indigenous peoples and their rights in international law.[30]

The rejection of Chief Levi General Deskaheh and Tahupōtiki Wiremu Ratana from the League of Nations symbolizes international resistance to Indigenous involvement within the international system. The shared idea was that only states could participate at the international level, and Indigenous representatives had no place in the League of Nations. This shared idea informed the interest of the Eurocentric international system to protect the dominance of states and promote the idea of nationalism. This, in turn, appears to have shaped the reaction of the members of the League of Nations, that is, the refusal to welcome Indigenous representatives to the League of Nations.

The reluctance of the international society to address Indigenous concerns continued until the late 20th century. The League of Nations responded to some issues affecting minority groups (Indigenous peoples constituted numerical minorities and were considered minority groups) through Minority Treaties negotiated between states without the involvement of minority groups.[31] "The denial of *locus standi* to affected minorities in these treaties was conscious and undertaken to reduce the incidence of controversial public debates between minority and host state."[32] The Standard of Civilization was developed in the late 19th century to regulate acceptance within

[29] United Nations Department of Economic and Social Affairs, "Indigenous Peoples at the United Nations" (2014) online: <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (UNDESA, Indigenous Peoples).
[30] Hanne Hagtvedt Vik, "Indigenous Internationalism" in Glenda Sluga and Patricia Clavin, eds, *Internationalisms: A Twentieth-Century History* (Cambridge: Cambridge University Press, 2017) 315.
[31] Minority Treaties are binding international instruments and unilateral declarations made by states applying to join the League of Nations. The instruments vested basic rights on all residents of the states that signed them without discrimination on the basis of race, religion, nationality etc. For discussion on the League of Nations' Minority Treaties, see Harald Christian Scheu, "The Heritage of the League of Nations' Minority Protection System" (2022) 61:4 Hungarian Journal of Legal Studies 356.
[32] Maivan lam, *At the Edge of the State: Indigenous Peoples and Self Determination* (New York: Transnational Publishers, 2000) at 94.

international society.[33] By connecting civilization to statehood, the Standard of Civilization prescribed that only states that followed the European model of the sociopolitical organization were acceptable international actors.[34] Hence, Indigenous peoples were subsumed under their colonizing states and could only be represented by such states at the international level. Indeed, the extent to which Indigenous peoples could claim any form of internal sovereignty was determined by their colonizing state because the colonizing state exercised full sovereignty over the colonized territory by virtue of being civilized.[35]

Without statehood, Indigenous peoples had no recourse to the international system, or any recourse at all, to address the violations they were subjected to by colonizing states. The principle of sovereignty protected states from external interference. So far states complied with the rules of the international society, international law did not react to their cruel dealings with Indigenous peoples.[36] However, Indigenous peoples were unrelenting in seeking recourse for the violations caused to their communities. They sought recourse in both domestic and international courts but were hindered by the systems' refusal to recognize them as legal entities.

In the case of *Cayuga Indians (Great Britain) v United States*,[37] the Cayugas ceded their land to the state of New York. Afterwards, some of them relocated to Canada, while others relocated to New York and Ohio. The state of New York continued to pay the perpetual annuity to the Cayugas that relocated to New York and Ohio but stopped paying those that relocated to Canada. The Canadian Cayugas, led by Chief Ojageghti, sought to recover their share of the perpetual annuity

[33] For an extensive report on the Standard, see Gerrit Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984).
[34] Andrew Linklater, "The 'Standard of Civilisation' in World Politics" (2016) 5:2 Social Character, Historical Processes 1.
[35] Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003) at 104-105.
[36] *Ibid* at 105.
[37] (1926) 99 N.Y. (54 Sickels) 235, 1 N.E. 770.

with interest. The New York Court of Appeals held that the claimants have no legal status and no statutory authority to sue the state.[38] Shortly afterward, the Permanent Court of International Justice decided that the Inuit people of Greenland had no standing or right to be heard before the Court.[39]

When Chief Deskaheh made the first attempt to access the international system, his objective was to gain the attention of the international system and bring Indigenous concerns to light. Indigenous leaders made two failed attempts to access the League of Nations within three years.[40] Despite the initial failed attempts, different Indigenous groups later formed an Indigenous movement in order to gain international attention and advocate for Indigenous peoples' rights. Indigenous peoples sought recourse through judicial systems because of the lack of legal standing at the League of Nations.[41] Additionally, Indigenous peoples protested state actions and publicly criticized states for violating their rights.[42] Indigenous peoples' activism within their states and regionally later got international attention. The Indigenous Peoples Caucus and other Indigenous groups applied different approaches to spur international attention, including lobbying, public events, press conferences, public awareness and education, and submission of position papers and reports to different international organizations.[43]

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[38] *Ibid* at 771.
[39] *Legal Status of Eastern Greenland (Denmark v Norway)*, (1933) P.C.I.J. (ser. A/B) No. 53.
[40] Chief Levi General Deskaheh tried to access the League of Nations in 1923 and Tahupōtiki Wiremu Ratana made the same attempt in 1925. Niezen, Recognizing Indigenism, *supra* note 27; UNDESA, Indigenous Peoples, *supra* note 29.
[41] Examples of cases initiated by Indigenous peoples include, *Cayuga Indians (Great Britain) v United States*, (1926) 99 N.Y. (54 Sickels) 235, 1 N.E. 770; *Legal Status of Eastern Greenland (Denmark v Norway)*, (1933) P.C.I.J. (ser. A/B) No. 53.
[42] Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (London: Routledge, 2016); Kristen Carpenter and Angela Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 Calif. L. Rev. 173; Neil Hughes, "Indigenous Protest in Peru: The 'Orchard Dog' Bites Back" (2010) 9:1 Social Movement Studies 85.
[43] Asia Indigenous Peoples Pact Foundation, *Indigenous Peoples Human Rights Defenders Field Handbook on Human Rights Documentation and Advocacy* (Thailand: AIPP Printing Press, 2015) at 75; Meghan Davis, "Indigenous

Despite the international society's resistance to Indigenous peoples, Indigenous diplomatic efforts endured and grew stronger. By the 1960s and 1970s, the transnational Indigenous movement had evolved to collectively tackle common interests and challenges ranging from human rights violations, forceful land acquisition, killings and marginalization.[44] The movement attracted international attention. The emergence of the Indigenous movement is distinct because it birthed transnational allegiance and collaboration between Indigenous groups. The groups were motivated by the common interest of asserting their right to self-determination and tackling their peoples' common issues. This common interest has shaped, to a large extent, the interactions of Indigenous peoples with other international actors. As Wilmer argues, the transnational Indigenous movement impacted contemporary IR because:

> Indigenous activism challenges the normative basis of international politics by asserting that the rights of sovereignty, in order for a people to control their own political and economic development, do not belong exclusively to nation-states emulating the European model. Indigenous nations, whose members are self-conscious of a shared culture and history and who wish to live and develop in a manner consistent with their own traditions, are also entitled to the international sovereign rights necessary to do so.[45]

The feat achieved by Indigenous peoples – challenging the foundational assumption of international power, the ability to coerce governments to support policies not necessarily in the government's interest – cannot be attributed to any subsisting source of influence identified in IR theory.[46] Indigenous peoples claimed independence from colonial authorities through a means "that does not depend on official channels of recognition sanctioned by international institutions

Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008)9 Melb. J. int'l L. 439.

[44] United Nations Department of Economic and Social Affairs, "State of the World's Indigenous Peoples" (2009) UNDESA Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, ST/ESA/328 at 2 (UNDESA, World's Indigenous Peoples).

[45] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (London: Sage Publications, 1993) at 2.

[46] *Ibid* at 2-4.

even while it works within those same channels of recognition."[47] Indigenous advocacy challenged the state-centric basis of IR and helped to assert the rights of Indigenous peoples.[48]

Although most scholarly studies of international politics ignore Indigenous perspectives, Indigenous peoples participate in global politics, using creative approaches that challenge the failure of dominant IR theories, such as realism and liberalism, to account for Indigenous peoples.[49] Due to Indigenous peoples' remarkable legal and political attainments in the international arena, mainstream political scientists turned their attention to Indigenous international politics. Scholars such as Wilmer,[50] Brysk,[51] Keal,[52] and Epp,[53] from different IR perspectives, have addressed the place of Indigenous peoples in IR in their works. Indigenous peoples, NGOs, and advocates persistently questioned and reoriented the international system to acknowledge and accommodate Indigenous peoples' collective concerns.[54] Indigenous advocates challenged the established basis of the international system and introduced Indigenous actors to the international system through persistent advocacy and exertion of pressure on the international community.

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[47] Margeret Franz, "Usurping the Contract: The Geneva Campaign (1923-1924) and the Refusal of Settler Sovereignty" (2019) 16:4 Journal of Communication and Critical/Cultural Studies 287 at 287-288.
[48] Jeff Corntassel and Marc Woons, "Indigenous Perspectives on International Relations Theory" (2018) E-International Relations 1 at para. 4.
[49] Manuela Picq, "Self Determination as Anti-Extractivism: How Indigenous Resistance Challenges World Politics" in Marc Woods, ed, *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (Bristol: E-International Relations, 2014) 26 at 27.
[50] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (London: Sage Publications, 1993).
[51] Allison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford: Stanford University Press, 2000).
[52] Paul Keal, *Conquest and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2003).
[53] Roger Epp, "At the Wood's Edge: Toward a Theoretical Clearing for Indigenous Diplomacies in International Relations" in Robert Crawford and Darryl Jarvis, eds, *International Relations – Still an American Social Science? Toward Diversity in International Thought* (New York: State University of New York Press, 2001) 299.
[54] Michael Murphy, "Indigenous Peoples and the Struggle for Self-Determination: A Relational Strategy" (2019) 8:1 Canadian Journal of Human Rights 67 at 68.

Lightfoot,[55] Biere,[56] and Chen[57] have challenged the categorization of international or transnational Indigenous politics into any of the existing IR frameworks. Indeed, Lightfoot portends that transnational Indigenous politics represents a novel IR perspective.[58] The bourgeoning IR literature on Indigenous international politics is credited to the enduring transnational Indigenous activism. More so, the success of Indigenous international activism is greatly attributed to the platform provided by the UN. Aside from paying much attention to Indigenous peoples' concerns, the UN provided the opportunity for Indigenous peoples to share their issues and aspirations with the global community. The next section of this chapter discusses Indigenous peoples' interactions with the UN system. The discussion in the following section illustrates how Indigenous peoples' engagements within the UN structure propelled their goals of gaining recognition in international politics and creating an international Indigenous rights instrument.

IV. Indigenous Peoples and the United Nations

After World War I, the League of Nations was created to resolve conflicts between nations. However, when World War II started, the structure failed and revealed the need for another organization that could promote world peace. After the League of Nations was substituted with the UN, the international climate became more receptive to Indigenous peoples' rights. Niezen observes that global politics was altered by three events that propelled Indigenous rights after World War II. First, it was discovered that states were not always dependable in protecting their

[55] Sheryl Rae Lightfoot, *Indigenous Global Politics*, (Manitoba: University of Manitoba, 2009) Ph.D. Dissertation (Lightfoot, *Indigenous Global Politics*).
[56] Marshall Beier, "Forgetting, Remembering and Finding Indigenous Peoples in International Relations" in Marshall Beier, ed, *Indigenous Diplomacies* (New York: Palgrave Macmillan, 2009) 11.
[57] Ching-Chang Chen, "The Im/Possibility of Building Indigenous Theories in a Hegemonic Discipline: The Case of Japanese International Relations" (2012) 36:3 Asian Perspectives 463.
[58] Lightfoot, *Indigenous Global Politics*, *supra* note 55 at chapter 2.

citizens' rights. Hence, people were reinvigorated to protect their rights, and this was reflected in the UN Charter and the initial adoption of human rights laws. Second, the defeat of European Colonial powers resulted in worldwide attentiveness to cultural subjugation and a lack of trust in colonial governments. Third, assimilation programmes failed to disconnect non-Europeans from their culture but unintentionally fostered political unison and educated Indigenous leaders.[59] Therefore, by the end of World War II and by the time the UN was founded, the international atmosphere was prepared, to some extent, to address Indigenous rights issues. By the time the UN replaced the League of Nations, Indigenous movements had begun to capture the attention of the international community. Although it challenged their efforts, the state-centric international system did not stop Indigenous groups from using other means to achieve their goals of international recognition and protection of Indigenous peoples' rights.

Fifty-one countries founded the UN in 1945 with the objective of "maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights."[60] The emergence of the UN was one of the events that impacted the recognition of Indigenous peoples in the international system. While the UN Charter confirmed the principle of equality and self-determination of peoples,[61] it did not grant Indigenous peoples automatic access to the international system. Indigenous peoples were confronted by established international standards that stipulate a different view of appropriate international actors. The positivist idea of a state-centric international system was the subsisting norm, and

[59] Niezen, Recognizing Indigenism, *supra* note 27 at 126.
[60] United Nations, "History of the UN" (2015) online: <https://www.un.org/un70/en/content/history/index.html#:~:text=History%20of%20the%20UN,living%20standards%20and%20human%20rights.>.
[61] Article 1(2), *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Indigenous peoples were propagating a different idea – an idea of an international system accessible to non-state actors.

As mentioned earlier, Indigenous groups had formed a formidable transnational movement by the 1970s, and Indigenous issues were beginning to gain international attention. In 1972, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated a study on discrimination perpetrated against Indigenous peoples. This study was the beginning of momentous events in the international system. It created an international awareness of the enduring injustices against Indigenous peoples.[62] The study, later named after the Special Rapporteur leading the study, José R. Martinez Cobo of Ecuador (Martinez Cobo study), commenced when the Indigenous movement snowballed across different continents.[63] The sub-commission received the result of the study in parts from 1981 to 1984. The Martinez Cobo study addressed a broad range of issues, including the definition of Indigenous peoples, the fundamental rights of Indigenous peoples, measures for the prohibition, avoidance and eradication of discrimination, the roles of governments to protect these rights, the right of Indigenous peoples to own and benefit from their land and fairness in the administration of justice.[64]

The Martinez Cobo study took Indigenous rights discourse to another level in the international sphere. Concurrently, transnational Indigenous movements thrived as Indigenous groups were pulled together by shared struggles and common enemies. Indigenous peoples were provoked to act because their existence was threatened. "It might seem odd that these often local and socially

[62] Roxanne Dunbar-Ortiz et al, "Introduction" in Roxanne Dunbar-Ortiz et al, eds, *Indigenous Peoples' Rights in International Law: Emergence and Application* (Copenhagen: Galdu & IWGIA, 2015) 13.
[63] UNDESA, World's Indigenous Peoples, *supra* note 29 at 2.
[64] UN Commission on Human Rights, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of the Problem of Discrimination against Indigenous Populations" (10 March 1982) 34th session, E/CN.4/RES/1982/19 (Martinez Cobo Study).

deprived (Indigenous) organizations were immediately engaged in international cooperation. This was the result of a historic "push-and-pull" effect: their territories all over the world became attractive for big development projects threatening their basis of existence."[65] As Indigenous peoples continued to gain international grounds, they found out that the UN provided a suitable platform for their agenda.[66]

As the UN paid attention to Indigenous issues, different Indigenous groups emerged to maintain the momentum and support Indigenous peoples in achieving their goals. The Indigenous Peoples Caucus, a coalition of Indigenous advocates, was one of the most tenacious and influential of those groups and was one of the groups that advocated for the development of the UNDRIP.[67] The Indigenous Peoples Caucus was a primary forum for transnational Indigenous movements to interact with the UN.[68] A combination of the Martinez Cobo report and the thriving transnational Indigenous movement propelled the UN to create its pioneer mechanism on Indigenous issues – the WGIP.

The UN changed the course of Indigenous international advocacy by providing a platform for Indigenous peoples to articulate their concerns and expectations to the international community. As mentioned earlier, the UN-initiated Martinez Cobo study was the catalyst for international Indigenous rights discourse. To respond pragmatically to Indigenous rights issues, the UN created and assigned agencies to address and proffer solutions to these issues. Three of the early UN bodies tasked with supporting and protecting Indigenous peoples' rights are discussed below. This

[65] Henry Minde, "The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985" in Henry Minde, ed, *Indigenous Peoples: Self Determination, Knowledge, Indigeneity* (Delft: Eburon Academic Publishers, 2008) 49 at 58.
[66] *Ibid*.
[67] David Forsythe, *Encyclopedia of Human Rights* (Oxford: Oxford University Press, 2009) at 30.
[68] Lez Malezer, "Dreamtime Discovery: New Reality and Hope" in Jackie Hartley, Paul Joffe and Jennifer Presten, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, Action* (Saskatoon: Purich Publishing, 2010) 29 at 31.

discussion reveals Indigenous peoples' interactions within the three UN mechanisms and presents the trajectory of Indigenous advocacy within the UN. Indigenous peoples' recognition and involvement within the UN bodies improved over time. Indigenous peoples were tenacious in their struggle to participate in international law, and their involvement within the UN helped their participation in international politics.

The discussion below illustrates the importance of Indigenous peoples' insistence on their involvement within the international system, the pivotal role of Indigenous peoples within the UN, and the imperativeness of UN agencies working with Indigenous peoples in furthering their rights. Importantly, Indigenous peoples' interactions within the UN underscore their influence as international actors and their ability to motivate or sway the direction of international Indigenous rights law.

A. International Labour Organization

The International Labour Organization (ILO) was founded in 1919 as part of the Treaty of Versailles that ended World War I.[69] The challenges besetting Indigenous peoples have been a primary concern for the ILO since its inception. Hence the ILO has been engaged with Indigenous issues since the 1920s.[70] In 1929, the ILO Governing Body submitted a report on Indigenous peoples' poor working conditions to the General Conference.[71] While the ILO discussed the law and practice relating to forced labour and recommended an international instrument to address these issues, Indigenous peoples were not involved or consulted in drafting the report or during discussions with the General Conference. By the 1950s, the ILO further confirmed that the

[69] International Labour Organization, *Constitution of the International Labour Organization* (1 April 1919) adopted by the Peace Conference. Later Part XIII of the Treaty of Versailles (28 June 1919) (ILO Constitution).
[70] UNDESA, Indigenous Peoples, *supra* note 29.
[71] International Labour Conference, "Forced Labour: Report and Draft Questionnaire" (1929) 12th Session, Item 3, 1st Discussion.

discrimination and exploitation of Indigenous workers were caused by inequality and prejudices connected to broader issues of identity, culture and land rights.[72] Particularly, in 1953, the ILO published the results of an extensive study into the living and working conditions of Indigenous peoples in different countries.[73] Consequently, the ILO, on behalf of the UN system, adopted the first international treaty addressing the rights of Indigenous peoples.[74]

The ILO Constitution prescribes that each delegation to any ILO session should be composed of four delegates: two state delegates, one delegate representing employers and one delegate representing the workers.[75] Nevertheless, during the drafting process of the ILO Convention No. 107,[76] the ILO granted access to professionals who represented Indigenous workers but were not members of any Indigenous population. Of note, when the issue of provision of adequate food, housing and facilities for recreation and culture for Indigenous workers was discussed among state representatives, employers and Indigenous workers' representatives, a professional Workers' adviser spoke on behalf of Indigenous peoples.[77] Mr. Picard, a Workers' adviser, pointed out on behalf of Indigenous peoples during one of the drafting sessions that while some of the concerns of Indigenous workers have been discussed among the delegates, these issues should not be dealt with as labour issues but as human rights problems.[78]

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[72] International Labour Organization, "Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)" (2013) International Labour Standards Department 1 at 4.
[73] International Labour Organization, "Living and Working Conditions of Aboriginal Populations in Independent Countries" (1953) 35 ILO Studies and Reports.
[74] *Ibid* at 4. The ILO Conventions Nos. 107 and 169 have been discussed in chapter three of this thesis.
[75] Article 3 (1), ILO Constitution, *supra* note 69.
[76] *Indigenous and Tribal Populations Convention, c107,* International Labour Organization, 26 June 1957 (entered into force 2 June 1959).
[77] International Labour Office, "International Labour Conference" (1956) Record of Proceedings, thirty-ninth session 03616 at 541-542.
[78] *Ibid* at 542. While Indigenous peoples were represented by communal delegates at the WGIP, Indigenous workers were also represented by Worker's advisers at the ILO.

A review of ILO's reports in the 1950s reveals that Indigenous issues were discussed in the absence of Indigenous peoples.[79] Indeed, the drafting process of the ILO Convention No. 107 did not involve Indigenous peoples.[80] The ILO assumed Indigenous advocacy by observing the forced labour and cruel working conditions of Indigenous workers and decided the approach to address Indigenous workers' concerns without their involvement. By 1954, the ILO initiated the Programme of Technical Assistance to the Indigenous Populations of the Andean High Plateau with the objective of training Indigenous advocates and representatives to "serve as intermediaries in the introduction of modern practices of social and economic organization in their own communities for the improvement of their living and working conditions."[81] Although the programme was implemented on a novel condition that all activities should be with the support of Indigenous peoples, its approach was based on the prevalent assumption, of that time, that assimilation of Indigenous peoples into the mainstream national system would solve their problems.[82]

The ILO did not create an avenue for Indigenous peoples to participate in its programmes and sessions. Nevertheless, Indigenous peoples accessed ILO's structure through organizations that

[79] Sample ILO reports include, International Labour Conference, "Resolution Concerning the Placing on the Agenda of the Next General Session of the Conference of the Question of the Protection and Integration of Indigenous and Other tribal and Semi-Tribal Populations in Independent Countries" (adopted 26 June 1956) Record of Proceedings, 39th Session; International Labour Conference, "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries" (1957) 40th Session, 6th Item, Report VI (1); International Labour Conference, "Final Record Vote on the Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries" (1957) Record of Proceedings, 40th Session, 29th Sitting; International Labour Conference, "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries" (1957) 40th Session, 6th Item, Report VI(2).

[80] Replies from governments were deliberated at the sessions without any mention of comments from Indigenous peoples. International Labour Conference, "Living and Working Conditions of Indigenous Populations in Independent Countries" (1956) Thirty-Ninth Session, Eighth Item, Report VIII (2).

[81] International Labour Organization, "Appraisal of the Achievements of the Andean Indian Programme" (1962) Agenda Item 2, Panel of Consultants on Indigenous and Tribal Populations, 1 at 9.

[82] Loretta de Luca et al, *Unleashing the Potential for Rural Development Through Decent Work: Building on the ILO Rural Work Legacy 1970s-2011* (Geneva: ILO 2012) at 30.

were on the ILO Special List of NGOs.[83] As Indigenous peoples consolidated their efforts and strategies and developed Indigenous organizations to promote and protect their rights, they became better positioned to request involvement in decisions that impact their peoples. This was one of the reasons for the revision of the ILO Convention No. 107 and Recommendation No. 104.[84]

Furthermore, the emphasis of the ILO Convention No. 107 on the assimilation and integration of Indigenous peoples was prioritized over the rights protective measures of the Convention. Therefore, the Convention was criticized and rejected by Indigenous peoples.[85] By the time the ILO Convention No. 169 was in the pipeline, Indigenous peoples found ways to participate in ILO sessions through NGOs accredited as direct representatives of Indigenous peoples and workers' and employers' delegations.[86] The ILO was slow in opening its doors to Indigenous peoples. Even after accrediting some NGOs, their participation was minimal.[87]

Although the ILO created novel international instruments that address Indigenous concerns, its internal structure did not uphold Indigenous peoples' participatory rights. The ILO's supervisory mechanism includes reporting and complaint procedures applicable to state parties. The ratifying states are responsible for sending annual treaty compliance reports to the International Labour Office.[88] Recent reports show that state parties to ILO No.169 falter in involving Indigenous

[83] International Labour Office, "Partial Version of the Indigenous and Tribal Populations Convention 1957 (No. 107)" (1988) 75th Session, 6th Item, Report VI (1) at 13.
[84] *Ibid* at 13.
[85] Fergus MacKay, "A Guide to Indigenous Peoples' Rights in the International Labour Organization" (2010) Forest Peoples Programme, online: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf>.
[86] International Labour Office, "International Labour Conference: Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)" (1988) Record of Proceedings, 75th session, 1st Report of the Selection Committee at 36/3.
[87] At one of the sessions, accredited NGOs were given an hour to comment during general discussions. International Labour Office, "International Labour Conference: Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)" (1989) Record of Proceedings, 66th Session.
[88] Article 22, ILO Constitution, *supra* note 69.

peoples in preparing their reports. The ILO encourages state parties to consult with Indigenous peoples in the preparation of their annual reports, but Norway is the only state party that was reported to involve Indigenous peoples in preparing their reports.[89]

With the ILO's Special List established in 1956,[90] NGOs gained access to ILO structures, and Indigenous peoples worked with the NGOs. Now Indigenous peoples can send comments directly to ILO through any workers' organization or employers' organization.[91] The Committee of Experts and the Conference Committee have emphasized the importance of Indigenous peoples' contributions to their works.[92] The ILO is bridging the gap with Indigenous peoples through its involvement with the UN Permanent Forum on Indigenous Issues. The forum allows ILO to participate in its sessions, which creates the platform for states, UN agencies, and Indigenous peoples to dialogue.[93]

When the ILO was established, state-centric international law did not welcome non-state actors. Essentially, Indigenous peoples were objects of discussion for the ILO, and the ILO's practices conformed with the established practice of leaving Indigenous peoples out of their sessions. As the institutional host of ILO Convention No. 169, the ILO still requires an effective framework for ensuring Indigenous peoples' participation within its structure. Conversely, the WGIP promoted

[89] International Labour Organization, "The ILO and Indigenous Peoples" (2003) Leaflet No. 8 at 4.
[90] International Labour Organization, "ILO Special List of NGOs" online: <https://www.ilo.org/pardev/partnerships/civil-society/ngos/ilo-special-list-of-ngos/lang--en/index.htm>.
[91] International Labour Organization, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (Geneva: ILO, 2003) at 78; International Labour Office, "Application of International Labour Standards 2017 (I): Report of the Committee of Experts on the Application of Conventions and Recommendations" (2017) 106th Session, Report III (Part 1A) at 22.
[92] *Ibid* at 79.
[93] International Labour Organization, "ILO at the Eighteenth Session of the United Nations Permanent Forum on Indigenous Issues" (2019) online: < https://www.ilo.org/global/topics/indigenous-tribal/news/WCMS_674594/lang--en/index.htm>.

the novel idea of involving Indigenous peoples within its system, thereby departing from established state-centric international norms.

B. UN Working Group on Indigenous Populations

The Martinez Cobo study and the intensifying Indigenous advocacy of the 1970s and early 1980s led to the creation of the WGIP in 1982.[94] The WGIP was created as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights.[95] The WGIP's mandate was to appraise projects to protect and promote Indigenous rights and develop related international principles.[96] The WGIP was Indigenous peoples' platform to articulate their experiences, concerns and aspiration at the UN.

The WGIP provided an unprecedented opportunity for Indigenous peoples to participate in international discourse that impacted their rights. It set the standard for Indigenous peoples' involvement at the international level by making its sessions open to states and non-state actors, especially Indigenous peoples. To ensure the effective participation of Indigenous representatives in the deliberations of WGIP, the UN Voluntary Fund for Indigenous Populations was created in 1985.[97] This fund was an indication of the UN's commitment to empowering Indigenous peoples

[94] Ellen Lutz and Nicole Ledema, "Addressing Indigenous Rights at the United Nations" (2004) 28:3 *Cultural Survival Quarterly* 1.
[95] United Nations Economic and Social Council, "Study of the Problem of Discrimination against Indigenous Populations" (7 May 1982) 28th Plenary Meeting, E/RES/1982/34.
[96] United Nations Human Rights, Office of the High Commissioner, "Mandate of the Working Group on Indigenous Peoples" online: <https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx> (OHCHR, Mandate of WGIP).
[97] *Ibid*. United Nations General Assembly, "United Nations Voluntary Fund for Indigenous Populations" (13 December 1985) 40th session, A/RES/40/131.

to claim their rights.[98] Although the WGIP was located at the lowest level of the UN human rights bodies,[99] it made a significant impact in promoting Indigenous peoples' rights.

The WGIP commenced the initial draft of UNDRIP in 1985 after consultation with Indigenous representatives from different parts of the world.[100] The WGIP agreed on the final texts of the draft UNDRIP for submission to the Sub-Commission at its eleventh session in July 1993.[101] Indigenous peoples preferred the first draft of UNDRIP submitted by the WGIP because it reflects Indigenous peoples' aspirations and was created with their participation.[102] Asbjørn Eide, a former Chairman of the WGIP, recounts that while many Indigenous representatives aspired to participate in the WGIP processes, they encountered hindrances because they did not have consultative status provided by the UN Economic and Social Council (ECOSOC).[103] Eide decided that the mandate of the WGIP was only achievable with the participation of experts, and the best experts on Indigenous issues were Indigenous representatives.

The WGIP broke the standard requiring consultative status and granted access to Indigenous representatives. Although there were objections to granting access to Indigenous representatives

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[98] United Nations Human Rights, Office of the High Commissioner, "UN Voluntary Fund for Indigenous Peoples: 30 Years of Empowering Indigenous Peoples to Claim their Rights" (2015) UNHR Booklet 4. The mandate of the fund has been expanded a number of times by the UN General Assembly to improve how the fund can be applied to assist Indigenous representatives to participate at different UN forums. United Nations General Assembly, "International Decade of the World's Indigenous People" (15 February 2002) 56th session, A/RES/56/140 at paragraph 9; United Nations General Assembly, "Practical Implications of a Change in the Mandate the Voluntary Fund for Indigenous Populations: Report of the Office of the High Commissioner on Human Rights" (5 July 2010) 15th session, agenda items 2 and 3, A/HRC/15/38.

[99] As a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights, the WGIP's recommendations are subject to review and approval by the Sub-Commission, the Commission on Human Rights and the Economic and Social Council (ECOSOC) and then the UN General Assembly. UNDESA, Indigenous Peoples, *supra* note 29.

[100] United Nations Economic and Social Council, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Thirty-Eighth Session" (4 November 1985) E/CN.4/Sub.2/1985/57.

[101] OHCHR, Mandate of WGIP, *supra* note 96.

[102] UNDESA, World's Indigenous Peoples, *supra* note 29 at 3.

[103] Asbjørn Eide, "The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 32 at 34 (Asbjørn Eide, Indigenous Peoples).

without consultative status, Theo van Boven, the former Director of the UN Centre for Human Rights, supported this move.[104] The WGIP was the first UN entity to welcome organizations without consultative status. Indeed, reports show that the WGIP never denied access to Indigenous organizations due to states' objections.[105] Indigenous peoples from different countries saw the WGIP as a platform for articulating their concerns to the international community, and the WGIP became the most significant forum for Indigenous peoples.[106] Indigenous peoples were not just observers at WGIP sessions but had the opportunity to raise their concerns and participate in drafting the UNDRIP.[107] They were actively involved and played an informal and significant role in drafting the UNDRIP because the WGIP created valuable mechanisms for the participation of Indigenous representatives.[108]

Other UN human rights bodies have incorporated the exemplary WGIP process by according Indigenous peoples and states equal status at seminars and technical meetings on Indigenous rights.[109] Indigenous peoples had an unprecedented involvement at the international level through the WGIP, thereby setting the stage for future Indigenous engagements within the international

[104] *Ibid*. The WGIP was confronted with other established norms that create different views of "appropriateness and interest". Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887 at 897 (Finnemore & Sikkink).

[105] See Erica-Irene Daes, "The Participation of Indigenous Peoples in the United Nations System's Political Institutions" (27 May 2004) Lecture presented at the Castan Centre for Human Rights.

[106] Andrew Thompson, "The Slow "Evolution of Standards": The Working Group on Indigenous Populations and UNDRIP" in Carol Bonnett et al, eds, *The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context" (2014) Special Report, for Centre for International Governance Innovation* (CIGI) 29 at 29.

[107] United Nations Economic and Social Council, "Discrimination against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Sixth Session" (24 August 1988) 40th session, agenda item 12, E/CN. 4/Sub.2/1988/24; United Nations Economic and Social Council, "Prevention of Discrimination and Protection of Indigenous Peoples: Report of the Working Group on Indigenous Populations on its twenty-Third Session" (12 August 2005) 57th session, agenda item 5(b), E/CN.4/Sub.2/2005/26; United Nations General Assembly, "Prevention of Discrimination and Protection of Indigenous Peoples: Report of the Working Group on Indigenous Populations on it Twenty-Fourth Session" (14 August 2006) Agenda item 5(b) A/HRC/Sub.1/58/22.

[108] Asbjørn Eide, "Rights of Indigenous Peoples: Achievements in International Law during the Last Quarter of a Century" (2006) 37 Netherlands Yearbook of International Law 155.

[109] Erica-Irene Daes, "The Participation of Indigenous Peoples in the United Nations System's Political Institutions" (27 May 2004) Lecture presented at the Castan Centre for Human Rights.

system. The WGIP had its last meeting in July 2007 after being replaced by the Expert Mechanism on the Rights of Indigenous Peoples.[110]

C. Permanent Forum on Indigenous Issues

The UN Permanent Forum on Indigenous Issues (Permanent Forum) was created in July 2000 as an advisory body to the ECOSOC.[111] The mandate of the Permanent Forum is to "discuss Indigenous issues…relating to economic and social development, culture, the environment, education, health and human rights."[112] The Permanent Forum is one of the three UN bodies authorized to address Indigenous peoples' issues.[113] The Permanent Forum comprises sixteen members – eight nominated by governments and the other eight nominated by the President of ECOSOC after extensive consultation with Indigenous groups.[114]

By the time the Permanent Forum was created, the WGIP had normalized Indigenous peoples' participation at the international level. Indeed, the resolution establishing the Permanent Forum referred to the procedures established by the WGIP for Indigenous peoples' participation in its sessions.[115] In accordance with Finnemore and Sikkink's norm life cycle theory, a norm reaches the acceptance stage when state and non-state actors are involved in convincing other actors to support a norm.[116] The involvement of Indigenous peoples in international discussions that impact them was generally accepted by UN bodies by the time the Permanent Forum was established, and

[110] UNDESA, Indigenous Peoples, *supra* note 29. The Expert Mechanism was created by a resolution of the Human Rights Council in December 2007. United Nations Human Rights Council, "Expert Mechanism on the Rights of Indigenous Peoples" (2007) 6th session A/HRC/RES/6/36.
[111] UNDESA, Indigenous Peoples, *supra* note 29.
[112] United Nations Economic and Social Council, "Establishment of a Permanent Forum on Indigenous Issues" (28 July 2000) Economic and Social Council Resolution 2000/22, 45th Plenary Meeting at paragraph 2.
[113] United Nations Department of Economic and Social Affairs, "Permanent Forum" online: <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.
[114] United Nations Economic and Social Council, "Establishment of a Permanent Forum on Indigenous Issues" (28 July 2000) Economic and Social Council Resolution 2000/22, 45th Plenary Meeting at paragraph 1.
[115] *Ibid.*
[116] Finnemore and Sikkink, International Norm, *supra* note 104.

the Permanent Forum complied with this norm. This norm had cascaded within the UN at this point.

The Permanent forum's first session was attended by state representatives, UN entities, and quite a number of Indigenous nations, organizations, and groups.[117] One of the issues discussed at the first session of the Permanent Forum was the collective engagement of UN agencies, states and Indigenous peoples' representatives "in order to promote models for environmental and sustainable development governance that incorporates principles of genuine partnership between states and Indigenous peoples."[118] The Permanent Forum not only grants Indigenous peoples access to its sessions, but after allowing different participants to make statements on different issues, the Permanent Forum provides a summary of actions taken to address issues raised at previous meetings.[119]

The UN supports the engagement of Indigenous peoples in the Permanent Forum and promotes the rights of Indigenous peoples through the Trust Fund on Indigenous Issues. The fund facilitates the participation of Permanent Forum members at specific international meetings, finances awareness projects and implementation of the UNDRIP.[120] Aside from following the procedures

[117] United Nations Permanent Forum on Indigenous Issues, "Report on the First Session" (13-24 May 2002) Economic and Social Council Official Records, 2002, Supplement No. 23, E/CN.19/2002/3/Rev.1.
[118] *Ibid* at paragraph 28 and 29.
[119] See the sample reports of the Permanent Forum: United Nations Permanent Forum on Indigenous Issues, "Report on the Second Session" (12-23 May 2003) Economic and Social Council Official Records, 2003, Supplement No. 23, E/C.19/2003/22; United Nations Permanent Forum on Indigenous Issues, "Report on the Fourth Session" (16-27 May 2005) Economic and Social Council Official Records Supplement No. 23, E/C.19/2005/9; United Nations Economic and Social Council, "Information Received from Non-Governmental Organizations: Netherlands Centre for Indigenous Peoples" (10-21 May, 2004) Permanent Forum on Indigenous Issues, 3rd Session, Agenda Item 3, E/C.19/2004/8; Permanent Forum on Indigenous Issues, "Baguio Declaration of the 2nd Asian Indigenous Women's Conference" (10-21 May 2004) Submitted by Tebtebba Organization, a Non-Governmental Organization in Special Consultative Status with the Economic and Social Council, 3rd Session, Agenda item 4, E/C.19/2004/CRP.1; United Nations Economic and Social Council, "Information Received from Non-Governmental Organizations: Asian Indigenous and Tribal Peoples Network" (10-21 May, 2004) Permanent Forum on Indigenous Issues, 3rd Session, Agenda Item 4, E/C.19/2004/6/Add.2.
[120] United Nations General Assembly, "Permanent Forum on Indigenous Issues: Report of the Third Committee (A/57/553)" (2003) 57th Session, Agenda Item 106, A/RES/57/191 paragraph 1(b).

established by the WGIP by granting Indigenous peoples access to its sessions, the Permanent Forum took steps to ensure other international and regional bodies create and implement mechanisms that protect the right of Indigenous peoples to participate.

At its tenth session in May 2011, the Permanent Forum appointed a member of the Forum, Dalee Sambo Dorough, to conduct a study on good practices of Indigenous participatory mechanisms.[121] The study focused on examples of good practices in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat, and the Laponia management system.[122] The study found that the inclusion of Arctic Indigenous peoples by the three sample organizations creates opportunities for "consultation, dialogue and partnership and consensus decision-making."[123] Additionally, the study recommends that all Arctic-rim states "guarantee the direct and immediate role of Indigenous peoples in defining and determining all forms of Arctic development, in particular with regard to extractive industries."[124] The study's report was presented at the eleventh session of the Permanent Forum, and the recommendations were considered and adopted.[125] The Permanent Forum took Indigenous peoples' participation at the international level further by encouraging other UN bodies and states to recognize the participatory rights of Indigenous peoples.

UN entities have come a long way in recognizing Indigenous peoples as international actors with the right to participate in international politics. Participation of Indigenous peoples within the UN

[121] United Nations Economic and Social Council, "Indigenous Participatory Mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat and the Laponia Management System" (7-18 May 2012) Permanent Forum on Indigenous Issues, 11th Session, Item 9 of Provisional Agenda E/C.19/2012/10.
[122] *Ibid*.
[123] *Ibid* at paragraph 57-60.
[124] *Ibid* at paragraph 76.
[125] United Nations Economic and Social Council, "Permanent Forum on Indigenous Issues: Report on the Eleventh Session" (7-18 May 2012) Office Records, 2012, Supplement No. 23, E/2012/43-E/C.19/2012/13 at paragraph 126.

structure is broadly accepted, and there is wide compliance within UN structures. Although UN entities are more receptive to Indigenous peoples, Indigenous participation has not yet reached the norm internalization stage because some UN bodies have not integrated the norm of involving Indigenous peoples in all decisions that impact them.[126] An example is the ILO process that was discussed earlier in this chapter. While there is a "widespread acceptance around the essential nature"[127] of Indigenous peoples' participation within UN structures, the level of Indigenous peoples' involvement and the weight attached to their statements and recommendations varies.

Despite the hindrances Indigenous peoples experienced in their attempts to gain the international community's audience, Indigenous peoples continued to gain international recognition as prominent non-state actors. The creation of the WGIP and Permanent Forum and the two international decades of the World's Indigenous People (1995-2014)[128] furthered Indigenous peoples' recognition in international politics. To a large extent, the early experiences of Indigenous representatives at the WGIP changed the erstwhile international practice of shutting out non-state actors in UN human rights organizations. WGIP established the precedent for Indigenous representation at subsequent UN negotiations. Indeed, Indigenous peoples' involvement and actions within the international system through UN bodies emphasized the need for an

[126] A norm is internalized when actors incorporate actions in accordance with a norm without having to think about it or debate about it. Finnemore and Sikkink, International Norm, *supra* note 104 at 905.
[127] Andy Knight, "The Development of the Responsibility to Protect – From Evolving Norm to Practice" (2011) 3:1 Global Responsibility to Protect 3 at 19.
[128] The UN General Assembly proclaimed the first International Decade of the World's Indigenous People, 1995 – 2004, with the primary aim of "strengthening international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health." United Nations General Assembly, "International Decade of the World's Indigenous People: Resolution Adopted by The General Assembly" (21 December 1993) 48th session, agenda item 114b, A/RES/48/163. On December 22, 2004, the UN General Assembly adopted a resolution, for the Second International Decade of the World's Indigenous People, from January 2005 until December 2014. The objectives of the second decade included "non-discrimination, inclusion, and full and effective participation" of Indigenous peoples. United Nations General Assembly, *Second International Decade of the World's Indigenous People: Resolution/Adopted by the General Assembly*, 24 February 2005, A/RES/59/174.

international instrument that specifically asserts and protects the rights of Indigenous peoples. Indigenous participation within the UN structure has evolved since Chief Deskaheh made the first attempt.

The next section of this chapter extensively examines how Indigenous peoples' involvement shaped the development of UNDRIP. The importance of Indigenous peoples' participation in the development of the UNDRIP cannot be overstated. The historical account below reveals Indigenous peoples' critical role as international lawmakers. A detailed recount of Indigenous peoples' influence on the language of the UNDRIP demonstrates how their shared ideas, identities, and interests shaped the actions of state actors during the drafting process. More so, the following section foregrounds Indigenous peoples as norm entrepreneurs and influential non-state actors on international matters that impact their rights. Considering the direct impact of environmental degradation on the realization of Indigenous rights, an account of Indigenous peoples' influence on the development of the UNDRIP is a significant harbinger of their role as procedural environmental rights norm makers.

V. Indigenous Peoples' Participation During the Development of the UNDRIP between 1985 and 2007

The UNDRIP is the most comprehensive international instrument on Indigenous peoples' rights, and it provides an unprecedented assertion of their collective rights. The UN General Assembly adopted it after over twenty years of the drafting process that originated from the WGIP.[129] The birth of the UNDRIP is linked to the José R. Martinez Cobo study on the "Problem of Discrimination against Indigenous Populations."[130] The ECOSOC responded to the Martinez Cobo

[129] UNDESA, Indigenous Peoples, *supra* note 29.
[130] Martinez Cobo Study, *supra* note 64.

study by establishing the WGIP with the mandate to develop international standards about the rights of Indigenous peoples, among others.[131] At the first session, the WGIP established its procedural standards for the participation of states and Indigenous peoples.[132] The WGIP asserted that Indigenous peoples would be present at its sessions, and their views would be sought simultaneously with the governments' comments.[133] Additionally, the WGIP committed to encouraging Indigenous representatives' participation in its sessions and collaboration between Indigenous peoples, governments, and intergovernmental agencies.[134] Therefore, the WGIP involved Indigenous peoples in its processes from inception and gave Indigenous organizations access to its sessions.

By the time the WGIP started drafting the Declaration in 1985, it was in consultation with Indigenous representatives. During the preliminary drafting sessions, Indigenous observers reported some of the challenges besetting Indigenous peoples, including high illiteracy among Indigenous peoples and violation of rights to life, security and liberty.[135] The Indigenous observers who spoke about issues relating to the right to land emphasized the importance of land to the survival of Indigenous peoples and the preservation of their identity.[136] While most speakers at the fourth WGIP session agreed that existing international instruments did not adequately address the needs of Indigenous peoples, Indigenous observers stressed the need for human rights standards

[131] United Nations Economic and Social Council, "Study of the Problem of Discrimination against Indigenous Populations" (7 May 1982) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 28th Plenary Meeting, E/RES/1982/34.
[132] United Nations Economic and Social Council, "Report of the Working Group on Indigenous Populations on its 1st Session" (25 August 1982) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1st Session, E/CN.4/Sub.2/1982/33.
[133] *Ibid* at paragraph 45-46.
[134] *Ibid* at paragraph 111-112.
[135] United Nations Economic and Social Council, "Study of the Problem of Discrimination against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fourth Session" (27 August 1985) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 38th Session, Agenda Item 11, E/CN.4/Sub.2/l985/22.
[136] *Ibid* at paragraph 38.

that mainly address Indigenous issues.[137] Indigenous NGOs submitted two drafting texts to the fourth WGIP session. Many of the suggestions of Indigenous observers relating to the right to land and natural resources were classified under active consideration by the WGIP.[138]

Indigenous observers and NGOs stressed Indigenous peoples' concerns and the various aspects of their human rights that required attention. They provided an extensive account of the challenges Indigenous peoples dealt with and their expectations from the Declaration.[139] Aside from the statements made by governments, Indigenous observers, and NGOs at the fifth session, the WGIP also considered the several private meetings held during the session before presenting the preliminary draft of some of the principles of the draft Declaration.[140]

Indigenous representatives at the seventh session highlighted that the Declaration must not be limited to existing human rights standards, but the draft must set standards that are acceptable to Indigenous peoples and states.[141] Indigenous representatives unanimously submitted that the term "peoples" should be used in the Declaration, but some government representatives expressed a preference for concepts of "populations" or "communities."[142] Members of the WGIP supported the term "peoples". While the idea of the provisional definition of the term "peoples" was brought

[137] *Ibid* at paragraph 60-61.
[138] *Ibid* at paragraph 73 and 77.
[139] One of the Indigenous NGOs emphasized the need to include remedies for human rights violations in the declaration. *Ibid* at paragraph 81.
[140] United Nations Economic and Social Council, "Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on Its Fifth Session" (24 August 1987) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 39th Session, Agenda Item 10, E/CN-4/Sub.2/1987/22, Annex II.
[141] United Nations Economic and Social Council, "Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Seventh Session" (25 August 1989) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 41st Session, Agenda item 12, E/CN.4/Sub.2/1989/36 at paragraph 52.
[142] *Ibid* at paragraph 54 – 55.

up by some observers and a member of the WGIP, Indigenous representatives rejected a qualified use of the term.[143]

During the review process, Indigenous and government representatives commented on each article of the draft Declaration. Indigenous representatives insisted on some terms and presented facts to rebuff some state representatives' arguments. For instance, in response to some states' argument that granting Indigenous peoples the right to self-determination would result in secession, Indigenous representatives stated that this argument "is unfounded because of the general approach and understanding of international legal instruments."[144] Indigenous representatives proposed different clauses or sentences to replace some articles in some instances.[145]

The WGIP requested that its reports be transmitted to governments, Indigenous peoples, and intergovernmental and non-governmental organizations for their comments on the revised text of the draft Declaration. Furthermore, governments and Indigenous organizations were invited to participate in informal and in-sessional drafting groups in order to expedite the drafting process and seek consensus on some terms of the draft. Therefore, Indigenous representatives were involved in the WGIP sessions and informal groups in preparation for the sessions. The Chairperson/Rapporteur of the WGIP, Ms. Erica-Irene Daes, presented the first revised text of the draft UNDRIP to the seventh session. Ms. Daes commented that the revision was based on the different written comments provided by governments and Indigenous peoples, and the draft was open to corrections and additions.[146]

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[143] *Ibid* at paragraph 55.
[144] *Ibid* at paragraph 55.
[145] For instance, an Indigenous observer proposed a different phrase to replace a part of article 27. *Ibid* at paragraph 92.
[146] United Nations Economic and Social Council, "Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Seventh Session" (25 August 1989) Sub-Commission on Prevention of

After the first revised text of the draft UNDRIP was presented at the seventh session of the WGIP in 1989, the WGIP established three informal drafting groups to elaborate the draft in 1990. The three groups respectively considered the provisions on land and resources, political rights and autonomy, self-determination, and the preamble.[147] During the initial reports of the three groups at the eighth session of the WGIP, they unanimously suggested that the first paragraph of the Declaration's preamble should be modified. One of the Working Group members proposed that the first paragraph should be divided into two – the first establishing the freedom and equality of Indigenous peoples and the second affirming the collective right of Indigenous peoples to be different from others.[148] In response, two participants raised concern that asserting collective rights will hinder individual Indigenous people from considering themselves different.[149] Consequently, the preamble was amended to include "the right of all peoples and individuals to be different."[150] The WGIP followed this pattern of allowing participants to comment on the draft wordings, argue for or against comments, and the three groups made respective amendments if deemed necessary.

An issue that received much attention and conflicting opinions from the participants at various WGIP sessions is the right to self-determination and its implication on the terms "Indigenous peoples," "collective rights," and "land rights."[151] Many government observers expressed

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Discrimination and Protection of Minorities, 41st Session, Agenda item 12, E/CN.4/Sub.2/1989/36 at paragraph 49. *Ibid* at paragraph 49.

[147] United Nations Economic and Social Council, "Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Eighth Session" (27 August 1990) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 42nd Session, Agenda Item 15, E/CN.4/Sub.2/1990/42 at paragraph 51 – 52.

[148] *Ibid* at paragraph 56.

[149] *Ibid* at Annex II. For scholarly discussions on states' opposition to Indigenous peoples' collective rights, see Dwight Newman, "Theorizing Collective Indigenous Rights" (2006/07) 31:2 American Indian Law Review 273; Kirsty Gover, "Settler – State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26:2 European Journal of International Law 345.

[150] *Ibid* at Annex IV, preambular paragraph 1.

[151] United Nations Economic and Social Council, "Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Eleventh Session" (23 August 1993) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session, Agenda Item 14, E/CN.4/Sub.2/1993/29 at Paragraph 49.

reservations about the right to self-determination. The observer for Canada raised concerns about the applicability of the concepts of self-determination, self-government and autonomy. Nevertheless, he supported the right to self-determination of Indigenous peoples in international law, so far it is on the same basis as non-Indigenous people. The observer for Australia proposed that to clarify the ambiguities of self-determination and territorial integrity, language should be included in the Declaration to ensure that no provision of the Declaration could be interpreted to authorize and support any action that might be detrimental to the territorial integrity of states. The observer for New Zealand sought to include language that limited the application of the right to self-determination to imply that governments would work with Indigenous peoples in the process of empowerment within states.[152]

The observer for the American Indian Movement of Colorado disagreed with states' position that self-determination would result in conflicts and dismemberment of states. On the contrary, the observer suggested that conflicts are caused by the fact that peoples are forced to assimilate into states that do not acknowledge their distinct identities.[153] Other Indigenous representatives debunked some of the concerns and arguments of states against the full affirmation of the right to self-determination. Mr. Moana Jackson spoke on behalf of Indigenous representatives after they had met informally. Indigenous representatives expressed concern about the attempts to restrict the concept of self-determination to the internal affairs of Indigenous peoples. Considering that the right to self-determination is the pillar on which other provisions of the draft Declaration rest, Indigenous representatives insisted that the Declaration must affirm their right to self-determination without any restrictions or qualifications.[154]

[152] *Ibid* at paragraph 50 – 55.
[153] *Ibid* at paragraph 60.
[154] *Ibid* at paragraph 56-60.

Academics were invited to give their opinions on the concept of self-determination. Professor Maivan Lam supported the position of the majority of Indigenous representatives. She underscored that just like all other peoples, Indigenous peoples have the right to self-determination. She reported that many jurists believed the right to self-determination had attained the "status of jus cogens and was therefore not subject to changes by states."[155] Professor Anaya posited that the right to self-determination was an established concept with two aspects – constitutive and ongoing. The scholars all testified to the fact that self-determination was a long-standing concept in international law.[156] Initially, the draft Declaration indicated that the right to self-determination was subject to the UN Charter and the 1970 Declaration on Friendly Relations. However, the reference to the Declaration on Friendly Relations was deleted, while the reference to the UN Charter was retained.[157] After considering the various opinions of observers, the Chairperson – Rapporteur revised the text of article 3 to state that "Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[158]

During the drafting process, the presence and actions of Indigenous peoples were effective in modifying the actions of other actors, that is, in support of and acceptance of their right to self-determination.[159] Although states did not support the UNDRIP asserting the right of Indigenous peoples to self-determination, the position taken by Indigenous representatives influenced the WGIP's position on the issue. Additionally, the WGIP draft included an extensive right to land, environment and the "the right to the restitution of the lands, territories and resources which they

[155] *Ibid* at paragraph 61.
[156] *Ibid*.
[157] *Ibid*, at paragraph 56.
[158] *Ibid* at Annex I.
[159] See Bas Arts and Piet Verschuren, "Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation" (1999) 20:4 International Political Science Review 411.

have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent."[160] As a result, by the time the WGIP had its final meeting, the draft Declaration affirmed the right of Indigenous peoples to self-determination and land rights. Erueti states that:

> The linchpin and significant breakthrough was article 3. What did it mean? There is no doubt that the right to self-determination was a response to the decolonization arguments of indigenous peoples of the North. The *repeated assertion* of the decolonization model in the Working Group led to the self-determination framework in the Declaration.[161]

Thus, the WGIP draft was a landmark achievement for Indigenous peoples. It was an expression of their aspirations with the unconditional right to self-determination. The WGIP adopted a final draft of the UNDRIP at its 45th session in 1993[162] and forwarded the draft to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission).[163] The Sub-Commission adopted the draft in 1994 and forwarded it to the then UN Commission on Human Rights for their review and approval, if found appropriate.[164] The UN Commission on Human Rights, a body made up of member states, raised issues with the draft Declaration. This started the painstaking process of reviewing and refining the draft because states continued to raise concerns about some of the terms, especially regarding the right to self-determination and control over natural resources existing within Indigenous communities.[165] Indigenous representatives were also

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[160] United Nations Economic and Social Council, "Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Eleventh Session" (23 August 1993) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session, Agenda Item 14, E/CN.4/Sub.2/1993/29, Annex I.

[161] Andrew Erueti, *The UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretation Approach*, (PhD Thesis, University of Toronto, 2016) at 70 [emphasis added].

[162] *Ibid*.

[163] Now the Sub-Commission on the Promotion and Protection of Human Rights.

[164] United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session" (1994) Doc. E/CN.4/Sub.2/1994/56.

[165] United Nations Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview" online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (UNDESA, UNDRIP Historical Overview)

adamant about their positions. Indeed, the Declaration could have been adopted a decade earlier if not for the unyielding dissension on the right to self-determination.[166] Consequently, an open-ended inter-sessional Working Group of the Draft Declaration (WGDD) was established in 1995 to review and elaborate the 1994 draft Declaration.[167]

A. Revision by the Working Group of the Draft Declaration

Similar to the WGIP procedures, Indigenous peoples were involved in the WGDD.[168] As mentioned earlier, Indigenous peoples preferred the Sub-Commission's draft Declaration as it expressed their desired terms with minimal restrictive language. More than one hundred Indigenous organizations participated annually in the WGDD sessions.[169] Indigenous representatives were unanimous in presenting informed arguments in support of their positions at the WGDD. While some government representatives were indifferent to some of the opinions of Indigenous representatives,[170] some divisive issues lingered throughout the review process. Aside from the issues raised about the right to self-determination, recognition of the collective rights of Indigenous peoples, and control over land and natural resources were other issues that got much attention. Indigenous representatives emphasized the importance of the right to land and natural resources to exercise their right to self-determination and the survival of their communities.[171]

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[166] Marc Weller, "Self-Determination of Indigenous Peoples" in Jessie Hohmann and Marc Weller, ed, *The UN Declaration on the Rights of Indigenous Peoples: Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2018) 115 at 116.

[167] United Nations Commission on Human Rights, "Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994" (1995) res. 1995/32 ESCOR Supp. (No. 4) at 110, U.N. Doc. E/CN.4/1995/32.

[168] José Urrutia was appointed Chairperson-Rapporteur (Chairperson) of the WGDD and was later succeeded by Luis Enrique Chavez.

[169] UNDESA, UNDRIP Historical Overview, *supra* note 164.

[170] For instance, some government representatives were indifferent about the use of the term "peoples" in the declaration. United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995" (4 January 1996) Commission on Human Rights, 52nd Session, Item 3 of the provisional agenda, E/CN.4/1996/84 at paragraph 37.

[171] *Ibid* at para 84.

Indigenous representatives were persistent on the demands for terms that affirmed and protected their rights throughout the WGDD sessions.

The first meeting of the WGDD focused on different participants' positions on the content of the draft Declaration as received from the Sub-Commission.[172] In an attempt to protect the rights already affirmed in the Sub-Commission's draft, Indigenous representatives adopted a rigid strategy and rejected any amendments to the texts. This strategy created a gridlock as state representatives were unwilling to accept the draft as it was.[173] At the second meeting, the Chairperson mentioned that after his consultations, there was a general notion that the WGDD should adopt a practical approach to ensure progress in the draft review. The Chairperson proposed regrouping the articles in the draft by issues, noting that it will be easier to discuss articles dealing with similar issues simultaneously.[174] This proposal was backed by a caveat that the regrouping is not a negotiation and "no changes would thus be made to the draft declaration at that session."[175] The WGDD approved the Chairperson's proposal to regroup the articles.[176] The Chairperson's caveat was significant because Indigenous representatives' trust in the process was won on the understanding that the Sub-Commission's text would not be altered. The challenge going forward was how to "guide the work towards negotiations without, however, it being perceived as such."[177]

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[172] United Nations Economic and Social Council, "Report of the Working Group on Indigenous Populations on its 1st Session" (25 August 1982) Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1st Session, E/CN.4/Sub.2/1982/33.
[173] Luis Enrique Chávez, "The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 108 (Luis Enrique Chávez, The Declaration).
[174] United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32" (10 December 1996) Commission on Human Rights, 53rd Session, Item 24 of the provisional agenda, E/CN.4/1997/102.
[175] *Ibid* at paragraph 18.
[176] *Ibid* at paragraph 19.
[177] Luis Enrique Chávez, The Declaration, *supra* note 173 at 100.

Indigenous representatives refused to negotiate different terms in the draft, and state delegations refused to submit proposals.[178] In order to move forward, Indigenous representatives were open to reviewing state proposals that were unanimously agreed to by all states. This implies that state delegates had to agree on their proposals from the fifth session onwards.[179] Indigenous representatives requested that any alteration to the Sub-Commission text should be "reasonable, necessary and improve or strengthen the text, and that they should be consistent with the fundamental principles of equality, non-discrimination and the prohibition of racial discrimination."[180] In response, government delegations emphasized that the objective of their proposals was to "improve, clarify and strengthen the text and at the same time to make it acceptable to all participants."[181] Going forward, participants worked together to minimize their differences, and much progress was recorded by the tenth session of the WGDD.[182]

By 2003, the WGDD had compiled proposed amendments to the draft for future discussion.[183] The WGDD planned to finalize the review of the draft declaration within the International Decade of the World's Indigenous Peoples, which was 1995-2004. However, it did not conclude its review by 2004, so its mandate was extended until 2015.[184] Despite the progress made by the WGDD, delegates could not seem to agree on some terms of the draft Declaration. It was apparent that

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[178] *Ibid* at 101.
[179] *Ibid*.
[180] United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32" (6 December 1999) Commission on Human Rights, 56th Session, Item 15 of the provisional agenda, E/CN.4/2000/84 para 124.
[181] *Ibid* at para 125.
[182] The report of the 10th session contains the original text of the Sub-Commission's draft, the Chairperson's summary of representatives' proposals and the Chairperson's proposed texts. United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Tenth Session" (1 September 2005) Commission on Human Rights, 62nd Session, E/CN.4/2005/WG.15/2.
[183] United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32" (6 January 2003) Commission on Human Rights, 59th Session, Item 15 of the provisional agenda, E/CN.4/2003/92.
[184] UNDESA, UNDRIP Historical Overview, *supra* note 165.

some states were generally in support of the draft Declaration while others worked hard to limit the language. The principal proponents of the draft Declaration were the Latin American and European countries, while the opposing countries included Australia, New Zealand, Canada and the United States of America.[185]

Australia, New Zealand and the United States of America proposed to amend the language of Article 3 of the draft Declaration by limiting the right to self-determination to internal and local affairs and in accordance with the rule of law.[186] The Indigenous caucus and states in support of the Declaration opposed this proposal. The Chairperson of the WGDD attempted to defer the consideration of the proposal on the ground that only the English version was circulated. Other delegates opposed the deferral of the matter because there was no need to translate the proposal to communicate a firm rejection of the proposal. De Alba, the Ambassador from Mexico and inaugural Chairperson of the UN Human Rights Council, responded that "if we did not all show a will to come together around the text via the path of consensus, the option always remained of submitting the declaration to a vote so that the majority could express its wish."[187]

By the eleventh session of the WGDD, both states and Indigenous representatives showed the willingness to negotiate, and the Chairperson, Luis Enrique Chavez, played the role of a mediator. The progress recorded at the eleventh session was linked to the meeting organized by the Mexican government at Pátzcuaro, Michoacán, in September 2005. The meeting was attended by over ninety Indigenous representatives, state delegates and international experts. The meeting attendees committed to "accommodate both the concerns of states and Indigenous peoples without holding

[185] Asbjørn Eide, Indigenous Peoples, *supra* note 103 at 38.
[186] United Nations Economic and Social Council, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session" (22 March 2006) Commission on Human Rights, 62nd Session, Item 15 of the provisional agenda, E/CN.4/2006/79 at 22.
[187] Luis Enrique Chávez, The Declaration, *supra* note 173 at 114.

back the development of international law."[188] States' responsibility to protect human rights was emphasized.[189] Anaya and Rodriguez-Pinero describe the Pátzcuaro meeting as the "single most influential breakthrough in the Declaration's drafting process."[190]

The eleventh session of the WGDD recorded much progress. By the end of the session, there was a preliminary adoption of over 25 preambular paragraphs and 35 articles of the draft Declaration. Aside from the Pátzcuaro meeting, where participants committed to accommodating the concerns of others, the progress made at the eleventh session was also linked to Indigenous representatives' acceptance of the Chairperson's draft because it reflected and improved on the draft adopted by the Sub-Commission in 1994.[191] Nevertheless, some issues were still outstanding.

The right to self-determination in connection to the identity of Indigenous peoples remained an issue for Australia, New Zealand, and the United States of America.[192] These countries sought to include language that affirms the territorial integrity of states and limits the context of self-determination to internal autonomy. Some states and Indigenous representatives remained on conflicting ends about the articles on self-determination and how it impacts state autonomy, the meaning of "lands and territories," and the contradiction between collective rights and individual rights.[193] No consensus was reached on many of the articles of the proposed draft. An Indigenous representative expressed reservations about the Chairman's proposals because there was no

[188] United Nations Commission on Human Rights, "International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples, Patzcuaro, Michoacán, Mexico, 26 – 30 September 2005" (29 November 2005) E/CN.4/2005/WG.15/CRP.1 at 11.
[189] *Ibid* at 11.
[190] James Anaya and Luis Rodriguez-Pinero, "The Making of the UNDRIP" in Jessie Hohmann and Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2018) 38 at 55.
[191] Luis Enrique Chávez, The Declaration, *supra* note 172 at 114.
[192] United Nations Economic and Social Council, "Human Rights and Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session" (22 March 2006) Commission on Human Rights, 62nd Session, Item 15 of the provisional agenda, Annex I.
[193] *Ibid*.

consensus on many of the articles in the proposed draft that the WGDD intended to forward to the Commission on Human Rights. Regardless, the Chairperson of the WGDD decided to submit the proposed amendments to the draft Declaration at the eleventh and final session of the WGDD "with the hope that it would be considered as a final compromise text."[194]

B. Revision by the Human Rights Council and Opposition by the African Group

In April 2006, the Commission on Human Rights was replaced by the Human Rights Council. The Commission on Human Rights was to review the proposed draft submitted by the WGDD at its 62nd session. However, due to the transition to the Human Rights Council, the Commission on Human Rights had its final session and referred all pending reports to the Human Rights Council.[195] In June 2006, Peru submitted a Draft Resolution for the approval of the WGDD's draft Declaration at the first session of the Human Rights Council.[196] Australia, Canada, New Zealand and the United States of America opposed the adoption of the draft. The draft Declaration was adopted by a majority of the members of the Human Rights Council.[197] Canada and Russia voted against it.[198]

The draft Declaration was scheduled for consideration by the UN General Assembly's Third Committee in November 2006. Shortly before then, the Permanent Representative of Namibia,

[194] The proposed changes were presented in a tabular form for ease of comparison with the initial draft and the chairman's summary of participants' proposals on each item and sources of each proposal. The eleventh session of the Working Group was held in two meetings, 5 – 16 December 2005 & 30 January – 3rd February 2006. See United Nations Economic and Social Council, "Human Rights and Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session" (22 March 2006) Commission on Human Rights, 62nd Session, Item 15 of the provisional agenda, E/CN.4/2006/79, Annex I.

[195] United Nations Human Rights Council, "Commission on Human Rights Report on the Sixty-Second Session" (13 – 27 March 2006) Economic and Social Council Official Records, Supplement No. 3, E/CN.4/2006/122.

[196] United Nations General Assembly, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council'" (23 June 2006) First Session, Agenda Item 4, A/HRC/1/L.3.

[197] United Nations Human Rights Council, "Report of the Human Rights Council" (19-30 June 2006) First Session, A/61/53.

[198] *Ibid* at19.

also Chair of the African Group, through a letter to the President of the UN General Assembly, requested that the consideration of the Human Rights Council's draft Declaration be deferred.[199] The Chair of the African Group claimed that the group members needed more time to deliberate in detail. The permanent representative of Botswana also expressed reservations concerning the Human Rights Council's draft Declaration and stated that Botswana would require more deliberation before adopting the Declaration.[200] The African Group's position was formalized at the Third Committee, and consideration of the Declaration was deferred to the next session.[201]

In January 2007, the Assembly of the African Union adopted a resolution against the Declaration, expressing concerns about issues that it considered to have "fundamental political and constitutional" implications."[202] There is a notion amongst some that African states' last-minute intervention was influenced by some states, such as the United States of America and Canada.[203] The African Group proposed amendments to 37 paragraphs of the Human Rights Council's draft.[204]

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[199] Luis Enrique Chávez, The Declaration, *supra* note 173 at 126.
[200] *Ibid* at 126.
[201] United Nations Human Rights Council, "Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994: Namibia Amendments to Draft Resolution A/C.3/61/L.18/Rev.1" (21 November 2006) 61st Session, 3rd Committee, Agenda Item 68, A/C.3/61/L.57/Rev.1.
[202] Assembly of the African Union, "Decision on the United Nations Declaration on the Rights of Indigenous Peoples: Doc.Assembly/AU/9(VIII) ADD.6" (2007) Assembly/AU/Dec.141(VIII) at para. 6.
[203] James Anaya and Luis Rodriguez-Pinero, "The Making of the UNDRIP" in Jessie Hohmann and Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2018) 38 at 58. I do not take a definitive view on this notion but would note that some have also suggested that African states had underlying reasons for concerns with the draft Declaration. Dwight Newman, "Africa and the United Nations Declaration on the Rights of Indigenous Peoples", in Solomon Dersso, ed, *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria: University Law Press 2010) 141.
[204] Luis Alfonso De Alba, "The Human Rights Council's Adoption of The United Nations Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous* Peoples (Copenhagen: IWGIA, 2009) 108 at 129 (De Alba, HRC Adoption of UNDRIP).

The President of the UN General Assembly appointed the Permanent Representative of the Philippines, Ambassador Hilario Davide, to mediate discussions on the draft Declaration.[205] Davide's report suggested three options for breaking the impasse and warned against reopening the text of the draft Declaration.[206] The African Group maintained its position about amending the Human Rights Council's text. A clause on "territorial integrity of states" was added to the draft to win over some African Group members.[207] The final draft of the Declaration introduced terms with significant implications, including terms protecting states' "territorial integrity or political unity."[208]

Despite the irrefutable efforts of Indigenous representatives, some compromises were made that significantly impacted the rights affirmed in the Declaration. Alterations were made to Article 45 (now Article 46), and it reads in part: "the exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations."[209] On June 29, 2006, the UN Human Rights Council adopted the draft UNDRIP, and on September 13, 2007, UNDRIP was adopted by a majority of 144 states in favour, four votes against and eleven abstentions.[210] The drafting process of the UNDRIP was quite

[205] The President of the General Assembly, "Letter to All Permanent Representatives and Permanent Observers to the United Nations" (6 June 2007) online: <https://www.un.org/en/ga/president/61/pdf/letters/20070723-indigenouspeoples.pdf>.
[206] United Nations, "Report to the President of the General Assembly on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples: Submitted by H.E. Mr. Hilario G. Davide, Jr. Permanent Representative of the Republic of the Philippines to the United Nations" (13 July 2007) online: <https://www.un.org/en/ga/president/61/pdf/letters/20070723-indigenouspeoples.pdf>.
[207] De Alba, HRC Adoption of UNDRIP, *supra* note 204, at 130 -131.
[208] Article 46 *United Nations Declaration on the Rights of Indigenous Peoples,* United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).
[209] Article 46(2) of UNDRIP. United Nations Economic and Social Council, "Human Rights and Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session" (22 March 2006) Commission on Human Rights, 62nd Session, Item 15 of the provisional agenda, E/CN.4/2006/79, at 74-76.
[210] UNDESA, UNDRIP Historical Overview, *supra* note 165.

challenging and lengthy because some states and Indigenous representatives remained on opposing ends on some pertinent terms.

Indigenous representatives were unanimous on most issues throughout the drafting process.[211] Indigenous representatives maintained momentum throughout the process by providing knowledgeable arguments and dispelling some of the contentions of state representatives. The prolonged process of negotiating, drafting, and reviewing the draft UNDRIP until the UN General Assembly's approval was a landmark achievement in international human rights law. This extraordinary achievement was greatly influenced by the unprecedented global unanimity among Indigenous peoples and their resilience in shaping the development of an international instrument that affirms and protects their rights. The cooperation among Indigenous groups on the terms of UNDRIP and the extensive acceptance of the Declaration at the UN General Assembly reflects the expectation that the rights of Indigenous communities and Indigenous individuals must be respected.[212]

The process that led to the endorsement of the UNDRIP by a majority of the UN General Assembly brought to light Indigenous cultures and revealed a substantial shift in the internationalization of Indigenous rights.[213] Arguably, Indigenous peoples shaped the development of UNDRIP, but the extent of their influence on the process remains debatable, especially considering the later

[211] Although their few disagreements delayed the process. For instance, while other Indigenous representatives compromised on the final proposal of the Chairman of the Working Group at the eleventh session, one Indigenous representative was insistent that the proposal should not be presented without the consensus of all participants. Regardless, the proposal was presented to the Commission on Human Rights.

[212] John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in Centre for International Governance Innovation, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws" (2017) Special Report, CIGI 1 at 26.

[213] Blaine Favel and Ken Coates, "Understanding UNDRIP: Choosing Action on Priorities Over Sweeping Claims About the United Nations Declaration on the Rights of Indigenous Peoples" (2016) 10 Aboriginal Canada and the Natural Resource Economy Series, Macdonald-Laurier Institute Publication 1 at 7.

inclusion of the restrictive Article 46. The following section assesses Indigenous peoples' influence during the drafting process of the UNDRIP.

VI. An Assessment of Indigenous Peoples' Influence During the Drafting Process of the UNDRIP between 1985 and 2007

Although UN agencies served as platforms for Indigenous peoples to participate in international politics, the success of Indigenous international activism can be traced to transnational alliances of Indigenous groups during the late 19th century and early 20th century. Essentially, Indigenous peoples worldwide identified and explored their shared ideas and identity during the drafting process of the UNDRIP.[214] Indigenous peoples generally believe in cultural values, preservation of nature, spiritual connection to land and connection to the community. They also have shared experiences of marginalization, dispossession from their ancestral lands, and historical human rights violations.

Indigenous peoples developed common aspirations – protecting their rights and seeking the affirmation of their rights in an international instrument. They created a global movement that helped them unite during the drafting process through these shared ideas.[215] Indigenous peoples worldwide derived a sense of collective identity from their struggle to oppose persistent injustices against their peoples. Despite the diversity of cultures, principles, and ideologies among the various Indigenous communities that formed the Indigenous movement, their representatives emphasized the similarity of their struggles. As one of the movement representatives expressed, "despite the many regions of the world we represent and the variety of cultures we command,

[214] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge, 2016) at 145 (Barelli, *Seeking Justice*).
[215] The first successful trans-border networks created by Indigenous peoples was in the 1970s. James Anaya, *Indigenous Peoples in International Law*, 2nd ed, (Oxford University Press, 2004) 56-57. For more on the creation of the global dimension of the Indigenous movement, see Barelli, *ibid* at 98 – 101.

…the worldwide struggle is the same; for preservation of our land base, the environment, religious freedom, culture and language."[216]

The shared identity held by Indigenous peoples worldwide enhanced the political legitimacy of the global Indigenous movement "by connecting the Indigenous representatives operating at the international level and the members of the world's Indigenous communities who stand behind them."[217] The shared identity held by Indigenous peoples created the foundation for the recognition of Indigenous representatives as legitimate actors at the international level. Indigenous peoples spoke in unison about the fundamental issues of their rights and aspirations throughout the drafting process, despite some disagreements they had within the movement.[218]

Aside from creating a structure that brought different Indigenous communities together, Indigenous representatives utilized the platform the movement created tactfully. The Indigenous representatives who participated in the drafting process were knowledgeable about the principles and dynamics of international law. A former secretary of the WGIP commented about Indigenous representatives: "the performance of many of the indigenous delegates was often very impressive. Many came to the meetings with superior knowledge about the situations facing their people and international standards, and the workings of the UN. They were thoroughly prepared."[219] Indigenous peoples put forward people that were adequately knowledgeable to participate

[216] Native American Council of New York City, "Introduction: An Indigenous Worldview" in Alexander Ewen, ed, *Voice of Indigenous peoples: Native People Address the United Nations,* (Santa Fe: Clear Light, 1994) at 24.
[217] Barelli, *Seeking Justice*, *supra* note 213 at 145.
[218] United Nations Commission on Human Rights, "Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57" (4 February 2002) 58th session, Doc. E/CN.4/2002/97, para. 85.
[219] Gudmundur Alfredsson, "Working Group on Indigenous Populations 1985-91" in Dunbar-Ortiz et al, eds, *Indigenous Peoples' Rights in International Law: Emergence and Application* (Copenhagen: Gáldu & IWGIA, 2015) 200 at 201.

effectively and make informed decisions throughout the process. They pursued their collective interest through "persuasive, rhetorical and symbolic power."[220]

While the international system was attentive to the activism of Indigenous peoples and showed readiness to atone for the mistakes of the past through the adoption of an international instrument that addresses the rights of Indigenous peoples, states were also reluctant to include any language that threatened their sovereignty, finances, political unity and control over land and natural resources.[221] States were aware of the potential adverse implications of rights affirmed in UNDRIP on their political and economic interests. In fact, "more was at stake, economically and politically, in the Draft Declaration than perhaps any other human rights instrument submitted to the Commission on Human Rights for approval since the International Covenants of Human Rights."[222]

Despite the implications of UNDRIP for states, the instrument received overwhelming support from most states.[223] Indigenous peoples defied the norms of international politics and achieved an unprecedented level of political success in the international order, thereby challenging mainstream IR theory. Indigenous peoples seized the opportunity the drafting process provided them to tell their stories when they had the international community's attention. Indigenous stories "tell more than the labels associated with identity politics. The contradictions, complicity, and complexities of lived experiences cannot be grasped in the mere claiming of identities. Indigenous stories are a

[220] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (London: Sage Publications, 1993) at 31.
[221] See Kristy Gover, "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26:2 European Journal of International Law 345.
[222] Erica-Irene Daes, "Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples" (1994) 63 Nordic Journal of International Law 205 at 211.
[223] United Nations General Assembly, "General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President" (13 September 2007) 61st GA Plenary GA/10612.

reclamation of Indigenous voice, Indigenous land, and Indigenous sovereignty."[224] As a result, the international community was compelled to confront its colonial background and the overdue response to Indigenous concerns.[225]

One of the actions taken by Indigenous representatives that helped achieve their goals during the drafting process of UNDRIP was telling Indigenous stories of past and present injustices confronting their communities.[226] An actor's influence is assessed by the extent to which the achievement of a goal can be connected to the actor's actions.[227] The drafting process was influenced by Indigenous peoples' stories about their struggles and the necessity of an international human rights mechanism that protects their collective rights.[228] Indigenous representatives told their stories in a compelling way to persuade states to support the efforts to stop human rights violations against Indigenous communities. Thus, the achievement of the goal of developing the UNDRIP can be linked to Indigenous representatives' storytelling and the urgency of international reaction to the human rights struggles of Indigenous communities.

"The issue of Indigenous rights draws attention to the normative arguments that provided justification for the initial exclusion of Indigenous nations from the process of world community building, namely, the assumption of their moral inferiority or incompetence to manage and dispose

[224] Aman Sium and Eric Ritskes, "Speaking Truth to Power: Indigenous Storytelling as an Act of Living Resistance" (2013) 2:1 Decolonization: Indigeneity, Education & Society 1 at 7-8.
[225] The strategy employed by Indigenous peoples to secure international affirmation of their rights through the shared idea that Indigenous peoples are oppressed and require political freedom is akin to Identity Politics. See Cressida Heyes, "Identity Politics" (2020) 2nd ed, Stanford Encyclopedia of Philosophy 1.
[226] Claire Charters, "The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 280.
[227] David Nunez-Gonzalez et al, "A New Heuristic for Influence Maximization in Social Networks" (2016) 24:6 Logic Journal of the IGPL 996 at 1002.
[228] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 213.

of land and natural resources in a manner consistent with the interests of states."[229] In light of the human rights violations occasioned by industrialization and assimilation, the moral superiority of Western states was questioned. Indigenous representatives stressed the severity of the human rights violations confronting their communities and the imperativeness of international intervention. The international community was confronted by the historical injustices suffered by Indigenous communities. Indigenous struggles were inextricably tied to international human rights causes so much that the human rights reputation of states that opposed the UNDRIP was impacted.[230]

In a constructivist IR fashion, states acted in alignment with their interest to preserve their human rights reputation and atone for the past injustices against Indigenous peoples. The human rights agitation of Indigenous peoples had a strong moral force and was one factor that bolstered the adoption of the UNDRIP. Barelli states that:

> … the way in which states and international institutions responded to the claims of indigenous peoples was shaped to some extent by what some authors have referred to as the 'guilty feeling' of the international community. As the latter became increasingly concerned with human rights and fundamental freedoms, as well as adamant to distance itself from the past colonial practice, it was almost inevitable that special attention would be paid to the thorny question of Indigenous peoples. Once this happened, states and international institutions had additional reasons to respond adequately to the concerns of these groups, as doing so was required not only by the gravity of the situation but also the realization that a combination of past conduct and (more recent) failure to act had contributed significantly to the deterioration of Indigenous people's living conditions.[231]

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[229] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (London: Sage Publications, 1993) at 26.

[230] The international human rights reputation of states that opposed the UNDRIP was impacted by their decision to oppose such ground-breaking achievement in international human rights law. For instance, Canada's human rights credibility diminished domestically and internationally due to the government's strategies undertaken to oppose the UNDRIP. Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation" (2010) 26:2 National Journal of Constitutional Law 121 at 221. After adopting the UNDRIP, Canada's human rights reputation is questioned in light of UNDRIP implementation setbacks. Terry Mitchell, "Realizing Indigenous Rights in the Context of Extractive Imperialism: Canada's Shifting and Fledgling Progress Towards the Implementation of UNDRIP" (2019) 12:1 International Journal of Critical Indigenous Studies 46.

[231] Barelli, *Seeking Justice*, *supra* note 213 at 129.

Indigenous peoples worked together and systematically to persuade the international community to address their long-lasting human rights concerns through the development of an international instrument. The significant contributions of Indigenous peoples during the drafting, reviewing, and adoption of the UNDRIP motivated the development of the Declaration. The achievement of the objective of creating an international instrument that affirms and protects the rights of Indigenous peoples is evidently connected to the involvement of Indigenous peoples throughout the process and their persistence on the language of some articles. For instance, the affirmation of the right to self-determination in UNDRIP, despite some states' objections, was motivated by the insistence of Indigenous representatives and their emphasis that the right to self-determination is the foundation for other rights. Anaya and Rodriguez-Pinero explain that:

> [W]hile the assertion that the UNDRIP was the outcome of equal negotiations between states and Indigenous peoples is an exaggeration, neither the Declaration nor its actual contents could be explained without Indigenous peoples' participation in the international arena.[232]

As mentioned earlier, the ability of actors to achieve their set goals, notwithstanding opposition from other actors, determines their level of influence.[233] Despite opposition from countries such as Australia, Canada, New Zealand, Russia, United States of America, Indigenous peoples achieved a significant part of their goals through their intervention and working together with states in support of the Declaration.

In August 2006, Australia, New Zealand and the United States of America made a joint statement to the UN Human Rights Council stating several reasons why the texts of the draft Declaration are problematic and may result in contradictory interpretations. They cited the provisions on the right

[232] James Anaya and Luis Rodriguez-Pinero, "The Making of the UNDRIP" in Jessie Hohmann and Marc Weller, ed, *The UN Declaration on the Rights of Indigenous Peoples: Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2018) 38 at 49.
[233] Michael Kuchinsky, "Nonstate Actors in International Relations", in John Ishiyama and Marijke Breuning, *21st Century Political Science: A Reference Handbook* (Thousand Oaks: Sage, 2011) at 414.

to self-determination as a threat to territorial integrity and political stability.[234] They described the provisions on lands and resources as impracticable and improper. They rejected the notion that a group in society should have rights that precede the rights of others.[235] The joint statement of Australia, New Zealand and the United States of America did not stop the UN Human Rights Council from adopting the draft Declaration. Irrespective of the opposition, Indigenous representatives played an essential role in propelling a novel interpretation of the right to self-determination to include claims to communal resources.[236]

However, the opposition states insisted on having a limiting language in the Declaration. Although Indigenous representatives were opposed to any language that limited the rights affirmed in the Declaration, their intervention did not stop the inclusion of Article 46, limiting the operationalization of the rights affirmed in the UNDRIP. Some states refused to adopt the Declaration unless a limiting language was included to protect states' interests and limit the Declaration's impact on their territorial authority, autonomy, and control over resources and finances.

The late intervention of the African Group threatened the adoption of the Declaration. States in support of the Declaration were forced to negotiate with the African Group to eliminate any further barriers to the successful adoption of the Declaration. On August 30, 2007, the African Group and the states supporting the Declaration reached an agreement.[237] The agreement included the affirmation of the principles of territorial integrity in Article 46. Before finalizing the agreement,

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[234] United Nations Human Rights Council, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Note Verbale Dated 2 August 2006 from the Permanent Mission of Australia to the United Nations Office at Geneva Addressed to the Office of the United Nations High Commissioner for Human Rights" (24 August 2006) 2nd Session, Item 2 of the Provisional Agenda, A/HRC/2/G/1 at 2.
[235] *Ibid* at 2-3.
[236] Jèrèmie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors,* 2nd ed., (Leiden: Brill Nijhoff, 2016) at 243.
[237] De Alba, HRC Adoption of UNDRIP, *supra* note 203 at 131 – 132.

delegates from Guatemala, Mexico and Peru met with the Indigenous caucus to apprise them of the terms of the agreement. Some Indigenous representatives expressed their concern with the inclusion of the clause on territorial integrity. However, the majority of the Indigenous representatives supported the agreement.

This compromise shows that no group had absolute influence over the language of the draft Declaration. Indigenous representatives did not have an outright influence to stop the last-minute inclusion of the caveat in Article 46 of the Declaration, among other provisions added shortly before the Declaration was presented before the UN General Assembly.[238] A preambular paragraph was also included in response to the concerns of the African Group. The paragraph states, in part, that "the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration."[239] While Indigenous peoples' staunch positions on some provisions facilitated the conceptualization of some of the standards included in the Declaration,[240] some states insisted on the inclusion of provisions that offered generous interpretations and limitations to the rights.[241]

Without absolute control over the process, Indigenous representatives could not stop the UN Human Rights Council from adding the caveat terms at the later end of the review process. Arts and Verschuren's definition of influence is not restricted to the ability to achieve *all* the goals of an actor but also includes the ability to achieve part of an actor's goals.[242] Indigenous representatives worked together with states in support of the Declaration and made significant

[238] See Luis Enrique Chávez, The Declaration, *supra* note 172.
[239] Preambular paragraph 24 of UNDRIP, *supra* note 1.
[240] Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (London; New York: Routledge, 2015) at 100-101.
[241] Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 European Journal of International Law 141 at 162.
[242] Arts and Verschuren, Assessing Political Influence, *supra* note 14.

contributions to the development of UNDRIP. As a result, Indigenous peoples are more recognized within the international system after UNDRIP was adopted. Their collective and individual rights are confirmed in UNDRIP, and states are more conscious of Indigenous peoples' rights within their territories. This demonstrates that Indigenous peoples have significantly influenced the international system. Indeed, Indigenous peoples' involvement, tactical actions and collaboration with some states shaped the development of UNDRIP.

VII. Conclusion

This chapter applies Arts and Verschuren's definition of influence in assessing how Indigenous peoples have shaped the development of international Indigenous rights law. It demonstrates how Indigenous peoples' "intervention"[243] in international politics resulted in the actualization of their shared aspiration to affirm their rights in an international instrument through a detailed analysis of Indigenous peoples' past interactions in the international system. International actors' ability to achieve their set goals, regardless of opposition from other actors, determines their level of influence. The historical analysis of the European contact with Indigenous peoples and the initial obstruction of Indigenous peoples from participating in international politics reveals the global system's colonial foundation and Indigenous peoples' level of influence in the international domain.

Additionally, the historical account of Indigenous peoples' achievements in the international system demonstrates how much the system had to adjust (in response to Indigenous peoples' protests) to welcome Indigenous peoples into UN deliberations and international Indigenous rights lawmaking. Indigenous peoples' activism within the international system did not start with the

[243] Bas Arts and Piet Verschuren, 'Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation' (1999) 20(4) International Political Science Review 411 at 413.

UNDRIP drafting process. Discussions about Indigenous peoples' interactions within UN agencies reveal the underground work that paved the path for Indigenous peoples' active participation during the UNDRIP drafting process.

Presence at UN sessions does not necessarily imply influence on decisions. This chapter has assessed the influence of Indigenous peoples in shaping the language of UNDRIP through an evaluation of their achieved goals. After a detailed analysis of the drafting process, the positions of Indigenous peoples, their interactions with state delegates and their analytical contributions, this chapter concludes that Indigenous peoples significantly influenced the language of UNDRIP.

Arts and Verschuren describe influence as "the achievement of (*a part of*) an actor's goal in political decision-making, which is either caused by one's own intervention or by the decision-makers' anticipation."[244] Indigenous peoples successfully achieved their goal of developing an international instrument that protects their rights, but their influence was not absolute. They made some last-minute concessions by accepting the inclusion of limiting provisions that protect states' territorial integrity and political unity. An actor's influence is determined by how the actor's achievements can be linked to the actor's actions. However, an actor does not have to achieve all the projected objectives. A substantial achievement of goals suffices. Indigenous peoples' insistence on some provisions, collaboration with states in support of the Declaration and cooperation among Indigenous representatives helped attain their goals. Irrespective of the limiting clauses in the UNDRIP, Indigenous peoples achieved their objective of having an international instrument that exclusively affirms their rights.

[244] Bas Arts and Piet Verschuren, 'Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation' (1999) 20(4) International Political Science Review 411 at 413.

Indigenous peoples coordinated through transnational social movements and NGOs during the development of the UNDRIP. This thesis raises the question of the suitability of the social movement approach in developing and implementing Indigenous peoples' procedural environmental rights. This chapter contributes to scholarly discussions about the influence of non-state actors in international politics, focusing on Indigenous peoples during the development of UNDRIP. The next chapter investigates the efficacy of an alternative approach to Indigenous representation in international politics – transnational Indigenous advocacy networks.

CHAPTER 5: TRANSNATIONAL INDIGENOUS ADVOCACY NETWORKS AND NORM DEVELOPMENT

I. Introduction

II. Indigenous Peoples as International Lawmakers

III. Transnational Indigenous Advocacy Networks (TIANs)

- A. Sphere of Operation
- B. Shared Principled Ideas
- C. Advocacy Approach
- D. Information Strategy

IV. Locating TIANs in the Norm Life Cycle

V. Interactions of TIANs with State Actors

VI. Codification of Legal Norms on Indigenous Peoples' Procedural Environmental Rights

VII. Conclusion

I. Introduction

As discussed in the preceding chapter, Indigenous peoples emphasized the dynamics of their human rights struggles as they gained ground in international politics. They highlighted how international human rights standards should be applied to their distinct concerns,[1] and sought recourse through international human rights law as a viable tool for promoting their aspirations. Chapter four of this thesis illustrates how the involvement of Indigenous peoples in international politics has transitioned over time and how they have influenced international Indigenous rights law since the initial attempt to participate in global politics in 1923.

After a comprehensive review of Indigenous peoples' past interactions in the international system, this thesis concludes, in chapter four, that Indigenous peoples are influential international lawmakers. Furthermore, an analysis of Indigenous peoples' involvement in the drafting process of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or Declaration)[2] reveals Indigenous peoples' influence on the provisions in the Declaration and its adoption. It also exemplifies Indigenous peoples' influence in shaping the development of international Indigenous rights law.

This chapter takes the conversation further by exploring the roles of Indigenous peoples as international lawmakers within the context of procedural environmental rights. Usually, Indigenous peoples are represented in the international sphere by communal groups, social movements, non-governmental organizations (NGOs) and international non-governmental organizations (INGOs), and they have gained much influence in international (human rights)

[1] James Anaya, *Indigenous Peoples in International Law*, 2nd ed, (Toronto: Oxford University Press, 2004) at 45-47 (Anaya, *Indigenous Peoples*).
[2] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).

lawmaking through these organizations. This thesis argues that, although Indigenous representatives have made significant contributions to international Indigenous rights law generally, an alternative structure that is more inclusive is required to address some of the shortcomings of the prevalent organizations and to promote Indigenous peoples' procedural environmental rights. This thesis does not recommend the discontinuation of the other social structures. They are established organizations that have advanced Indigenous peoples' cause and can coexist with this thesis' proposed Indigenous advocacy structure.

This chapter explores transnational Indigenous advocacy networks (TIANs), a variant of Keck and Sikkink's transnational advocacy networks (TANs), that will focus on promoting and protecting Indigenous rights. After examining the distinguishing features of TIANs, the chapter locates them in the norm life cycle, particularly to reveal their role as norm entrepreneurs and platforms to advance budding norms on the right of Indigenous peoples to participate and access information in environmental decision-making.

II. Indigenous Peoples as International Lawmakers

Generally, state actors are considered lawmakers in the international legal system. Orthodox positivists underscore the place of states as international lawmakers and stress the contrast between state and non-state actors in international politics. James Crawford argues that "the power structures within the international system are such that sovereignty and statehood remain the basic units of currency…International law works on the basis that the general consent or acceptance of states can create rules of general application."[3] Constructivists, for their part, recognize the

[3] James Crawford, *Brownlie's Principles of Public International* Law, 9th ed, (Great Britain: Oxford University Press, 2019) at 15, 18.

importance of non-state actors and their role in shaping international law.[4] In this regard, state interests and actions are shaped through socialization with other states and non-state actors within international normative structures.[5]

International law is a body of norms that regulate the relations between states. Primarily, international law focuses on the relationships between states. Therefore, states are the principal subjects of international law. However, international law has evolved to embrace other actors, such as businesses[6] and civil society organizations.[7] Civil society is a collective term for organizations and groups that are independent of governments and represent and promote the interests and concerns of their members and others. Civil society is different from states and for-profit organizations. The World Bank defines civil society organization as a "wide array of non-governmental and not-for-profit organizations that have a presence in public life and express the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations."[8] They include NGOs, social movements, advocacy groups, community groups and coalitions.[9] Different forms of civil society organizations have contributed to the advancement of Indigenous rights. Notably, social movements, NGOs, and

[4] Jutta Brunnee and Stephen Toope, "Constructivism and International Law" in Jeffrey Dunoff and Mark Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012) 119; Carmit Valensi, "Non-State Actors: A Theoretical Limitation in a Changing Middle East" (2015) 7:1 Military and Strategic Affairs 59 at 66.
[5] David Chandler, "The Constructivist Thesis" in David Chandler, ed, *Constructing Global Civil Society: Morality and Power in International Relations* (New York: Palgrave Macmillan, 2004) 25.
[6] See Robin Hansen, "The Public Policy Dimensions of MNE Legal Personality: Is It Time to Unveil the Masters of Globalization?" in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen, eds, *International Law in the New Age of Globalization* (Boston: Martinus Nijhoff Publishers, 2013) 241.
[7] Jochen von Bernstorff, "New Responses to the Legitimacy Crisis of International Institutions: The Role of 'Civil Society' and the Rise of the Principle of Participation of 'The Most Affected' in International Institutional Law" (2021) 32:1 European Journal of International Law 125.
[8] World Bank, "Consultations with Civil Society" (2007) Civil Society Team, World Bank, Source Book 1 at 1-2.
[9] World Health Organization, "Social Determinants of Health: Civil Society" (2021) online: <https://www.who.int/social_determinants/themes/civilsociety/en/>.

INGOs representing the Indigenous agenda shaped the development of international Indigenous rights law.

The acknowledgement of Indigenous peoples' status in the international system progressively created the path for their participation in international lawmaking. The assumption that states are the sole actors in international politics has been challenged by the rising influence of non-state actors in global affairs. The growing influence of non-state actors can be linked to globalization, the flow of capital and technology that have made disseminating information and actualizing non-state undertakings possible.[10] The easy flow of information (and misinformation) facilitates the global spread and imbibition of different narratives. "The atmosphere has changed the playing field for states and opened up the space for anyone who can create a competing narrative, a kind of information war."[11] International law has evolved so much that non-state actors are recognized as participants in the international legal system[12] and influential international lawmakers.[13]

Some non-state actors shaping international human rights law are Indigenous peoples and civil society organizations supporting Indigenous rights. The increasing influence of Indigenous activists in international lawmaking has been well documented in the literature.[14] As discussed in chapter four of this thesis, Indigenous peoples gained access to interact and participate in international politics through United Nations (UN) organizations. The UN Working Group on

[10] Daphné Josselin and William Wallace, "Non-State Actors in World Politics: The Lessons" in Daphné Josselin and William Wallace, eds, *Non-State Actors in World Politics* (London: Palgrave, 2001) at 251.
[11] Anne-Marie Balbi, "The Influence of Non-State Actors on Global Politics" (2016) Australian Institute of International Affairs 26 at 26-27.
[12] Cedric Ryngaert, "Non-State Actors: Carving Out a Space in A State-Centred International Legal System" (2016) 63 Netherlands International Law Review 183 at 187.
[13] Timothy Masiko and Mary Footer, "Law-Making by Non-State Actors" (2019) Oxford Bibliographies 1.
[14] For discussions on the influence of Indigenous advocates, see generally Shea Esterling, "Legitimacy, Participation and International Law-Making: Fixing the Restitution of Cultural Property to Indigenous Peoples" in Karen Scott et al, eds, *Changing Actors in International Law* (Netherlands: Brill, 2020) 158; Kristen Carpenter and Angela Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 Calif. L. Rev. 173.

Indigenous Populations of the Sub-Commission (WGIP) created an unprecedented avenue for Indigenous peoples to participate within the international system, thereby setting the standards for Indigenous participation in international politics.[15] Despite the provision of Article 18 of UNDRIP that affirms the right of Indigenous peoples "to participate in decision-making in matters which could affect their rights",[16] the roles of Indigenous peoples as international lawmakers in matters that affect them remain unclear.[17]

Essentially, Indigenous peoples do not possess the same level of international decision-making power as states but retain rights that allow them to participate in international politics to the extent of promoting and protecting their collective rights.[18] The international law standard requiring states to consult with Indigenous peoples "provides a particular focus of study removed from some of the more complex and controversial dimensions of self-determination."[19] Indigenous peoples exercise some elements of the right to self-determination at the international level by participating generally in international relations.[20] Through participation in international conferences, involvement in UN entities' processes and sessions,[21] and socialization with different actors, including civil society organizations,[22] Indigenous peoples influence the actions of other actors in

[15] See chapter four of this thesis.
[16] UNDRIP, *supra* note 3.
[17] Jordan Diamond, "The Role of Indigenous Peoples in Managing Offshore Arctic Resources" in Harry Scheiber, James Kraska and Moon-Sang Kwon, eds, *Science, Technology, and New Challenges to Ocean Law* (Leiden: Brill Nijhoff 2015) 345 at 347.
[18] James Phillips, "The Rights of Indigenous Peoples Unver International Law" (2015) 26:2 Global Bioethics 120.
[19] Dwight Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?" in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen, eds, *International Law in the New Age of Globalization* (Leiden: Nijhoff, 2013) 267 at 268.
[20] Timo Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re) Gain Their Right to Self-Determination (2008) 15:1 International Journal on Minority and Group Rights 1 at 15.
[21] Alexandra Xanthaki, "Indigenous Rights in International Law Over the Last 10 Years and Future Developments" (2009) 10 Melb. J. Int'l L. 27.
[22] See Anna-Mária Bíró and Corinne Lennox, "Introductory Study: Civil Society Actors and the International Protection Regime for Minorities" (2011) 18:2 International Journal on Minority and Group Rights 135.

international lawmaking, especially in the development and implementation of international Indigenous rights law.[23]

Indigenous peoples' involvement in the development of international law underscores the manifold phases in international lawmaking, including the development of shared values by norm entrepreneurs, dissemination of information, creation of organizational platforms, and persuasion of states.[24] Since the 1970s, Indigenous peoples have increasingly gained recognition and influence in international lawmaking through the support of social movements, transnational activists, intergovernmental organizations and NGOs.[25] Indigenous social movements and NGOs advocating for Indigenous rights strategically persuade international organizations to support their ideas and interests and provide institutional platforms for emerging Indigenous rights norms.[26] One of the approaches adopted by Indigenous social movements and NGOs in promoting international Indigenous rights is their collaboration with international human rights organizations.[27] UN bodies such as WGIP provided the platform for Indigenous advocates to socialize with other international actors, express their concerns and emphasize the need for an international instrument that protects their rights.

[23] Indigenous peoples' participation in matters that affect them is an important factor in the advancement of Indigenous rights. United Nations General Assembly, "Consent, Participation of Indigenous Peoples in Decisions Affecting Them Vital to Advancing Their Rights, Special Rapporteur Tells Third Committee" (12 October 2017) 3rd Committee, 72nd Session, GA/SHC/4203.
[24] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) International Organization 887. The role of Indigenous Peoples as norm entrepreneurs will be discussed later in this chapter.
[25] James Anaya, "Indigenous Peoples in International Law" (1997) *Cultural Survival Quarterly* 1.
[26] See generally Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010) chap. 3 & 4.
[27] One of the primary elements of twentieth-century international law are – "international institutions that represent the pragmatist approach and human rights law that represents the liberal approach." Balakrishnan Rajagopal, *International Law from Below: Development, Social Movement and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 293.

Indigenous activists participated in the processes of international structures that influence the development of international human rights law, such as the UN Permanent Forum on Indigenous Issues. Through advocacy before UN agencies, Indigenous activists and representatives revealed the marginalization, discrimination and human rights violations against Indigenous peoples and the need for international human rights standards that clearly confirm and protect their rights by taking into consideration their distinctiveness.[28] While Indigenous activists have influenced the development of international human rights norms through the support of social movements and NGOs, the next section of this chapter elaborates on a concept initiated in this thesis – transnational Indigenous advocacy networks. The literature has paid much attention to Indigenous peoples' transnational collaboration through other structures, such as social movements and INGOs, but this thesis turns the analysis to an inclusive and dynamic structure that can support the enduring and arduous undertaking of the development and implementation of Indigenous peoples' procedural environmental rights.

III. Transnational Indigenous Advocacy Networks

A body of international relations (IR) literature examines the activities of institutionalized civil societies in the global order.[29] As civil society organizations continue to gain ground in the international sphere, inter-organizational collaboration has emerged as a growing mechanism for enhancing their influence. The prevalence of the internet, social media, telephones and other communication technologies has increased the desirability of advocacy networking.[30] Advocacy

[28] Lillian Aponte Miranda, "Indigenous Peoples as International Lawmakers" (2010) 32: 1 University of Pennsylvania Journal of International Law 203 at 237.
[29] Examples include, Thomas Davies, ed, *Routledge Handbook of NGOs and International Relations* (New York: Routledge, 2019); Timothy Shaw, Sandra MacLean, and Maria Nzomo, "Going Beyond States and Markets to Civil Societies" in Thomas Lawton, James Rosenau, and Amy Verdun, eds, *Strange Power: Shaping the Parameters of International Relations and International Political Economy* (New York: Routledge, 2018) 413.
[30] Luis Hestres, "Tools Beyond Control: Social Media and the Work of Advocacy Organizations" (2017) 3:2 Social Media & Society 1.

networks are groups of individuals and organizations that have agreed to collaborate to share knowledge, expertise, and resources with the aim of achieving a collective objective. Networks are created based on a collective understanding of the networks' objective. The analysis of advocacy networks cuts across political science, law and other social sciences fields.[31]

Advocacy networks may operate within a state or transnationally, depending on the diversity and location of their membership. Even though the idea of transnational advocacy networks (TAN) emerged much earlier, Keck and Sikkink's prodigious work spurred academic inquiries into the concept.[32] Keck and Sikkink cite the campaign for the eradication of violence against women as an example of early manifestations and application of TANs by various networks of women's groups advocating for the eradication of violence against women.[33] Eradication of violence against women swiftly became a shared advocacy issue in different parts of the world, bringing several women's groups together across borders.

TAN has since become a popular organizational structure for promoting different shared ideas and for the collaboration of advocacy groups. For instance, the Nike workers' TAN was created to protest the labour practices of Nike's factories in Asia and sought to protect the rights of workers and promote better working conditions.[34] Furthermore, several TANs have emerged around environmental and human rights causes. Such TANs include the transnational mobilization against

[31] For an analysis of networks from the political science lens, see Michael Ward, Katherine Stovel, and Audrey Sacks, "Network Analysis and Political Science" (2011) 14 Annual Review of Political Science 245.
[32] Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca and London: Cornell University Press, 1998) (Keck and Sikkink, Activists Beyond Borders).
[33] *Ibid* at 165- 198.
[34] George Sage, "Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes" (1999) 16:3 Sociology of Sport Journal 206.

disaster in Rondônia,[35] the cyanide ban network in Central and Eastern Europe,[36] and the Cities for Climate Protection program, a network formed by 550 organizations to promote local initiatives for the mitigation of climate change.[37]

Since Keck and Sikkink's elucidation on TANs, several scholars have applied the concept to various social, political, and legal analyses.[38] The effectiveness of the structure and operational gaps of some TANs have also been explored in the literature.[39] This thesis extrapolates Keck and Sikkink's insights on TANs by modifying and adapting the concept within the context of Indigenous peoples' procedural environmental rights. It conceptualizes and analyzes transnational Indigenous advocacy through a concept referred to as transnational Indigenous advocacy networks (TIANs). This chapter of the thesis presents a distinct formulation of TIANs to address the shortfalls of other structures and ensure the successful development and implementation of the procedural environmental rights of Indigenous peoples.

Transnational collaborations among Indigenous groups are not new, but alliances among Indigenous groups across borders require "dense and constant information flows that characterize

[35] Maria Rodrigues, *Global Environmentalism and Local Politics: Transnational Advocacy Networks in Brazil, Ecuador, and India* (Albany: State University of New York Press, 2004) at 33 – 48.
[36] Alexandra-Maria Bocse, "Hybrid Transnational Advocacy Networks in Environmental Protection: Banning the Use of Cyanide in European Gold Mining" (2021) 21 International Environmental Agreements: Politics, Law and Economics 285.
[37] Michele Betstill and Harriet Bulkeley, "Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program" (2004) 48:2 International Studies Quarterly 471.
[38] For literature that apply the concept of TAN, see for example Jennifer Hadden and Lorien Jasny, "The Power of Peers: How Transnational Advocacy Networks Shape NGO Strategies on Climate Change" (2019) 49:2 British Journal of Political Science 637; Kemi Fuentes-George, *Between Preservation and Exploitation: Transnational Advocacy Networks and Conservation in Developing Countries* (Massachusetts: MIT Press, 2016).
[39] For scholarly analysis of the effectiveness of TANs, see for example Zeynep Kadirbeyoğlu, "Assessing the Efficacy of Transnational Advocacy Networks" in Fikret Adaman and Murat Arsel, eds, *Environmentalism in Turkey: Between Democracy and Development?* (New York: Routledge, 2016) 101; Alexandra-Maria Bocse, "Hybrid Transnational Advocacy Networks in Environmental Protection: Banning the Use of Cyanide in European Gold Mining" (2021) 21 International Environmental Agreements: Politics, Law and Economics 285.

modern networks."[40] TIANs, as developed and presented in this thesis, will hold distinct characteristics and operate differently from other forms of Indigenous organizations. Some organizations may possess some of the particularities of TIANs as presented in this thesis, but this thesis' analysis focuses on networks that embody the four-fold dynamics discussed below. TIANs fall beyond the borders of traditional classifications of Indigenous organizations, mainly because of the diversity of their constituents, their scope of operations, and advocacy tactics.

Unlike other transnational advocacy networks, the emergence of TIANs is not dependent on the "boomerang pattern"[41] triggered by domestic advocates reaching out to their international allies for assistance. As chapter four of this thesis discusses, Indigenous peoples have gained some level of influence in global affairs. Their impact during the UNDRIP drafting process exemplifies the role of Indigenous peoples as international actors, shaping international Indigenous rights law. This thesis introduces TIANs as an umbrella structure for those Indigenous organizations operating within the international sphere but with strong and sustainable connections to domestic Indigenous organizations. TIANs are proffered as aptly constituted networks that can ensure the realization of international standards at the national and local levels.

Keck and Sikkink describe TANs as "those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[42] However, TIANs' operations will not be limited to the international sphere but will cut across international and domestic domains, with a focus on the promotion and protection of

[40] Keck and Sikkink, Activists Beyond Borders, *supra* note 33 at 89. For the importance of strategic information flow among NGOs to influence international policy making, see Jonas Tallberg et al, "NGO Influence in International Organizations: Information, Access and Exchange" (2018) 48:1 British Journal of Political Science 213.
[41] Keck and Sikkink, Activists Beyond Borders, *supra* note 33 at 36.
[42] Margaret Keck and Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (1999) 51:159 International Social Science Journal 89 at 89 [emphasis added].

Indigenous peoples' rights. Essentially, TIANs are networks of Indigenous international advocates seeking to condense the divide between international and domestic Indigenous rights advocacy, formed under the shared principle of promoting and protecting Indigenous rights with fluid operations across international and domestic domains. TIANs, as introduced and analyzed in this thesis, are webs of Indigenous advocates drawn together by the shared idea of promoting and protecting the rights of Indigenous peoples through active involvement in international politics and domestic connections. They are structures for the meeting of different Indigenous rights advocates strategically employing information politics to shape and revolutionize international Indigenous rights practices and standards.

The four-fold distinguishing and interrelated components of TIANs modified and adapted for this thesis from Keck and Sikkink's insights on TANs are – sphere of operation, shared principled ideas, advocacy strategies, and information strategies. Although these four factors apply to TANs, they are applied differently to TIANs, and their practical implementations differ from what operates in TANs. As shown in this chapter, these characteristics differentiate TIANs from other Indigenous groups or organizations.

A. Sphere of Operation

As states and non-state actors interact within the global system, they shape the development and implementation of international law. Constructivist international relations (IR) theory explains that ideas and interests are not static but constructed through interactions between actors.[43] Civil groups, multinational corporations and individuals are some of the non-state actors engaging within the international order to protect their interests or values. Like other non-state actors,

[43] Ted Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23:1 International Security 171; Hoyoon Jung, "The Evolution of Social Constructivism in Political Science: Past and Present" (2019) 9:1 Sage Open 1.

Indigenous advocates endeavour to participate in global processes to shape policy development and implementation.

One of the contributions of this thesis is to highlight how the proposed structure, TIANs, can operate to inform the development and implementation of international Indigenous rights law. Aside from TIANs' focus on international actors and decision-makers, they must be well positioned to draw from both international and domestic sources. TIANs can condense the divide between domestic and international realms by imbibing flexible and unrestricted connections among their actors. This social structure negates the divide between transnational and domestic politics and emphasizes the significance of social interactions, values and norms.[44] Unlike the distinguishing elements of NGOs and INGOs, where some organizations are focused on domestic politics while others are involved in the international sphere, TIANs are designed to *target* international politics by engaging internationally and domestically. For instance, the social movements that represented Indigenous peoples' interests internationally during the development of UNDRIP emerged from domestic actors, but once the international structure was created, their domestic engagements diminished.

The success of TIANs depends on their level of influence both in the international and national spheres. A transnational advocate with local roots actively engages within the international sphere while connected, functional, and influential within the domestic arena.[45] Tarrow questions the idea of international advocacy without a domestic connection.[46] He argues that domestic advocacy is

[44] See Peter Willets, "The Voice of Which People? Transnational Advocacy Networks and Governance Networks at the United Nations" (2013) City University, London, Working Paper on Transnational Politics, CUTP010 1 at 11.
[45] Sarah Sargent, "Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights" (2012) 16:1 International Journal of Human Rights 123 at 129.
[46] Sidney Tarrow, "The Dualities of Transnational Contention: "Two Activist Solitudes" or A New World Altogether?", (2005) 10:1 Mobilization: An international Quarterly 53 at 57.

part of transnational advocates' strategy.[47] For Tarrow and della Porta, "the long-term impact of the current wave of transnational campaigns may not be so much through externalization and transnational coalition formation, but through the implosion of international issues into domestic politics through the multiple belongings and flexible identities of these rooted cosmopolitans."[48] Therefore, one of the significant factors in actualizing TIANs' objective of developing Indigenous peoples' procedural environmental rights is their international engagements with connection to domestic and international players.

There are international Indigenous rights organizations that have sustained partnerships with various local community groups across the globe. For instance, the International Work Group for Indigenous Affairs (IWGIA) collaborates with Indigenous and non-Indigenous groups on different continents. IWGIA affirms its reliance on information gathered from grassroots organizations in its Indigenous rights campaigns and in creating periodic reports about Indigenous communities' concerns and human rights challenges.[49] Additionally, Cultural Survival,[50] Forest Peoples Programme,[51] and Indigenous Environmental Network,[52] are examples of transnational Indigenous rights organizations that have established connections with Indigenous communities and tribal

[47] *Ibid* at 57 – 58.
[48] Sidney Tarrow and Donatella della Porta, "Conclusion: ""Globalization," Complex Internationalism, and Transnational Contention" in Sidney Tarrow and Donatella della Porta, eds, *Transnational Protest and Global Activism: People Passions and Power,* (Lanham: Rowman & Littlefield, 2005) 227 at 238. In comparison to transnational advocacy, see the concept of *rooted cosmopolitanism*. Stuart Taberner, "A Rooted Cosmopolitanism" in Stuart Taberner, ed, *Transnationalism and German-Language Literature in the Twenty-First Century* (Cham: Palgrave Macmillan, 2017) 233; Roy Todd, "Rooted Cosmopolitanism: Canada and the World" (2014) 27:2 British Journal of Canadian Studies 271.
[49] International Work Group on Indigenous Affairs (IWGIA), "IWGIA's Global Network" (2011) online: <https://www.iwgia.org/en/network.html>.
[50] Cultural Survival, "Advancing Indigenous Peoples' Rights & Cultures Worldwide" (2021) online: <https://www.culturalsurvival.org/>.
[51] Forest Peoples Programme, "Working with Forest Peoples to Secure Their Rights" online: <https://www.forestpeoples.org/>.
[52] Indigenous Environmental Network, "It Takes Roots" online: <https://www.ienearth.org/it-takes-roots/>.

governments to bring awareness to the issues affecting Indigenous peoples and promote Indigenous rights standards.

These organizations exemplify the importance of transnational Indigenous groups' collaboration with local communities, especially to gain access to firsthand information about the concerns of Indigenous communities. However, they differ from TIANs as their membership is restricted to Indigenous communities or groups. Therefore, they do not reflect the advocacy structure of TIANs, which is flexible and open to non-Indigenous allies. More so, while the sample organizations often collaborate with local Indigenous communities, they do not operate within the same organizational structure as proposed for the constituents of TIANs.

In recognition of the diversity of actors to be involved in TIANs, it is imperative to create a bridge between international and domestic actors with due recognition of their contributions and expertise in different realms. Generally, transnational activism implicates collaboration between domestic players and international allies, which sometimes results in the involvement of international civil organizations in domestic civil causes.[53] For TIANs, their component organizations will be engaged with partners beyond their national domains, on issues targeted at international players, while maintaining their grounds in particular national frameworks. Essentially, this thesis proffers that TIANs' member organizations work together on Indigenous rights issues at the international level with allies from other regions and levels while rooted, or engaged concurrently, with their domestic constituents or partners. The duality of spheres of operation is crucial for the transplantation of international Indigenous rights standards to national and local grassroots.

[53] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 3rd ed, (New York: Cambridge University Press, 2011) at 255 – 256.

TIANs have distinctive spheres of operation because, firstly, their members will interact across national boundaries and collaborate with allies across borders. Secondly, their objectives will not be limited to international causes. They are established to shape the development and implementation of international Indigenous rights policies. By forming assiduous webs spread across the world, TIANs will be well positioned to spur and sustain "interactions among an imagined community to shape collective life that are not confined to their territorial and institutional space of states."[54] TIANs are recommended structures for connecting the political actions of different organizations promoting Indigenous interests beyond national territorial confinement. They are projected to operate on a larger scale compared to Indigenous communal or national organizations.

TIANs are envisioned to have global and cross-cultural membership, and sometimes, leadership. Considering the probable diversity of membership, the leadership of TIANs must create bridges to connect members, take up the role of an intermediary, and develop the required skills to communicate and manage multicultural and professionally diverse groups.[55] Despite the diversity of Indigenous cultures and advocacy strategies, TIANs must strive toward creating an umbrella body to express and align their members' international and domestic interests and strategies. A unifying factor in this instance is the commitment to the shared principled ideas held by the constituents of TIANs.

[54] Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52:3 International Organization 613 at 615.

[55] For suggestions about the leadership of TANs, see Cristina Balboa, "How Successful Transnational Non-Governmental Organizations Set Themselves Up for Failure on the Ground" (2014) 54 World Development 273 at 276.

B. Shared Principled Ideas

Keck and Sikkink explain that TANs are distinct from other civil organizations because of the "centrality of principled ideas or values in motivating their formation… Ideas that specify criteria for determining whether actions are right or wrong and whether outcomes are just or unjust are shared principled beliefs or values."[56] Likewise, TIANs are developed and must operate on the underlying and shared principled idea that the rights of Indigenous peoples should be protected and promoted in international law. TIANs' objectives should support Indigenous causes and promote Indigenous rights norms. This shared value should invigorate members of TIANs and represent the unifying thread among the diverse actors. As applied in this thesis, the relevant shared principled idea of TIANs in this context is the development and implementation of the procedural environmental rights of Indigenous peoples.

Shared principled ideas held by TIANs will distinguish them from organizations such as governance networks. Aside from their status as NGOs and their belief in the right to political participation,[57] governance networks are open to diverse values and ideas. Conversely, the uniting elements for TIANs are their shared values and common discourse about upholding Indigenous rights. This differentiating factor of TIANs aligns with two of the principal tenets of constructivism – "that the structures of human association are determined primarily by shared ideas rather than material forces, and that the interests of purposive actors are constructed by these shared ideas rather than given by nature."[58] Some of the identified kinds of ideas include ideological ideas and normative ideas.[59] The shared ideas of TIANs would be normative or principled ideas "about right

[56] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 32, at 1.
[57] Peter Willets, "The Voice of Which People? Transnational Advocacy Networks and Governance Networks at the United Nations" (2013) City University, London, Working Paper on Transnational Politics, CUTP010 1 at 18.
[58] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 1.
[59] Nina Tannenwald, "Ideas and Explanation: Advancing the Theoretical Agenda" (2005) 7:2 Journal of Cold War Studies 13 at 14 – 15.

or wrong. They consist of values and attitudes that specify criteria for distinguishing right from wrong or just from unjust, and they imply associated standards of behaviour."[60]

The shared normative ideas of TIANs must be ingrained in international Indigenous rights law, and their common discourse established on these principles – right to self-determination, collective rights, right to equality and non-discrimination, and economic, social, and cultural rights.[61] Intersubjective beliefs shared among people, and institutionalized ideas that have been normalized through practices about the rights of Indigenous peoples will motivate players in TIANs to be dedicated to the networks' values and goals.[62] The inspiration for the constituents of TIANs will depend on their passionate and intellectual commitment to the shared principled ideas of their network.

Various kinds of Indigenous groups work on the premise of the above-mentioned Indigenous rights principles, but some may focus on particular aspects of Indigenous issues while others are receptive to any subject that impacts Indigenous peoples. For example, the Saami Council is an Indigenous NGO made up of four organizations with the objective of promoting Saami interests and rights.[63] Coalition for the Human Rights of Indigenous Peoples (CHRIP) is a human rights organization that focuses on the complete implementation of UNDRIP.[64] The Saami Council and CHRIP are examples of Indigenous organizations involved in several Indigenous issues, focusing on specific groups or international law instruments. On the other hand, Indigenous Environmental

[60] *Ibid* at 16.
[61] See chapter two of this thesis for detailed discussion of international law on the rights of Indigenous peoples.
[62] Intersubjective ideas and institutionalized ideas cannot be reduced to individual ideas. Therefore, the ideas that shape international relations are beyond individual beliefs. For an idea to inform global order, it must be shared widely among people. For example, the idea that Indigenous peoples are equal to other members of society is a widely shared idea. For more discussion on social construction, see Ian Hurd, "Constructivism" in Christian Reus-Smit and Duncan Snidal, eds, *The Oxford Handbook of International Relations* (Oxford: OUP Oxford, 2009) 298 at 300-302.
[63] Saami Council, "About the Saami Council" online: <https://www.saamicouncil.net/en/the-saami-council>.
[64] Coalition for the Human Rights of Indigenous Peoples, "The Coalition" online: <https://www.declarationcoalition.com/coalition>.

Network and Land Rights Now are receptive to various issues that impact Indigenous peoples. They are tasked with promoting economic justice, environmental issues, and Indigenous land rights, respectively.[65]

Generally, advocacy networks are receptive to issues that implicate principled ideas.[66] That is, ideas about what is right or wrong, and what is just and unjust. Such issues are sensitive, stir reactions, and draw volunteers and advocates to the networks.[67] Keck and Sikkink identify two issues that TANs often engage in – those that respond to normative logic and those that respond to juridical and institutional logic.[68] Firstly, issues of normative logic are those relating to the infliction of bodily harm to vulnerable persons or groups. The success of activities of normative logic depends on the "causal story" that links the issue in question to a particular person or organization.[69] The public and actors in the advocacy networks must clearly pin the fault of the challenges besetting an individual or a group on a particular actor. For instance, two TANs advocated for the accountability of corporations involved in the human rights violations committed during the former Argentinean dictatorship and the existing Cambodian armed conflict.[70] Indigenous Environmental Network links climate change to extractive corporations' activities to target those businesses.[71] With a target that is easily identifiable and connected to the calamities of a group of people, advocacy networks can easily garner the sympathy and support of their members.

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[65] Human Rights Careers, "15 Indigenous Human Rights Organizations to Follow" online: <https://www.humanrightscareers.com/issues/indigenous-human-rights-organizations/>.
[66] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 32 at 26.
[67] *Ibid*.
[68] *Ibid* at 27.
[69] *Ibid*.
[70] Raluca Grosescu, "Transnational Advocacy Networks and Corporate Accountability for Gross Human Rights Violations in Argentina and Colombia" (2019) 33:3 Global Society 400.
[71] Indigenous Environmental Network, "Indigenous Principles of Just Transition" online: <https://www.ienearth.org/justtransition/>.

Secondly, issues of institutional logic relate to legal equality of opportunity.[72] Advocacy networks tend to initiate and support campaigns against legal mechanisms that deny or restrict a group's equality of opportunity. Advocacy networks identify laws or policies that discriminate against a group of people and promote the principle of equality in light of such discriminatory standards. For instance, Indigenous advocates fought against several federal and provincial laws that discriminated against Indigenous peoples in Canada, including property and electoral laws.[73] The targets of institutional logic advocacy are usually governments and policymakers.

While Keck and Sikkink present the shared principled ideas adopted by TANs as an act of benevolence with selfless motive,[74] Carpenter argues that "organizational survival" and "normative concerns" have equal weights when TANs consider their issues of focus.[75] For TIANs, their normative issues and continued existence are essential but do not have equal weight. The intended members of TIANs are *advocates* that may not directly benefit from the course of their network. Hence, the network's survival is not of the same importance to such organizations compared to the shared principled ideas that propelled their establishment. Regardless, the longevity of TIANs will depend on their ability to achieve their goals, and the realization of their goals depends on how they can establish collaboration and productive relationships among their members and sustain their members' interests and support. Although organizational survival may influence the choice of advocacy issues for TIANs, they should not have the same weight as normative concerns.

[72] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 32 at 27.
[73] Wendy Moss and Elaine Gardner-O'Toole, "Aboriginal People: History of Discriminatory Laws" (1992) Library of Parliament, Research Branch BP-175E.
[74] Keck and Sikkink, *Activists Beyond Borders*, *supra* note 32 at 8-9.
[75] Charli Carpenter, "Studying Issue (Non-) Adoption in Transnational Advocacy Networks" (2007) 61:3 International Organization 643 at 663.

In addition to the shared principled ideas binding the membership of TIANs, they can influence other international actors through the strategic dissemination of information. TIANs would not only have shared principled ideas, but their members must work together "to promote causes, principled ideas, and norms"[76] that align with their shared principled ideas. Essentially, TIANs are created with the shared principle that Indigenous peoples have inherent rights and are entitled to the full enjoyment of their rights, including self-determination, socio-economic and political rights, and they can achieve this common objective through a strategic advocacy approach.

C. Advocacy Approach

The principal strategies of TIANs are their *network* of *advocates* and information politics. Networked advocacy is not a novel organizational approach, but it significantly gained much popularity in the 20th century due to the widespread accessibility of telecommunications and the internet. In addition, the thriving information technology sector has helped reduce the financial and administrative burden of activists communicating across borders. First, I discuss the advocacy network strategy and later explore how TIANs can strategically use information as a weapon of influence. Keck and Sikkink explain the idea of advocacy networks thus:

> We call them advocacy networks because advocates plead the causes of others or defend a cause or proposition; they are stand-ins for persons or ideas. Advocacy captures what is unique about these transnational networks – they are organized to promote causes, principled ideas and norms, and often involve individuals advocating policy changes that cannot be easily linked to their interest.[77]

Advocacy by "outsiders" is a factor that distinguishes TIANs from other forms of Indigenous civil organizations, such as Indigenous social movements that are formed on the shared identities and common historical experiences of the members. For instance, Indigenous international movements

[76] Keck and Sikkink, Activists Beyond Borders, *supra* note 32 at 9.
[77] Margaret Keck and Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (1999) 51 International Social Science Journal 89 at 91.

were formed by Indigenous groups from different parts of the world, drawn together by their shared colonial history and struggle to defeat colonial systems. While some other forms of Indigenous civil organizations stress the significance of identity and common historical experiences, diversity will be an asset for TIANs.

Indigenous groups are progressively welcoming the idea of including non-Indigenous individuals or organizations in their membership or creating advocacy organizations with their allies. Particularly, Indigenous peoples form partnerships with environmental advocates to protect Indigenous interests in environmental campaigns and governance.[78] For instance, fifteen First Nations leaders and representatives of Canada's environmental NGOs had a series of workshops and developed a "Solutions Bundle Dialogue" to foster relationships and collaborations between Indigenous and environmental advocates.[79]

Furthermore, Idle No More, a grassroots protest movement among Canada's Indigenous peoples, was founded by three First Nations women and a non-Indigenous ally.[80] Idle No More is an example of inclusive Indigenous organizations collaborating with non-Indigenous partners to support Indigenous rights. The Idle No More movement emerged in response to Bill C-45, which the activists claim weakens environmental protection laws. The movement opposes specific types of resource exploitation in First Nations territories and swiftly became popular, even beyond Canadian shores. Within weeks of the movement's initiation, Idle No More motivated solidarity protests in several countries, including the United States of America, Germany, and New

[78] Merran Smith and Art Sterritt, "Towards a Shared Vision: Lessons Learned from Collaboration between First Nations and Environmental Organizations to Protect the Great Bear Rainforest and Coastal First Nations" in Lynne Davis, ed, *Alliances: Re/Envisioning Indigenous-Non-Indigenous Relationships* (Toronto: University of Toronto Press, 2010) 131.
[79] Conservation Through Reconciliation Partnership, "Environmental NGOs & IPCAs: A Solution Bundle Dialogue" (April 2019) online: <https://conservation-reconciliation.ca/dialogues/engos-ipcas>.
[80] Idle No More, "About the Movement: An Indigenous-Led Social Movement" online: <https://idlenomore.ca/about-the-movement/>.

Zealand.[81] On the movement's fifth anniversary, one of Idle No More's founders, and the only non-Indigenous founder, Sheelah McLean, commented that the movement rapidly became popular and powerful because everyone was involved, but "there could have been more work on the part of white settlers and non-Indigenous people to get involved with the movement."[82]

Indigenous rights organizations are increasingly recognizing the benefits of collaborating with non-Indigenous allies and have shown willingness to do so. However, the roles of different members or composite organizations must be clearly defined to avoid drawbacks or sidelining some members. Tarrow and della Porta underscore the importance of the multiplicity of actors in contemporary advocacy efforts thus:

> If past movements stressed equality understood as "communities of equals" – activists in contemporary transnational mobilization stress diversity as a positive asset for collective actors. Concrete common campaigns are perceived not only as built upon a minimal common denominator, but as the basis for the development of a shared understanding of the external reality. Notwithstanding multiple belongings, activists stress the important role of "subjectivity" and individual involvement. Identification with global causes does not exclude other types of identifications.[83]

TIANs, as proposed in this thesis, must be flexible and unrestricted to advocates that do not have connections to any Indigenous community or share the cruel historical experiences of Indigenous peoples. Additionally, they must recognize the significant and diverse contributions of different actors. In this era of globalization and profusion of telecommunications and internet access,

[81] Tim Groves, "Idle No More Events in 2012: Events Spreading across Canada and the World" (27 December 2012) *Media Co-op*, online: <http://www.mediacoop.ca/story/idle-no-more-map-events-spreading-across-canada-an/15320>.
[82] Lenard Monkman and Brandi Morin, "5 Years After Idle No More, Founders Still Speaking Out" (11 December 2017) *CBC News,* online: <https://www.cbc.ca/news/indigenous/idle-no-more-five-years-1.4436474>.
[83] Sidney Tarrow and Donatella della Porta, "Conclusion: "Globalization," Complex Internationalism, and Transnational Contention" in Sidney Tarrow and Donatella della Porta, eds, *Transnational Protest and Global Activism: People Passions and Power* (Lanham: Rowman & Littlefield, 2005) 227 at 239 – 240.

tapping from the resources and expertise of various constituents is most conducive.[84] The thriving contemporary information communication technology (ICT) system is an essential asset for human rights networks and a tool for countering social, cultural, economic, and political inequalities.[85] Indigenous peoples have taken advantage of the ICT system to collaborate across territorial boundaries in the past. They communicate and coordinate across borders to further human rights campaigns, sometimes with the support of NGOs.[86]

However, these networks are often composed of, organized and operated by Indigenous representatives or organizations. Indigenous identity is usually a prerequisite for membership in many existing Indigenous networks. Non-Indigenous NGOs may support the work of Indigenous networks through the provision of funds and other resources, but they may not be recognized as part of the networks. For instance, in recognition of the contributions of "mainstream" NGOs to Indigenous issues, Aboriginal Peak Organisations Northern Territory developed NGO Partnership Principles to guide the "partnership-centred approach" between the Indigenous organizations and mainstream NGOs.[87] This is an example of Indigenous organizations collaborating with non-Indigenous NGOs through partnership without opening their membership to non-Indigenous individuals or groups. Indigenous communities and their representatives often form organizations or movements that are exclusively open to Indigenous peoples or groups.[88] Carey and Lydon

[84]Derrick Cogburn, *Transnational Advocacy Networks in the Information Society: Partners or Pawns?* (New York: Palgrave Macmillan, 2017) 30.
[85] Jorge Garcia, Ramiro Jordan, and David Lujan, "Transnational Networks: An Approach to Support the Human Rights of Indigenous Peoples to Create Social, Economic, and Cultural Development" (2006) 9th International Conference on Engineering Education, Session R4G.
[86] Sarah Radcliffe, Nina Laurie, and Robert Andolina, "Development, Transnational Networks, and Indigenous Politics" in Robert Andolina, Nina Laurie, and Sarah Radcliffe, eds, *Indigenous Development in the Andes: Cultures, Power, and Transnationalism* (Durham: Duke University Press, 2009) 23.
[87] Aboriginal Peak Organisations Northern Territory, "Background: NGO Partnership Principles" (2013) online: <http://www.amsant.org.au/apont/background-ngo-partnership-principles-2/>.
[88] For discussion about Indigenous groups' collaboration with external organizations, see Jane Carey and Jane Lydon, eds, *Indigenous Networks: Mobility, Connections and Exchange* (New York: Routledge, 2014).

explain that those who belong in Indigenous networks are "people who were historically dispossessed of their lands, territories and resources and for whom there is no clear postcolonial future because the settlers came to stay."[89]

Contrariwise, the unifying factor for players within TIANs would be the participants' shared principled ideas and not the common historical background. However, organizations and individuals forming TIANs must be conversant with Indigenous issues and have similar opinions about Indigenous rights protection. They ought to have a profound understanding of Indigenous communities' struggles and be willing to support Indigenous agendas at the international level. The constituents should be webs of individuals and organizations brought together under the umbrella of TIANs with endorsed tactics for political actions to further protect and promote Indigenous peoples' rights. Some of the players in TIANs may include Indigenous groups and non-Indigenous allies, including mainstream NGOs, academic organizations, philanthropic foundations, professional institutions, environmental advocates and religious organizations. TIANs are designed to be dynamic and open structures that can integrate different actors subject to their agreement and commitment to the shared principled idea of protecting and promoting Indigenous peoples' rights.

The different constituents of TIANs should operate at equivalent levels without hierarchies because the networks are "relatively flat organizational forms that are based upon trust, cooperation, loyalty and reciprocity between constituent parts."[90] Despite the multiplicity of players anticipated in the TIANs, a common denominator is the recognition of common interest.

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[89] Jane Carey and Jane Lydon, "Introduction: Indigenous Networks – Historical Trajectories and Contemporary Connections" in Jane Carey and Jane Lydon, eds, Indigenous Networks: Mobility, Connections and Exchange (New York: Routledge, 2014) 1 at 15.

[90] Alan Hudson, "NGOs' Transnational Advocacy Networks: From 'Legitimacy' To 'Political Responsibility'?" (2002) 1:4 Global Networks 331 at 336.

The success of TIANs depends on the ability of the initiator to incite the entrenched ideas and sentiments of the constituents. For the constituents of TIANs, their aim should be to contend for the interests of the Indigenous peoples in the international and domestic domain before decision-makers and other actors that impact or influence the enjoyment of Indigenous peoples' rights, such as extractive corporations. Their participation in TIANs will be propelled by their intention to shape international Indigenous rights law, support a broadly acknowledged principle within domestic or international law, support the implementation of international Indigenous rights standards locally, share their expertise with others, and gain support from other advocates.

D. Information Strategy

As adapted in this thesis, one of the distinguishing characteristics of TIANs is their strategic use of information to promote their cause. Like other civil organizations operating internationally, TIANs are designed to inform international politics through the strategic collation and dissemination of information. Keck and Sikkink identify four strategies used by TANs to persuade and pressure state actors – information politics, symbolic politics, leverage politics, and accountability politics.[91] In this era of easy dissemination of information, activists understand the significance of gathering and broadcasting information that is not readily accessible or apparent to the global audience. As Keck and Sikkink note, "the construction of cognitive frames is an essential component of networks' political strategies."[92] Some of the tasks of TIANs would be to seek information about Indigenous struggles, frame the information in a meaningful and understandable context, and externalize the information in the international sphere. Aside from the

[91] These tactics are examined in chapter one of this thesis under the discussion about Transnational Advocacy Networks.
[92] Keck and Sikkink, Activists Beyond Borders, *supra* note 32 at 17.

tactical framing of information, TIANs can seek a suitable venue that is most receptive to their claims.

Firstly, TIANs can produce credible information and present such information where it will have a significant political impact. For instance, one of the aspects of Indigenous storytelling centers on their historical experiences and political beliefs. Indigenous storytelling is an act of resistance through the cultural dissemination of information.[93] Several Indigenous organizations have weaponized information to influence international policies.[94] TIANs can provide information about Indigenous communities' social, economic, political, and environmental challenges during natural resource extraction projects that would not otherwise be available to the international community. Considering the envisaged domestic connections of TIANs, the expertise of some of the constituents, and their international information-sharing practices, TIANs would be sources of credible information about the realities of Indigenous communities in the international sphere, especially regarding their environmental challenges during extractive projects.

One of the expectations for TIANs is to investigate issues in Indigenous communities and report the facts in a compelling way. The issues need to be well-timed and presented to draw public sympathy and reaction from policymakers. TIANs could also bring attention to best practices to encourage and reinforce positive and impactful responses to Indigenous issues. Barelli argues that Indigenous peoples presented their claims to the international community by linking the issues to human suffering, which had a profound moral force, and highlighted the "gravity and urgency" of

[93] James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21 Ariz. J. Int'l & Comp. L. 13; Adrienne Chan, "Storytelling, Culture, and Indigenous Methodology" in Alan Bainbridge, Laura Formenti, and Linden West, eds, *Discourses, Dialogue and Diversity in Biographical Research* (Leiden: Brill, 2021) 170.
[94] Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007) chapter 2.

states' response to Indigenous issues.[95] "Testimonial, technical, and statistical information"[96] are broadcasted and sometimes presented before international bodies to seek Indigenous policy creation or changes. TIANs need the media as a crucial ally as they help propagate the findings of TIANs and attract a far-reaching audience.

Indigenous representatives have used information as a tool for policy reform in the past. Indeed, the UN recognizes the role of NGOs as experts and representatives of the opinions of the public. Through the investigative works of TIANs and the human resources of participating experts and Indigenous organizations, TIANs can become experts representing the views of Indigenous peoples. With the diversity of their constituents and the leverage of information and resource sharing among members, TIANs can influence international Indigenous rights law through the methodical framing and dissemination of information within the international system.

Secondly, TIANs can "leverage" state actors and other influential international actors through "mobilization of shame".[97] In light of the wide acceptance of the UNDRIP and states' commitment to affirm and protect the rights of Indigenous peoples, TIANs are well situated to persuade states to fulfil their commitments by holding them accountable. Through periodic scrutiny and exposure of states failing to act on their commitments, TIANs will publicly discredit defaulting governments. For instance, the North American Indigenous Caucus raised issues regarding states' inadequate implementation of the UNDRIP before the UN Permanent Forum on Indigenous

[95] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge, 2016) at 119.
[96] Keck and Sikkink, Activists Beyond Borders, *supra* note 32 at 21.
[97] Keck and Sikkink, Activists Beyond Borders, *supra* note 32 at 23.

Issues.[98] Minority Rights Group International,[99] Amazon Watch,[100] and Survival International,[101] also publish reports, produce films and lobby those in power to support compliance with Indigenous rights standards and foster accountability. Additionally, Indigenous organizations such as the IWGIA release periodic reports on the human rights struggles of Indigenous peoples in different parts of the world and call out governments that fail to promote and protect Indigenous peoples' rights.[102]

Such reports may impact the reputation of states cited as lagging in implementing Indigenous rights standards. Reputation chastisement has different implications for states. For states that revere their human rights reputation, leverage politics is more effective.[103] States with poor international human rights reputations may not be propelled to take positive actions, but they risk international retribution from other states.[104] TIANs may publicize governments' non-compliance

[98] North American Indigenous Caucus, "Compilation of Issues Raised and Recommendations Advanced by the North American Indigenous Caucus to The United Nations Permanent Forum on Indigenous Issues Between 2008-2012 In Connection with Implementation of the United Nations Declaration on the Rights of Indigenous Peoples" (2012) online: <https://www.afn.ca/uploads/files/northamericancaucus_issues_presented_to_unpfii.pdf>.
[99] Minority Rights Group International, "What We Do" online: <https://minorityrights.org/programmes/>.
[100] Amazon Watch, "Protecting the Amazon and Our Climate by Supporting Indigenous Peoples" <https://amazonwatch.org/work>.
[101] Survival International, "How We Work" online: <https://www.survivalinternational.org/whatwedo>.
[102] International Work Group on Indigenous Affairs (IWGIA), "The Indigenous World: Global Reports on the Rights of Indigenous Peoples" online: <https://www.iwgia.org/en/resources>. See generally, Jackson Smith and Terry Mitchell, "Development of an UNDRIP Compliance Assessment Tool: How a Performance Framework Could Improve State Compliance" (2020) 11:2 International Indigenous Policy Journal 1. The UN also assess compliance with international Indigenous standards and their reports can have impact on the human rights status of states. For instance, James Anaya's report about Canada's Indigenous peoples' human rights situation revealed that Canada was behind in promoting the social, economic and cultural rights of Indigenous peoples. United Nations Human Rights Council, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in Canada" (4 July 2014) UNHRC 27th Session, A/HRC/27/52/Add.2.
[103] For an analysis of how states develop their human rights identity, see Claudia Fuentes-Julio, "Norm Entrepreneurs in Foreign Policy: How Chile Became an International Human Rights Promoter" (2020) 19:2 Journal of Human Rights 256.
[104] Thomas Risse and Stephen Ropp, "Introduction and Overview" in Thomas Risse and Stephen Ropp, eds, *The Persistent Power of Human Rights: Cambridge Studies in International Relations* (Cambridge: Cambridge University Press, 2013) 3 at 17.

with international Indigenous rights standards to attract support from the international community in an attempt to coerce the target government's conformity.[105]

Thirdly, TIANs can use the tactic of disseminating information and explaining symbolic events that impact Indigenous communities. Keck and Sikkink refer to this tactic as "symbolic interpretation."[106] TIANs can report and provide explanations on pertinent events in Indigenous communities in a way that links them to the human rights, environmental, economic, social, and cultural challenges of Indigenous communities. Such reports are presented to provoke reactions from the public and the international community. For instance, the Coalition for the Human Rights of Indigenous Peoples linked the high transmission rate of the COVID-19 virus within Indigenous communities to the lack of essential services within these communities.[107] In response to such reports about the disparate impact of the pandemic on Indigenous communities, the Chair of the UN Permanent Forum on Indigenous Issues implored states and the international community to prioritize the needs of Indigenous communities in addressing the COVID-19 pandemic.[108]

As the international system responds to Indigenous concerns and takes steps to affirm the rights of Indigenous peoples, the transplantation of international standards to the domestic sphere remains a challenge. The conceptualization of TIANs in this thesis underscores a distinct form of Indigenous civil collaboration characterized by the multi-jurisdictional involvement of players, reception of Indigenous and non-Indigenous constituents, and the strategic use and publicity of information in support of a shared principled idea – the promotion and protection of Indigenous

[105] For more on the politics of leverage in the international system, see Faradj Koliev, "The Politics of Leverage in International Relations: Name, Shame, and Sanction" (2015) 91:5 International Affairs 1168.
[106] Keck and Sikkink, Activists Beyond Borders, *supra* note 32 at 22.
[107] Lucy Scholey, "Indigenous Peoples' Rights Must Be Respected During COVID-19" (15 April 2020) *Amnesty International*, online: <https://www.amnesty.ca/news/indigenous-peoples%E2%80%99-rights-must-be-respected-during-covid-19>.
[108] Anne Nuorgam, "COVID-19 and Indigenous Peoples" (April 2020) Statement by the Chair of the United Nations Permanent Forum on Indigenous Issues, UNDESA Report, 1.

rights. The operations of TIANs, as envisioned in this thesis, align with the fundamental assumptions of constructivist IR theory – the significance of normative or ideational structures, the impact of shared ideas on actors' interests and actions, and the social construction of international politics.[109] Through shared ideas, TIANs will define their constituents' actions and engage in international politics to promote their shared ideas and shape the behaviour of other actors.

Different civil society organizations are involved in international politics. Indigenous civil organizations have also played significant roles in shaping international human rights law. Although this thesis reveals some shortcomings of social movements and INGOs, it does not suggest that these two mechanisms should be discontinued. They are longstanding organizations that have contributed immensely to international Indigenous rights law, and they can coexist with, or under the umbrella of, the proposed TIANs. TIANs are recommended as inclusive and apposite alternative structures for developing and implementing Indigenous peoples' procedural environmental rights.

This thesis proposes a form of Indigenous networking that is not restricted to Indigenous peoples but is open to *advocates* with a common or related commitment to Indigenous issues. Additionally, this thesis calls attention to a fluid and adaptive sphere of operation for Indigenous networks with concurrent influence and operations in domestic and international arenas. This form of networking creates an ideal platform for creating and sharing information and resources. With readily accessible intellectual players and other constituents with material resources, TIANs can rely on their munificent members to support their shared principled ideas. The concept of TIANs presented

[109] Christian Reus-Smit, "Constructivism" in Scott Burchill et al, eds, *Theories of International Relations* (New York: Palgrave Macmillan, 2005) 188.

in this thesis offers a comprehensive, flexible, and resourceful platform for the collaboration of Indigenous rights advocates.

IV. Locating TIANs in the Norm Life Cycle

The term "norm" is a ubiquitous concept in international relations scholarship, and different scholars apply it in explaining actors' actions at various levels of policymaking. Like other social constructs, international norms have received considerable scholarly attention with diverse meanings and applications.[110] International norms are "generalized standards of behaviour that embody collective expectations about what is appropriate in a given situation."[111] There is no generally accepted definition or common application of the term, but norms are commonly referred to as generally accepted societal standards and internalized values.[112] This thesis focuses on international legal norms that prescribe the principles for appropriate actions. Romaniuk and Grice explain that:

> The web of expectations created by norms guide behaviour; even in the absence of centralized mechanisms to enforce compliance…norms take on a life of their own rather than being perceived of as fixed or concretizing elements, they are standards that are constantly in flux, changing and evolving over time and in relation to other norms and other events unfolding at various points in time and places in the world. *Norms* possess considerable power and potential for channelling and regularizing behaviour; they often limit the range of choice and constrain actions.[113]

[110] For more description of international norms, see Ciaran O'Faircheallaigh, "IR Theory and Domestic Adoption of International Norms" (2014) 51:2 International Politics 155; Renee De Nevers, "Imposing International Norms: Great Powers and Norm Enforcement" (2007) 9:1 International Studies Review 53.
[111] Gregory Raymond, "International Norms" in Gregory Raymond, ed, *International Norms and the Resort to War* (Cham: Palgrave Macmillan, 2020) at 23.
[112] Christine Horne and Stefanie Mollborn, "Norms: An Integrated Framework" (2020) 46 Annual Review of Sociology 467.
[113] Scott Romaniuk and Francis Grice, "Norm Evolution Theory and World Politics" (2018) E-International Relations 1.

Constructivist IR scholars have established the importance and implications of norms in global politics. They clarify that international norms have dissimilar impacts on different actors.[114] In an attempt to capture and explicate the diverse ways actors react to norms, Finnemore and Sikkink developed a perspective on the life cycle of norms. The norm life cycle theory explains the different stages of norm development and the ideational changes that occur during "norm emergence, norm acceptance, and norm internalization."[115] Given the significant roles of different players at the different stages of norm development, the norm life cycle theory expounds on the implications of actors' social engagements and how such engagements shape actors' identities, interests, and actions. Though the major actors during norm emergence are norm entrepreneurs with organizational platforms, advocacy networks are identified players during norm cascading.[116] TIANs will be suitable actors at both stages of norm development. However, this thesis focuses on the role of TIANs as norm entrepreneurs because the international legal norm on the right to participation and access to information of Indigenous peoples in environmental matters is still at the first stage of the norm life cycle – the norm has not been widely "institutionalized in specific sets of international rules and organizations,"[117] and domestic pressure is still being asserted for the procedural environmental rights of Indigenous peoples to be respected.

Finnemore and Sikkink identify two factors required in the development of new norms – "norm entrepreneurs and organizational platforms from which entrepreneurs act."[118] Norm entrepreneurs, such as the constituents of TIANs, are policy innovators, norm initiators, and idea architects

[114] Matthew Hoffmann, "Norms and Social Constructivism in International Relations" (2010) Oxford Research Encyclopedia of International Studies 1; Hoyoon Jung, "The Evolution of Social Constructivism in Political Science: Past and Present" (2019) 9:1 Sage Open 1 at 5.
[115] Finnemore & Sikkink, International Norm, *supra* note 24.
[116] *Ibid* at 899 and 902.
[117] *Ibid* 900.
[118] *Ibid* at 896.

working to instigate and promote new norms. They are individuals, organizations, or networks introducing new ideas into global politics. Norm entrepreneurs are agents of social revolution with an ardent commitment to a specific idea.[119] TIANs' membership organizations or groups will be norm entrepreneurs established to *persuade* other actors to change their behaviour and align their actions to support the Indigenous rights agenda. TIANs can advocate for auspicious and progressive Indigenous rights standards because they are discontented with the unpleasant realities of Indigenous communities.

As organizational platforms for norm entrepreneurs, TIANs will apply information politics to call attention to the human rights challenges of Indigenous communities and interpret and broadcast symbolic events in a way that draws public attention. As conceived in this thesis, TIANs can frame cognitive ideas in simple terms that easily resonate with different actors. Like other norm entrepreneurs, the motivation for the constituent members of TIANs includes "altruism, empathy, and commitment"[120] to Indigenous rights causes. Considering that some of the constituents of TIANs will be advocates that may not directly benefit from their network's undertakings, they will be driven by a selfless and resilient commitment to Indigenous rights causes.

TIANs are fundamentally organizational platforms for promoting new norms. Generally, NGOs and social movements are valuable platforms for international actors to introduce norms. The success of TIANs constituents' norm entrepreneurship will depend on their ability to persuade or pressure state actors to approve of the norm. Hence, they are involved in the emergence and

[119] Carmen Wunderlich, "Dedicated to the Good: Norm Entrepreneurs in International Relations" in Carmen Wunderch, ed, *Rogue States as Norm Entrepreneurs: Black Sheep or Sheep in Wolves' Clothing?* (Cham: Springer, 2020) 15 at 24 – 25.
[120] Finnemore & Sikkink, International Norm, *supra* note 115 at 898.

diffusion of the norms.[121] Constructivist analysis of international relations depicts power in different forms, including the ability to shape the behaviour of other actors.[122] The influence of TIANs will greatly depend on their members' social skills, expertise, and reputation. Through consistent interactions with state actors, participation in international meetings, and compliance with existing international norms, TIANs can build a reputation with state actors.[123] TIANs can influence other international actors at different stages of norm development. Keck and Sikkink explain how advocacy networks shape international norm development at different phases thus:

> First, issue creation and attention/agenda setting; second, influence on discursive positions of states and regional and international organizations; third, influence on institutional procedures; fourth, influence on policy change in 'target actors' which may be states, international or regional organizations, or private actors…; fifth, influence on state behaviour… Networks influence discursive positions when they help to persuade states and international organizations to support international declarations or change stated domestic policy positions.[124]

To institutionalize norms and initiate the codification of Indigenous rights principles in an international instrument, TIANs would propose new policies to state actors. They are also well-placed to offer rhetorical continuation of the norm through consistent broadcasting and interactions with state actors and international organizations. More than any other stage of the norm life cycle, the participation of domestic activists is essential at the norm emergence stage. Domestic advocates devise various means to persuade the government and other actors to support the new idea. Considering the projected active connection of TIANs to domestic organizations and politics, they are structures that can navigate the "two-level norm game"[125] between domestic and

[121] Daisuke Madokoro, "International Commissions as Norm Entrepreneurs: Creating the Normative Idea of the Responsibility to Protect" (2019) 45:1 Review of International Studies 100.
[122] Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 International Organization 391; Stefano Guzzini, *Power, Realism and Constructivism* (New York: Routledge, 2013).
[123] Richard Friman, "Unpacking the Mobilization of Shame" in Richard Friman, ed, *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (London: Palgrave Macmillan) 1.
[124] Margaret Keck and Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (2019) 89 International Social Science Journal 89 at 98.
[125] Finnemore & Sikkink, International Norm, *supra* note 115 at 893.

international norms. Tapping into their domestic connections, TIANs can mobilize domestic support to persuade or pressure governments to support the new norm. Considering the importance of domestic legitimation to the political sustainability of governments, states sometimes succumb to pressures from domestic activists.[126]

TIANs are proposed as alternative and likely-influential structures for promoting change in international environmental law and international Indigenous rights fields because they provide a more secure and less challenging option for several people and groups than social movements, considering the autocratic conditions of many countries. Additionally, they offer resources (including monetary and non-monetary support) and platforms for collaboration with domestic organizations that may not have adequate revenue or support to actualize their objectives, thereby encouraging the transposition of domestic activism to the regional and global realm. TIANs can connect Indigenous communities of the Global South with the resources, connections, reputation, and protection from allies in the global north.[127]

Considering the enormity of environmental change and the extensive implications of environmental degradation, and the undemocratic nature of environmental decision-making on Indigenous communities around the world, this thesis recommends TIANs as valuable representatives of Indigenous peoples because they can improve the globalization of Indigenous advocacy work, promote diversity in Indigenous activism, and are amenable to various advocacy strategies.[128]

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[126] For an explanation of the transboundary operations of TANs, with a focus on immigration issues, see Philippe Stoessle, Valeria Diaz, and Yetzi Martinez, "Transnational Advocacy Networks of Migrants and Asylum Seekers' Human Rights: The San Diego—Tijuana Border in the Trump Era" (2020) 9:8 Social Sciences 144.
[127] *Ibid* at 241.
[128] For the complexity of transnational advocacy networks, see Barry Coates and Rosalind David, "Learning for Change: The Art of Assessing the Impact of Advocacy" (2002) 12:3 Development in Practice 530.

International human rights law has evolved, taking into consideration Indigenous peoples' concerns and connection to their ancestral lands and communities. Environmental protection is another issue (or a subset of Indigenous rights claims) of utmost concern to Indigenous peoples. Environmental sustainability is a pivotal piece of international Indigenous rights because of Indigenous peoples' connection to their ancestral lands and environment. Indigenous peoples' right to access environmental information and participate in environmental decision-making is crucial to promoting and protecting Indigenous peoples' rights. Despite the existing international human rights provisions on the right to participation and access to information,[129] a legal norm that exclusively affirms and protects Indigenous peoples' rights to access information and participate in decision-making in environmental matters is imperative.

For an emergent legal norm to cascade and reach the tipping point, it must be "institutionalized in specific sets of international rules and organizations."[130] The success of a budding international norm on the procedural environmental rights of Indigenous peoples depends on the institutionalization of the norm in international human rights law. Codification of the norm in an international legal instrument will define the norm, outline procedures for compliance, clarify expectations from states and non-state actors, and prescribe punitive measures for defaulters. The next section discusses TIANs' interactions with state actors in order to influence the development of the international legal standard on the right of Indigenous peoples to access environmental information and participate in environmental decision-making.

[129] See chapter three of this thesis.
[130] *Ibid* at 900.

V. Interactions of TIANs with State Actors

States actors are vital international players that TIANs must interact with to achieve their goals. The principled shared ideas of TIANs cannot materialize precipitously. The diffusion of international human rights norms depends on the collaboration of domestic and transnational networks and their ability to work with international regimes.[131] Hence, the acceptance and actualization of the procedural environmental rights of Indigenous peoples will be informed, to a large extent, by the effectual partnership between local and international advocates.

Advocacy networks have been instrumental in instigating international legal standards through social construction. Wendt describes social construction as a process of interaction that produces and reproduces social structures.[132] Hence, the international system is socially constructed by both the actors that inhabit it and the interactions between international actors and the system.[133] Since the fundamental structure of global politics is social, social constructivists argue that social interactions between states could shape states' behaviour and inform norm development.[134] Non-state actors, such as TIANs, can interact within the international system and produce social structures for legal standards. Sikkink explains how advocacy networks influence the social construction of legal norms:

> They help build legal norms by bringing new ideas and issues into policy debates, by serving as sources of information and testimony, and in some cases by actually drafting legal rules. Advocacy networks espousing norms also promote norm implementation by publicizing the existence of legal norms and documenting rule-breaking behaviour. In some cases networks and NGOs facilitate international

[131] Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction" in Thomas Risse, Stephen Ropp, and Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 2002) 1 at 4.
[132] Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 International Organization 391 at 411.
[133] See Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
[134] John Baylis, "International and Global Security" in John Baylis, Steve Smith, and Patricia Owens, eds, *The Globalization of World Politics: An Introduction to International Relations,* 6th ed, (Oxford: Oxford University Press, 2014) at 229.

> litigation, pressure target actors to adopt new policies and laws and to ratify treaties, and monitor compliance with international standards.[135]

Although TIANs will have diverse ways of contributing to the social construction of international legal standards, their engagements with states in furtherance of the procedural environmental rights of Indigenous peoples require tactical communication. TIANs' interactions with state actors may involve a series of public or closed meetings, public statements or reports, direct communication with state representatives, or indirect communication through international organizations.[136] Essentially, the success of TIANs' socialization with state actors to promote the procedural environmental rights of Indigenous peoples depends on how their message is designed. Finnemore and Sikkink clarify that "norm entrepreneurs call attention to issues or even create issues by using language that names, interprets, and dramatizes them. The construction of cognitive frames is an essential component of norm entrepreneurs' political strategies."[137]

Framing is not the ideas held by advocacy networks but ways of collating and presenting their ideas.[138] In context, the interactions of TIANs with states will depend on how they structure, present and explain the necessity for a legal norm on Indigenous peoples' rights to access information and participate in environmental decision-making. Framing involves highlighting the peculiar environmental challenges of Indigenous communities and the proposed norm as a panacea to gain the support of states. *Persuasion* is also a pivotal strategy in the acceptance of a budding norm. Persuasion may involve a non-coercive communication of nascent ideas,[139] and it may also

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[135] Kathryn Sikkink, "Transnational Advocacy Networks and the Social Construction of Legal Rules" in Yves Dezalay & Bryant Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Michigan: University of Michigan Press, 2005) 37 at 39.

[136] For more on how advocacy groups can optimize interacts with states parties, see United Nations Human Rights Office of the High Commissioner, "Advocacy and Intervention with the National Authorities" (2011) Manual on Human Rights Monitoring, Chapter 31, HR/P/PT/7/Rev.1.

[137] Finnemore & Sikkink, International Norm, *supra* note 115 at 897.

[138] Sidney Tarrow, Power in Movement: Social Movements and Contentious Politics, 3rd ed, (New York: Cambridge University Press, 2011) at 31.

[139] Thomas Risse, "Let's Argue!: Communicative Action in World Politics" (2000) 54:1 International Organization 1.

engender normative coercion such as shaming. While coercive measures may lead to public acceptance, it does not result in compliance.

Checkel identifies two forms of persuasion – manipulative and argumentative persuasion.[140] Manipulative persuasion lacks interaction, and it is used for an audience that can be easily swayed. Conversely, argumentative persuasion "is a social process of interaction that involves changing attitudes…in the absence of overt coercion."[141] Argumentative persuasion gives room for reciprocal persuasion. Argumentative persuasion is non-coercive and creates the opportunity for learning about the other party's beliefs. Learning is "an active process of redefinition or reinterpretation of reality on the basis of new causal and normative knowledge…It has social dimension to it because it can promote mutual trust and shape the identities of actors"[142] Through interactions and exchange of ideas, actors can influence the interests and behaviour of others. The emergence and eventual adoption of a legal norm by a "critical mass of relevant state actors" requires an astute and articulate framing of the ideas and argumentative persuasion through active and sustained interactions of actors.

Aside from strategic framing and persuasion, TIANs could also directly participate in drafting an international instrument on the rights of Indigenous peoples to access environmental information and participate in environmental decision-making. Several international legal rules can be traced to the contributions of particular individuals and civil organizations. For instance, Eglantyne Jebb, the proprietor of Save the Children Fund, drafted the "Geneva Declaration of the Rights of the

[140] Jeffrey Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55:3 International Organization 553.
[141] *Ibid* at 562.
[142] Emanuel Adler and Michael Barnett, "Studying Security Communities in Theory, Comparison, and History" in Emanuel Adler and Michael Barnett, eds, *Security Communities* (Cambridge: Cambridge University Press, 2000) 413 at 422.

Child" that was adopted in 1924 by the fifth Assembly of the League of Nations.[143] The preamble of the 1989 Convention on the Rights of the Child mentions the 1924 Declaration and reiterates some of the terms of the 1924 draft.[144]

Furthermore, some of the human rights terms in the UN Charter can be traced to the efforts of some non-governmental groups. In June 1945, delegates from 45 countries met in San Francisco to work on the Dumbarton Oaks proposals and the Yalta Agreement.[145] The US government invited 42 NGOs representing churches, cultural groups, and trade associations. The groups met with the US delegation, lobbied and caused four amendments to the US government's initial draft of the Charter. One of the amendments was the inclusion of the terms "respect for human rights and fundamental freedoms" in the first chapter.[146] The Conference later agreed on the UN Charter and Statute of the new International Court of Justice. Some of the non-governmental groups were convinced that without their push for the inclusion of the human rights language and the strong support they received from the American government, no human rights language would have been included in the UN Charter.[147]

Since the involvement of non-governmental groups during the drafting process of the UN Charter, civil society organizations have continued to contribute to the development of international human rights law. More recently, Indigenous peoples were significantly instrumental in the development of the UNDRIP. Likewise, TIANs can bring awareness to the gaps in international Indigenous

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[143] United Nations Children's Fund, "History of Child Rights" online: <https://www.unicef.org/child-rights-convention/history-child-rights>.
[144] *Convention on the Rights of the Child*, 20 November 1989, UN Treaties Series, vol. 1577, at 3.
[145] United Nations, "History of the United Nations: The San Francisco Conference" online: <https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference>.
[146] Torild Skard, "Getting Our History Right: How Were the Equal Rights of Women and Men Included in the Charter of the United Nations?" (2008) 35:1 Forum for Development Studies 37.
[147] Universal Rights Group, "Human Rights and the UN Charter: NGOs Made the Difference" (June 2020) online: <https://www.universal-rights.org/by-invitation/human-rights-and-the-un-charter-ngos-made-the-difference/>

rights and environmental rights law, participate in the drafting process, and secure the adoption of an international instrument that exclusively addresses the right of Indigenous peoples to participate in environmental decision-making and access environmental information.

Like other norm promoters in the international domain, the members of TIANs require an "organizational platform" through which they can collectively broadcast emerging norms.[148] International organizations will be valuable supporting platforms for TIANs' interactions with state parties. Learning from the past experiences of Indigenous engagements in the international arena, the UN provides a forum for Indigenous peoples to interact with state parties. Organizations involved specifically in promoting Indigenous peoples' rights or environmental rights may provide valuable stages for TIANs, such as the UN Permanent Forum on Indigenous Issues, and UN Environmental Programme. Nonetheless, international organizations with different objectives can provide their expertise and influence to support the new norm.

Finnemore and Sikkink present hypotheses about the likelihood of the survival of an emerging norm. "International legitimation" is a prerequisite for the acceptance of an international norm at the domestic level.[149] International legitimacy is the international community's shared opinion about states' actions, positions, and policies.[150] A state's legitimacy is the "belief in *its* rightful use of authority."[151] Legitimacy is a useful asset to states as it determines their ability to exercise authority and obtain the support of other states on policies or resolutions.[152] Hence, legitimacy is

[148] *Ibid* at 899.
[149] Finnemore and Sikkink, *supra* note 115 at 906.
[150] For more on international legitimation, see Jutta Brunnee and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, Cambridge University Press, 2010); Thomas Brewer, "Collective Legitimization in International Organizations Concept and Practice" (2020) 2:1 Denver Journal of International Law & Policy 73.
[151] Ian Hurd, "Legitimacy and Contestation in Global Governance: Revisiting the Folk Theory of International Institutions" (2019) 14 Review of International Organizations 717 at 718.
[152] *Ibid* at 717.

tied to a state's reputation. States seeking to improve their international reputation are found to be more open to new international norms.[153] Therefore, the packaging and presentation of the new norm by TIANs will vary for different states. The strategy for *persuading* environmentally proactive and human rights conscious states would be different from other states.

Additionally, the more "prominent" a norm or its entrepreneur, the higher the likelihood of its internalization.[154] The quality of a norm or the popularity of the norm entrepreneur has implications for how states and other international actors react to the norm. The envisaged multiplicity of TIANs' constituents and their multifarious engagements domestically and internationally will be advantageous for their popularity. Prominent and desirable norm entrepreneurs tend to be more successful in promoting and diffusing new norms.[155] Hence, the achievements and desirability of TIANs could have repercussions on the acceptability of the international norm on Indigenous peoples' procedural environmental rights.

Moreover, procedural environmental norms and Indigenous rights norms are not novel to the international community. Scholarship on the emergence of international norms portends that the prospect of a budding norm succeeding increases tremendously if the concept can be linked to an existing norm.[156] "Norms that are *clear* and *specific*,…and those that have been around for a while, surviving numerous challenges, are more likely to be effective."[157] Therefore, for an existing concept such as procedural environmental rights, there is arguably a high probability of success if

[153] Emilie Hafner-Burton, Kiyoteru Tsutsui, and John W. Meyer, "International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties" (2008) 23:1 International Sociology 115; Jens Steffek, "The Legitimation of International Governance: A Discourse Approach" (2003) 9:2 European Journal of International Relations 249.
[154] Finnemore and Sikkink, *supra* note 115 at 906.
[155] *Ibid*.
[156] Tatjana Puschkarsky, "Norm Entrepreneurs in International Politics: A Case Study of Global Footprint Network and the Norm of Sustainability" (2009) Institut für Politische Wissenschaft 1 at 27.
[157] Finnemore and Sikkink, *supra* note 115 at 907.

the norms can be framed to show the necessity for a legal procedural norm that exclusively addresses and affirms Indigenous peoples' right to procedural environmental rights, in this case, the rights to access and participate in environmental decision-making.

VI. Codification of Legal Norms on Indigenous Peoples' Procedural Environmental Rights

International legal norms find expression in different forms of international instruments, such as declarations and conventions.[158] Particularly, international declarations are statements of accepted principles. Declarations do not create binding obligations but contain agreements, positions, intentions, or aspirations adopted by members of international bodies such as the UN General Assembly. States that vote in support of an international declaration are not required to ratify it but commit to act in accordance with the provisions of the declaration. Examples of international declarations include the UNDRIP and the Universal Declaration of Human Rights.[159]

International actors create international norms that are not legally binding (soft law) but possess some level of legal authority and political relevance.[160] Where there is no hard law on a particular subject, soft law norms may be the source of reference.[161] The interconnections of soft law and hard law have been observed in the literature. Shelton found that soft law and hard law are so closely intertwined that it may be difficult to distinguish them clearly. For instance, a soft law

[158] Declarations are usually adopted by organizations such as the UN General Assembly. Though they are not legally binding, they can be politically authoritative and shape the behaviour of international players. On the other hand, conventions are legally binding multi-party agreements with prescriptive terms and requirement for ratification by states. Other forms of international law documents include recommendations and guiding principles.
[159] UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III).
[160] Michele Olivier, "The Relevance of 'Soft Law' As A Source of International Human Rights" (2002) 35:3 Comparative and International Law Journal of South Africa 289. Jürgen Friedrich, *International Environmental Soft Law: The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Berlin: Springer, 2013) at 1 – 2.
[161] Andrew Guzman and Timothy Meyer, "International Soft Law" (2010) 2:1 Journal of Legal Analysis 171.

instrument may provide supervisory mechanisms and contain specific normative standards that are "harder" in practice than some treaties' "soft" obligations.[162]

The choice of international instrument is sometimes informed by states' responsiveness to the potential implications of the terms contained therein, wariness to binding obligations, and the nature of the issue in question. Considering the past engagements of Indigenous peoples in the international system, the lessons from the development and adoption of the UNDRIP and the distinctiveness of Indigenous peoples' human rights and environmental concerns, this thesis proposes a declaration as a valuable and pragmatic form of international legal codification of the procedural environmental rights of Indigenous peoples.[163]

First, considering the particularities surrounding the development and adoption of the UNDRIP and some states' reluctance to codify the collective rights of Indigenous peoples, soft law is an advantageous alternative to hard law. Some states often raise concerns about balancing the collective rights of Indigenous peoples with the rights and needs of the public.[164] The scarce ratification of the International Labour Organization Conventions Nos 107 and 169 reveals states' reluctance to endorse binding Indigenous rights instruments.[165] In light of the circumstances surrounding Indigenous peoples' environmental claims – the need to balance Indigenous peoples'

[162] Dinah Shelton, "Law, Non-Law and the Problem of 'Soft Law'" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000) at 10 (Dinah Shelton, Law, Non-Law).

[163] This thesis does not engage in the debate about the comparison of the superiority or influence of soft and hard law. Instead, a declaration is proposed as a preferred instrument in light of the particularities of Indigenous rights and environmental rights and following the strides of the UNDRIP. As Finnemore explains, the debates about the influence of hard or soft law is irrelevant without first establishing that legal norms generally, have distinctive effects. Martha Finnemore, "Are Legal Norms Distinctive" (2000) 32 New York University Journal of International Law and Politics 699.

[164] See chapter four of this thesis for some of the arguments proffered by states against some of the rights affirmed in the UNDRIP.

[165] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58:4 International and Comparative Law Quarterly 957 at 964 – 966.

spiritual connections to their ancestral land and the environment and states' authority to manage natural resources for national development goals – states may be cautious in making binding commitments on Indigenous peoples' procedural environmental rights. Hence, a declaration is preferable to binding instruments with few ratifications and minimal potential for norm internalization.

Second, soft law development and negotiation processes are usually amenable to the active participation of non-state actors, such as TIANs. One of the significant findings from Shelton's insightful study of soft law is that the soft law-making process, compared to conventional binding law, permits the involvement of the growing diverse international players and incorporates their contributions.[166]As demonstrated in chapter four of this thesis, the development process of the UNDRIP and subsequent negotiations allowed for the sustained interactions of different state and non-state participants. Essentially, Indigenous peoples were actively involved in the drafting and negotiation processes, which is crucial to developing Indigenous rights law.

Third, soft law may provide more instantaneous proof of international actors' support for, and agreement on, a legal norm compared to a binding instrument.[167] The waiting period before achieving the required number of ratifications for treaties and entering into force may be a drawback for Indigenous peoples who require urgent and practical actions on their environmental concerns. More so, the adoption of the UNDRIP by the majority of the UN General Assembly portrayed the stance of a significant portion of the international community on Indigenous peoples'

[166] Dinah Shelton, Law, Non-Law, *supra* note 162 at 13.
[167] Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007) at 212.

rights. Since the adoption of the UNDRIP, states are beginning to incorporate the Declaration's principles nationally.[168]

The UNDRIP provides comprehensive protection for Indigenous peoples' rights and clearly defines the international standards and expectations regarding the rights of Indigenous peoples around the globe. The Declaration has been a good compromise for Indigenous peoples and states by affirming the rights of Indigenous peoples and delineating state responsibilities. Indeed, the majority votes in support of the adoption of the UNDRIP by the UN General Assembly are clear evidence and reference to the preponderant backing for the protection of Indigenous peoples' rights. Likewise, a UN General Assembly declaration on the procedural environmental rights of Indigenous peoples may signify the international community's agreement with the legal norm and encourage states' support and implementation.

Fourth, a declaration on the procedural environmental rights of Indigenous peoples may prompt the creation of a binding international document in the future, thereby turning out to be the initial part of a "multilateral treaty-making process."[169] Most UN General Assembly declarations are classified as soft law, but sometimes, soft law becomes hard law. For instance, about two decades after the adoption of the *Universal Declaration of Human Rights* (UDHR),[170] the *International Covenant on Civil and Political Rights* (ICCPR)[171] and the *International Covenant on Economic,*

[168] For instance, Canada passed the UNDRIP Act in June 2021, to create the framework for the implementation of the Declaration at the federal level. Government of Canada, *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (assented to 21 June 2021).
[169] Alan Boyle, "Soft Law in International Law-Making" in Malcolm David Evans, ed, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2006) 119 at 145.
[170] *Universal Declaration of Human Rights*, United Nations General Assembly, 10 December 1948, 217 A (III) (UDHR).
[171] *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999 at 171 (entered into force 23 March 1976).

Social and Cultural Rights (ICESCR)[172] were adopted, and reflect the rights contained in the UDHR. The codification of the procedural environmental rights of Indigenous peoples may start as a declaration that sets the foundation for creating a treaty that will be well ratified by a large number of states.

Lastly, a declaration on the procedural environmental rights of Indigenous peoples may shape the development of customary international law. UN General Assembly resolutions have significant implications for the formation and crystallization of international norms.[173] As noted by the International Court of Justice, "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.*"[174] As the international community's meeting point, the UN General Assembly is a suitable forum for international players' interactions. Therefore, a UN General Assembly declaration on the procedural environmental rights of Indigenous peoples will be a manifestation and expression of the position or intentions of a "critical mass"[175] of states and may result in the stigmatization or isolation of non-conforming states.

The proposed declaration is a valuable tool of persuasion and reference for Indigenous peoples' environmental claims and can significantly shape the behaviour of states and other actors.[176] The

[172] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993 at 3 (entered into force 3 January 1976).
[173] For instance, Barelli posits that the UNDRIP, or some part of the document, may result in the formulation of customary international law. Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58:4 International and Comparative Law Quarterly 957 at 967.
[174] International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion" (1996) I.C.J. Reports of Judgments, Advisory Opinions and Orders 226 at para 70.
[175] Finnemore & Sikkink, International Norm, *supra* note 115 at 897.
[176] For an explanation on how international law influences world politics and the behaviour of different actors, see Martha Finnemore and Stephen Toope, "Alternatives to "Legalization": Richer Views of Law and Politics" (2001) 55:3 International Organization 743.

declaration can delineate procedural environmental standards and expected behaviour from different stakeholders regarding their actions that may impact Indigenous peoples' rights. As Abbott and others observe:

> [L]arge number of instruments state seemingly unconditional obligations even though the institutions or procedures through which they were created have no direct law-creating authority. Many UN General Assembly declarations, for example, enunciate legal norms, though the assembly has no formal legislative power…Over time, even nonbinding declarations can shape the practices of states and other actors and their expectations of appropriate conduct, leading to the emergence of customary law or the adoption of harder agreements. Soft commitments may also implicate the legal principle of good faith compliance, weakening objections to subsequent developments.[177]

Considering that UN General Assembly declarations have international political force, they are ideal international law instruments with drafting and negotiation processes that give non-state actors, such as TIANs, the opportunity to shape international lawmaking without the limitations of the process for creating hard law.[178] Aside from giving non-state actors like Indigenous peoples the opportunity to participate, a declaration is preferable to treaties with few ramifications. The analysis of the development of the UNDRIP in chapter four of this thesis and the influence of Indigenous peoples on the rights contained therein demonstrate that a declaration is an apt instrument that could create the necessary avenues for Indigenous peoples' interactions with other international actors during the drafting and negotiation processes. More so, it provides an important opportunity for Indigenous peoples to influence the language of the proposed declaration. This thesis finds that an international declaration on the procedural environmental

[177] Kenneth Abbott et al, "The Concept of Legalization" (2000) 54:3 International Organization 401 at 412.

[178] Much scholarly attention has been given to the effectiveness of moral norms in influencing the activities of international actors such as MNCs. See for example, Larry Cata Backer, "Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law" (2005) 37 Columbia Human Rights Law Review 287. Other scholars have also indicated the need for other legal instruments backing international norms such as domestic laws and social sanctions. Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (London: Routledge 2014).

rights of Indigenous peoples is a desirable and attainable instrument for the internalization of the emergent legal norm.

VII. Conclusion

This thesis chapter extrapolates Keck and Sikkink's construct of TANs and conceptualizes a variant referred to as TIANs. The TIANs structure captures the shared principled idea of Indigenous rights activism – protecting and promoting Indigenous peoples' rights. Importantly, TIANs are designed to be flexible structures, open to multiple actors, with connections to domestic organizations and the capacity to introduce new issues, or reintroduce and highlight overlooked issues, to the international community by procuring testimonials from Indigenous communities and tactical broadcasting of information. Indigenous members of TIANs and local groups connected to TIANs will significantly define the shared principled ideas and inform its operations. Indigenous groups in TIANs will bring their ways of life and perspectives on environmental protection, Indigenous communities' sustainability and collective rights to the networks' deliberations and project implementation. TIANs will present a distinct, viable and instrumental platform for Indigenous rights advocates across borders to have longstanding connections with allies operating nationally and internationally and leverage the resources and opportunities each member organization brings to the network. This chapter argues that TIANs' operations will align with Indigenous values, and they can be influential and suitable structures for introducing and sustaining the budding international legal norm on the procedural environmental rights of Indigenous peoples.

As envisaged in this thesis, TIANs will seek to reveal the experiences of Indigenous communities domestically and transnationally, thereby drawing the attention of different international actors to pressing Indigenous issues. TIANs are structured to be pragmatic Indigenous organizations that

recognize the normative and ideational potentials of reiterated engagements with domestic and transnational actors in creating norms. Through consistent interactions within the international system, TIANs can influence the development of international Indigenous legal norms.

Although Indigenous international activism became prominent in the early 20th century, contemporary achievements can be linked to the sophisticated transnational collaboration of Indigenous groups, individuals, and organizations. The transnational networking of Indigenous peoples and organizations has defied international relations standards and accomplished unprecedented global political influence. Indigenous social movements and INGOs have made strides in promoting Indigenous peoples' rights. However, this thesis introduces and proposes the concept of TIANs as an alternative structure that can accommodate diverse constituents, pull domestic and international followership, and sustain interactions with international actors while aligning with Indigenous values.

States are key actors that TIANs must engage with for the proposed norm on the procedural environmental rights of Indigenous peoples to cascade. Due to their potential wealth of intellectual and information resources, TIANs can strategically mobilize Indigenous communities' stories to persuade, coerce, and gain leverage with state players. Taking a cue from Indigenous peoples' indelible roles in shaping the language of the UNDRIP and the significance of the Declaration in affirming the individual and collective rights of Indigenous peoples, this thesis recommends a UN General Assembly declaration on the procedural environmental rights of Indigenous peoples. This chapter asserts that a UN Declaration that unequivocally delineates and confirms the rights of Indigenous peoples to participate and access information in environmental decision-making is a logical international instrument option for materializing the legal norm. This recommendation is based on the distinctiveness of Indigenous peoples' environmental concerns, the influence of

Indigenous peoples in shaping the language and adoption of UNDRIP, and the normative force of soft law and other factors.

This chapter has highlighted the distinctiveness of TIANs compared to other Indigenous organizations. TIANs hold the promise of promoting the development of an international legal norm on Indigenous peoples' rights to access environmental information and participate in environmental decision-making. The next chapter discusses how TIANs could promote the development and implementation of international norms relating to the procedural environmental rights of Indigenous peoples through active interactions with extractive multinational corporations.

CHAPTER 6: TIANS' INTERACTIONS WITH EXTRACTIVE MNCs

I. Introduction

II. MNCs as International Law Actors

III. Legal Framework for the Regulation of MNCs

IV. Indigenous Peoples and Extractive MNCs: International Actors with Divergent Interests

V. MNCs' Engagement with TIANs

VI. Conclusion

I. Introduction

The first chapter of this thesis discussed the disproportional implications of environmental degradation on Indigenous communities and the need to protect their environmental rights to ensure the actualization of other Indigenous rights. One of the significant challenges besetting many Indigenous communities worldwide is environmental degradation caused by natural resource exploitation. Extractive projects that result in environmental and human rights challenges for Indigenous communities are usually linked to multinational corporations (MNCs) and other players beyond the territory of a single state. Indigenous peoples regard international law as a viable approach to promote and protect their environmental rights in light of the immense consequences and extraterritorial impact of environmental degradation and the challenges of holding extractive MNCs accountable under national laws.[1] Hence, the peculiar role of MNCs as international actors and international law's attempts to regulate their activities are examined in this chapter. This chapter also discusses the frosty relationship between extractive MNCs and Indigenous peoples and highlights the depth of extractive MNCs' impact on Indigenous peoples' environmental rights.

Initially, Indigenous peoples were excluded from the social construction of international politics and could not interact with other actors or influence their practices. In a global system with varying ideas and cultures, the representation of Indigenous peoples and their interaction with other actors was imperative for these other actors to appreciate Indigenous concerns. As discussed in chapter two, constructivists emphasize the importance of shared ideas and how it shapes actors' identities,

[1] James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples on Extractive Industries and Indigenous Peoples" (2015) 32 Ariz. J. Int'l & Comp. L. 109.

interests and actions in international politics.[2] Ideas are powerful tools in the international system and fundamental in predicting or understanding actors' decisions in the international order.[3] Ideational power relations are constructed, sustained and altered within the international system with agents' interactions. Indigenous peoples and MNCs are some of the non-state agents that shape the behaviour and decisions of other actors through their interactions within the international order.

Chapters four and five of this thesis examine Indigenous peoples' past international engagements and their future interactions with states through TIANs, respectively. This chapter turns attention to another group of pertinent international actors, extractive MNCs, and analyzes the relationship between MNCs and Indigenous peoples. It examines how the players with varying interests may interact to promote the development and implementation of international norms on the participatory environmental rights of Indigenous peoples.

II. MNCs as International Law Actors

MNCs are corporate enterprises that operate their business in more than one country.[4] Usually, MNCs have their head office in the home country while operating in other countries. They are made up of complex and interrelated business webs, all connected and controlled by the head office.[5] The United Nations (UN) defines multinational corporation as an "economic entity

[2] Christian Reus-Smit, "Constructivism" in Scott Burchill et al, eds, *Theories of International Relations* (New York: Palgrave Macmillan, 2005) 188 at 197; Peter Katzenstein, Robert Keohane and Stephen Krasner, "International Organization and the Study of World Politics" (1998) 52:4 International Organization 645.
[3] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Annual Review of Political Science 391 at 406.
[4] MNC is also referred to as transnational corporation, transnational enterprise, multinational enterprise. There are slight differences between the different terms, but they are often used interchangeably.
[5] The operations of MNCs align with the assumption of economic liberals and the free market system. Economic liberals believe that MNCs are the leading promoters of interdependent world economy and integrated national economies. Karen Mingst, Heather McKibben, and Ivan Arreguin-Toft, *Essentials of International Relations*, 8th edition, (New York: W.W. Norton & Co., 2018).

operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."[6] Globalized businesses have increased exponentially in the last four decades, so much that MNCs' production has contributed an average of 30% of world GDP in the last decade.[7] Indeed, MNCs generate turnover that exceeds the budget of some states.[8]

Like any other corporation, MNCs are comprised of legal entities with the ability to hold rights and obligations.[9] The concept of legal personality is recognized in international law.[10] It is used to differentiate between recognized and relevant entities to the international legal system and those that are not.[11] It is a generally accepted notion that states have international legal personality. However, the standards for delineating other entities, such as individuals, NGOs, and corporations, as international legal persons are ambiguous. More so, the implications of holding international legal status are unclear.[12] In this light, the International Court of Justice (ICJ) expressed that the concept of international personality is "giving rise to controversy."[13] The ICJ stated further that international legal personality applies to "an international person…capable of possessing

[6] United Nations Sub-Commission on the Promotion and Protection of Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2.
[7] See United Nations Conference on Trade and Development, "World Investment Report 2020: International Production Beyond the Pandemic" (2020) UNTADWIR/2020; Organization for Economic Co-operation and Development, "Multinational Enterprises and Global Value Chains" (2018 & 2019) Analytical AMNE Database, online: <https://www.oecd.org/sti/ind/analytical-amne-database.htm>.
[8] John Mikler, "Global Companies as Actors in Global Policy and Governance" in John Mikler, ed, *The Handbook of Global Companies* (Oxford: Wiley-Blackwell, 2013) 1 at 4.
[9] Sheikh Solaiman, "Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy" (2017) 25: 2 Artificial Intelligence 155.
[10] For an analysis of international legal personality, see generally, Fleur Johns, *International Legal Personality* (New York: Ashgate Publishing, 2016).
[11] See generally Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010).
[12] *Ibid* at 1.
[13] International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations* (1949) Advisory Opinion, ICJ Reports 174 at 178.

international rights, and duties and … has capacity to maintain its rights by bringing international claims."[14] In addition, the ICJ recognizes the notion of separate legal personality for corporations as an international law concept.[15]

Nonetheless, the question of whether MNCs should be recognized as subjects of international law or hold international legal personality – whether they can possess international rights and obligations and pursue international claims – has continued to generate divergent opinions among international law scholars. Some scholars hold the traditional position that MNCs are not subjects of international law and do not have international personality because, unlike states, they do not have the legitimacy and power to participate directly in international lawmaking.[16] This school of thought argues that recognizing the legal personality of MNCs in international law would reduce the power of states. On the other hand, some international legal scholars recognize MNCs as subjects of international law. The second group of scholars argues that MNCs have limited personality because of their significant participation and influence in the international order, and they have rights and obligations and the ability to institute international claims through international economic law.[17] The third group of scholars deemphasizes the label ascribed to

[14] *Ibid* at 179.
[15] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* (2007) International Court of Justice, Preliminary Objections, ICJ Reports 582 at para 61.
[16] Scholars holding the traditional position on MNCs' international personality include Muchlinski and Ruggie. Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann and Cedric Ryngaert, eds, *Non-State Actor Dynamics in International Law* (London: Routledge, 2016) at 9; John Ruggie, "Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises" (2006) UN Doc. E/CN.4/2006/97.
[17] Such scholars include, Janne Nijman, "Revisiting the 'Realist Theory' of International Legal Personality" in Math Noortmann and Cedric Ryngaert, eds, *Non-State Actor Dynamics in International Law* (London: Routledge, 2016) 91; Karsten Nowrot, "Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities" in Fleur Johns, ed, *International Legal Personality* (London: Routledge, 2010) 369; Andrew Clapham, "Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups" (2008) 6:5 Journal of International Criminal Justice 899.

MNCs and focuses on their rights, responsibilities and participation.[18] They focus on addressing which international rules apply to corporations rather than whether corporations are or are not subjects of international law.[19] Klabbers downgrades the international subjectivity of MNCs and portends that "personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality."[20]

The notion of the legal personality of corporations is the foundation of corporations' power. It gives the management, shareholders, and other actors behind the veil of incorporation protection from the consequences of the decisions taken in the corporation's name. Regardless of the divergent opinions about the international legal personality of MNCs, they enjoy some rights and have responsibilities under international law. Their significant roles in global politics have been extensively explored in the literature.[21] Meanwhile, the international legal system has developed some frameworks for imposing legal consequences on the actions of MNCs. For instance, MNCs are bound by national and international environmental rules, and they are subject to international law for egregious criminal offences.[22] As prominent forces at the fore of globalization, international investments, and trade, MNCs are major international actors that impact the global

[18] Merja Pentikäinen, "Changing International "Subjectivity" and Rights and Obligations under International Law – Status of Corporations" (2012) 8 Utrecht Law Review 145 at 153. Higgins describes the classification of MNCs as subject or object of international law as "intellectual prison *without* functional purpose". Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1995) at 49 – 50.
[19] José Alvarez, "Are Corporations 'Subjects' of International Law?" (2011) 9 Santa Clara Journal of International Law 1 at 31.
[20] Jan Klabbers, *An Introduction to International Law*, 2nd ed, (Cambridge: Cambridge University Press, 2009) at 51 – 52.
[21] See for example, John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: Norton & Company, 2013); John Ruggie, "Multinationals as Global Institution: Power, Authority and Relative Autonomy" (2018) 12:3 Regulation and governance 317; David Detomasi, "The Multinational Corporation as a political Actor: 'Varieties of Capitalism' Revisited" (2015) 128 Journal of Business Ethics 685; Vincent Chetail, "The Legal personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Denis Alland et al, eds, *Unity and Diversity in International Law* (New York: Brill Nijhoff, 2014) 105.
[22] Peter Muchlinski, "Corporations in International Law" in Rüdiger Woldfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009) at 8 – 9.

economy. They are also active social and political players engaged with (or within) state agencies, providing finances, infrastructure or services.[23] Therefore, MNCs are significant global economic forces in the development and implementation of international law.

III. Legal Framework for the Regulation of MNCs

The regulation of the activities of MNCs and the enforceability of their responsibilities through international law has been debated in the literature since the 1960s.[24] Earlier, international organizations such as the UN, Organization for Economic Co-operation and Development (OECD), and International Labour Organization (ILO) argued that corporate social responsibility should be self-regulated and corporate regulatory frameworks should be voluntary.[25] Corporations supported this approach.[26] The UN Sub-Commission on the Promotion and Protection of Human Rights challenged the self-regulatory approach to the promotion and protection of human rights (the Sub-Commission) in 2003. The Sub-Commission adopted the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the draft Norms).[27] The draft Norms were the foremost collection of comprehensive international human rights standards outlining the human rights responsibilities of businesses.[28] In April 2004, the UN Commission on Human Rights deliberated on the draft Norms

[23] Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Cheltenham: Edward Elgar Publishing, 2011).
[24] See Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964).
[25] Menno Kamminga, "Corporate Obligations under International Law" (2004) International Law Association, Report of the 71st Conference of the International Law Association 422.
[26] Scholars like Addo argue that most corporate responsibilities are not legal but moral, although there is a need for human rights norms that provide the legal basis for regulating corporate activities. Michael K. Addo, "Human Rights and Transnational Corporations- An Introduction" in Michael K. Addo, ed, *Human Rights Standards and the Responsibility of Transnational Corporations* (Boston: Kluwer, 1999) 1.
[27] United Nations Subcommission on the Promotion and Protection of Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (26 August 2003) 55th Session, E/CN.4/Sub.2/2003/12/Rev.2.
[28] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97:4 American Journal of International Law 901.

and stated that they contained "useful elements and ideas for consideration," but as a draft proposal, the draft Norms have no legal standing."[29] The draft Norms were not approved, and the UN took no further action.

In 2005, John Ruggie was appointed as the special representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations (TNCs)[30] to address the growing contentions about the human rights responsibilities of businesses. Ruggie drafted the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs are founded on three pillars – states' duty to protect human rights, corporate responsibility to respect human rights and access to remedy.[31] Ruggie's mandate was later extended to propose how the "Protect, Respect and Remedy" framework (the "Framework") can be implemented and promoted. International human rights standards existed before the SRSG mandate,[32] obliging states to "respect, protect and fulfill human rights."[33] Even so, John Ruggie acknowledges that the human rights responsibilities specified in the UNGPs are not novel.[34]

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[29] United Nations Economic and Social Council, "Draft Decisions Recommended for Adoption by the Economic and Social Council: Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights" (April 2004) Commission on Human Rights, Report on the 60th Session, Supplement No. 3, E/CN.4/2004/127 at 332 – 333.

[30] United Nations Commission on Human Rights, "Promotion and Protection of Human Rights" (2005) 61st Session HR/CN/1109.

[31] United Nations Human Rights Office of the High Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework" (2011) HR/PUB/11/04.

[32] Binding international instruments protected, and still protects, the rights of all humans including those affected by the actions of TNCs. The *International Covenant on Economic, Social and Cultural Right* and the *International Covenant on Civil and Political Rights* provide binding human rights standards and state parties are obliged to "respect, protect and fulfill human rights". *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993, p. 3; *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol. 999, at 171 (entered into force 23 March 1976).

[33] United Nations Human Rights Office of the High Commissioner, "Frequently Asked Questions about the Guiding Principles on Business and Human Rights" (2014) HR/PUB/14/3.

[34] United Nations Human Rights Council, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie" (2011) 17th Session, Agenda Item 3, A/HRC/17/31. For example, Article 1 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (Norms) provides that "states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights

The UNGPs gained unprecedented attention in the international and regional spheres after they were endorsed by the UN Human Rights Council. This indicates a significant transformation in global attention, perspectives and reaction to corporate human rights responsibilities. Considering the significant attention the UNGPs have brought to human rights in business activities, the UNGPs have made human rights issues part of corporate management by improving corporate accountability and bringing awareness to the human rights responsibilities of businesses.[35] The UNGPs are international soft law standards that have brought corporate human rights issues to the fore of international discourse.[36] The Framework and UNGPs have been assessed by several scholars with divergent opinions on their effectiveness in resolving issues relating to the human rights responsibilities of corporations.[37] Nevertheless, the emergence of the UNGPs is a milestone in international human rights law.

recognized in international as well as national law…transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights…" United Nations Sub-Commission on the Promotion and Protection of Human Rights Resolution, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) U.N. Doc. E/CN.4/Sub.2/2003/L.11. The Norms elaborate the obligations of corporations and the responsibilities of states, and it already fills some existing vacuum in international human rights and regulation of MNCs. David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 American Journal of International Law 901.

[35] See Björn Fasterling & Geert Demuijnck, "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights" (2013) 116:4 J of Business Ethics 799.

[36] This is an indication of the move from the state-centric international law to a "transnational legal pluralism realm" with the perspective of corporate responsibility as a scope and not as a law. Sara Seck "Transnational Judicial and Non-Judicial Remedies for Corporate Human Rights Harms: Challenges of and for Law" (2013) 31 Windsor Yearbook of Access to Justice 177.

[37] Errol Mendes evaluates the efficacy of the Framework in minimizing "corporate tragic flaw in global governance" and concludes that the Framework is a good start, but more innovative initiatives are desirable. Errol P. Mendes, *Global Governance, Human Rights and International Law: Combating the Tragic Flaw* (London; New York: Routledge,8 2014). Carlos Lopez faults the Framework, mainly for the choice of words. Carlos Lopez, The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?" in Surya Deva and David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (New York: Cambridge University Press, 2013) 58. Surya Deva argues that UNGPs portrayed human rights too slightly and unknowingly weakened the intent of holding businesses legally responsible for human rights violations. Surya Deva, "Treating Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva and David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (New York: Cambridge University Press, 2013) 78.

After the UNGPs were endorsed, the Open-Ended Intergovernmental Working Group's "Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises" is another attempt by international law to regulate the human rights responsibilities of businesses.[38] The third revised draft of the Treaty was published on August 17, 2021. The Global Campaign on the Third Revised Draft of the Binding Treaty commented that the current draft would not close the existing legal gaps that TNCs take advantage of to infringe on human rights. They propose that more advanced and ambitious provisions are required to ensure the success of the Treaty.[39] The Draft Treaty provides recourse for victims of corporate human rights violations and shows international commitment to regulating the activities of corporations.

The UNGPs and the Draft Treaty underscore the growing international effort to prescribe and enforce corporate human rights responsibilities. The diverse reactions to the UNGPs and the subsisting challenges of regulating MNCs reveal the dynamics of managing and enforcing the responsibilities of MNCs. There are theoretical and moral grounds for holding MNCs responsible for human rights violations, but their legal human rights responsibilities remain unclear.

[38] The draft is a legally binding instrument to regulate, under international law, the activities of transnational corporations and other business enterprises. United Nations Human Rights Council, "Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises" (2021) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.

[39] Business and Human Rights Resource Centre, "Statement of the Global Campaign on the Third Revised Draft of the Binding Treaty on Transnational Corporations and Human Rights" (7 September 2021) Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and Stop Impunity, online: <https://www.business-humanrights.org/en/latest-news/statement-of-the-global-campaign-on-the-third-revised-draft-of-the-binding-treaty-on-transnational-corporations-and-human-rights/>. In October 2022, the UN Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights had their 8th session to discuss the third revised draft and states' proposals submitted during the 7th session. United Nations Human Rights Council, "Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" (24 – 28 October 2022), online: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8>.

Although the protection of human rights is generally considered the responsibility of states, the impact of corporate activities on the enjoyment of human rights questions the state-centred approach. The enduring advocacy of human rights activists, NGOs, environmentalists, and academics reveals the continuing efforts to hold corporations accountable for their human rights violations.[40] Despite the clear connection between human rights violations and the activities of MNCs, holding MNCs legally accountable for their actions remains problematic.[41] The UNGPs confirm the responsibilities of corporations to respect human rights and remediate adverse impacts of their actions through legitimate processes,[42] but "the precise legal basis of that responsibility and possible mechanisms for enforcing human rights standards are lacking."[43]

Moreover, the regulation of extractive MNCs has generated significant scholarly conversations.[44] There are copious opinions about extractive companies' international responsibilities, particularly their human rights responsibilities, and the appropriate international instrument to regulate MNCs.[45] More stringent regulation of MNCs' environmental activities is desirable to mitigate the

[40] Peter Utting, "The Struggle for Corporate Accountability," (2008) 39: 6 Development and Change 959.
[41] Craig Scott, "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights" in Asbjørn Eide, Catarina Krause, and Allan Rosas, eds, *Economic, Social, and Cultural Rights: A Textbook* (Boston: M. Nijhoff Publishers, 2001) 561 at 563.
[42] Principles 11 and 22 of the UNGPs.
[43] Justine Nolan "All Care, No Responsibility? Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law" in Lara Blecher, Nancy Stafford, and Gretchen Bellamy, eds, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago: American Bar Association, 2015) 3 at 25.
[44] Scholarly discussions on the regulation of extractive MNCs include, Gerhard Hafner, "General Principles of Sustainable Development: From Soft Law to Hard Law" in Malgosia Fitzmaurice and Milena Szuniewicz, eds, *Exploitation of Natural Resources in the 21st Century* (New York: Kluwer Law International, 2003) 53; Nigel Haigh, "Sustainable Development in the European Union Treaties an in National Legislation: Some Conclusions" in Malgosia Fitzmaurice and Milena Szuniewicz, eds, *Exploitation of Natural Resources in the 21st Century* (New York: Kluwer Law International, 2003) 1-8.
[45] For scholarly opinions on the human rights responsibilities of extractive corporations, see Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 Journal of Human Rights and the Environment 5. For more on the need to regulate the environmental activities of MNCs in international law, see Philip Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press 2005); Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012).

cruel consequences of environmental injustice.[46] Indeed, scholars are turning their attention to the interrelated issues of environmental justice and Indigenous rights and how the environmental injustice perpetrated, intentionally or inadvertently, against Indigenous communities can be addressed.[47] The disproportionate impacts of extractive activities on Indigenous communities and the lingering human rights violations reveal the urgent need to regulate the activities of extractive MNCs.

In the absence of a precise legal basis for holding MNCs accountable for their human rights violations, international human rights law provides conceptual frameworks for enforcing the human rights responsibilities of non-state actors, including MNCs.[48] The doctrines of horizontality and indirect state responsibility apply within the context of state responsibility.[49] Under the indirect horizontal effect doctrine, states are held responsible for the actions of non-state actors that hinder the enjoyment of human rights because states have an international obligation to protect human rights. Therefore states can be held liable for failing to regulate the activities of non-state actors, and non-state actors, including MNCs, may be subjected to indirect human rights obligations under

[46] The need for an international response to mitigate the cruel consequences of environmental injustice echoes in the literature. For example, see Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (London, England: Harvard University Press, 2011); Carmen Gonzalez, "Environmental Justice, Human Rights and The Global South" (2015) 13 Santa Clara J. Int'l L. 151; Rob White, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (New York: Routledge, 2013); Edward Barbier, "Poverty, Development and Environment" (2010) Environment and Development 635.

[47] See for example, Rebecca Tsosie, "Indigenous People and Environmental Justice: The Impact of Climate Change" (2007) 78 University of Colorado Law Review 1625; Sumudu Atapattu, "Extractive Industries and Inequality: Intersections of Environmental Law, Human Rights, and Environmental Justice" (2018) 50:2 Arizona State Law Journal 431.

[48] Danwood Mzikenge Chirwa, "The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law" (2006) 22 S.A.J.H.R. 76.

[49] For more on the doctrines of horizontality and indirect state responsibility, see generally Ibrahim Kanalan, "Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations" in Marc Bungenberg et al, eds, *European Yearbook of International Economic Law* (Cham: Springer, 2016) 423; Eleni Frantziou, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality" (2015) 21:5 European Law Journal 657; John Knox, "Horizontal Human Rights Law" (2008) 102:1 American Journal of International Law 1.

the horizontal application of human rights principles.[50] For example, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights applied the doctrine of horizontal application of human rights, respectively, in *Awas Tingni Community v Nicaragua*[51] and *Center for Economic and SERAC v Nigeria.*[52]

The doctrine of horizontality requires states to develop and implement policies to avert MNCs' human rights harms. However, MNCs may not be essentially restricted from perpetuating human rights infringements or held accountable under the doctrine of horizontality. The power imbalance between some states and MNCs and economic gains may deter some states, especially those in the Global South, from regulating the activities of MNCs. In some instances, states may be complicit or support MNCs in implementing projects that impede the enjoyment of human rights. For instance, some Myanmar refugees instituted a case against Total in a Belgian court alleging that Total supported Myanmar's military government's crimes against humanity in their country by using forced labour provided by the government to build pipelines and providing logistics and financial support to the military junta.[53] Additionally, the complexity and enormity of the corporate structures of MNCs may hinder host states from regulating or holding MNCs responsible for their activities.[54] Therefore the doctrine of horizontality may not deter MNCs from violating human rights or ensure they face the consequences of their actions, especially in the Global South.

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[50] Lottie Lane, "The Horizontal Effect of International Human Rights Law in Practice" (2018) 5:1 European Journal of Comparative Law and Governance 5.
[51] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua,* (August 2001) Inter-Am. Ct. H.R. (Ser. C) No. 79.
[52] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (2001) ACHPR Communication No. 155/96.
[53] Business and Human Rights Resource Centre, "Belgium Reopens Myanmar Humanity Crimes Probe Against Oil Giant Total" (1 October 2007) online: <https://www.business-humanrights.org/en/latest-news/belgium-reopens-myanmar-humanity-crimes-probe-against-oil-giant-total/>.
[54] Joseph Stiglitz, *Making Globalization Work* (New York, London: W.W. Norton & Co., 2007) at 193 – 195.

On the other hand, under the doctrine of indirect state responsibility or extraterritorial regulation, home states have "intentional obligations" to regulate the conduct of their MNCs beyond borders.[55] Generally, states are not obliged to regulate the actions of their citizens outside the country, but they have jurisdiction based on the nationality of their natural and corporate citizens. Some scholars argue that home states should be held liable for violating their duty to regulate the activities of their citizens abroad, "which flows from the general duty of states under international law not to act in such a way as to cause harm outside their territory."[56]

Despite the policy and moral justifications for home states to regulate the extraterritorial activities of their MNCs, they are usually reluctant to interfere. Nonetheless, the United States of America, for example, has laws that allow individuals to institute actions under international human rights standards for the extraterritorial activities of their corporations.[57] Theoretically, transnational litigations instituted in MNCs' home states are options for holding them responsible for their activities abroad, but this approach's effectiveness is debatable. Many cases are stalled because of procedural challenges, while others settle out of court.[58] Many human rights victims have limited resources and may be frustrated by the onerous legal proceeding. The doctrines of extraterritorial regulation and horizontal application of human rights have not provided pragmatic and prolific recourse to human rights victims of MNCs' activities, especially victims from the Global South.

[55] Antal Berkes "Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights" in Yannick Radi, ed, *Research Handbook on Human Rights and Investments* (Cheltenham: Edward Elgar, 2018) 304 at 304.
[56] Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Neth Intl L. Rev. 91 at 98.
[57] Although there are other options, most cases have been initiated under the Alien Tort Claims Act, (1789) 28 U.S.C. §1350.
[58] See Matthew Eibe, "Making *Forum Non Conveniens* Convenient Again: Finality and Convenience for Transnational Litigation in U.S. Federal Courts" (2019) 68 Duke Law Journal 1193; Ekaterina Aristova, "The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum (Non) Conveniens Back?" (2021) 6:3 Business and Human Rights Journal 399.

IV. Indigenous Peoples and Extractive MNCs: International Actors with Divergent Interests

One of the business sectors dominated by MNCs is the extractive industry. Extractive MNCs can be a significant source of economic growth and financial development for both home and host states,[59] but their operations often generate adverse social and environmental consequences.[60] Resource extraction has significant impacts on the rights of Indigenous peoples, environmental sustainability, foreign exchange, international trade and investment, among others.[61] Extractive activities disproportionately impact Indigenous peoples because a large proportion of the world's untapped resources are located within or close to Indigenous communities. With the soaring demand for natural resources, increasing economic activities across borders, and supporting investment agreements, extractive MNCs continue to encroach on Indigenous territories to exploit natural resources.[62]

Indigenous peoples view their land and environment as fundamental parts of their spiritual, religious, and cultural survival. Conversely, extractive companies, and many governments, consider unexploited natural resources within Indigenous territories as economic assets. Natural resource extraction is a significant factor that challenges both environmental sustainability and

[59] Aqib Aslam and Alpa Shah, "Tec(h)tonic Shifts: Taxing the "Digital Economy" (2020) IMF Working Paper WP/20/76; Henry Veltmeyer, "The Political Economy of Natural Resource Extraction: A New Model or Extractive Imperialism?" (2013) 34:1 Canadian Journal of Development Studies 79.

[60] Ved P. Nanda & George Pring, *International Environmental Law and Policy for the 21st Century* (Boston: Martinus Nijhoff Publishers, 2013); Alan Boyle, "Human Rights and the Environment: Where Next?" (2012) 23 European Journal of International Law 613-642.

[61] See generally, Emma Gilberthorpe, ed, *Natural Resource Extraction and Indigenous Livelihoods: Development Challenges in an Era of Globalization* (New York: Routledge, 2016); Suzana Sawyer & Edmund Terence Gomez, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (Cheltenham: Palgrave Macmillan, 2012) at 37.

[62] Stefania Errico, "The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights" in Stephen Allen and Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart, 2011) 329.

Indigenous peoples' rights.[63] Moreover, natural resource extraction and human rights violations by extractive companies are the leading hindrances to the realization of Indigenous peoples' rights.[64] Hence, Indigenous communities and extractive MNCs are often actors with contrasting interests in natural resource extraction and preservation. Indigenous and low-income communities are more impacted by industrial pollution and environmental degradation, and this is referred to as "environmental racism, environmental inequality or environmental injustice."[65] That is, environmental practices or policies that disproportionately affect a group of people or limit their ability to enjoy their fundamental human rights.[66]

Extractive MNCs have violated the rights of Indigenous peoples in some cases, including through forced displacement, arbitrary incarcerations, killings, oil spills, waste dumping, and other environmentally degrading activities in Indigenous communities.[67] The UN Committee on Elimination of Racial Discrimination reports that "in many regions of the world, Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms…they have lost their land and resources to colonists, commercial companies and state enterprises."[68] Invariably, there have been numerous skirmishes between

[63] Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (Chippenham: Palgrave Macmillan, 2012); PBL Netherlands Environmental Assessment Agency, *Trends in Global CO2 Emissions: 2014 Report* (Hague: PBL Publication 2014) at 10.
[64] Shawkat Alam, "Collective Indigenous Rights and the Environment" in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (Routledge, 2013) 585.
[65] Paul Mohai, David Pellow & J. Timmons Robert, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405 at 406.
[66] Robert Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (New York: Routledge, 2018).
[67] Christina Dhillon & Michael Young, "Environmental Racism and First Nations: A Call for Socially Just Public Policy Development" (2010) 1:1 Canadian Journal of Humanities and Social Sciences 25; Laura Westra, "Environmental Justice and Rights of Indigenous Peoples: International and Domestic Legal Perspectives" (2012) *Earthscan* 1.
[68] United Nations Committee on Elimination of Racial Discrimination, "General Recommendation XXIII (51) Concerning Indigenous Peoples" (18 August 1997) Adopted at the Committee's 235th meeting, UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

Indigenous communities and extractive MNCs worldwide.[69] The human rights violations against Indigenous peoples by extractive MNCs often occur with the support or acquiescence of states, thereby giving the corporations precedence whenever they dispute with Indigenous communities.[70] Highlighting the adverse impact of the activities of MNCs on the enjoyment of Indigenous peoples' rights, the Special Rapporteur on the rights of Indigenous peoples states that:

> [T]he business model that still prevails in most places for the extraction of natural resources within indigenous territories is not one that is fully conducive to the fulfilment of indigenous peoples' rights, particularly their self-determination, proprietary and cultural rights in relation to the affected lands and resources… Increasing resource extraction and its mounting effects on indigenous peoples make it all the more imperative to reverse historical trends and secure indigenous peoples' rights in this context.[71]

The modalities of extractive MNCs have profound implications for the right to a healthy environment.[72] International organizations, such as the UN and World Bank, and some MNCs have criticized the unfavourable effect of natural resource extraction projects on Indigenous communities.[73] In recent times, there has been a progression in the affirmation of Indigenous peoples' rights in international law and by international organizations. After the UNDRIP articulated Indigenous peoples' right to free, prior, and informed consent (FPIC) in particular instances, this right was integrated into the International Finance Corporation (IFC) Performance

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[69] Rachel Davis and Daniel Franks, "Costs of Company-Community Conflict in the Extractive Sector" (2014) 66 Corporate Social Responsibility Initiative Report 1; Lisa Calvano, "Multinational Corporations and Local Communities: A Critical Analysis of Conflict" (2008) 82:4 Journal of Business Ethics 793.

[70] Forest People Programme, "Indigenous Peoples' Rights and Transnational and Other Business Enterprises: A Review of International Law and Jurisprudence" (2007) A Submission to the African Commission on Human and Peoples' Rights 1 at 7.

[71] United Nations Human Rights Council, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples" (July 2013) 24th Session, Agenda Item 3, A/HRC/24/41 at para. 4 – 5.

[72] United Nations Economic and Social Council, "The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations- Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Second Session" (28 August 2000) 52nd Session, Agenda Item 4(c) E/CN.4/Sub.2/2000/12.

[73] See generally, Suzana Sawyer and Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (London: Palgrave Macmillan, 2012).

Standard 7,[74] thereby making compliance with FPIC a precondition for IFC investment in mining projects. More than ninety banks and financial institutions have endorsed the IFC Performance Standards through a joint initiative called the Equator Principles.[75] Consequently, compliance with the FPIC of Indigenous communities is a requirement for the approval of commercial loans for extractive projects. However, there is much more to be done to ensure the effectiveness of the IFC Performance Standard in protecting Indigenous peoples' right to FPIC.[76]

Notwithstanding the assertion of Indigenous rights in various international instruments, Indigenous peoples are continually subjected to contemptible realities caused by extractive projects within their communities. The interests of corporations are prioritized over Indigenous peoples' rights, especially in the Global South. Indigenous peoples sometimes fight back against corporate perpetrators of human rights violations and the government through protests. However, Indigenous lands and ways of life are still being threatened by extractive corporations, often with the support of governments. Hence, Indigenous peoples and extractive MNCs remain actors fighting to protect their dissimilar interests.

V. MNCs' Interactions with TIANs

Since the adoption of the UNDRIP, Indigenous rights have gained much attention. As discussed in chapter four of this thesis, before the early1990s, Indigenous peoples sought recourse through the international system to affirm their rights which eventually led to the milestone in international human rights law – the adoption of the UNDRIP. The discussions during the drafting process of

[74] International Finance Corporation, "Performance Standard 7: Indigenous Peoples" (1 January 2012) IFC, World Bank Group 1.
[75] International Financial Corporation, "The Equator Principles" (July 2020) online: <https://equator-principles.com/>.
[76] Sara Seck, "Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights" (2016) 12:1 McGill International Journal of Sustainable Development Law and Policy 54.

the UNDRIP and the wide support from states propelled an increased recognition of the rights of Indigenous peoples. As a result, the world has become more aware and attentive to Indigenous concerns in the last two decades. Consequently, actors (states and extractive corporations) and activities (natural resource extraction, environmental degradation, human rights violations) that impact the rights of Indigenous peoples are readily subjected to academic and political scrutiny. Against the backdrop of the increasing attention on natural resource development and Indigenous rights law, Odumosu-Ayanu and Newman observe that:

> Due, in part, to Indigenous peoples' advocacy and activism in domestic and international fora, recognition in some jurisdictions of sovereignty that Indigenous peoples have asserted for centuries, the ascendance of free, prior, and informed consent and contentions over its scope, governments' interpretation of the duty to consult Indigenous peoples prior to resource development, and industry's turn to the social licence to operate, agreements between Indigenous peoples and industry have proliferated in recent decades.[77]

Thus, extractive MNCs are ever more conscious and cautious of how their operations impact Indigenous communities. Generally, since the 1990s, there have been progressively more collaborative efforts between Indigenous peoples and businesses.[78] Indigenous peoples have shown the willingness to engage with extractive corporations in recent decades to benefit from and gain some level of control over operations within their communities. The common forms of Indigenous engagements are negotiated agreements and environmental impact assessments.[79] Extractive businesses and Indigenous peoples are increasingly executing contracts shaped by

[77] Ibironke Odumosu-Ayanu and Dwight Newman, "Indigenous-Industry Agreements, Natural Resources and the Law: An Introduction" in Ibironke Odumosu-Ayanu and Dwight Newman, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York & London: Routledge, 2021) 3 at 3.
[78] Daniel Arenas, Pablo Sanchez, and Matthew Murphy, "Different Paths to Collaboration Between Businesses and Civil Society and the Role of Third Parties" (2013) 115:4 Journal of Business Ethics 723; Matthew Murphy and Daniel Arenas, "Through Indigenous Lenses: Cross-Sector Collaborations with Fringe Stakeholders" (2010) 94:1 Journal of Business Ethics 103.
[79] Rauna Kuokkanen, "At the Intersection of Arctic Indigenous Governance and Extractive Industries: A Survey of Three Cases" (2019) 6 Extractive Industries and Society 15.

international norms.[80] Notwithstanding the proliferation of agreements between Indigenous peoples and extractive corporations, Indigenous peoples' participation in extractive operations is often inadequate,[81] especially in the Global South.[82] Some barriers to Indigenous peoples' participation include lack of prior and sufficient information about projects, marginalization of some groups such as women and underprivileged groups, widespread illiteracy, poverty and lack of trust in the process based on past experiences.

When extractive MNCs refuse or neglect to respect the rights of Indigenous communities, Indigenous representatives often approach the corporate subsidiary within, or close to, the site of the operations to stop or demand a remedy for their actions. The extractive MNCs may ignore the demands of the representatives of the Indigenous communities because the host government backs them, the host state lacks the capacity to regulate the corporations, or lack the power to enforce compliance with their regulations.[83] When the corporate executives on site fail to respond to the demands of Indigenous representatives, the "boomerang pattern of influence" may occur.[84] In such instances, Indigenous communities reach out to external allies in order to propel corporate headquarters to interfere through top-down coercion.

Historically, advocacy for social change was concentrated in home states, but considering the diversity of actors and inter-territorial implications of environmentalism, environmental and

[80] Ibironke Odumosu-Ayanu, "Indigenous Peoples, International Law, and Extractive Industry Contracts" (2017) 109 American Journal of International Law 220.
[81] Ciaran O'Faircheallaigh, "Explaining Outcomes from Negotiated Agreements in Australia and Canada" (2021) 70 Resource Policy 101922.
[82] For critical analysis of agreements between Indigenous peoples and extractive corporations, see Ibironke Odumosu-Ayanu and Dwight Newman, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York & London: Routledge, 2021).
[83] Emily McAteer and Simone Pulver, "The Corporate Boomerang: Shareholder Transnational Advocacy Networks Targeting Oil Companies in Ecuadorian Amazon" (2009) 9:1 Global Environment Politics 1 at 3.
[84] Margaret Keck and Kathryn Sikkink, Activists Beyond Borders (Ithaca and London: Cornell University Press, 1998) (Keck and Sikkink, *Activists Beyond Borders*) at 12.

human rights activists have widened their scope to include actors beyond their borders. Indigenous peoples' rights and environmental protection are complex issues with domestic and international implications, and they require a strategic advocacy approach. Hence, this thesis proposes TIANs as valuable structures that can provide the needed connection to the international realm, leverage, financial support, and information for domestic Indigenous organizations. Human rights abuses occasioned by extractive operations resonate in the international domain. International connections afforded by the advocacy network domestic Indigenous groups associate with can help to intensify their demands. Using different tactics that will be discussed shortly, TIANs can expose the human rights violations caused by extractive MNCs and pressure international organizations to conduct investigations.

With sustained connections with local Indigenous groups and NGOs, TIANs' constituents can generate credible information about the repressive actions of extractive MNCs within Indigenous communities. For instance, NGOs or Indigenous groups in TIANs can call the attention of the international community or international organizations, such as the UN Human Rights Council, to natural resource operations that do not align with international human rights standards.

As mentioned earlier, MNCs are more conscious of their human rights responsibilities to extractive communities in light of general recognition and inclination to protect the rights of Indigenous communities. In an information age, coupled with public awareness about international Indigenous rights and corporate human rights responsibilities, extractive MNCs are protective of their reputation and their social licence to operate. Indigenous organizations are reliable sources of information about the activities of extractive MNCs within Indigenous communities. As prospective constituents of TIANs, Indigenous organizations can readily generate information unavailable from other sources. As discussed in chapter five, TIANs will have the capacity to

convey the local realities of Indigenous communities to the international community in a manner that provokes actions through their first-hand source of Indigenous communities' realities, strategic dissemination of information and leverage politics.

One of the intended strategies of TIANs is to investigate issues that impact Indigenous peoples and bring them to the attention of the media and policymakers. Human rights violations of extractive MNCs are frequent narratives within the global sphere. In order to draw attention to emerging issues in particular communities, "the information must be timely and dramatic."[85] Therefore, TIANs must take advantage of symbolic events within Indigenous communities to further their principled shared ideas. For instance, the 2020 oil spill along the Coca and Napo Rivers during the COVID-19 pandemic revealed the dire condition of the Indigenous peoples of the Ecuadoran Amazon. Different NGOs took the opportunity to reveal the Ecuadorian government's failure to protect the rights of Indigenous peoples and the urgent need for the government to guarantee the communities' socio-economic rights and take remedial actions.[86] Likewise, TIANs can take advantage of symbolic environmental occurrences affecting Indigenous communities to exemplify their environmental and human rights challenges and emphasize the dire need for protecting Indigenous peoples' environmental rights.

However, not all TIANs' interactions with extractive MNCs would be argumentative or hostile. The interactions could be cordial and collaborative. As mentioned in chapter one, the interaction between MNCs and TIANs explored in this thesis is social – the mutual pursuit of shared interest

[85] *Ibid* at 19.
[86] Ada Recinos, "Oil Spill Along the Coca and Napo Rivers Affects Ecuadorian Indigenous Communities" (9 April 2020) online: <https://amazonwatch.org/news/2020/0409-oil-spill-along-the-coca-and-napo-rivers-affects-ecuadorian-indigenous-communities>.

based on agreed terms.[87] With the ability of TIANs to unearth and frame information about the realities in Indigenous communities, the extensive campaign on environmental sustainability, wide denunciation of the human rights cruelties of extractive MNCs, and in light of the world's growing awareness about Indigenous peoples' rights, TIANs can leverage their "soft power" to influence the actions of extractive MNCs. Keohane and Nye define "soft power" as:

> [T]he ability to achieve goals through attraction rather than coercion. It works by convincing others to follow or getting them to agree to norms and institutions that produce the desired behaviour. Soft power can rest on the appeal of one's ideas or culture or the ability to set the agenda through standards and institutions that shape the preferences of others.[88]

Advocacy networks usually persuade powerful international players to support their objectives which often implicate policy alteration by particular actors, including governments and MNCs.[89] The significance of networks' persuasion, or pressure, depends on their level of influence over other actors. As Keck and Sikkink note, "by leveraging more powerful institutions, weak groups gain influence far beyond their ability to influence state practices directly. The identification of *material* or *moral* leverage is a crucial strategic step in network campaigns."[90] Leverage is usually exerted where powerful actors are persuaded or pressured to take action by less influential actors. Keck and Sikkink identify two forms of leverage – moral and material leverage.[91] Aside from material and moral leverage, intellectual leverage is also gaining much attention in network advocacy. Levy and Prakash observe that:

> The power to frame debates within particular discursive and cultural contexts has increasingly been recognized as a key factor in the course of international

[87] Xavier Castañer and Nuno Oliveira, "Collaboration, Coordination, and Cooperation Among Organizations: Establishing the Distinctive Meanings of These Terms Through a Systematic Literature Review" (2020) 46:6 Journal of Management 965 at 966.
[88] Robert Keohane and Joseph Nye Jr., "Power and Interdependence in the Information Age" (1998) 77:5 Foreign Affairs 81 at 86.
[89] Keck and Sikkink, Activists Beyond Borders *supra* note 84 at 23.
[90] *Ibid* at 23.
[91] *Ibid*.

> negotiations…A form of "soft power" that generates legitimacy and consent by projecting *intellectual and moral* leadership and a sense of common interests. A key implication of the discursive aspect of power is that actors' interests and preferences are not fixed by structural circumstances, but can be shifted by framing issues in particular ways.[92]

Norm entrepreneurs create awareness of issues by strategically framing and broadcasting information. "The construction of cognitive frames" is crucial for norm entrepreneurship.[93] TIANs require an efficient strategy to frame Indigenous rights issues within the discursive frameworks of environmental protection. The ability to frame deliberations within the international order is an essential tool utilized by advocacy networks. Environmental regulatory discussions often involve contested scientific claims. Hence, government agencies often request "sound science" to support advocates' positions or assertions.[94] TIANs can utilize their constituents – Indigenous groups, environmental organizations, and human rights experts – to provide the intellectual and moral basis for their position. TIANs can leverage their access to information and ability to frame issues in a compelling manner or to appeal to moral standards even though they may not have the same material resources and leverage as extractive MNCs. In light of the intensifying call for extractive MNCs' human rights accountability, they may be amenable to collaborating with TIANs for various reasons.

First, the world's environmental challenges are becoming more apparent as record-breaking temperatures and natural resource calamities are experienced more frequently.[95] Additionally, the environmental challenges of Indigenous communities are complicated by social, economic, and

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[92] David Levy and Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance" (2003) 5:2 Business and Politics 131 at 144 – 145 [emphasis added].
[93] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Org. 887 at 897.
[94] Sound science means reliable scientific research to back a claim. See Henk Van den Belt and Bart Gremmen, "Between Precautionary Principle and "Sound Science": Distributing the Burden of Proof" (2002) 15:1 Journal of Agricultural and Environmental Ethics 103.
[95] David Alexander, *Natural Disasters* (New York: Routledge, 2017).

political drawbacks, thereby making Indigenous communities' environmental challenges complex to address. While Indigenous peoples may not have the financial resources to resolve their environmental issues, they have in-depth knowledge about the environment. Extractive MNCs sometimes collaborate with advocacy groups to address factors causing complex environmental challenges.[96] Extractive MNCs may interact with TIANs to access and understand the standards and expertise of TIANs' constituents, including Indigenous groups and environmental experts. Extractive MNCs have shown readiness to work with Indigenous communities to acquire some form of consent and jointly address environmental issues caused by the operations. Therefore, extractive MNCs may be agreeable to working with TIANs to support the development of procedural environmental rights norms that address both parties' concerns.

Second, businesses are aware of the interconnection between their profitability and their relationship with stakeholders. Stakeholders are persons or groups that may impact or be affected by the attainment of a business's goals, and they include communities, employees, and customers.[97] While a business's primary purpose is to maximize profit, the legitimacy of a business depends on the strength of its relationship with other stakeholders. To operate, every corporation requires implicit or explicit consent from states, communities, and several other stakeholders.[98] The anticipated diversity and vastness of TIANs' constituents could provide extractive MNCs with extraordinary access to various stakeholders. While Indigenous communities are excessively impacted by environmental degradation, non-Indigenous members of different societies are

[96] Gábor Harangozó and Gyula Zilahy, "Cooperation between Business and Non-Governmental Organizations to Promote Sustainable Development" (2015) 89 Journal of Cleaner Production 18.
[97] The Stakeholder theory stresses the importance of stakeholders to a business's profitability. See Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press, 2010).
Edward Freeman, Robert Phillips, and Rajendra Sisodia, "Tensions in Stakeholder Theory" (2020) 59:2 Business & Society 213.
[98] Michael Porter and Mark Kramer, "The Competitive Advantage of Corporate Philanthropy" (2002) 80:12 Harvard Business Review 56.

increasingly involved in environmentalism. To gain the support of customers, employees and other stakeholders, extractive MNCs must be seen to comply with human rights and environmental standards. This may incentivize extractive MNCs to work with TIANs to develop and implement procedural environmental rights standards.

Third, extractive MNCs have been found blameworthy for their roles in human rights violations and environmental degradation. Corporations' reputation impacts their market value, sustainable market competitiveness, and stakeholders' support.[99] Furthermore, one of the pillars of the UNGPs is the responsibility of businesses to respect human rights.[100] As mentioned earlier, the adoption of the UNGPs and the academic and political debates that ensued afterwards spurred global attention on the human rights responsibilities of MNCs. Consequently, MNCs started developing internal measures to inculcate human rights as part of their corporate management.[101] The reputation of corporations has direct implications on their credibility and the level of public trust.[102] More so, the public tends to trust civil organizations more than corporations.[103] Indigenous communities have more trust in their representatives and civil organizations representing their interests. Hence extractive MNCs' partnership with TIANs will reflect a commitment to social responsibility. Additionally, extractive MNCs' interactions with TIANs in furtherance of

[99] Markus Eberl & Manfred Schwaiger, "Corporate Reputation: Disentangling the Effects on Financial Performance" (2005) 39:7 European Journal of Marketing 838.
[100] United Nations Human Rights Office of the High Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework" (2011) HR/PUB/11/04.
[101] Björn Fasterling & Geert Demuijnck, "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights" (2013) 116:4 J of Business Ethics 799.
[102] Mobin Fatma, Zillur Rahman, and Imran Khan, "Building Company Reputation and Brand Equity Through CSR: The Mediating Role of Trust" (2015) 33:6 International Journal of Bank Marketing 840.
[103] Enrique Carlos Bianchi, Gaspar Gracia Daponte, and Leticia Pirard, "The Impact of Cause-Related Marketing Campaigns on the Reputation of Corporations and NGOs" (2021) 18:2 International Review on Public and Nonprofit Marketing 187.

Indigenous peoples' procedural environmental norms is a way of demonstrating their allegiance to environmental sustainability and Indigenous rights.

Fourth, as mentioned earlier, international organizations have created mechanisms for influencing the activities of MNCs. For instance, the United Nations Global Compact is a corporate sustainability initiative that aims to "mainstream the ten principles in business activities around the world" and promote actions to support UN objectives, including sustainable development.[104] Three of the ten principles of the UN Global Compact centre on the environment.[105] While the Global Compact is not a regulatory mechanism, it seeks to influence the actions of its corporate participants. Additionally, international financial institutions, such as the World Bank, have initiated strategies and global reporting initiatives to promote environmental sustainability and Indigenous peoples' rights. For instance, IFC Performance Standards on Environmental and Social Sustainability,[106] and Performance Standard 7,[107] are policies that require their borrowers to address specific environmental or human rights risks before receiving financial support for investment projects.[108] These are some "market-related initiatives" that have been developed to influence the activities of MNCs, and defaulters risk losing their social licence to operate or their

[104] United Nations Global Compact, "About the UN Global Compact" online: <https://www.unglobalcompact.org/about>.
[105] United Nations Global Compact, "The Ten Principles of the UN Global Compact" online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.
[106] International Finance Corporation, "IFC Performance Standards on Environmental and Social Sustainability" (January 2012) online: <https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk>.
International Finance Corporation, "Guidance Note 7: Indigenous Peoples" (January 2012) online: <https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=mRQk089>.
[107] International Finance Corporation, "Guidance Note 7: Indigenous Peoples" (January 2012) online: <https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=mRQk089>.
[108] The World Bank, "Environmental and Social Policies" online: <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>.

profitability in the global market.[109] Extractive MNCs are propelled to collaborate with TIANs to comply with "market-based initiatives" and international standards on business human rights responsibilities.

Regardless, extractive MNCs unwilling to collaborate with TIANs may be compelled or cajoled to rethink their positions for various reasons. Constructivist IR theorists explain the process of socialization, social learning, and how international actors' interactions shape their interests.[110] Actors' interactions shape their interests and may result in normative compliance.[111] MNCs are members of (or involved with) networks of international financial systems, which provide the arena for corporate and institutional engagements. These financial frameworks sometimes outline collective expectations on the proper behaviour of their members. Consequently, collective expectations and values metamorphose into "collective understandings."[112]

MNCs respond to social pressure and comply with international organizations' standards because such standards are considered appropriate and should be obeyed. Therefore, these institutions and member corporations shape MNCs' preferences and behaviour. For instance, there is a growing understanding that extractive MNCs must respect the rights of Indigenous communities and promote environmental sustainability. Social pressure from other MNCs, growing international financial organizations' guidelines on Indigenous rights and environmental responsibility, and the

[109] Yolandi Meyer, "The Effectiveness of Market-Based Initiatives for Regulating Development Projects by Multinational Corporations in Africa with Regard to Human Rights and Environmental Abuses" (2019) 9:1 African Human Rights Law Journal 126 at 126.
[110] Martha Finnemore and Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Annual Review of Political Science 391; Matthew Hoffmann, "Norms and Social Constructivism in International Relations" (2010) International Studies 1.
[111] Hevina Dashwood, "Corporate Social Responsibility and the Evolution of International Norms" in John Kirton, ed, *Hard Choices, Soft Law: Combining Trade, Environment and Social Cohesion in Global Governance* (Toronto: Ashgate Publishers, 2004) 189.
[112] Jutta Brunnee and Stephen Toope, "Interactional International Law: An Introduction" (2011) 3:2 International Theory 307 at 313.

increasing notion that these norms should be complied with, are some rationales for extractive MNCs' interactions with TIANs in furtherance of an international norm relating to Indigenous peoples' procedural environmental rights.

On the other hand, TIANs' deviation from the often-coercive approach of civil organizations for a collaborative engagement with extractive MNCs will benefit them. Aside from the economic influence of MNCs, especially in the Global South, they also tend to have political influence in their home and host states.[113] Extractive MNCs make decisions that have global implications, and their impact transcends national borders. Since the mid-20th century, MNCs have become increasingly powerful internationally,[114] and their wide-ranging transnational activities, global strategy and economic power improve their chances of influencing international decision-making.[115] Considering extractive MNCs' political muscle, TIANs will benefit from engaging with them to promote Indigenous agendas in international politics.

Besides the political influence of extractive MNCs, their economic resources can also be advantageous to TIANs. Funding is one of the primary reasons for civil societies' collaboration with corporations.[116] The funding sources of networks are diverse – constituents, private philanthropic foundations and supporters. MNCs are also funders of advocacy networks. One of the rationales for TIANs' engagement with extractive MNCs is to receive financial support for

[113] John Mikler, *The Political Power of Global Corporations* (Cambridge: Polity Press, 2018); Nuria Molina-Gallart "Strange Bedfellows? NGO-Corporate Relations in International Development: An NGO Perspective (2014) 1:1 Development Studies Research 42.
[114] Kema Irogbe, "Global Political Economy and the Power of Multinational Corporations" (2013) 30:2 Journal of Third World Studies 223.
[115] Susan Strange called the attention of international relations scholars to the surging international influence of MNCs in the early 1990s. MNCs' growing influence has since impacted states' control over some international decision-making. See Milan Babic, Jan Fichtner, and Eelke Heemskerk, "States Versus Corporations: Rethinking the Power of Business in International Politics" (2017) 52:4 Italian Journal of International Affairs 20.
[116] Sylvaine Poret, "Corporate-NGO Partnerships through Sustainability Labeling Schemes: Motives and Risks" (2019) 11 Sustainability 1.

their operations. Notably, environmental norm entrepreneurship requires the cooperation of other stakeholders. Extractive MNCs are prominent players in environmentalism, and TIANs' collaboration with them will be a symbolic affiliation with the potential to drive change. TIANs could significantly impact and influence the development of international norms on Indigenous peoples' procedural environmental rights by tapping into extractive MNCs' resources and leveraging their interactions.

VI. Conclusion

The growing recognition of the significant role of MNCs in global affairs and the need to regulate their activities have resulted in a meteoric rise in calls for the enforcement of the human rights responsibilities of business. Mainly, the braided issues of the human rights violations of extractive MNCs, protection of Indigenous peoples' rights and environmental protection have resulted in a surge of agreements between Indigenous communities and extractive MNCs. These agreements demonstrate the willingness of extractive corporations to seek some level of consent and social licence to operate from host communities. However, these agreements fall short in several ways, including the inequality of negotiation powers, states' prescriptive roles, selective participation and sometimes, lack of compliance monitoring mechanisms. Without an international legal standard that precisely outlines and affirms Indigenous peoples' rights to participate in environmental decision-making and access environmental information, a precarious gap will linger in regulating extractive MNCs and their interactions with Indigenous communities.

Chapter three of this thesis addressed the lack of a clear operational framework that serves as an international standard for the obligatory involvement of Indigenous peoples in environmental decision-making. As MNCs and Indigenous peoples have become ubiquitous players in international law-making, this chapter explored the interactions of extractive MNCs and TIANs

within the international system towards developing and implementing an international legal norm that protects the procedural environmental rights of Indigenous peoples. While the past interactions of Indigenous peoples and extractive MNCs have been conflictual, it reveals that the parties have rationales for interacting to support TIANs' prospective objectives of developing and implementing an international norm that affirms Indigenous peoples' procedural environmental rights.

The development of an international legal norm that responds to Indigenous peoples' environmental and human rights concerns is beneficial, but there should be a pragmatic expectation of the proposed legal norm. International law is not a collection of standards that may be simply applied to address global challenges. The development of international legal frameworks is subject to dominant material and social structures and the dynamics of power politics.

Therefore, the interactions of TIANs and extractive MNCs in international law-making is a form of participation in creating "a field in which parties pursue their conflicting and competing strategies mediated by contending interpretations of the rules."[117] In essence, the development of international legal norms on the procedural environmental rights of Indigenous peoples is an initial step. International lawyers portend that compliance legitimizes international law,[118] and legitimation of the emerging norm requires actors' compliance. After providing a summary of this thesis' findings, the next chapter discusses the roles of TIANs in enforcing the implementation (and legitimation) of the emerging legal norm on the rights of Indigenous peoples to environmental

[117] Sol Picciotto, *Regulating Global Corporate Capitalism* (New York: Cambridge University Press, 2011) at 443.
[118] Christopher Thomas, "The Uses and Abuses of Legitimacy in International Law" (2014) 34:4 Oxford Journal of Legal Studies 729.

participation and access to environmental information. The seventh chapter also highlights some of the issues that may impact the implementation of the thesis findings.

CHAPTER 7: REFLECTIONS ON RESEARCH FINDINGS AND CONCLUSION

I. Reflections on Research Findings

II. TIANs' Roles in Norm Implementation

III. Key Considerations for Implementing Research Findings

   A. Probable Colonial Undertones

   B. Reliance on Domestic Base

   C. Inconsistent Evaluations of the Success of a Campaign

   D. Questioning the Potency of International Human Rights Law

IV. Conclusion

V. Opportunities for Further Research

I. Reflections on Research Findings

This thesis set out to investigate the roles of Indigenous peoples in developing and implementing international legal norms on Indigenous peoples' procedural environmental rights through the proposed structure – transnational Indigenous advocacy networks (TIANs). Considering Indigenous peoples' connection to their ancestral lands and the disproportionate impact of environmental degradation on them, this thesis found that the protection and actualization of Indigenous peoples' environmental rights is a prerequisite for the enjoyment of their other rights. This research focused on procedural environmental rights because they are the initial steps for environmental protection and serve as an assurance of substantive environmental rights. It focuses on two interrelated aspects of procedural environmental rights, rights to participate in environmental decision-making and access to environmental information. These rights are necessities for Indigenous peoples' involvement in environmental management and stakeholders' accountability.

Despite the importance of environmental sustainability to Indigenous peoples and their particular position on environmental matters based on historical, spiritual, and cultural attachment to their land and the environment, there are practical limitations to Indigenous peoples' involvement in environmental decision-making. This thesis determined that irrespective of the numerous international law instruments that affirm the rights to participation and access to information, generally and within environmental management, there is a gap in international Indigenous rights law that needs to be addressed. That is, the development and practical implementation of international legal norms that specifically affirm and protect Indigenous peoples' procedural environmental rights.

This thesis' objective is to fill this international human rights gap by assessing Indigenous peoples' roles in shaping international legal norms on their procedural environmental rights. An analysis of past Indigenous representation in the global system revealed the shortfalls of other organizational structures, such as international non-governmental organizations (INGOs) and social movements, and the necessity for an alternative structure. It questioned the adequacy of the subsisting Indigenous rights representative structures in ensuring the actualization of international standards locally. Sometimes, international Indigenous organizations lose sight of domestic Indigenous issues and the lacking implementation of international standards.

To address some of the shortfalls of international Indigenous organizations, this thesis proposed TIANs as an alternative platform for sustainable Indigenous collaboration. It extrapolated Keck and Sikkink's insights on transnational advocacy networks (TANs) and introduced and analyzed the concept of transnational Indigenous advocacy networks. TIANs, as expounded and conceptualized in this thesis, will hold distinct characteristics and operate differently from other forms of Indigenous organizations. Unlike TANs that emerge from the "boomerang pattern",[1] TIANs will be made up of established international Indigenous rights advocates with strong connections to domestic groups. More so, TIANs are alternative structures that can accommodate diverse constituents, pull domestic and international followership, and sustain interactions with international actors while aligning with Indigenous values.

The four-fold distinct and interrelated components of TIANs modified and adapted in this research are – sphere of operation, shared principled ideas, advocacy strategies, and information strategies. First, TIANs are envisaged to have distinct spheres of operation because their members will

[1] Margaret Keck & Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998) at 36.

interact across national boundaries, form strong webs spread across the world, and participate in domestic and international politics concurrently. Second, TIANs will operate in alignment with Indigenous values and on the underlying and shared principled idea that the rights of Indigenous peoples should be protected and promoted in international law. Third, TIANs are flexible structures, open to diverse component members, including Indigenous groups, NGOs, INGOs, and non-Indigenous allies. Fourth, they are designed to strategically use information to promote their cause. This thesis asserted that TIANs could be suitable structures for integrating the efforts of international and domestic Indigenous advocates in developing and implementing international legal norms on the procedural environmental rights of Indigenous peoples through their interactions with other international actors.

Indigenous peoples' engagement with other international actors is not novel, and this thesis demonstrated that through active participation in international politics, Indigenous peoples shaped international Indigenous rights law. To illustrate Indigenous peoples' influence as international lawmakers, it analyzed the drafting process of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] Since the adoption of the UNDRIP by the United Nations (UN) General Assembly in 2007, political and academic discussions and recognition of Indigenous peoples' rights have increased exponentially. Indigenous peoples contributed to the development of international human rights law despite the various systemic stumbling blocks they encountered.

This thesis' historical account of Indigenous peoples' struggles and clamour for international recognition demonstrated that the presence of Indigenous peoples at international decision tables greatly influenced the behaviour of other international actors, especially states, regarding

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).

Indigenous issues and the necessity to protect their rights. Considering the dearth of domestic legal frameworks protecting Indigenous peoples' rights, Indigenous peoples sought recourse within the international system for injustices perpetrated within their territories. The UN provided prominent and safe platforms for Indigenous peoples from different parts of the world to share their concerns about the cruel realities of their communities. More so, the UNDRIP negotiation process created a meeting point for Indigenous peoples to reinforce their commitment to impel the international community to adopt an international instrument that precisely and unequivocally affirms their rights. The adoption of the UNDRIP delivered the much-awaited normative framework for protecting Indigenous peoples' rights and evaluating states' responses to Indigenous concerns.

Indigenous peoples were represented mainly by national or communal groups, INGOs, NGOs and social movements during the drafting process of the UNDRIP, but this thesis has shown the limitations of these forms of representation. As mentioned earlier, the disconnection between domestic and international Indigenous representation impedes local actualization of international standards. The fulfillment of international Indigenous rights principles requires sturdy and systematic structures that can bridge the gap between domestic and international domains. Though the UNDRIP asserts Indigenous peoples' individual and collective rights, domestic realities and competing economic, political, and social interests may stiffen the realization of the promises of the Declaration. States and other impacted actors, such as extractive corporations, are sometimes on opposing edges about upholding Indigenous rights and maintaining the economic rewards of extractive projects.

As discussed in this thesis's first and sixth chapters, Indigenous communities are mostly affected by resource extraction projects because most traditional territories contain untapped natural resources. The rising quest for natural resources draws extractive corporations to Indigenous

communities for resource exploitation. The global inclination towards resource extraction and its derivative economic benefits threatens Indigenous peoples' enjoyment of their rights. While extractive corporations and governments seek to explore natural resources for financial reasons, Indigenous peoples have a different connection to their land and environment. Indigenous peoples have spiritual and cultural connections to their lands and act as guardians of their environment and natural resources.[3] Some Indigenous communities have welcomed extractive projects within their traditional territories, but many Indigenous communities resist them because they believe that land and natural resources should be preserved as sources of cultural and social identity.

The first chapter of this thesis provided some background and context on the issues addressed. It explained the disparate perceptions of states, extractive corporations and Indigenous peoples about environmental protection and how it impedes the implementation of international Indigenous rights standards. Chapter one clarified the distinctive position of Indigenous peoples on environmental sustainability and how they are often directly and adversely impacted by the environmental implications of extractive operations. Additionally, the thesis research questions and adopted methodological approaches were outlined in chapter one.

The second chapter of this thesis analyzed international law standards on Indigenous peoples' rights by exploring international human rights instruments that establish the legal basis for Indigenous peoples' rights. Furthermore, the interdisciplinary theoretical approach adopted in the research was comprehensively examined in the same chapter. Drawing from international law and constructivist international relations (IR) theory, this research explored how international actors' interactions shape their ideas, identities, interests, and behaviour. This thesis relied on the

[3] Graeme Reed et al, "Indigenous Guardians as an Emerging Approach to Indigenous Environmental Governance" (2021) 35:1 Conservation Biology 179.

constructivist IR insights on the life cycle of norms because it takes cognizance of the roles of different actors at various stages of norm creation and the factors that inform actors' acceptance of an emerging norm.

The third chapter commenced by applying the taxonomic approach to define environmental justice. The chapter provided a historical account of the origin of the concept of environmental justice. It comprehensively analyzed the international law basis for procedural rights, generally and within the context of environmental decision-making, focusing on the rights to participation and access to information. Specifically, the chapter examined the international law position on Indigenous peoples' rights to participation and access to information in environmental matters. It found that there are legal bases for the participatory rights of Indigenous peoples on the issues that directly impact them generally, but an international instrument that specifically and unequivocally affirms the rights of Indigenous peoples to access environmental information and participate in environmental decision-making is a necessity.

Chapter four provided a thorough account of Indigenous peoples' past engagements within the international system. The chapter revealed how Indigenous peoples' shared ideas, identities, and interests shape their interactions in the global sphere and how Indigenous peoples have influenced the development of international Indigenous rights law. A crucial accomplishment for Indigenous peoples is the adoption of the most comprehensive international law instrument that confirms their individual and collective rights – UNDRIP. The fourth chapter extensively examined the involvement of Indigenous peoples during the development of UNDRIP between 1985 and 2007 to reveal how Indigenous peoples influenced the drafting process. This research adopted Arts and Verschuren's methodological triangulation definition of influence in assessing Indigenous peoples' influence during the drafting process of UNDRIP. This thesis concluded that Indigenous

peoples were influential international players during the drafting and negotiation processes of the UNDRIP because they achieved a significant portion of their goals through the terms contained in the Declaration and the wide adoption of the Declaration by a majority of states. However, their influence was not absolute because they could not prevent the last-minute inclusion of limiting provisions in the Declaration.

A comprehensive review of past Indigenous international collaborative efforts in this thesis's fifth chapter revealed the shortfalls of subsisting structures, including the slow or lack of realization of international standards locally, the gap between Indigenous rights organizations operating internationally and locally, and restricted membership. Indigenous peoples form alliances through structures such as social movements and INGOs. They have achieved much success through these structures, but the identified inherent limitations of these approaches impede the success of Indigenous advocacy and the implementation of international standards domestically. By modifying and adapting Keck and Sikkink's work on TANs, this thesis proposed a structure it refers to as TIANs. The fifth chapter elaborated on the distinctive and interconnected features of TIANs.

This thesis proffered TIANs as suitable alternative structures for promoting Indigenous peoples' interests in the international domain. The fifth chapter examined the potential roles of TIANs in developing and implementing international legal norms on the rights of Indigenous peoples to access information and participate in environmental decision-making, considering the direct adverse consequences of environmental degradation on Indigenous communities. This research explored the roles of TIANs' members as norm entrepreneurs by relying on constructivist IR insights on the life cycle of norms. The interactions of TIANs and state actors were examined in

furtherance of the development of the procedural environmental rights of Indigenous peoples, considering the significant roles of states in international law-making.

For the codification of the emerging legal norms in an international instrument, this thesis recommended a UN General Assembly declaration. The reasons for recommending a UN General Assembly declaration include its international political force, the openness of its drafting and negotiation processes to non-state actors such as Indigenous peoples, the experiences from the development and adoption of the UNDRIP, the potential for Indigenous peoples to influence the terms of the proposed declaration and the likelihood for the declaration to become hard law or shape customary international law on the procedural environmental rights of Indigenous peoples.

Aside from states, extractive MNCs also influence the enjoyment of Indigenous peoples' rights, especially their environmental rights. The sixth chapter of this thesis explored the engagements of Indigenous peoples and extractive MNCs, actors with dissimilar interests. It examined the position of MNCs as influential international actors with economic and political power to impact the enjoyment of Indigenous peoples' rights. Despite the conflicting interests of extractive MNCs and Indigenous peoples on natural resource exploration and environmental sustainability, this thesis provided rationales and strategies for their collaboration in order to develop and implement international norms on the procedural environmental rights of Indigenous peoples.

This thesis has demonstrated that Indigenous peoples are key international human rights lawmakers, and they have been successful in shaping international law's response to their concerns. However, there have been gaps and inadequacies in Indigenous peoples' international collaboration tactics. The disconnections between domestic and international advocacy groups, restrictive memberships and transitory representation approaches undermine the impact of Indigenous activism.

Although constructivist IR theory postulates the importance of actors' socialization in shaping interests and behaviours in the international order, it does not suggest that international players' interactions will always yield positive results.[4] This thesis established that Indigenous representatives need to adopt a more inclusive, enduring, and strategic advocacy approach to increase their global influence and ensure the realization of international Indigenous rights standards locally. The complex connection of states, extractive MNCs and Indigenous peoples to natural resources and the environment brings to light the imperativeness of efficient and shrewd Indigenous socialization with these other actors. This research revealed the necessity for an advocacy approach that can garner adequate human and material resources to protect Indigenous peoples' interest in environmental decision-making.

It is not enough for Indigenous peoples to interact with other international actors, but the subtleties of environmental rights protection call for material, moral and intellectual leverage over the political, economic and institutional powers of states and extractive MNCs. As extractive operations continue to endanger the environment and leave Indigenous communities in precarious conditions, Indigenous peoples' struggle for environmental justice subsists. As Tauli-Corpuz states, "there is no slowing down…We contributed in reshaping discourses on human rights, development and environment. The terrains of our struggles range from our own communities to the national, regional and global arenas."[5] The unswerving impacts of extractive operations and environmental degradation on Indigenous communities have located Indigenous peoples at the centre of the quest for environmental justice.

[4] Thomas Risse-Kappen, "Ideas Do Not Flow Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48:2 International Organization 185.
[5] Victoria Tauli-Corpuz, "The Prospect Ahead," in Jerry Mander and Victoria Tauli-Corpuz, eds, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (San Francisco: Sierra Club Books, 2015) 218 at 219.

This thesis focused on the rights of Indigenous peoples to participate and access information in environmental decision-making. These rights are necessities for safeguarding Indigenous peoples' rights, protecting the environment, and ensuring substantive environmental rights. Therefore, the development of international legal norms on the participatory environmental rights of Indigenous peoples is a pivotal step in protecting their substantive environmental rights and other rights. This thesis stressed the importance of strategic and impactful Indigenous alliance through TIANs in developing and implementing the emerging legal norms on the procedural environmental rights of Indigenous peoples through interactions with states and extractive MNCs. The following section discusses the roles of TIANs in enforcing the implementation (and legitimation) of the emerging norm.

II. TIANs' Roles in Norm Implementation

The development of international norms does not necessarily imply that actors will change their behaviour.[6] Conformity differs from compliance. Generally, conformity may involve a state adopting an action, behaviour, or international instrument acceptable to most other states. Such actions are mostly taken to align with other states and avoid the consequences of being the odd one out. On the other hand, a state may comply with international law when its actual behaviour, actions or policies are consistent with prescribed international law principles.[7] States and non-state actors often violate existing international legal norms.[8]

[6] Pollack identifies four levels of support for international rules – "leadership, consent, compliance, and internalization." The peak of actors' support is internalization when states incorporate international legal norms into domestic law. Mark Pollack, "Who Supports International Law, and Why? The United States, the European Union, and the International Legal Order" (2015) 13:4 International Journal of Constitutional Law 873 at 875.

[7] See Zoltán Búzás, "Evading International Law: How Agents Comply with the Letter of the Law but Violate Its Purpose" (2017) 23:4 European Journal of International Relations 857.

[8] For example, both customary international law and treaty law prohibits the use of force by states against the political independence or territorial integrity of any state. Article 2(4), *Charter of the United Nations,* 1 UNTS XVI. However, in practice, states, especially developed countries, defy this rule. When President Donald Trump launched a cruise

Sometimes, states adopt international norms to conform with others for the sake of their reputation or due to pressure from norm entrepreneurs. State conformity may not lead to compliance for several reasons. For instance, states may lack the capacity to implement their obligations or have domestic norms that conflict with the new norm. In some cases, states with the capacity to comply may blatantly refuse to comply. On the other hand, non-state actors such as MNCs have varying compliance levels for international standards depending on how such rules impact their operations and profitability. Therefore, after an international norm cascades, or is adopted by a mass of states, norm entrepreneurs or actors supporting the norm may have to persuade or coerce other actors to comply with the new norm.

Social construction is a process of interaction that produces and also *reproduces* social structures.[9] Through social interactions, international actors' behaviours are altered to comply with acceptable standards.[10] Thus, international socialization "implies the presence of an international society and is the process through which new members to that society are induced to change their behaviour in accordance with international norms."[11] TIANs can contribute to international social interactions in order to promote the implementation of the emerging norm on Indigenous peoples'

missile strike on Syria, there was minimal reaction to this violation of international law. Anders Henriksen, "Trump's Missile Strike on Syria and the Legality of Using Force to Deter Chemical Warfare" (2018) 23:1 Journal of Conflict and Security Law 33. See David Koplow, "Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty" (2013) 37:1 Fletcher F. World Aff. 53.

[9] Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 International Organization 391 at 411.

[10] John Baylis, "International and Global Security" in John Baylis, Steve Smith, and Patricia Owens, eds, *The Globalization of World Politics: An Introduction to International Relations,* 6th ed, (Oxford: Oxford University Press, 2014) at 229; Olga Avdeyeva, "When Do States Comply with International Treaties? Policies on Violence against Women in Post-Communist Countries" (2007) 51 International Studies Quarterly 877.

[11] Sikkink mentions four processes of socialization – "learning, shaming, ostracism, and coercion". Kathryn Sikkink, "Transnational Advocacy Networks and the Social Construction of Legal Rules" in Yves Dezalay & Bryant Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Michigan: University of Michigan Press, 2005) 37 at 50. Furthermore, Waltz identifies three processes of socialization – "emulation, praise, and ridicule". Kenneth Waltz, *Theory of International Politics* (Illinois: Waveland Press, 1979) at 75 – 76.

rights to access environmental information and participate in environmental decision-making in different ways.

TIANs can facilitate public awareness about the new legal norm. One of the identified impediments to the implementation of international Indigenous rights law is the lack of awareness about the rights contained therein.[12] Publication of the new legal standard and organization of community training to raise awareness of Indigenous peoples' rights are the preliminary steps for TIANs to support the implementation of the new norm.

On the other hand, TIANs' primary social interaction in the international domain could be through collation, framing, and publication of information about actors' infringement of international standards. TIANs can receive and publish information about actors' compliance with the new norm. Specifically, they can collate information about states' and extractive MNCs' compliance to provide adequate environmental information and create avenues for fair community participation in environmental matters. Publicizing information about violations by states and extractive MNCs can shame, ridicule, or coerce them into compliance.

Furthermore, TIANs can lobby powerful states and multilateral institutions to compel the enforcement of international rules. For example, in 1999, the Canadian Assessment Mission to Sudan was tasked with investigating allegations of slavery in Sudan after a Canadian company operating there, Talisman Energy Inc., was alleged to have contributed to forceful displacements of civilians and other human rights violations. The Mission confirmed the allegation, but the Canadian government argued that it had no legal right to sanction Talisman for actions carried out

[12] Speaking within the context of the implementation of the UNDRIP in Canada, Lightfoot highlights some of the hindrances to the actualization of the principles affirmed in the Declaration, including lack of public awareness. Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in Centre for International Governance Innovation, ed, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic, and Indigenous Law* (Waterloo: CIGI, 2018) 17 at 18.

in Sudan. After reactions from civil society organizations and a call on the U.S. to intervene, the U.S. government threatened Talisman with capital market sanctions and Alien Tort Statute litigation liability. After the U.S. government's threats, Talisman decided to sell its Sudanese holding.[13] In the same fashion, TIANs can petition powerful states to coerce norm defaulters to comply.

Lastly, TIANs can support international litigation processes against violators of the procedural environmental rights of Indigenous peoples through financial support, collation of evidence, and institution of litigation processes. For instance, after the Rio Blanco mining conflict in Peru's northern highlands, twenty-eight people detained and tortured by the Peruvian National Police during protests sought relief in domestic courts with the help of an NGO, Fundación Ecuménica para el Desarrollo y La Paz (Fedepaz). The case was stalled and never got to the procedural stage. Due to domestic hindrances, Fedepaz decided to initiate litigation in an international court. Fedepaz collaborated with the national governing organization for Peru's human rights NGOs, Coordinadora Nacional de Derechos Humanos, searching for an international law firm to represent them. Afterwards, Fedepaz and Coordinadora Nacional de Derechos Humanos collaborated in instituting action in London against Monterrico Metals and its Peruvian subsidiary for their involvement in the human rights violations by the Peruvian government.[14]

Like many other international litigations against MNCs, the matter did not get to the trial stage. An out-of-court settlement was reached before the trial commenced.[15] Civil society organizations have been instrumental in litigating human rights cases in domestic, regional, and international

[13] Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (London: Routledge 2014) at 61-63.
[14] *Guerrero v Monterrico*, [2009] EWHC 2475 (QB).
[15] Angela Lindt, "Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?" (2020) 4:2 Journal of Legal Anthropology 57.

courts. This is another approach for TIANs to compel compliance from states and extractive MNCs.

This thesis has presented a historical account of Indigenous peoples' engagements within the international system and analyzed how international legal norms on the rights of Indigenous peoples to participate and access information in environmental decision-making can be developed and implemented. It proposed TIANs as pragmatic structures for representing Indigenous interests in their interactions with states and extractive MNCs within the international community in furtherance of the procedural environmental rights of Indigenous peoples. A practical question is whether Indigenous peoples will be amenable to working within the structures of TIANs and with their multiple constituents. The next section examines four practical issues that might limit the success of TIANs' efforts as norm entrepreneurs and platforms, promoting the development and implementation of the procedural environmental rights of Indigenous peoples.

III. Key Considerations for Implementing Research Findings

A. Probable Colonial Undertones

The success of TIANs depends on their ability to navigate the local and transnational spheres of their operations astutely. Importantly, TIANs must be mindful of the dynamics and distinctiveness of Indigenous communities. Strategies or initiatives that work with Indigenous representatives from one community may not work for another. Therefore, the success of TIANs will depend on the adaptability of their leadership to various Indigenous constituents.

TIANs must be mindful to avoid the pitfall of responding to Indigenous concerns and relating to Indigenous groups through the colonial lens. In his analysis of "anti-colonial" and "anti-neo-colonial" solidarity approaches, De Waal observes that humanitarian solidarity between "faraway oppressed" people and western organizations is one of the determinants of transnational advocacy

networks' effectiveness.[16] If the power imbalances between the constituents of TIANs are not well managed, Indigenous groups may perceive their humanitarian campaigns as neocolonial coercion to assimilate the western perspectives of the other constituents.

Despite the potential colonial undertones linked to transnational advocacy, TIANs can avoid this negativity by keeping abreast of the local realities of Indigenous communities and actively involving their Indigenous constituents in their strategic planning. Indigenous peoples are strongly connected to their cultural and spiritual beliefs and may resist any transnational campaigns that contradict their values. As discussed in chapter five of this thesis, the intended focus of TIANs in this thesis' context is the development and implementation of international norms on the procedural environmental rights of Indigenous peoples. Considering Indigenous peoples' connection to their environment, their desire to protect their environmental rights and TIANs' connection to domestic Indigenous groups, the potential for colonial undercurrents can be minimized.

B. Reliance on Domestic Base

This thesis has stressed the significance of domestic Indigenous groups to TIANs. TIANs need to coordinate and collaborate with their domestic base to achieve their objectives. Domestic groups will be crucial parts of TIANs because they are the primary source of information about the realities of Indigenous communities, attract participants to connect with the visions of TIANs, and, importantly, monitor compliance with international standards on Indigenous peoples' rights. Martin explains that:

> [D]omestic social movements, whether on local or regional or national levels, maintain mobilization through transnational advocacy networks based on the strength of their domestic mobilization and ability to attract participants.

[16] Alex De Waal, "Genealogies of Transnational Activism" in Alex De Waal, ed, *Advocacy in Conflict: Critical Perspectives on Transnational Activism* (London: Zed Books, 2015) at 18.

> Furthermore, policy implementation, outcomes, and monitoring are often activities of domestic social movements with the aid of their partners in the advocacy network.[17]

The participation of domestic organizations at the international level is determined by the level of democracy in their state.[18] States with poor democratic governments tend to have limited civil organization representation within the international system.[19] As Thomas Risse-Kappen observes, the domestic power structures of states vary significantly, which has implications for the success of global campaigns.[20] Fear of political retribution and limited resources are some factors that may hinder the commitment of domestic players to TIANs. Moreover, domestic actors may be overwhelmed by immediate issues within their communities to pay attention to issues that only appear relevant to future contexts or transnational commitments. Hence, the success of TIANs depends on domestic groups whose commitment and operations may be impacted by factors outside the control of TIANs.

However, Indigenous groups at the domestic level are better positioned to abate some factors limiting their successful operations through their connection with TIANs.[21] TIANs can provide domestic Indigenous groups with finances, knowledge, and support for their campaigns. More so, through connections with TIANs, Indigenous groups may gain access to influential institutions such as the UN agencies that may help pressurize their governments to comply with international human rights standards.

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[17] Pamela Martin, *The Globalization of Contentious Politics: The Amazonian Indigenous Rights Movement* (New York: Routledge, 2003) at 132.
[18] Marcel Hanegraaff et al, "The Domestic Global Origins of Transnational Advocacy: Explaining Lobbying Presence During WTO Ministerial Conferences" (2015) 48:12 Comparative Political Studies 1591 at 1595.
[19] *Ibid* at 1608-9.
[20] Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions* (Cambridge: Cambridge University Press, 1995) at 22.
[21] See Jennifer Hadden and Lorien Jasny, "The Power of Peers: How Transnational Advocacy Networks Shape NGO Strategies on Climate Change" (2019) 49:2 British Journal of Political Science 637.

C. Inconsistent Evaluations of the Success of a Campaign

Divergent opinions about the outcome of a campaign are foreseeable considering the multiplicity of TIANs' constituents. Domestic interest groups may not appreciate the efforts of TIANs until they notice feasible changes. While some constituents may deem the adoption of a UN General Assembly declaration on the procedural environmental rights of Indigenous peoples as a milestone, others might focus on implementation and the success of monitoring efforts. These varying perspectives on the actual objective of TIANs may impact constituents' commitment at different stages of their campaigns.

For instance, an investigation of a TAN's campaign targeting CELCO, a Chilean pulp manufacturer, revealed the varying reactions to the campaign's outcome from the members of the network.[22] World Wildlife Fund commented that the campaign was successful because it improved awareness about the environmental challenges in Chile. Greenpeace agreed with this assessment because the campaign led to the creation of environmental institutions in Chile. Conversely, the World Rainforest Movement, another constituent of the TAN, argued that the environmental institutions were useless.[23] It was apparent that members of the network had varying understandings of the campaign issues and expectations.[24]

Inconsistencies in campaign evaluations by the constituents of TIANs can be avoided by clearly identifying and communicating the objectives and plans of each campaign to members from the onset. Periodic progress assessment and unambiguously outlined phases of projects are essential to ensure all constituents understand the advocacy network's objective. As Noakes aptly states,

[22] Christina Kiel, "How Transnational Advocacy Networks Mobilize: Applying the Literature on Interest Groups to International Action" (2011) 3 Josef Korbel Journal of Advanced International Studies 77.
[23] *Ibid* at 94.
[24] Michael Huelshoff and Christina Kiel, "Swan Song: Transnational Advocacy Networks and Environmental Policy in Chile: The Case of the Cisnes de Cuello Negro" (2012) 1 Interest Groups & Advocacy 260.

"navigating the competing interests and ideas of constituent organizations is endemic to all network politics."[25]

In context, the objective of TIANs' involvement with states and extractive MNCs is to develop and implement legal norms on the rights of Indigenous peoples to access information and participate in environmental matters. The implementation aspect may be difficult to evaluate, and some constituents might find the adoption of an international law instrument by a mass of states as a sufficient achievement. However, domestic Indigenous groups may seek the support of TIANs in ensuring that states and extractive MNCs comply with the standards of the developed international law. TIANs ought to inform their constituents of their intentions and level of involvement in implementing and promoting Indigenous procedural environmental rights to avoid disappointing their members and receiving inconsistent evaluations.

D. Questioning the Potency of International Human Rights Law

Scholars have questioned the effectiveness of international human rights law in protecting human rights.[26] Eric Posner argues that human rights law should be abandoned because persistent human rights violations show that they are unreliable.[27] The lack, or ineffectiveness, of enforcement mechanisms sometimes hinders the actualization of international human rights standards. The UN expressed that the development of legal standards and *monitoring mechanisms* is required to

[25] Stephen Noakes, "Transnational Advocacy Networks and Moral Commitment: The Free Tibet Campaign Meets the Chinese State" (2012) 67:2 International Journal 507 at 524.
[26] Douglass Cassel, "Does International Human Rights Law Make a Difference?" (2001) 2:1 Chicago Journal of International Law 121; Par Engstrom, "Human Rights: Effectiveness of International and Regional Mechanisms" (2010) 1 Oxford Research Encyclopedia of International Studies 1 (Casseel).
[27] Eric Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014); Eric Posner, "Human Welfare, Not Human Rights" (2008) John M. Olin Program in Law and Economics, Working Paper No. 94.

promote and protect human rights.[28] In this light, much attention has been given to international monitoring bodies designed to pursue strategies for implementing international law.[29]

Indigenous peoples have also been confronted with the limitations of international human rights law. Despite the wide adoption of the UNDRIP by a majority of states, Indigenous peoples continue to fight for the implementation of the UNDRIP principles. Some of the factors limiting the operationalization of the UNDRIP at the national level include the democratic structure of states and political will.[30] Additionally, some national laws have limited remedies for the violations of Indigenous peoples' rights.[31] These limiting factors might fuel Indigenous peoples' pessimism about the effectiveness of international law and its potential to promote and protect their rights, especially against states and corporations.

Over a decade after the adoption of UNDRIP, the principles contained therein are still aspirations of many Indigenous peoples in different parts of the world. The UN reports that although the principles of the UNDRIP have informed legislative developments and judicial decisions in many countries, the practical realization of the rights set out in the UNDRIP is still quite unsatisfactory.[32] In his evaluation of the effectiveness of international human rights law generally, Cassel concludes that:

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[28] United Nations Office of the High Commissioner of Human Rights, "Effective Implementation of International Human Rights Instruments: Development of the Human Rights Treaty System" online: <https://www.ohchr.org/EN/HRBodies/Pages/DocumentsSystem.aspx>.

[29] Par Engstrom, "Human Rights: Effectiveness of International and Regional Mechanisms" (2010) 1 Oxford Research Encyclopedia of International Studies 1.

[30] See generally, Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington: Georgetown University Press, 2005); Nigel Crawhall, "Africa and the UN Declaration on the Rights of Indigenous Peoples" (2010) 15:1 International Journal of Human Rights 11.

[31] Brenda Gunn, "Remedies for Violation of Indigenous Peoples' Human Rights" (2019) 69:1 University of Toronto Law Journal 150.

[32] United Nations Department of Economic and Social Affairs, "State of The World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples" (2019) 4th Edition, Division for Inclusive Social Development, Indigenous Peoples and Development Branch/ Secretariat of the Permanent Forum on Indigenous Issues ST/ESA/371.

> Overtime, the extent to which international law serves as a useful tool for protection of human rights will depend mainly on its contribution to a broader set of transnational processes that affect the ways people think and institutions behave – whether governments, state security forces, or corporations…*International law's* direct, and even more its indirect influence on conduct, have grown rapidly in historical terms, and appear to be spreading in ways that cannot be explained by a worldview based solely on state power and rational calculations of self-interest…Thus understood, international law can be seen as a useful tool for the protection of human rights and one which promises to be more useful in the future.[33]

Regardless of some setbacks recorded by Indigenous peoples in implementing the prescriptions of the UNDRIP, the Declaration has been instrumental in affirming and publicizing minimum Indigenous rights standards. As Odumosu-Ayanu observes, "international law retains some ability to reverse effects of domination; hence Indigenous peoples' turn to the international legal system in resistance to and engagement with dominant economic and political systems."[34]

Although the Declaration does not explicitly refer to corporations, several corporations have taken steps to develop Indigenous relations policies since the UNDRIP was adopted.[35] There has also been an upsurge in Indigenous-industry agreements between corporations and Indigenous peoples, especially regarding resource development.[36] Indeed, the UNDRIP is an "unavoidable parameter of reference when dealing with Indigenous peoples' rights."[37] The UNDRIP has had a significant impact in protecting and affirming the rights of Indigenous peoples. In the same light, the

[33] Cassel, *supra* note 26 at 122 & 135.
[34] Ibironke Odumosu-Ayanu, "Indigenous Peoples, International Law and Extractive Industry Contracts" (2015) 109 AJIL Unbound 220 at 221.
[35] Basil Ugochukwu, "Implementing UNDRIP in Canada: Any Role for Corporations?" (2020) 7:3 Transnational Human Rights Review 75.
[36] For detailed analyses of Indigenous-industry agreements, see Ibironke Odumosu-Ayanu and Dwight Newman, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York & London: Routledge, 2021). See also, Tegan Brock, Maureen Reed, and Katherine Stewart, "Indigenous Community Participation in Resource Development Decision-Making: Practitioner Perceptions of Legal and Voluntary Arrangements" (2021) 283 Journal of Environmental Management 1.
[37] Felipe Gómez Isa, "The UNDRIP: An Increasingly Robust Legal Parameter" (2019) 23:1 International Journal of Human Rights 7 at 7.

international legal norm on the procedural environmental rights of Indigenous peoples can promote and protect Indigenous peoples' participatory rights in environmental decision-making.

IV. Opportunities for Further Research

This thesis has analyzed Indigenous peoples' influence as international actors and proposed TIANs as suitable structures for developing and implementing international legal norms on Indigenous peoples' procedural environmental rights. Procedural environmental rights include the rights to access environmental information, participate in environmental decision-making processes, and access to remedies and justice when environmental rights are violated. All the components of procedural environmental rights serve distinct and complementary objectives and have significant implications for Indigenous peoples. However, this thesis focused on Indigenous peoples' rights to access environmental information and participate in environmental decision-making.

Therefore, there are opportunities for further research on international legal norms relating to Indigenous peoples' right to access remedies and justice for environmental rights infringement. Specifically, there is a need to examine: applicable international law instruments on Indigenous peoples' right to access remedies for environmental rights violations and damages; the adequacy of existing international legal frameworks; whether an international instrument that explicitly affirms and protects that right is required; and TIANs' roles in promoting norms relating to Indigenous peoples' right to access environmental remedies and justice.

Applying the norm life cycle theory, future research may examine the level of implementation of norms relating to Indigenous peoples' right to access environmental remedies and justice, the norms' phase on the norm life cycle, and TIANs' roles in promoting the acceptance and internalization of the norms. In conclusion, subsequent studies can build on this thesis' analysis of

TIANs' roles as norm entrepreneurs that can foster the development and implementation of international norms relating to Indigenous peoples' procedural environmental rights.

V. Conclusion

Despite the feat achieved by Indigenous peoples so far in the global sphere and in some countries, there is more to be done to ensure the realization of the rights stipulated in the UNDRIP. The emergence of international Indigenous rights law created the legal framework to confront injustices against Indigenous peoples. As international law evolved to affirm Indigenous peoples' rights, Indigenous peoples embraced the hope of a world that acknowledges, respects, and protects their rights. Nonetheless, Indigenous peoples remain at the centre of the quest for environmental justice.

This thesis' argument for developing international legal norms on the right of Indigenous peoples to participate and access information in environmental matters is essentially about the expansion of international human rights law to address the longstanding environmental challenges of Indigenous communities pragmatically. The legal recognition of rights is a crucial step in promoting an idea, prompting support for a cause, and propelling changes in the actions of others. Alston observes that the "proclamation of the existence of human, natural or other forms of inalienable rights as a means by which to mobilize public support through the invocation of high moral principles in a given cause or struggle is a time-honoured and proven technique."[38] An essential element of human rights law is the ability to respond to different emerging and ever-

[38] Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" (1984) 78:3 American Journal of International Law 607 at 608.

changing issues while protecting the rights of everyone. A new normative framework may be developed, or existing frameworks may be expounded and reinforced to achieve this purpose.[39]

The environmental rights of Indigenous peoples are situated at the intersection of international human rights law, natural resource extraction and the human rights responsibilities of extractive MNCs. Irrespective of the robust human rights principles stipulated in the UNDRIP, Indigenous peoples' fight for their rights and communal survival persists. Environmental degradation impedes the actualization of Indigenous rights. Therefore, this thesis highlights the need for international legal norms that precisely confirm the procedural environmental rights of Indigenous peoples in the same fashion as the UNDRIP.

Understanding that Indigenous rights law is not limited to the relations between state and Indigenous peoples, this research investigated the significant role of extractive MNCs and their potential collaboration with the proposed and initiated Indigenous representative structure – TIANs. After analyzing their four distinguishing and interrelated potential characteristics, this thesis concludes that TIANs can engage with states and MNCs to inform the development and implementation of international legal norms relating to Indigenous peoples' procedural environmental rights. TIANs' identified attributes respond to the particularities of Indigenous rights advocacy and will make them well-positioned to bridge the gap between international and domestic Indigenous rights advocates, optimize transnational Indigenous alliances, and foster the actualization of international Indigenous environmental rights principles domestically.

A comprehensive analysis of TIANs' interactions with states and extractive MNCs underscores the multifarious and interrelated roles of various international actors in the development of

[39] Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Human Rights Quarterly 547 at 619 – 620.

international law. The enterprise of international norm creation, and subsequent efforts towards successful implementation, require a comprehensive, strategic, and engagement-focused structure such as TIANs.

Much has been learnt from Indigenous peoples' past and present involvement in the international domain. UNDRIP offers legal, ethical and moral language to confront the injustices against Indigenous peoples. It is my aspiration that the development and implementation of international norms on the rights of Indigenous peoples to participate and access information in environmental decision-making will help alleviate the environmental injustices besetting Indigenous communities, especially regarding natural resource development and related activities.

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