

# THE LEGITIMISING EFFECT OF COORDINATION BETWEEN RELEVANT INTERNATIONAL INSTITUTIONS AND THE HARMONISATION OF THE RIGHTS OF INDIGENOUS PEOPLES

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## I. INTRODUCTION

A remarkable aspect of the role of the Special Rapporteur on the rights of indigenous peoples is that it sits within an international institutional structure full with bodies that engage—albeit to differing degrees—in promoting, monitoring, and upholding the rights of Indigenous peoples. These bodies include, most closely to the Special Rapporteur, the United Nations (U.N.) Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) and the U.N. Permanent Forum on Indigenous Issues (Permanent Forum). More broadly, bodies with overlapping mandates include other U.N. human rights special procedures, some of which engage in issues close to the rights of indigenous peoples, such as environment and culture, the U.N. human rights treaty bodies, the International Labour Organisation (I.L.O.) convention monitoring bodies, and regional human rights courts and commissions.<sup>1</sup> Some of the issues addressed by the Special Rapporteur are also addressed contemporaneously by a number of the aforementioned bodies. Even more widely, many of the issues engaged by the

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<sup>1</sup> Luis Rodríguez-Piñero Royo details the similarities between the rights of Indigenous peoples as expressed in the U.N. Declaration on the Rights of Indigenous Peoples and other instruments, including U.N. human rights treaties. See Luis Rodríguez-Piñero Royo, “Where Appropriate”: *Monitoring/Implementing of Indigenous Peoples’ Rights Under the Declaration*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 314 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

Special Rapporteur are the subject of significant international institutional attention by bodies as diverse as the World Bank, the U.N Food and Agricultural Organisation, the U.N. Global Compact, and the U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises. All of these bodies are producing influential interpretations of indigenous peoples' rights. The thick institutional structure engaged with the rights of indigenous peoples, within which the Special Rapporteur is a central figure, can imperil the legitimacy of the rights of indigenous peoples.

Legitimacy can be described as the legal, political, and social influence of norms and institutions. A focus on legitimacy helps us avoid the unrealistic and misleading positivist focus on the formal bindingness of norms or the legal authority of the institution. As Rodriguez-Piñero Royo has pointed out:

the distinction between hard law and soft law in the area of human rights is obviously a *legal* one, which is not necessarily relevant in practice. Empirical research has shown that the legal status of specific human rights norms is far from a determinative factor in promoting compliance with these norms, and in several instances formally non-binding norms have played an even more effective role in promoting respect for human rights.<sup>2</sup>

Confusion about the procedures that make and apply the law can arise where there are multiple players simultaneously engaged in interpreting and applying the law. Equally, indeterminacy and incoherence in the substance of norms can result. Both procedural and substantive ambiguity can negatively impact the legitimacy of norms, including indigenous peoples' rights under international law.

Here, I examine the significant leadership that Special Rapporteur Anaya provided in countering the potential legitimacy deficits associated with the thick institutional environment within which he operated. He increased the legitimacy of indigenous peoples' rights under international law by promoting institutional cooperation and consistency in the development, interpretation, and application of norms while bringing cohesion and determinacy to the content of the law. Irrespective of the analytical lens, it is clear that the work of Professor S. James Anaya as Special Rapporteur was outstanding from a legitimacy perspective and well-deserving of the excellent reputation it earned him.

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<sup>2</sup> *Id.* at 317 (citing Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 458 (Dinah Shelton ed., 2004) (noting that, in actual practice, "it becomes difficult to separate the impact of the non-binding instruments from the treaty obligations"))).

## II. LEGITIMACY EXPLAINED

Legitimacy can be described as the quality in international norms that leads states to internalize the pull to voluntarily and habitually obey these norms even when it might not be in their interest to do so.<sup>3</sup> The legitimacy of norms is enhanced by a number of factors, including the process by which they are made and their substance.<sup>4</sup>

From a procedural perspective, law is more legitimate when it is sourced in settled, institutionalized, transparent, and ordered processes, as this lessens the extent to which it can be negatively influenced by, to use Thomas Franck's words, "corrupt, arbitrary or idiosyncratic decision-making."<sup>5</sup> The interpretation and application of rights is an important component of the process behind the formation, development, and understanding of law. The greater the number of bodies engaged in the interpretation and application of law, the greater the potential for opaque, idiosyncratic, and muddled law-making. Who makes the law? When different bodies make authoritative interpretations of the law, which interpretation is to be preferred? Moreover, there is no ultimate body to inject procedural clarity into the international legal system by, for example, authoritatively determining the relative hierarchy of interpreting institutions. The risk then, for present purposes, is the fact that the large number of bodies engaged in interpreting and applying indigenous peoples' rights, including the Special Rapporteur, can undermine the procedural legitimacy of such rights. However, legitimacy can be enhanced where there is transparent institutional coordination, cooperation, and a methodology to regulate the boundaries between various institutions and their roles in interpreting or applying the law.

Substance legitimacy relates to the quality of the substance of the norms, including their fairness, determinacy, and coherence. Here, I focus on the latter two dimensions. Franck describes determinacy as what makes a rule clear or transparent. He writes, "it is usually achieved by a rule text's explicit statement of a boundary between permissible and impermissible, or by the designation of a process for clarifying, in a contested instance, the meaning of a rule."<sup>6</sup> Coherence is described as consistency between the underlying principles behind rules and is aggravated by the fragmentation and proliferation of norms.<sup>7</sup> Where numerous

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<sup>3</sup> See Claire Charters, *The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 1, at 280, 281.

<sup>4</sup> For more detail on the above theory, see *id.*

<sup>5</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1998).

<sup>6</sup> Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006).

<sup>7</sup> RONALD DWORKIN, LAW'S EMPIRE (1986). Benedict Kingsbury has analyses of coherence in concepts behind Indigenous peoples' rights in *Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law*, 52 U. TORONTO L.J. 102 (2002).

bodies have the authority to make law and/or legally significant interpretations of norms, the potential exists that uncertainty and incoherence will result. For example, which institution's rule with respect to states' duties to consult with indigenous peoples is the "correct" one? Alternatively, where institutions coordinate to consciously and transparently provide consistent interpretations, legitimacy is enhanced by the certainty provided.

Procedural and substance legitimacy defects are problematic because they lessen the probability that states will comply with norms. As Special Rapporteur Anaya noted in his 2013 final report to the U.N. General Assembly, "commitment to the Declaration is weakened . . . by certain ambiguities and positions about the status and content on the Declaration."<sup>8</sup> States can manipulate the uncertainty in the meaning of rights to argue that they cannot be applied or, if they can be applied, apply such rights to the minimum extent with preference for the most state-friendly interpretation of the norm. If the processes by which the norms are made are confusing, states can use that to question the authority of the resultant norms.

### III. HOW SPECIAL RAPPORTEUR ANAYA INCREASED THE LEGITIMACY OF INDIGENOUS PEOPLES' RIGHTS UNDER INTERNATIONAL LAW

Special Rapporteur Anaya led the way in stimulating substance-legitimacy-enhancing consistency and coherence in indigenous peoples' norms and much needed process-legitimacy-enhancing transparency, coordination, and methodology to related international processes. This role was consistent with his mandate to:

work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies and regional human rights organizations; . . . [and] [t]o work in close cooperation with the Permanent Forum and to participate in its annual session.<sup>9</sup>

In so doing, he increased the likelihood that indigenous peoples' rights will pull states into conformity. I outline various concrete ways the Special Rapporteur Anaya achieved this.

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<sup>8</sup> Special Rapporteur on the Rights of Indigenous Peoples, *The Rights of Indigenous Peoples*, ¶ 59, U.N. Doc. A/68/317 (Aug. 14, 2013) (by S. James Anaya) [hereinafter *Final Report on Indigenous Peoples' Rights*].

<sup>9</sup> Human Rights Council Res. 15/14, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, 15th Sess., U.N. Doc. A/HRC/RES/15/14, ¶ 1(d)-(e) (Oct. 6, 2010).

### **A. The Special Rapporteur, the Expert Mechanism, and the Permanent Forum**

The Special Rapporteur, the Expert Mechanism, and the Permanent Forum are the three U.N. bodies exclusively focused on indigenous peoples' issues and rights (Indigenous Mandates). Throughout his tenure, Special Rapporteur Anaya brought clarity to, and attempted to address with methodology, the overlaps between the Indigenous Mandates, all of which improved process legitimacy. In so doing, he also stimulated greater consistency in their respective interpretations of indigenous peoples' norms, thus enhancing substance legitimacy.

From the beginning of his tenure, Special Rapporteur Anaya can be seen to be deliberately exposing the need to provide clarity on the respective roles of the Indigenous Mandates.<sup>10</sup> In his 2009 report, he writes of "a significant level of confusion among indigenous groups, NGOs, and other stakeholders about the respective roles and functions of the three mechanisms."<sup>11</sup> By drawing attention to the problems associated with the level of uncertainty about the respective roles of the Indigenous Mandates, he provided the impetus for the Indigenous Mandates to cooperate to provide greater clarity.

Special Rapporteur Anaya can be seen to take two approaches simultaneously to injecting greater methodology into the interactions between the mandates. The two approaches are role demarcation and coordination.

First, with respect to role demarcation, Special Rapporteur Anaya exercised restraint in encroaching on the mandates of the other bodies, encouraged self-regulation, and also encouraged delimitation of mandate boundaries. As Rodríguez-Piñero Royo has noted, "effective implementation of indigenous rights . . . necessarily involves cooperative relations among all actors based on a responsible assumption of their respective mandates."<sup>12</sup> For example, thematic study is one of the Special Rapporteur's four areas of mandated focus,<sup>13</sup> the principle activity of the Expert Mechanism,<sup>14</sup> and related to the Permanent Forum's mandate to coordinate and provide advice on issues of relevance to

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<sup>10</sup> Special Rapporteur Anaya's dedication to these objectives did not wane throughout his tenure, as illustrated, for example, by later statements at the annual Permanent Forum session that coordination between the three bodies is essential to minimize and avoid duplication and by his focus on coordination in his final report to the General Assembly. See *Final Report on Indigenous Peoples' Rights*, *supra* note 8.

<sup>11</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34, ¶ 8 (July 15, 2009) (by S. James Anaya) [hereinafter *Report on the Protection of All Human Rights*]. He also refers to a meeting earlier that year where the Indigenous mandates had discussed methods for streamlining their work. *Id.* at 10.

<sup>12</sup> Rodríguez-Piñero Royo, *supra* note 1, at 315.

<sup>13</sup> H.R.C. Res. 15/14, *supra* note 9, ¶ 1(b).

<sup>14</sup> Human Rights Council Res. 6/36, Expert Mechanism on the Rights of Indigenous Peoples, 34th Sess., /HRC/RES/6/36 (Dec. 14, 2007).

indigenous peoples.<sup>15</sup> Early on, Special Rapporteur Anaya chose to focus less on thematic studies and more on his other mandated areas of work. He stated:

because the mandate of the Expert Mechanism is primarily research-based and study oriented, the Special Rapporteur considers his role in this regard as focusing mainly on providing observations on the core issues that have arisen during his work evaluating specific countries and examining specific situations of allegations of human rights violations.<sup>16</sup>

In addition, he stated:

Taking into consideration the establishment of the Expert Mechanism with a mandate to provide thematic expertise and recommendations to the Human Rights Council on issues affecting indigenous peoples, the Special Rapporteur now sees his own work carrying out thematic studies as secondary to the other areas of his work. His role will, for the most part, be complementary and supportive of the work of the Expert Mechanism.<sup>17</sup>

At the end of this tenure, Anaya stated he had “striven to carry out his thematic work in a way that is complementary to, and non-duplicative of, the Expert Mechanism; and that draws on his unique experiences from other work areas.”<sup>18</sup>

Similarly, the Special Rapporteur is the only entity of the three Indigenous Mandates expressly mandated to receive communications from indigenous peoples about their specific complaints against states for non-compliance with indigenous peoples’ rights. Despite that, in practice, indigenous peoples raise their specific allegations against states in the sessions of the Permanent Forum and Expert Mechanism. To minimize the confusion associated with who has the authority to hear and respond to complaints against states, Special Rapporteur Anaya deliberately and consciously established a process to receive communications during the annual sessions of the Permanent Forum and Expert Mechanism. He developed the practice:

in light of the fact that numerous indigenous individuals go to the annual meetings of the Permanent Forum and Expert Mechanism with complaints about specific situations, although

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<sup>15</sup> E.S.C. Res. 2000/22, U.N. Doc. E/RES/2000/22, ¶ 2(b) (July 28, 2000).

<sup>16</sup> *Report on the Protection of All Human Rights*, *supra* note 11, ¶ 13.

<sup>17</sup> *Id.* ¶ 27.

<sup>18</sup> *Final Report on Indigenous Peoples’ Rights*, *supra* note 8, ¶ 39.

neither mechanism has a mandate to follow up with the Governments concerned.<sup>19</sup>

This practice had the effect of concretely clarifying the respective roles of the various bodies and, to some extent, drawing them out of the Expert Mechanism and Permanent Forum sessions while also providing indigenous peoples with the much-needed venue to raise alleged human rights abuse.

The second method adopted by Special Rapporteur Anaya was to cooperate with the other bodies where their mandates continued to overlap, which is to some extent unavoidable given their common focus on indigenous peoples' issues and direction to undertake thematic studies. In 2013, he wrote that from the beginning of his tenure, he has "consistently worked in coordination with" the Permanent Forum and Expert Mechanism.<sup>20</sup> Generally, this is reflected in the annual coordination sessions between the mandates, the Special Rapporteur's presentations at each of the sessions of the Expert Mechanism and the Permanent Forum including more latterly interactive dialogues, and deliberate attempts, when focusing on similar themes, to concentrate on specific and different aspects. For example, in his final report on extractive industries, Special Rapporteur Anaya concentrates a good deal on, in contrast to the Permanent Forum and Expert Mechanism,<sup>21</sup> the ways in which indigenous peoples can control and participate in development.<sup>22</sup>

From a substance legitimacy perspective, Special Rapporteur Anaya was especially in tune with the need for the Indigenous Mandates to take a coordinated and consistent approach to the development, interpretation, and application of indigenous peoples' rights. While the Declaration on the Rights of Indigenous Peoples is the jurisprudential basis for the work of the Special Rapporteur, the Expert Mechanism, and the Permanent Forum,<sup>23</sup> the potential for each body to take a different approach to the Declaration's interpretation was, and remains, a problem. Special Rapporteur Anaya addressed this in a number of ways. He "provided comments on the diverse studies" of the Permanent Forum and Expert

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<sup>19</sup> *Id.* ¶ 46; see also *Report on the Protection of All Human Rights*, *supra* note 11, ¶ 11.

<sup>20</sup> *Final Report on Indigenous Peoples' Rights*, *supra* note 8, ¶ 44.

<sup>21</sup> See Expert Mechanism on the Rights of Indigenous Peoples, Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, With a Focus on Extractive Industries, U.N. Doc. A/HRC/21/55 (Aug. 16, 2012) [hereinafter Follow-Up Report on Indigenous Peoples]; U.N. Permanent Forum on Indigenous Issues, Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility, U.N. Doc. E/C.19/2009/CRP.8 (May 4, 2009).

<sup>22</sup> See Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, U.N. Doc. A/HRC/24/41 (July 1, 2013) (by S. James Anaya).

<sup>23</sup> Special Rapporteur Anaya used the Declaration as "the principal normative frame of reference for his work" given the direction he received from the U.N. Human Rights Council—the U.N.'s primary and multi-state human rights organization—to promote the Declaration. *Final Report on Indigenous Peoples' Rights*, *supra* note 8, ¶ 57.

Mechanism,<sup>24</sup> such as the Expert Mechanism's report on indigenous peoples' participation in extractive industries and its report on participation in decision-making.<sup>25</sup> With respect to the latter, Special Rapporteur Anaya contributed by providing information from his country visit to New Caledonia of indigenous peoples' participation in governance.<sup>26</sup>

Importantly for substance legitimacy, Special Rapporteur Anaya's early thematic study on consultation with indigenous peoples laid the groundwork for the Expert Mechanism's approach to the difficult question of when indigenous peoples' free, prior, and informed consent is necessary. In 2009, Special Rapporteur Anaya stated that "a significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent,"<sup>27</sup> deliberately adopting a similar approach as did the Inter-American Court of Human Rights in *Saramaka People v. Suriname*.<sup>28</sup> Building on this work, in part because of interaction with Special Rapporteur Anaya, the Expert Mechanism went on to elaborate, citing Special Rapporteur Anaya, that consent is necessary in relation to "decisions that are of fundamental importance for their rights, survival, dignity and well-being."<sup>29</sup> And that:

in assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its *potential impact* on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned.<sup>30</sup>

Undoubtedly, the Special Rapporteur's strong reputation as an academic authority on the rights of indigenous peoples prior to his tenure as special rapporteur contributed to his ability to influence consistent approaches to the development, interpretation, and application of indigenous peoples' rights.

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<sup>24</sup> *Id.* ¶ 47.

<sup>25</sup> See Expert Mechanism on the Rights of Indigenous Peoples, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/18/42 (Aug. 17, 2011) [hereinafter Final Report on the Right to Participate in Decision-Making], available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42_en.pdf); Follow-Up Report on Indigenous Peoples, *supra* note 21.

<sup>26</sup> Final Report on the Right to Participate in Decision-Making, *supra* note 25, ¶ 29.

<sup>27</sup> *Report on the Protection of All Human Rights*, *supra* note 11, ¶ 47.

<sup>28</sup> *Id.*; *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007).

<sup>29</sup> Final Report on the Right to Participate in Decision-Making, *supra* note 25, ¶ 22.

<sup>30</sup> *Id.* (emphasis added).



## **B. Special Procedures, Human Rights Treaty Bodies, and the Human Rights Council's Universal Periodic Review**

From a substance legitimacy perspective, Special Rapporteur Anaya's coordination with other special procedures and human rights treaty bodies enhances the prospect of consistent interpretation and application of indigenous peoples' rights across a number of areas and bodies. As mentioned above, there are a number of other special procedures that are focused on issues of central importance to indigenous peoples, including culture, the environment, and women. Special Rapporteur Anaya worked remarkably close with related special procedure mandate holders, issuing a notable fifty-five joint allegation letters and urgent appeals under his communications mandate and making seven joint public statements.<sup>31</sup>

Special Rapporteur Anaya's coordination with U.N. human rights treaty bodies was not as close as with other special procedures but still significant with respect to both communications, especially in cases when he and the bodies were simultaneously reviewing the same situations and countries. He also spoke of more informal cooperation, through respective secretariats, by way of providing relevant information to treaty bodies. His work and role was influential, as evidenced the number of times he was cited, especially by the U.N. Committee on the Elimination of Racial Discrimination.<sup>32</sup> Equally, Special Rapporteur Anaya's assessment of certain states was referenced within the Human Rights Council's universal periodic review process.

## **C. Regional Human Rights Bodies**

Given the extent to which regional human rights bodies have engaged in cases involving the application of indigenous peoples' rights, it is especially important that Special Rapporteur Anaya engaged with them and, most vitally, with respect to specific cases.<sup>33</sup> He cooperated on, for example, the follow-up of Inter-American court cases such as *Awas Tingni v. Nicaragua*,<sup>34</sup> *Saramaka v. Suriname*,<sup>35</sup> and *Kichwa Indigenous People of Sarayaku v. Ecuador*.<sup>36</sup> Near the end of his tenure as Special Rapporteur, he also participated in a coordination-focused meeting between the Inter-American Commission on Human Rights, the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission

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<sup>31</sup> *Final Report on Indigenous Peoples' Rights*, *supra* note 8, ¶ 35.

<sup>32</sup> *See, e.g., id.*

<sup>33</sup> *Id.* ¶ 53.

<sup>34</sup> *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>35</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

<sup>36</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

on Human Rights, and the African Commission on Human and Peoples' Rights. The Special Rapporteur's coordination with the regional human rights bodies is procedurally important because of the transparency it provides to how the bodies function together in a supportive rather than conflictive or competitive manner. From a substance perspective, it illustrates coordination with respect to consistent and relatively uniform understandings of the rights of indigenous peoples and associated state duties. Different interpretations by the different bodies would be problematic for the reasons outlined earlier.

However, Special Rapporteur Anaya also notes the need for a more systemized methodology, especially with respect to specific cases and the problem that they can be brought both to the regional commissions and courts as well as to the Special Rapporteur under his communications mandate (and other U.N. human rights machinery).<sup>37</sup> Indeed, as discussed above, greater transparency and structure with respect to coordination provides greater procedural clarity with respect to how the law is interpreted and applied when there is more than one institution engaged. It also assists in lessening the danger that different bodies will apply different standards to the same set of facts, reduces forum-shopping, and lowers the unwanted effect of providing states with excuses for not complying with findings of international institutions. Of note in this respect is Special Rapporteur Anaya's call to indigenous peoples and their representatives to take responsibility here:

he encourages indigenous peoples and their representatives to think strategically when submitting the same case to both the Special Rapporteur and the regional human rights institutions, considering the added value that each procedure might be able to offer and avoiding unnecessary duplication.<sup>38</sup>

## **D. International Policy with Respect to the Rights of Indigenous Peoples**

U.N. legal and policy activity in the field of indigenous peoples' rights and issues is immense. Numerous bodies are publishing and disseminating global explanations and interpretations of indigenous peoples' rights. One example is the U.N. Global Compact's reference guide for business on the rights of indigenous peoples,<sup>39</sup> and another example is the Food and Agricultural Organisation's *Technical Guide on Respecting Free, Prior and Informed Consent*.<sup>40</sup> Other

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<sup>37</sup> See *Final Report on Indigenous Peoples' Rights*, *supra* note 8, ¶ 56.

<sup>38</sup> *Id.*

<sup>39</sup> U.N. GLOBAL COMPACT OFFICE, A BUSINESS REFERENCE GUIDE: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013), *available at* [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/BusinessGuide.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf).

<sup>40</sup> FOOD & AGRIC. ORG., RESPECTING FREE, PRIOR AND INFORMED CONSENT (2014), *available at* <http://www.fao.org/3/a-i3496e.pdf>.

relevant examples include the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises*, which, while not devoted to the rights of indigenous peoples, addresses issues of central importance to indigenous peoples and their rights.<sup>41</sup> Most of the U.N. institutional activity in the field is based on or grounded in its interpretation of the rights of indigenous peoples, such as training indigenous advocates with respect to their rights. This international institutional activity, while—possibly wrongly—not perceived as especially legal in nature, provides guidance on compliance with indigenous peoples' rights, contributing to their "normalisation" and "mainstreaming," all of which is legitimacy enhancing. However, there is the associated risk that each organization will interpret and apply, at the global and local levels, indigenous peoples' rights differently, thus sending out confused messages about the meaning of rights and the standards set. As explained above, this is problematic from a procedural and, especially, substance perspective. What is the relative authority of each interpretation? What is the exact meaning of the norm?

Special Rapporteur Anaya was especially effective in seeking to ensure that international institutions publishing on and conducting fieldwork applying the rights of indigenous peoples adopted a consistent and similar approach.<sup>42</sup> Of that effort, he writes that he was seeking to "advance harmonization of international programmes with international standards."<sup>43</sup> Anaya engaged in numerous processes at the international level, dedicating "significant energy" to providing comments and advice on the appropriate approach to take with, for example, the Food and Agricultural Organisation's technical guide, the OECD's Guidance for Multi-National Enterprises, and the U.N. Global Compact's Business Reference Guide to the U.N. Declaration on the Rights of Indigenous Peoples.<sup>44</sup> He also collaborated with the United Nations Development Programme, United Nations Educational, Scientific, and Cultural Organization (UNESCO), the World Bank

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<sup>41</sup> See *Guidelines for Multinational Enterprises*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://mneguidelines.oecd.org> (last visited Feb. 16, 2015); see also, e.g., ORGANISATION FOR ECON. CO-OPERATION & DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: RESPONSIBLE BUSINESS CONDUCT MATTERS* (2014), available at [http://mneguidelines.oecd.org/MNEguidelines\\_RBCmatters.pdf](http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf) (containing some discussion of the relevance of the Guidelines to Indigenous peoples).

<sup>42</sup> It should be noted that the Permanent Forum on Indigenous Issues might take on greater leadership in this respect in the future given that it is explicitly mandated to promote coordination with the United Nations with respect to indigenous peoples' issues. *The UN Permanent Forum on Indigenous Issues*, INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/human-rights/un-mechanisms-and-processes/un-permanent-forum-on-indigenous-issues> (last updated May 2013).

<sup>43</sup> *Final Report on Indigenous Peoples' Rights*, supra note 8, ¶ 14; see also S. James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, Statement at the Tenth Session of the UN Permanent Forum on Indigenous Issues (May 19, 2011), available at <http://unsr.jamesanaya.org/statements/statement-unsr-tenth-session-of-the-un-permanent-forum-on-indigenous-issues>.

<sup>44</sup> *Final Report on Indigenous Peoples' Rights*, supra note 8, ¶¶ 13-14.

Group, the World Intellectual Property Organization, the United Nations Food and Agriculture Organisation, and the United Nations Framework Convention on Climate Change.<sup>45</sup>

### III. CONCLUSION

Among the myriad of actors engaged in the rights of indigenous peoples at the international level, Special Rapporteur Anaya took the lead in enhancing the procedural and substance legitimacy of the rights of indigenous peoples. From a procedural perspective, he provided greater clarity, transparency, and coordination in the way multiple institutions work together to make, interpret, and apply the rights of indigenous peoples. From a substance perspective, he worked to ensure consistent interpretations and applications of the rights of indigenous peoples. Moreover, in conjunction with this work, he argued authoritatively and persuasively, drawing on his reputation as a leading academic in the area, for specific understandings of indigenous peoples' rights and their status under international law. All of these pursuits ultimately contribute to enhancing the quality of indigenous peoples' rights under international law in such a way to accelerate states' internalization of the pull to obey, even when it might not be in their interest to do so, despite the lack of an international sovereign and/or sanctions.

However, that is not to say that the job is finished or that Special Rapporteur Anaya saw it as such at the end of this tenure. He emphasized on a number of occasions in his last report to the U.N. General Assembly that more methodology is needed, as reflected in quotations above. He also wrote:

in general, more could be done, including within the Secretariat and among the experts, to coordinate and share information. There is still a significant level of duplication among the various human rights bodies and some inconsistent recommendations. For their part, indigenous peoples and others working on their behalf should be forthright when submitting information to the Special Rapporteur if the same matter has also been submitted to another special procedures mandate, United Nations human rights treaty bodies, regional human rights mechanism, or other relevant procedure, so that adequate coordination between the mechanisms can take place and unnecessary duplication avoided.<sup>46</sup>

The World Conference on Indigenous Peoples Outcome Document raises the potential for further intersection between the work of, particularly, the Special Rapporteur, the Expert Mechanism, and the human rights treaty bodies into the

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<sup>45</sup> *Id.* ¶ 14.

<sup>46</sup> *Id.* ¶ 51.

future, especially with respect to receiving individual communications.<sup>47</sup> If that is the case, there will be an even greater need for appropriate methodology.

A final and important point is that Special Rapporteur Anaya did not only enhance the legitimacy of the rights of indigenous peoples under international law by concentrating on their procedural and substance legitimacy. He also enhanced their “engagement legitimacy”: the phenomenon of increased state and public interaction with indigenous peoples’ rights leading to, over time, their “normalisation” and acceptance in governmental and public consciousness.<sup>48</sup> It is a process, often associated with social movement theory, by which state and public interaction with norms is increased in such a way that, over time, a collective attachment to them and their value is developed and violations of them come to be recognized as intolerable and wrong-headed. All of Special Rapporteur Anaya’s work contributed to this process, including country visits, responses to communications, reports to various multi-lateral bodies, attendance at seminars and conferences, dialogues with state and indigenous officials, and so on. This aspect of Special Rapporteur Anaya’s work is deserving of greater analysis in the future.



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<sup>47</sup> It requires the Human Rights Council, taking into account the views of indigenous peoples, to review the mandates of its existing mechanisms, in particular the Expert Mechanism on the Rights of Indigenous Peoples, during the sixty-ninth session of the General Assembly, with a view to modifying and improving the Expert Mechanism so that it can more effectively promote respect for the Declaration, including by better assisting Member States to monitor, evaluate, and improve the achievement of the ends of the Declaration. G.A. Res. 69/2, U.N. Doc. A/RES/69/2 (Sept. 25, 2014).

<sup>48</sup> Charters, *supra* note 3, at 294.

