The United Nations Special Procedures and Indigenous Peoples: A Regulatory Analysis

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Except where otherwise indicated, this thesis is my original work.

Signed 

Fleur Adcock

Date 11 April 2014

Acknowledgments

Dedicated to my grandfather, Piripi, who never let adversity dim his love

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Abstract

The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 has shifted the attention of Indigenous rights scholars from norm elaboration to norm implementation. Yet, the influence of the United Nations Human Rights Council's special procedures in actualising Indigenous rights norm implementation remains under-researched. I investigate how the non-coercive and resource-poor special procedures regulate – or influence – state behaviour towards Indigenous peoples. I depart from the existing international law corpus by drawing on regulatory literature. Contrary to rationalist theories, I find that the apparently weak international mechanism of the special procedures regulates state behaviour towards Indigenous peoples imperfectly but appreciably. However, I argue that ritualism is states' dominant response: states outwardly agree with the special procedures' recommendations while inwardly developing techniques to avoid them. I conclude that the special procedures mechanism is capable of exerting enhanced influence over state behaviour towards Indigenous peoples and propose strategies to that end. The findings are based on case studies regarding the special procedures' influence in Aotearoa New Zealand and the Republic of Guatemala.

The special procedures mechanism enjoys a broad mandate to advance the realisation of international Indigenous rights norms. In fulfilling this mandate the special procedures experts leverage a mixed dialogic tool-set; principally engaging techniques of shaming, in addition to dialogue-building and capacity-building. The experts' influence on state behaviour towards Indigenous peoples is perceptible in Aotearoa New Zealand and the Republic of Guatemala. But each state engages in ritualism both to disguise its inward resistance to recommendations regarding 'hard' rights to self-determination and land and its failure to fully commit to recommendations concerning the 'soft' cultural right to education. A complex collection of factors explain the experts' imperfect influence: key actors are not engaged, the core principles underlying states' responses to the experts' recommendations are not contested and important regulatory mechanisms are under-exploited. The analysis indicates that, by harnessing dialogic 'webs of influence', comparatively weak actors like the special procedures can influence powerful actors, such as states. It also reveals that, to counter states' rights ritualism, the special procedures should simultaneously shame and praise states, fostering continuous improvement in observing Indigenous rights.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ASEAN	Association of Southeast Asian Nations
Bill of Rights Act	New Zealand Bill of Rights Act 1990 (NZ)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of Racial Discrimination
CHR	UN Commission on Human Rights
CODISRA	Comisión Presidencial contra la Discriminación y el Racismo contra los Pueblos Indígenas en Guatemala (Presidential Commission against Discrimination and Racism towards Indigenous Peoples of Guatemala)
Constitution	Constitution of the Republic of Guatemala 1985
COPREDEH	Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (Guatemala's Presidential Commission for Coordination on Human Rights)
CPO	Consejo de Pueblos de Occidente (Western Peoples Council of Guatemala)
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DEMI	Defensoría de la Mujer Indígena (Guatemala's Indigenous women's defence office)
DIGEBI	Dirección General de Educación Bilingüe Intercultural (Guatemala's General Directorate of Bilingual and Intercultural Education)
doCip	Indigenous Peoples' Center for Documentation Research and Information
ECOSOC	Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
Expert on Burundi	Special Rapporteur on the situation of human rights in Burundi

Expert on Cambodia	Special Rapporteur on the situation of human rights in Cambodia (and the mandate's earlier iterations)
Expert on cultural rights	Special Rapporteur in the field of cultural rights
Expert on education	Special Rapporteur on the right to education
Expert on extrajudicial executions	Special Rapporteur on extrajudicial, summary or arbitrary executions
Expert on extreme poverty	Special Rapporteur on extreme poverty and human rights
Expert on food	Special Rapporteur on the right to food
Expert on foreign debt	Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights
Expert on freedom of opinion	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Expert on freedom of religion	Special Rapporteur on freedom of religion or belief
Expert on Guatemala	Independent Expert on the situation of human rights in Guatemala (and the mandate's earlier iterations)
Expert on health	Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
Expert on housing	Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context
Expert on human rights defenders	Special Rapporteur on the situation of human rights defenders
Expert on internally displaced persons	Special Rapporteur on the human rights of internally displaced persons
Expert on minority issues	Independent Expert on Minority Issues
Expert on Myanmar	Special Rapporteur on the situation of human rights in Myanmar
Expert on peaceful assembly	Special Rapporteur on the rights to freedom of peaceful assembly and of association
Expert on racism	Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
Expert on slavery	Special Rapporteur on contemporary forms of slavery, including its causes and consequences
Expert on terrorism	Special Rapporteur on the promotion and protection of human

	rights and fundamental freedoms while countering terrorism
Expert on the independence of judges	Special Rapporteur on the independence of judges and lawyers
Expert on the OPT	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967
Expert on the sale of children	Special Rapporteur on the sale of children, child prostitution and child pornography
Expert on torture	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
Expert on toxic waste	Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
Expert on transnational corporations	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
Expert on truth and justice	Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence
Expert on violence against women	Special Rapporteur on violence against women, its causes and consequences
Expert on water	Special Rapporteur on the human right to safe drinking water and sanitation
Expert Seminar	International Expert Seminar on best practices for implementation of the Special Rapporteur on Indigenous peoples' recommendations
Foreshore and Seabed Act	Foreshore and Seabed Act 2004 (NZ)
GA	UN General Assembly
GDP	Gross Domestic Product
GRULAC	Group of Latin American and Caribbean Countries
Guatemala	Republic of Guatemala
HCHR	UN High Commissioner for Human Rights
HRC	UN Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IITC	International Indian Treaty Council
ILO	International Labour Organization
ILO Committee of Experts	ILO Committee of Experts on the Application of Conventions and Recommendations

ILO Convention 107	ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries
ILO Convention 169	ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries
Indigenous Agreement	Agreement on Identity and Rights of Indigenous Peoples 1995 (Guatemala)
Inter-American Commission	Inter-American Commission on Human Rights
Inter-American Court	Inter-American Court of Human Rights
IPO	Indigenous peoples' organisation
IWGIA	International Work Group for Indigenous Affairs
Marine and Coastal Area Act	Marine and Coastal Area (Takutai Moana) Act 2011 (NZ)
New Zealand	Aotearoa New Zealand
NGO	Non-governmental organisation
NHRI	National human rights institution
NZHRC	New Zealand Human Rights Commission
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
OHCHR-Guatemala	OHCHR's Guatemalan office
PDH	Procurador de los Derechos Humanos (Guatemala's Human Rights Ombudsman)
PFII	Permanent Forum on Indigenous Issues
Special procedures	UN HRC's special procedures
Special Rapporteur on Indigenous peoples	Special Rapporteur on the rights of indigenous peoples, formerly the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
Study on Best Practices	Study Regarding Best Practices Carried out to Implement the Recommendations Contained in the Annual Reports of the Special Rapporteur on Indigenous Peoples
Sub-Commission	UN CHR Sub-Commission on the Promotion and Protection of Human Rights
Support Project	University of Arizona Support Project for the UN Special Rapporteur on Indigenous Peoples
Treaty	Treaty of Waitangi of 1840 (NZ)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	UN Development Programme

UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNESCO	UN Educational, Scientific and Cultural Organization
United States	United States of America
UPR	UN HRC's Universal Periodic Review
WGIP	Working Group on Indigenous Populations
WIPO	World Intellectual Property Office
Working Group on enforced disappearances	Working Group on enforced or involuntary disappearances
Working Group on mercenaries	Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination
Working Group on transnational corporations	Working Group on the issue of human rights and transnational corporations and other business enterprises

I INTRODUCTION

A *Addressing the Indigenous Rights 'Implementation Gap'*

Indigenous peoples' rights now form part of the lexicon of international human rights law. The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), adopted by the General Assembly (GA) in 2007, is the most comprehensive articulation of their contours.[1] Its adoption has shifted the attention of Indigenous rights scholars from the elaboration of international Indigenous peoples' rights norms to their implementation. [2] Intensified efforts at implementation are vital. In the last four decades Indigenous peoples have secured remarkable standard-setting and institution-building achievements on the international stage. Along with the *UNDRIP*, Indigenous peoples' rights have been affirmed in the jurisprudence of the bodies that monitor compliance with the core United Nations (UN) human rights treaties, amongst others, and a collection of UN mechanisms have been established with an exclusive focus on advancing the position of Indigenous peoples and their rights.[3] But, in their home states, many of the world's estimated 370 million Indigenous peoples remain at the margins of power and overrepresented in negative socio-economic indicators.[4] This disconnect has been described as the Indigenous rights 'implementation gap'.[5]

The gap between the international commitment to norms and their domestic implementation is not unique to Indigenous peoples' rights. Empirical studies confirm that

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[1] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2010) ('*UNDRIP*'). The referencing style used in this dissertation complies with the Australian Guide to Legal Citation: Third Edition. In this text I capitalise the word 'Indigenous' to show that it is being used as a proper noun, to reference a unique people or collection of peoples, rather than as an adjective to describe a 'thing' that originates in a place.

[2] See, eg, Rodolfo Stavenhagen, 'Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 147, 150-51; Irène Bellier and Martin Préaud, 'Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples' (2011) 16(3) *The International Journal of Human Rights* 474, 474; Luis Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs: IWGIA, 2009) 314, 314, 329.

[3] See generally S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2 ed, 2004); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002); Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers, 2006); Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27; Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (The Federation Press, 1998); Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660; Russel L Barsh, 'Current Developments: Indigenous Peoples: An Emerging Object of International Law' (1986) 80 *The American Journal of International Law* 369; Hurst Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649.

[4] See, eg Department of Economic and Social Affairs of the United Nations Secretariat, *State of the World's Indigenous Peoples* (United Nations Secretariat, 2009).

[5] Economic and Social Council Commission on Human Rights ('*CHR*'), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen,* UN Doc E/CN.4/2006/78 (16 February 2006) [14] ('*Stavenhagen Annual Report 2006*').

states do not consistently comply with their international obligations, especially in the field of human rights.[6] The motivations behind state compliance with international norms – understood expansively as standards of behaviour – have been the subject of increased focus amongst international law, international relations and, more latterly, sociology scholars.[7] These scholars have distinguished two broad approaches to understanding state conformity to international norms: rationalism and constructivism. In essence, rationalists argue that states, as rational actors, will only comply with international norms that are in their national interests.[8] There are different variations of rationalist explanations. One of its most prominent strands argues that state compliance is dictated by economic or military coercion, or the norm's accordance with the state's rational self-interest, with 'self-interest' understood restrictively as advancement of the state's economic and military power.[9] Such positions struggle to explain those instances where states comply with international norms absent coercion or furtherance of this narrow self-interest. In particular, human rights norms often entail the relinquishment of economic or military power by states and even binding human rights treaties lack the spectre of institutional coercive enforcement. In contrast, constructivist approaches argue that norms help to constitute state identities and that these identities then shape political action.[10] Constructivists acknowledge that state interests and power disparities matter, but do not view them alone as determinative of state behaviour.[11] There are different variations of constructivist explanations. But they are united in their tendency to emphasise the important role of the interaction of various actors, including resource-poor non-state actors, in influencing states' norm compliance.[12]

Inspired by the possibilities opened up by a constructivist approach to norm compliance, I explore how the international human rights system regulates – or influences – state behaviour towards Indigenous peoples. I do so in order to understand whether the international human rights system may be leveraged to secure improved domestic implementation of international Indigenous peoples' rights norms. I focus on the influence of one mechanism within the international human rights system: the UN Human Rights Council's

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[6] See, eg, Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001-2002) 111 *Yale Law Journal* 1935; Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

[7] For comment on the definition of 'norms' see Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 119, 119.

[8] I explore these two approaches in more depth in Chapter II. For now, regarding rationalist approaches see, eg, Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005).

[9] See, eg, ibid 3-6; Anne-Marie Slaughter, 'International Relations, Principal Theories' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [2]-[3].

[10] See generally Brunnée and Toope, above n 7, 121, 129; John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52(4) *International Organization* 855, 869-70.

[11] Slaughter, above n 9, [21].

[12] See, eg, Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998); Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

(HRC) special procedures (special procedures).[13] The special procedures are independent experts charged by the UN with monitoring and promoting human rights either on a thematic or a country basis. First established in the late 1960s, they commonly fulfil their role by conducting country missions to investigate human rights issues; through a communications process that involves receiving information on allegations of human rights violations and requesting state governments to clarify the facts; promoting best practice through technical advisory assistance and dialogue; and preparing thematic reports on topical rights issues.[14] In their country reports and the advice they offer in the course of providing technical advisory assistance they can issue recommendations to specific state governments to promote the realisation of international Indigenous peoples' rights norms. But they do not have the mandated power to economically or militarily coerce state compliance with their proposals: their propositions are recommendatory only and they receive sparse institutional funding.[15]

The special procedures are an apt mechanism to study in an effort to investigate how the international human rights system regulates state behaviour towards Indigenous peoples. They have global reach unshackled by the requirement that the state under study has ratified a particular human rights treaty.[16] They are unusual in that the experts receive their mandates from the UN and operate under its banner, with some support from the UN Office of the High Commissioner for Human Rights (OHCHR). But the experts function in their personal capacity, without a UN salary, giving them a level of flexibility uncommon in the international system.[17] The special procedures have an express mandate regarding Indigenous peoples' rights. Their parent body has called on all thematic mandate-holders to pay particular attention to the situation of Indigenous peoples within the framework of their mandates.[18] And, in 2001, the mandate of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people (Special Rapporteur on Indigenous peoples) was established to investigate and report on Indigenous peoples' rights.[19] This mandate continues. It was held first by the sociologist Rodolfo Stavenhagen and, since 2008, by the legal scholar James Anaya. The

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[13] In this research I refer to those individuals who hold or held special procedures mandates variously as 'experts' and 'mandate-holders' as well as by their specific titles, such as 'Special Rapporteur' and 'Working Group' member. I discuss the experts' different titles in Chapter III.

[14] See, eg, Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 213-16. I discuss these working methods in Chapter IV.

[15] See, eg, Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 209-10, 224-25.

[16] See, eg, Miko Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Abo Akademi University, 2001) 1.

[17] See, eg, Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *The International Journal of Human Rights* 232, 232-34.

[18] *International Year of the World's Indigenous People, 1993*, CHR Res 1993/30, UN Doc E/CN.4/RES/1993/30 (5 March 1993) para 2 ('*CHR Res 1993/30*').

[19] *Human Rights and Indigenous Peoples* CHR Res 2001/57, UN Doc E/CN.4/RES/2001/57 (24 April 2001) ('*CHR Res 2001/57*'). The mandate was renewed in 2004, 2007, 2010 and 2013 (with the title of the mandate changed in 2010), see Chapter III. In this dissertation, except for citation purposes, I use the abbreviated titles set out in the Abbreviations when referring to the individual mandates of the special procedures experts. Given the length of many of the mandates' titles, only the title of the Special Rapporteur on the rights of indigenous peoples is defined in the body of this dissertation.

mechanism has also been praised for its efficacy in the realisation of human rights. Former UN Secretary-General Kofi Annan described the special procedures as the 'crown jewel' of the UN human rights machinery, and Amnesty International has called them 'a critical element in the implementation of international human rights standards'.[20] Yet, there is a dearth of empirical academic research critically analysing the influence of the special procedures on state behaviour, especially in relation to Indigenous peoples.

B *Research Context*

A growing body of literature examines the special procedures. The earliest scholarship examines the historical development of the initial mandates, including concerning Chile, enforced disappearances, torture and arbitrary detention.[21] Several larger works on the international system outline the core features of the mechanism, including edited texts by Philip Alston, Janusz Symonides and Julie Mertus.[22] A collection of articles and book chapters

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[20] Kofi Annan, UN Secretary-General, 'Secretary-General Urges Human Rights Activists to 'Fill Leadership Vacuum', Hold World Leaders to Account, in Address to International Day Event', (Media Release, UN Doc SG/SM/10788, 8 December 2006); Amnesty International, *Organization of the Work of the Session: Written Statement Submitted by Amnesty International, a Non-Governmental Organization in Special Consultative Status,* UN Doc E/CN.4/2006/NGO/250 (27 March 2006) 2.

[21] Marc Bossuyt, 'The Development of Special Procedures of the United Nations Commission on Human Rights' (1985) 6 *Human Rights Law Journal* 179; Toine van Dongen, 'In Laatste Instantie: Verdwijningen en de Verenigde Naties' (1986) 40 *Internationale Spectator* 468; Menno T Kamminga, 'The Thematic Procedures of the UN Commission on Human Rights' (1987) 34 *Netherlands International Law Review* 299; Sir Nigel S Rodley, 'United Nations Action Procedures Against "Disappearances," Summary or Arbitrary Executions, and Torture' (1986) 8 *Human Rights Quarterly* 700; David Weissbrodt, 'The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights' (1986) 80(3) *The American Journal of International Law* 685; David Weissbrodt, 'Country-Related and Thematic Developments at the 1988 Session of the UN Commission on Human Rights' (1988) 10(4) *Human Rights Quarterly* 544; Reed Brody, 'The United Nations Creates a Working Group on Arbitrary Detention' (1991) 85(4) *The American Journal of International Law* 709; José Antonio Pastor Ridruejo, 'Les Procédures Publiques Spéciales de la Commission des Droits de l'Homme des Nations Unies' (1991-III) 28 *Receuil des Cours* 182; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994); Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1995-1996) 28 *Journal of International Law and Politics* 785; Beate Rudolf, 'The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights' in J A Frowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Martinus Nijhoff Publishers, 2000) 289; Manfred Nowak, 'Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission' (1991) 22 *Netherlands Yearbook of International Law* 39; Reed Brody, Penny Parker and David Weissbrodt, 'Major Developments in 1990 at the UN Commission on Human Rights' (1990) 12(4) *Human Rights Quarterly* 559.

[22] Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 1992); Tom Farer and Felice Gaer, 'The UN and Human Rights: At the End of the Beginning' in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World* (Clarendon Press, 1993) 240; Janusz Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate, 2003); Theo van Boven, 'United Nations Strategies to Combat Racism and Racial Discrimination; A Sobering but not Hopeless Balance-Sheet' in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr* (Kluwer Law International, 2003) 251; Julie A Mertus, *The United Nations and Human Rights: A Guide for a New Era* (Routledge, 2 ed, 2009); Manfred Nowak (ed), *Introduction to the International Human Rights Regime* (Martinus Nijhoff, 2003); Sir Nigel S Rodley, 'The Evolution of United Nations' Charter-based Machinery for the Protection of Human Rights' in Frances Butler (ed), *Human Rights Protection: Methods and Effectiveness* (Kluwer Law International, 2002) 187; Louis Joinet, 'The UN Special Rapporteurs' in Linos-Alexandre Sicilianos (ed), *The Prevention of Human Rights Violations* (Ant N Sakkoulas Publishers; Martinus Nijhoff Publishers, 2001) 91; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010); David Weissbrodt and Connie de la Vega, *International Human Rights Law: An Introduction* (University of Pennsylvania Press, 2007); David Weissbrodt, Joan Fitzpatrick and Frank Newman, *International Human Rights: Law, Policy, and Process*

examine the mechanism's different aspects. A few focus on particular country mandates, including Surya Subedi, Hilary Charlesworth and Michael Kirby's separate analyses of the mandate of the expert on Cambodia.[23] Some scholars focus on singular thematic mandates, such as the experts on torture, internally displaced persons or freedom of religion.[24] Others focus on the special procedures' role in promoting particular rights, such as migrants' rights, environmental rights or economic, social and cultural rights.[25] A sizeable number devote attention to the role of the experts in the context of conflicts, including Joan Fitzpatrick, Alston, Jason Morgan-Foster, William Abresch and Michael O'Flaherty.[26] Several also look at particular issues relating to the mandates.[27] For example, Sir Nigel Rodley analyses the relationship between the special procedures and the human rights treaty bodies,[28] while Alston,

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(Anderson Publishing Co, 3 ed, 2001); Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity, 2007); Henry J Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3 ed, 2008); Felipe Gómez Isa and Koen de Feyter (eds), *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, 2006).

[23] Surya P Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' (2011) 15(2) *The International Journal of Human Rights* 249; Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1; Michael Kirby, 'UN Special Procedures - Reflections on the Office of the UN Special Representative for Human Rights in Cambodia' (2010) 11 *Melbourne Journal of International Law* 491.

[24] Allehone Mulugeta Abebe, 'Special Rapporteurs as Law Makers: The Developments and Evolution of the Normative Framework for Protecting and Assisting Internally Displaced Persons' (2011) 15(2) *The International Journal of Human Rights* 286; Jared M Genser and Margaret K Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice' (2008) 39 *Columbia Human Rights Law Review* 687; Amrita Mukherjee, 'The Fact-Finding Missions of the Special Rapporteur on Torture' (2011) 15(2) *The International Journal of Human Rights* 265; Michael Wiener, 'The Mandate of the Special Rapporteur on Freedom of Religion or Belief - Institutional, Procedural and Substantive Legal Issues' (2007) 2(2) *Religion and Human Rights* 3; Gabriela Rodríguez, 'The Role of the United Nations Special Rapporteur on the Human Rights of Migrants' (2000) 38(6) *International Migration* 73.

[25] Taryn Lesser, 'The Role of United Nations Special Procedures in Protecting the Human Rights of Migrants' (2010) 28(4) *Refugee Survey Quarterly* 139; Caroline Dommen, 'Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms' (1998) 11 *Georgetown International Environmental Law Review* 1; Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299; Christophe Golay, Irene Biglino and Ivona Truscan, 'The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue' (2012) 9(17) *Sur - International Journal on Human Rights* 15.

[26] Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994); Claire Breen, 'Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security' (2008) 12 *Max Planck Yearbook of United Nations Law* 177; Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'' (2008) 19(1) *The European Journal of International Law* 183; Bertrand Ramcharan, 'The Special Rapporteurs and Special Procedures of the United Nations Commission on Human Rights and Human Security' in Bertrand Ramcharan (ed), *Human Rights and Human Security* (Kluwer Law International, 2002) 81; Michael O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3(1) *Human Rights Law Review* 53; Hurst Hannum, 'Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding' (2006) 28 *Human Rights Quarterly* 1.

[27] See, eg, Rhona K M Smith, 'The Possibilities of an Independent Special Rapporteur Scheme' (2011) 15(2) *The International Journal of Human Rights* 172; Surya P Subedi et al, 'The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 155; Lyal S Sunga, 'How can UN human rights special procedures sharpen ICC fact-finding?' (2011) 15(2) *The International Journal of Human Rights* 187; Markus Schmidt, 'Follow Up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council – Recent Developments' in Gudmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller* (Martinus Nijhoff Publishers, 2 ed, 2009) 25.

[28] Sir Nigel Rodley, 'UN Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights - Complementarity or Competition' (2003) 25 *Human Rights Quarterly* 882; Sir Nigel Rodley, 'The United Nations

Sir Nigel Rodley and Elvira Domínguez Redondo consider the responsibilities that attach to the experts.[29] A generous selection of scholars explore the impact of the disbandment of the Commission on Human Rights (CHR) – the special procedures' former parent body – and its replacement with the HRC on the mechanism,[30] as well as the impact of the HRC's institutional reviews.[31] An assortment of mandate-holders have provided personal reflections on their time holding mandates, including John Gerard Ruggie (as the expert on transnational corporations), Paulo Sérgio Pinheiro (as the expert on Burundi and then Myanmar) and Katarina Tomaševski (as the expert on education).[32] Olivier de Frouville, Patrick Flood, Beate Rudolf, Miko

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Human Rights Council, its Special Procedures and its Relationship with Treaty Bodies: Complementarity or Competition?' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 49.

[29] Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?' (2011) 52(2) *Harvard International Law Journal* 561; Sir Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15(2) *The International Journal of Human Rights* 319; Elvira Dominguez-Redondo, 'UN Public Special Procedures under Damocles' Sword - Two Particular Innovations: Mechanisms for the Appointment of Mandate-Holders and the Adoption of a Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council' (2008) 29(1) *Human Rights Law Journal* 32.

[30] Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185; Claire Callejon, 'Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence' (2008) 8(2) *Human Rights Law Review* 323; Nazila Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways' (2006) 55(3) *International and Comparative Law Quarterly* 695; Jeroen Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) 7(1) *Human Rights Law Review* 93; Francoise J Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' (2007) 7 *Human Rights Law Review* 7; Hurst Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights' (2007) 7(1) *Human Rights Law Review* 73; Oliver Hoehne, 'Special Procedures and the New Human Rights Council - A Need for Strategic Positioning' (2007) 4(1) *Essex Human Rights Review* 48; Paul Gordon Lauren, '"To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council' (2007) 29 *Human Rights Quarterly* 307; Ibrahim Salama, 'Institutional Re-engineering for Effective Human Rights Monitoring: Proposals for the Unfinished Business under the "New" Human Rights Council' in Gudmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller* (Martinus Nijhoff Publishers, 2 ed, 2009) 185; Patrizia Scannella and Peter Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled' (2007) 7(1) *Human Rights Law Review* 41; Katherine Short, 'From Commission to Council: Has the United Nations Succeeded in Creating a Credible Human Rights Body?' (2008) 9 *Sur - Revista Internacional de Direitos Humanos* 146; Helen Upton, 'The Human Rights Council: First Impressions and Future Challenges' (2007) 7(1) *Human Rights Law Review* 29; Lyal S Sunga, 'What Effect if Any Will the UN Human Rights Council Have on Special Procedures?' in Gudmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller* (Martinus Nijhoff Publishers, 2 ed, 2009) 169; Elvira Domínguez Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law - The Case of Special Procedures' (2011) 29(3) *Netherlands Quarterly of Human Rights* 261.

[31] Ingrid Nifosi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 389-417; Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 419; David Weissbrodt, 'United Nations Charter-Based Procedures for Addressing Human Rights Violations: Historical Practice, Reform, and Future Implications' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, 2011) 13; Patrick Flood, 'The UN Human Rights Council: What Would Eleanor Roosevelt Say?: The UN Human Rights Council: Is its Mandate Well-Designed?' (2009) 15(2) *ILSA Journal International and Comparative Law* 471; Rhona Smith, 'From 'Crown Jewel' to 'Frankenstein's Monster': Reviewing, Rationalising and Improving the Role of the UN Special Procedures' (2011) 17(2) *Australian Journal of Human Rights* 33; Bertrand G Ramcharan, *The UN Human Rights Council* (Routledge, 2011); Subedi et al, above n 27; Lyal S Sunga, 'Introduction to the "Lund Statement to the United Nations Human Rights Council on the Human Rights Special Procedures"' (2007) 76 *Nordic Journal of International Law* 281.

[32] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company, Inc, 2013); Paulo Sergio Pinheiro, 'Musings of a UN Special Rapporteur on Human Rights' (2003) 9 *Global Governance* 7; Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act' (2011) 15(2) *The International Journal of Human Rights* 162; Katarina Tomaševski, 'Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004'

Lempinen, Ingrid Nifosi, Domínguez Redondo, Jeroen Gutter and Bertrand Ramcharan offer book-length accounts of the historical evolution, legal foundations and contemporary organisation of the special procedures mechanism.[33] These accounts provide important context on the mechanism.

The literature offers much general comment on the special procedures' role in actualising the implementation of international human rights norms, mostly positive. But there is little sophisticated assessment of this influence. For example, David Weissbrodt argues that 'the thematic special procedures directly affect the policy and practices of governments',[34] O'Flaherty that 'examples can be cited of their activities having a favorable impact in state practice',[35] and Subedi that the experts 'significantly impact the enjoyment of human rights'.[36] Authors such as Weissbrodt and Subedi are well positioned to make an assessment, having held special procedures mandates. However, other former mandate-holders are more circumspect about the mechanism's impact. For example, Pinheiro has remarked that '[a]fter issuing recommendations for 13 years, I became increasingly tired of this exercise that had become a

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(2005) 5(2) *Human Rights Law Review* 205; Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' above n 23; Jean Ziegler et al, *The Fight for the Right to Food: Lessons Learned* (Palgrave Macmillan, 2011); Kirby, above n 23; Manfred Nowak, 'Monitoring Disappearances - The Difficult Path from Clarifying Cases to Effectively Preventing Future Ones' (1996) 4 *European Human Rights Law Review* 348; Theo van Boven, 'Urgent Appeals on Behalf of Torture Victims' in Luigi Condorelli et al (ed), *Libertés, Justice, Tolérance: Mélanges en Hommage au Doyen Gérard Cohen-Jonathan, Volume II* (Bruylant, 2004) 1651; Paul Hunt and Rajat Khosla, 'Holding Pharmaceutical Companies to Account: A UN Special Rapporteur's Mission to GlaxoSmithKline' in Geoff Gilbert, Francoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, 2011) 39; Alston, Morgan-Foster and Abresch, above n 26. For additional contributions that contain personal reflections, or projections, by mandate-holders see Natassia Rozario, 'A Conversation with Anand Grover, United Nations Special Rapporteur on the Right to Health' (2011) 5(1) *Health Law and Policy Brief* 57; Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights', above n 17; Joanna Naples-Mitchell, *Defining Rights in Real Time: The UN Special Procedures' Contribution to the International Human Rights System* (Senior Thesis, Harvard College, 2010); Paul Hunt, 'The UN Special Rapporteur on the Right to Health: Key Objectives, Themes, and Interventions' (2003) 7(1) *Health and Human Rights* 1.

[33] Olivier de Frouville, *Les Procédures Thématiques: Une Contribution Effi Cace des Nations Unies à la Protection des Droits de l'Homme* (Editions A Pedone, 1996); Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998); Lempinen, above n 16; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005); Beate Rudolf, *Die Thematischen Berichterstatter und Arbeitsgruppen der UN-Menschenrechtskommission: Ihr Beitrag zur Fortentwicklung des Internationalen Menschenrechtsschutzes* (Springer, 2000); Elvira Dominguez-Redondo, *Los Procedimientos Publicos Especiales de la Comision de Derechos Humanos de Naciones Unidas* (Tirant lo Blanch, 2005); Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia, 2006); Bertrand G Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff Publishers, 2009). I owe an intellectual debt to Naples-Mitchell whose canvas of the core literature on the special procedures inspired several of the categorisations used in this paragraph. Naples-Mitchell, *Defining Rights in Real Time: The UN Special Procedures' Contribution to the International Human Rights System*, above n 32.

[34] Weissbrodt, 'United Nations Charter-Based Procedures for Addressing Human Rights Violations: Historical Practice, Reform, and Future Implications', above n 31, 33.

[35] Michael O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3(1) *Human Rights Law Review* 53, 68.

[36] Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 223. See also, eg, Bertrand G Ramcharan, *The Protection Role of National Human Rights Institutions* (Martinus Nijhoff Publishers, 2009) 123-24; Golay, Mahon and Cismas, above n 25, 311; Kirby, above n 23, 493; Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community,* above n 33, 349-50; Ramcharan, 'The Special Rapporteurs and Special Procedures of the United Nations Commission on Human Rights and Human Security', above n 26, 81.

sort of ritual or repeated mantra with hardly any consequence.'[37] Greater attention is devoted to the issue of impact in several of the book-length works. Flood, whose 1998 text focuses on the experts on enforced disappearances, religious intolerance, Chile and Iran argues 'that these mechanisms constitute an increasingly influential deterrent to human rights abuse by states.'[38] Nifosi, writing in 2005 regarding the first country procedures as well as the mandates on enforced disappearances, extrajudicial executions, torture, arbitrary detention, the Congo, and the former Yugoslavia, concludes that the experts' impact on the improvement of domestic human rights situations is 'significant'.[39] She cites developments in Bhutan and Chile as examples.[40] Gutter's 2006 contribution examining the work of the mandates on enforced disappearances, torture and arbitrary detention is more pessimistic, describing their effect as 'extremely modest';[41] although his concern is more on state cooperation with the experts, which is a related but distinct question. The overriding impression is of a mechanism capable of bringing about human rights improvements. Yet, none of these scholars engage with the theoretical literature on norm implementation; where examples of influence are given, none explicitly outline how the causal link between the experts' efforts and the claimed rights improvement was drawn; and many are reliant on UN documents as the source of the improvements cited.[42]

The most rigorous and comprehensive empirical work on the special procedures' influence on states' domestic human rights behaviour is a 2010 study by the Brookings Institution led by Ted Piccone. Its findings are published in both report and book form through the Brookings Institution,[43] and in abridged form in *The International Journal of Human Rights*.[44] The study analysed the influence of two of the special procedures' working methods

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[37] Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act ', above n 32, 169. See also Kamminga, above n 21, 317-19; Charlesworth, above n 23, 9, 12-4.
[38] Flood, *The Effectiveness of UN Human Rights Institutions,* above n 33, 130.
[39] Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 33, 152.
[40] Ibid 141-43. Lempinen shares a similarly positive view of the special procedures' work but he emphasises their role as an awareness-raising tool so judges them against this function only. Lempinen, above n 16, 1, 11, 119, 285-86.
[41] Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community,* above n 33, 350. One journal article also considers the issue of impact in some depth but it is narrow in focus, examining only the Working Group on arbitrary detention, and it is not a comprehensive study: it looks at just four cases where the Working Group is argued to have contributed to securing the release of individuals from detention. Genser and Winterkorn-Meikle, above n 24, 716-39.
[42] See, eg, Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 33, 137 n 64. Flood's analysis is distinguishable from the other literature in that it is based on focused case studies, where the competing influence of domestic and other factors are given some consideration. Flood, *The Effectiveness of UN Human Rights Institutions,* above n 33, 49-115. Jared Genser and Margaret Winterkorn-Meikle provide the best elaboration of the connection between the special procedures' efforts and the claimed rights improvement, and draw on sources beyond UN documents in support of their analysis. But, as noted above, their focus is narrow and is not presented as a comprehensive study. Genser and Winterkorn-Meikle, above n 24, 716-39.
[43] Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010); Theodore J Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press, 2012). The book builds on the report's findings to explore in more depth the factors that impact the influence of the mechanism.
[44] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 15. Piccone also comments, briefly, on the study's findings in Ted Piccone, 'Why Are Special Human Rights Procedures So Special' in *A Global Agenda: Issues Before the United Nations 2011-2012* (The United Nations Association of the USA, 2011) 59.

on a selection of states: the recommendations made by the experts following their country missions and their communications. The team's field visits to five states and extensive interviews (more than 200, including with nearly 30 current and former special procedures mandate-holders) distinguish the study from the other literature commenting on the experts' influence.[45] The study concluded that 'the special procedures mechanism represents one of the most effective tools of the international human rights system' playing 'a direct, positive but uneven role in influencing government behaviour.'[46] The team found that '[i]n general, states have made modest but important progress toward implementing the recommendations a special procedure makes after a country visit', gathering 'numerous examples of positive steps taken by governments after the issue was raised during an SP's [special procedures'] country visit.'[47] But communications, although having 'some limited impact on influencing state behaviour…in general are ineffective.'[48] Again, the theoretical literature on norm implementation is not discussed; the causal link between the experts' efforts and the claimed rights improvement is rarely set out; and, despite the field visits and interviews, there is still an overreliance on UN documents as the source of the improvements cited.[49] Further, examples of the mechanism's impact are drawn from across the mandates and the globe, even beyond those states to which the team conduced field visits, opening the study up to accusations that it 'cherry picks' examples of the mechanism's impact. Limitations such as these prompted Alston to observe, in 2011, that '[i]t is…difficult…to understand why virtually no scholarly evaluation studies of the impact of reporting by Special Procedures mandate-holders have been undertaken.'[50] He went on, 'all that are available are anecdotal accounts of instances in which government policies have been reversed, individuals released, and prosecutions undertaken, subsequent to reporting by Special Procedures mandate-holders.'[51]

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[45] The team conducted field visits to Spain, Morocco, the United Kingdom, Indonesia and Colombia where they examined state responses to special procedures' country recommendations issued between 2003 and 2010; including, in Colombia, by the Special Rapporteur on Indigenous peoples. The study did not include interviews with either Stavenhagen or Anaya. The team also assessed government replies to 19 thematic mandate-holders' communications between 2004 and 2008, including by the Special Rapporteur on Indigenous peoples, representing 'over 5000 communications sent to over 140 countries.' I discuss the report's specific findings regarding Indigenous peoples below. Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, 4, 78; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 15, 207-08.

[46] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 15, 206.

[47] Ibid 214-15.

[48] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, ix.

[49] See, eg, ibid 16-7, 26-7, 31, appendix E 61-8; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 43, appendix D 159-60, 162-63; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 15, 208, 214-15. Piccone's team's methodology for assessing the influence of the experts' communications is outlined in some depth but it is based on the experts' communication reports rather than independent research and its focus is on the content of the replies received as opposed to action on the rights issues raised. Piccone's methodology has been praised by other commentators. Ryan Kaminski and A Edward Elmendorf, 'Catalysts for Change: How the UN's Independent Experts Promote Human Rights - Book Review' (2013) *Yale Journal of International Affairs* 121, 122-23.

[50] Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 29, 575 (citations omitted).

[51] Ibid.

The lacuna in the literature widens where the rights of Indigenous peoples are concerned. Literature on the special procedures infrequently mentions Indigenous peoples. Where it does it is generally to acknowledge, in passing, the application of a specific rights issue to Indigenous peoples, as Subedi has done in respect of Cambodia, or to briefly outline the mandate of the Special Rapporteur on Indigenous peoples, as Ramcharan has done.[52] Similarly, much of the literature on Indigenous peoples' rights under international law devotes only cursory attention to the work of the special procedures in relation to Indigenous peoples. Many identify that the Special Rapporteur on Indigenous peoples has a role in promoting Indigenous peoples' rights but as a side note, including Anaya's seminal *Indigenous Peoples in International Law*.[53] Few identify a role for special procedures mandate-holders other than the Special Rapporteur on Indigenous peoples in promoting Indigenous rights, Anaya's substantial contributions included.[54] Luis Rodríguez-Piñero Royo and Julian Burger are notable exceptions, although both focus on the role of thematic special procedures experts only.[55] A small number of scholars discuss the overlaps in the mandates of the Special Rapporteur on Indigenous peoples and the other Indigenous-exclusive UN bodies; Claire Charters' unpublished doctoral thesis is the most extensive examination.[56]

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[52] Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country', above n 23, 252, 257-58; Ramcharan, above n 36, 10, 170-71.

[53] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 3, 223-24; S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 107-14; James Anaya, 'Indigenous Law and Its Contribution to Global Pluralism' (2007) 1 *Indigenous Law Journal* 3, 10; Xanthaki, above n 3, 28; Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 49-50, 53-4, 57, 136-37, 307-08; Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137, 159-60; Irene Bellier, 'The Declaration of the Rights of Indigenous Peoples and the World Indigenous Movement' (2005) 14 *Griffith Law Review* 227, 228; Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate Publishing Limited, 2011) 29-30; Wilton Littlechild, 'When Indigenous Peoples Win, the Whole World Wins: Address to the UN Human Rights Council on the 60th Anniversary of the Universal Declaration on Human Rights' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 372, 373-74; Naomi Kipuri, 'The UN Declaration on the Rights of Indigenous Peoples in the African Context' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 252, 267.

[54] Anaya identifies that the establishment of the mandate of the Special Rapporteur on Indigenous peoples adds 'to the commission's system of extraconventional, thematic mechanisms which includes special rapporteurs and working groups on matters such as torture, religious intolerance, and forced disappearances.' But he does not explore the relevance of these mandates to Indigenous peoples. Anaya, *Indigenous Peoples in International Law,* above n 3, 223. A similar statement is made in Anaya, *International Human Rights and Indigenous Peoples,* above n 53, 107.

[55] Julian Burger, 'Making the Declaration Work for Human Rights in the UN System' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 304, 305, 307-08; Rodriguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration', above n 2, 330-34; Luis Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial' in Mikel Berraondo et al (eds), *Los Derechos de los Pueblos Indígenas en el Sistma Internacional de Naciones Unidas* (Instituto Promocion Esudios Sociales, 2010) 109, 124-26. See also Victoria Tauli-Corpuz and Erlyn Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and Challenges* (Tebtebba Foundation, 2004) 21-2; Garth Nettheim, 'The UN Charter-Based Human Rights System: An Overview' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Zed Books Ltd and The Federation Press, 1998) 32, 37-9.

[56] Claire Charters, *The Legitimacy of Indigenous Peoples' Norms Under International Law* (PhD Thesis, University of Cambridge, 2011) 63-5, 67-8, 75-80, 88-91; Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 2, 334; Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 127-28; Alberto Saldamando, 'The United Nations Special Rapporteur on Indigenous Human Rights' (2002) 5(1) *Indigenous Affairs* 32, 33-4.

The role of the special procedures regarding Indigenous peoples is the complete focus of only a handful of, mostly non-academic, published works. All bar one focus on the mandate of the Special Rapporteur on Indigenous peoples, specifically Stavenhagen's time in the role. Alberto Saldamando, Maureen Tong and David Bray offer short articles introducing the mandate of the Special Rapporteur on Indigenous peoples, emphasising the creation of the mandate, its potential use in Africa and Stavenhagen's contribution to the global Indigenous rights process, respectively.[57] Three publications devote lengthier, but principally descriptive, attention to the mechanism. In 2004 Victoria Tauli-Corpuz and Erlyn Ruth Alcantara published a guide for Indigenous peoples seeking to maximise the Special Rapporteur on Indigenous peoples' country missions as well as an information tool on Stavenhagen's 2002 mission to the Philippines.[58] Three years later Jennifer Preston et al reported the findings of a 2006 International Expert Seminar on best practices for implementation of the Special Rapporteur on Indigenous peoples' recommendations (Expert Seminar),[59] convened to feed into a report by the Special Rapporteur on implementation to the HRC (Study on Best Practices).[60] In 2010 Rodriguez-Piñero Royo provided an overview of the mandate and Stavenhagen's activities, as well as highlighting some examples of other thematic special procedures mandate-holders' attention to Indigenous rights concerns.[61]

No scholarly assessment of the influence of the special procedures mechanism in actualising the implementation of international Indigenous peoples' rights norms exists;[62] although its efficacy is resoundingly praised. Some comment positively on the mechanism's influence but do not explore the issue further.[63] Others provide examples in support of the claim. Bray identified Stavenhagen's contribution to 'the advancement and implementation' of the global Indigenous rights process, proposing that his eleven country reports 'appear to have had the greatest impact'.[64] He cited three examples of Stavenhagen's influence from Guatemala, the Philippines and Chile, including the establishment of a forum to monitor implementation of the

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[57] Saldamando, above n 56; Maureen Tong, 'The UN Special Rapporteur on the Situation of Human Rights and Fundamental Rights of Indigenous People: Benefits for Indigenous People in Africa' (2002) 5(1) *Indigenous Affairs* 36; David Barton Bray, 'Rodolfo Stavenhagen: The UN Special Rapporteur on Indigenous Peoples' (2011) 113(3) *American Anthropologist* 502, 502. Some magazine articles also focus on particular experts' country missions. See, eg, Tom Bennion and Darrin Cassidy, 'Special Rapporteur's Report Taken for a Spin' (2006) 70 *Mana* 40; Moana Jackson, 'The United Nations and the Foreshore' (2006) 68 *Mana* 18.

[58] Tauli-Corpuz and Alcantara, above n 55.

[59] Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007).

[60] Human Rights Council ('*HRC*') *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Study Regarding Best Practices Carried out to Implement the Recommendations Contained in the Annual Reports of the Special Rapporteur,* UN Doc A/HRC/4/32/Add.4 (26 February 2007) [42]-[76] ('*Study on Best Practices*').

[61] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 118, 124-26. He identified Anaya as the successor to the mandate but focused on Stavenhagen's work.

[62] A journal article based on Chapter V of this dissertation was accepted for publication on 23 August 2013: Fleur Adcock, 'The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A Study in Compliance Ritualism' (2013) forthcoming *New Zealand Yearbook of International Law*.

[63] See, eg, Tauli-Corpuz and Alcantara, above n 55, 37.

[64] Bray, above n 57, 502-03.

mandate's recommendations in Guatemala.[65] Rodriguez-Piñero Royo argued that '[t]he activities carried out by Stavenhagen during his seven years as Special Rapporteur made an undeniable contribution to the protection and promotion of indigenous rights'.[66] He saw Stavenhagen's thematic reports as having an indirect effect in opening up dialogue and debate. But he viewed the communications and country reports as having 'real impact', citing three examples of the communications' influence in Chile, Laos and Tanzania, including the cancellation of a project to build a game park in the traditional territory of the Hadza in Tanzania.[67] He referenced the Study on Best Practices in support of the country reports' influence.[68] Preston et al noted difficulties in assessing the domestic impact of Stavenhagen's thematic reports and communications, positing that his country visits and reports had a more direct impact at the national level.[69] In addition to the country reports' dialogue-fostering, educative and advocacy roles, Preston et al reported five instances where the Special Rapporteur's country recommendations were implemented in Guatemala, the Philippines, Canada, South Africa and Chile, including the Chilean President's 2006 commitment not to use an anti-terrorist law against Indigenous activists.[70] Piccone's report identified three examples of the influence of special procedures' country recommendations on Indigenous peoples, two from Stavenhagen concerning Guatemala and Mexico and one from the expert on violence against women regarding Canada.[71] The latter example involved the Canadian Government signing a contribution agreement with an Indigenous rights organisation to run a programme geared at addressing violence against Indigenous women.[72] A fourth example was included in the book version of Piccone's findings, concerning the influence of the expert on housing in Mexico.[73] UN documents offer examples of the mechanism's influence on Indigenous peoples' rights too, including Stavenhagen's Study on Best Practices,[74] the experts' annual and country reports,[75] and the OHCHR's reports and bulletins.[76] The message in the literature is clear: here is a

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[65] Ibid 503.
[66] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 117; Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 2, 330-31.
[67] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 121-24.
[68] Ibid.
[69] Preston et al, above n 59, 20, 39, 51.
[70] Ibid 39 (see also 31, 35-7, 40, 42, 52).
[71] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, appendix E 63, 66.
[72] Ibid appendix E 63.
[73] Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 43, appendix D 155.
[74] *Study on Best Practices,* UN Doc A/HRC/4/32/Add.4, [42]-[76].
[75] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating Within or Near Indigenous Territories,* UN Doc A/HRC/18/35 (11 July 2011) [71] ('*Anaya Annual Report 2011*'); HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: The Situation of Maori People in New Zealand,* UN Doc A/HRC/18/35/Add.4 (31 May 2011) [66] ('*Anaya Follow-up Report on New Zealand*').
[76] See, eg, HRC *Annual Report of the United Nations High Commissioner for Human Rights,* UN Doc A/HRC/22/17 (13 December 2012) [12]; Office of the High Commissioner for Human Rights ('*OHCHR*'), *United Nations Special Procedures Facts and Figures 2010* (2011) 13.

mechanism capable of delivering real improvements in the recognition of Indigenous peoples' rights, especially through the experts' country missions and reports. Yet, it is Stavenhagen's own assessment of the mechanism's efficacy that is the most discouraging; in 2007 he described 'the general record of implementation of the Special Rapporteur's recommendations' as 'gloomy'.[77]

The assessment of the mechanism's impact on the realisation of Indigenous peoples' rights is thin in important respects. The examples of direct rights improvements are drawn from two sources: the Expert Seminar and the special procedures' reports.[78] For example, Bray relies on Preston et el, who in turn rely on the Expert Seminar, and both Rodriguez-Piñero Royo and Piccone rely on Stavenhagen's reports.[79] Relying on the experts' self-assessment of their impact is problematic. As Alston has pointed out, '[e]valuation is ideally undertaken by objective and impartial external experts.'[80] This is because 'insiders, for their part, generally do not have the incentive or the necessary degree of detachment to enable them to undertake a compelling evaluation of the work with which they have been engaged.'[81] The Expert Seminar circumvents this concern to a degree, having brought together a group of experts to consider the mandate's efficacy. Yet, as Alston also argues, 'the real test lies in the strength of the methodology used, of the research undertaken, and of the degree of persuasiveness of the conclusions reached when measured against all available evidence.'[82] As with the bulk of the literature regarding the mechanism's impact generally, the causal link between the experts' work and the rights moves are not articulated (nor is any theory of compliance engaged), including in the Study on Best Practices that the Expert Seminar fed into.[83] Some of the examples reveal flaws in the research process too. For instance, Preston et al's Chilean example of the influence of Stavenhagen's country recommendation actually concerns a communication Stavenhagen sent. Although still a possible example of the mechanism's influence, the mislabelling undermines their assessment

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[77] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, 2, [84].

[78] There is one exception: the example of the expert on housing's influence in helping to convince the Mexican Government to delay completion of the La Parota Dam Project (which would displace Indigenous peoples, amongst others) that is included in Piccone's book version of his findings but not in his report. Its sources are even more tenuous. It relies on the fact that NGOs have cited the expert's findings and recommendations in their campaigns; an unattributed reflection from the expert that NGOs viewed his work as influential; and a statement by the Mexican permanent representative to the UN in Geneva that the work of the expert was 'effective', for which Piccone provides as authority a document that does not show such a statement having been made. Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 43, appendix D 155.

[79] The examples provided of direct action on the experts' recommendations reduce to these two sources. Indirect examples of impact emanate from a broader pool of sources, see, eg, Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 120. Rodriguez-Piñero Royo also draws on his experience as OHCHR assistant to the Special Rapporteur on Indigenous peoples in assessing the impact of Stavenhagen's communications.

[80] Philip Alston introducing Christian Salazar Volkmann, 'Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia' (2012) 4(3) *Journal of Human Rights Practice* 396, 396.

[81] Ibid.

[82] Ibid.

[83] In the Study on Best Practices Stavenhagen himself recognised that there were 'methodological limitations related to the difficulty of establishing clear relations of causality between the Special Rapporteur's recommendations and policy and practical changes that have actually taken place.' *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [10].

that it is the country reports, rather than communications, that have the most direct impact. Further, Piccone's example of the impact of the expert on violence against women relies, as its source, on Stavenhagen's Study on Best Practices, which ties the move to Stavenhagen's own efforts: the expert on violence against women has not conducted a country mission to Canada.[84] The analysis is also incomplete. The predominant focus is on Stavenhagen's time in the role, little attention is directed at the impact of Anaya's work or that of other special procedures mandates. And the literature centres on the influence of the experts' country reports, with some comment on their communications and thematic reports, ignoring entirely the capacity-building work they engage in. The field is ripe for an independent, robust, empirical analysis of the mechanism's influence regarding Indigenous peoples' rights.

C *Aims, Questions and Scope*

This research aims to help fill the space in the existing literature. It seeks to benefit scholarship regarding Indigenous peoples' rights under international law, the special procedures and also the implementation of international norms. Above all, it hopes to inform practical strategies to help close the yawning Indigenous rights implementation gap and improve the daily lived experiences of Indigenous peoples.

I investigate the question: how does the international human rights system, through the special procedures, regulate state behaviour towards Indigenous peoples? To do so I pose, and then seek to address, a collection of subsidiary questions. What does the theoretical literature tell us about how states respond to different normative orders – such as international Indigenous rights norms – and the mechanisms that promote them? Is it possible for apparently weak actors such as the special procedures to influence that behaviour? If so, how could they do so? What is the nature of the special procedures' role regarding Indigenous peoples? Do they have a role in advancing the realisation of international Indigenous rights norms? If so, what tools are at the special procedures' disposal to influence states to realise those norms? Have the special procedures actually influenced states to realise those norms? What factors explain the special procedures' influence? Can an understanding of those factors inform strategies to improve the regulatory impact of the mechanism and, thus, secure improved domestic implementation of international Indigenous peoples' rights norms? And, what, if anything, do the answers to these questions tell us about the larger inquiry concerning how the international human rights system regulates state behaviour towards Indigenous peoples?

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[84] Ibid [43]. Piccone also mistakenly identifies Danfred Titus as having held the role of Special Rapporteur on Indigenous peoples since March 2012. Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 43, appendix B 142. Anaya's term in the role does not end until 2014. Danfred Titus became a member of the UN HRC's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in 2012.

My thesis is that the international human rights system, through the special procedures mechanism, regulates state behaviour towards Indigenous peoples imperfectly but appreciably. Contrary to rationalist theories, there are instances where states have acted upon the special procedures' recommendations regarding Indigenous peoples' rights. However, ritualism is states' dominant response to the experts. 'Ritualism' is a concept used in the regulatory literature to denote behaviour where an actor abandons the regulatory objectives of a normative order but conforms to the institutionalised means for achieving those objectives.[85] It is an insidious behavioural response as it can be mistaken for norm conformity: there is outward agreement but inward resistance. I use the idea to argue that states predominantly outwardly agree with the special procedures experts' recommendations regarding Indigenous peoples, while inwardly developing techniques to avoid the international Indigenous rights norms that underlie those recommendations. I argue that states do so in order to deflect deeper scrutiny of their Indigenous rights records. Yet, I see a role for the special procedures mechanism in exerting enhanced regulatory power over state behaviour towards Indigenous peoples and I propose several strategies to that end.

States and their behaviour have been chosen as the focus of this research as states remain one of the actors – in addition to Indigenous peoples and, increasingly, transnational corporations – with the most power to effect change in the lives of Indigenous peoples. States are also the primary duty bearers under international human rights law.[86] I use the term 'state' to refer to nation-states, the political entities that exercise formal authority over defined territories. States are complex actors, defined by the people, parties, processes and conventions that make them up.[87] Understanding the influence of the special procedures on state behaviour thus requires analysing the responses of different state actors over time. However, the prime focus here is on the behaviour of the executive and legislative arms of government, given the sweeping powers they tend to exercise in relation to Indigenous peoples and their lead role in dictating state action.[88]

I adopt José Martínez Cobo's widely cited definition of Indigenous peoples for the purposes of this research. According to Martínez Cobo's 1987 *Study on the Problem of Discrimination against Indigenous Populations*, Indigenous peoples are those who '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 on

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[85] Robert K Merton, 'Social Structure and Anomie' (1938) 3(5) *American Sociological Review* 672; Robert K Merton, *Social Theory and Social Structure* (The Free Press, Enlarged ed, 1968); John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007); Charlesworth, above n 23.

[86] See, eg, Steiner, Alston and Goodman, above n 22, 1086. For comment on the problems this raises for the recognition of Indigenous peoples' rights in the context of the increasing power of transnational corporations see, eg, Morgan, above n 53, 156-58.

[87] Rachel Brewster, 'Unpacking the State's Reputation' (2009) 50(2) *Harvard International Law Journal* 231, 249, 256.

[88] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 3, 190-94.

those territories, or parts of them.'[89] And who 'form at present non-dominant sectors of society' that '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.'[90] The term continues to be debated.[91] I flag some of its complexities below and again in Chapters III and VII.

I adopt an open view of what constitutes international Indigenous peoples' rights norms. I treat the *UNDRIP* as a source of international Indigenous peoples rights norms. I do so despite the fact that, from a positivist point of view, as a declaration of the GA, it is 'soft' law and does not carry the binding force of a treaty. At the same time, aspects of the *UNDRIP* are already reflected in the jurisprudence of the human rights treaty bodies and customary international law and are thus 'hard' and binding.[92] However, on the constructivist theoretical position I adopt, whether a norm is a 'legal norm' rather than a social norm or 'hard' or 'soft' law is not determinative of the influence that the norm will have.[93]

The analysis proceeds on the assumption that states should act in accordance with the special procedures experts' recommendations. This is open to debate. Some (customarily states that have been criticised) argue that individuals who are typically outsiders and who spend only a short time in a state, if they spend any time at all, should not have any say over how a country addresses its Indigenous rights situation. There is a degree of merit in such arguments: these are important issues with long and complex histories that often require the delicate balance of valid competing interests. At the same time, the mandate-holders are appointed based upon their human rights expertise. As outside experts they may discern trends and behaviours not observed by domestic actors. Yet, the recommendations that the experts make are a product of domestic input too, including from the variety of national actors that the experts engage with during their

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[89] Economic and Social Council Commission on Human Rights, José Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations - Volume 5: Conclusions, Proposals and Recommendations,* UN Doc E/CN.4/Sub.2/1986/7/Add.4 (March 1987) [379].

[90] Ibid.

[91] See, eg, Mark Bennett, 'Indigeneity as Self-Determination' (2005) 4(1) *Indigenous Law Journal* 71; Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92(3) *American Journal of International Law* 414; Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy' (2003) 1 *New Zealand Journal of Public and International Law* 55.

[92] See, eg, International Law Association, *Rights of Indigenous Peoples,* 75th conference, Sofia, Bulgaria, Res 5/2012, para 2 (August 2012); International Law Association Committee on the Rights of Indigenous Peoples, *Sofia Conference Rights of Indigenous Peoples: Final Report* (2012); S James Anaya and Siegfried Wiessner, 'OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) *Jurist* <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>; Committee on Economic, Social and Cultural Rights, General Comment No 21, *Right of Everyone to Take Part in Cultural Life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21 (21December 2009) [7]; Committee on the Rights of the Child (CRC Committee), General Comment No 11, *Indigenous Children and their Rights under the Convention*, UN Doc CRC/C/GC/11 (12 February 2009); *Cal v Attorney-General* Claims Nos 171/2007, 172/2007, 18 October 2007 (Supreme Court of Belize).

[93] See, eg, Dinah Shelton, 'Commentary and Conclusions' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2004) 449, 449, 458. For comment on legal positivists and legal pluralists' views on what constitute legal norms see Brunnée and Toope, above n 7, 119. See also Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 302.

country missions and technical advisory work. Although the mandate-holders' suggestions are recommendations only, as the recommendations of an expert UN mechanism established under the authority of the UN Charter the recommendations carry the force of that organisation.[94] For example, Flood argues that '[v]alidly established Charter-based human rights mechanisms and procedures are legally binding on all member states'.[95] The states that are a party to the UN Charter are thus expected and encouraged to take steps to implement the special procedures experts' recommendations.[96] Further, the normative framework that informs the mandates of the special procedures experts is drawn from a range of international human rights sources to which many states are bound or have expressed their support. As holders of UN human rights mandates the special procedures experts are an authoritative voice on the application of these international norms in domestic contexts.

The influence of the special procedures mechanism as a whole is assessed, rather than focusing solely on the influence of the mandate of the Special Rapporteur on Indigenous peoples as the existing literature has largely done. The independent nature of the mandates, and their corresponding diversity, renders study of them as a group challenging. But the approach acknowledges that Indigenous peoples are affected by all of the human rights issues covered by the thematic special procedures mandates and by many of the country-specific mandates as well. However, as the only special procedures mechanism with an exclusive mandate to address the human rights of Indigenous peoples, the influence of the Special Rapporteur on Indigenous peoples is a core focus. The Special Rapporteur on Indigenous peoples is also of especial interest in a study on the mechanism's influence as it is one of the mandates to have directed the most pronounced attention to follow-up of its work.[97]

The special procedures are analysed from their first inception up until the close of the 24th regular session of the HRC in September 2013, a period of over 40 years. The analysis is pertinent as two decades have passed since the CHR called on thematic special procedures mandate-holders to pay particular attention to Indigenous peoples within the framework of their mandates. Also, more than a decade has elapsed since the establishment of the mandate of the Special Rapporteur on Indigenous peoples. This is a period of time over which some influence could be expected to be seen.

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[94] *United Nations Charter*, signed 26 June 1945, TS 993 (entered into force 24 October 1945). See Chapter III, Part B.

[95] Flood, *The Effectiveness of UN Human Rights Institutions,* above n 33, 91-92.

[96] See, eg, *Human Rights and Special Procedures*, CHR Res 2004/76, UN Doc E/CN.4/RES/2004/76 (21 April 2004) para 3 ('*CHR Res 2004/76*').

[97] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, 20; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 43, 33; Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 121.

D *Methodology*

The research departs from the existing international law corpus on the special procedures mechanism by expressly engaging with the theoretical debate over state compliance with international norms. It adopts a loosely constructivist theoretical framework. It adds to the existing debate on state compliance with international norms by drawing on the body of regulatory scholarship concerning norm compliance, a resource largely untapped by international law scholars.[98] In doing so, it leans heavily on the theoretical work of John Braithwaite and Peter Drahos regarding the globalisation of norms. In particular, it draws on their theorising regarding the role of apparently weak non-state actors in the globalisation process.[99] Although legal scholarship, by rendering law and its agents an object of inquiry this research is also sociological in nature. It is informed by my positioning as an Indigenous woman, who is both Māori and English, from a working class background, trained in common law legal practice. While my closeness to the rights issues raised inevitably complicates my discussion, it also has the potential to reveal insights not otherwise observable from a greater distance.

The blended research methodology used is a mixture of case study analysis, critical document analysis, semi-structured interviews and participant observation. In order to explore the mechanism's influence on state behaviour in depth, two states have been used as case studies for comparative critical analysis: Aotearoa New Zealand (New Zealand) and Guatemala (officially, the Republic of Guatemala). Examining the mechanism's influence on two states' behaviour towards Indigenous peoples has enabled patterns and understandings that may have remained hidden in a single state case study to be borne out. The deep analysis undertaken has also avoided the pitfalls of a generalised study that selects examples of the mechanism's influence from across the globe. Of course, only tentative insights can be drawn from such a small pool of case studies. A larger case study set, or world-level study, would have provided an opportunity to identify with more certainty themes and patterns in the mechanism's influence but is beyond the scope of this project. However, the two case studies examined provide a basis from which to start to begin to understand the influence of the special procedures mechanism on state behaviour towards Indigenous peoples.

I focus on the influence of special procedures' recommendations that have been directed at the governments of New Zealand and Guatemala. This means centring attention on the special procedures' reports on their country missions and the advice they give in the course of

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[98] Charlesworth is one international law scholar who has drawn on regulatory scholarship, see, eg, Charlesworth, above n 23. Eve Darian-Smith and Colin Scott argue that '[a] particular strength of a regulatory approach to rights might be a more direct focus on implementation of and compliance with rights regimes.' Eve Darian-Smith and Colin Scott, 'Regulation and Human Rights in Socio-Legal Scholarship' (2009) 31(3) *Law & Policy* 271, 273.

[99] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

offering technical advisory assistance, both of which contain country-specific recommendations. The existing, methodologically light, literature suggests that the special procedures' country visits and reports have had the most impact, inviting interrogation. The same body of work ignores the impact of the experts' technical advisory assistance, inviting attention. I do not assess the influence of the special procedures' communications as these do not contain recommendations, although they typically request information from the state on the rights issue with which they are concerned. I do track state responses to (rather than the influence of) each special procedures communication that concerns Indigenous peoples in New Zealand. There are too many special procedures communications concerning Indigenous peoples in Guatemala to examine all of them in detail. Instead, in that state I explore their content and the Government's responses to them in general terms. I also devote particular attention to examining the influence of a special country report by Anaya on Guatemala, which was sparked by a communication he sent. Given that I am concerned with the domestic impact of the special procedures' work I have not focused on the impact of the experts' recommendations to the international community at large in their thematic reports. I focus on recommendations directed at New Zealand and Guatemala in order to avoid the criticism that they were not an intended subject of the generally framed recommendation or the possibility that they were unaware of the recommendation's existence at all. In framing the study in this way, I do not discount the important influence that these texts may have: such an investigation is simply beyond the ambit of this undertaking.

Nor is this research concerned with the more diffuse and harder to quantify indirect influence that the experts have on state behaviour towards Indigenous peoples in their work. The experts conceivably influence state behaviour by empowering Indigenous peoples and civil society in their advocacy through public recognition and independent legitimation of their struggles, their ability to influence the discourse surrounding rights issues (including encouraging states to understand issues from a human rights perspective) and preventing the state's descent into even greater rights abuses.[100] In such scenarios the experts' impact on state behaviour towards Indigenous peoples may only be visible in the very long term, if visible at all.[101] As Alston has remarked in relation to country missions, 'it is essential to see a country visit by a special rapporteur in its overall perspective and not to assess it exclusively in terms of measures overtly taken in response to his or her recommendations.'[102] But, I share Alston's view that 'it remains the case that a consistent pattern of neglect of the relevant

[100] Regarding the indirect impact of the special procedures experts' work generally see Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council', above n 30, 220; Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 33, 138-41; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 15, 212; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 224-25; Golay, Mahon and Cismas, above n 25, 311; Kirby, above n 23, 505. Regarding the indirect impact of the Special Rapporteur on Indigenous peoples' work see Preston et al, above n 59, 35-6, 42.

[101] See, eg, Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country', above n 23, 258.

[102] Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council', above n 30, 220.

recommendations should ring alarm bells among those who are concerned with ensuring that the international human rights regime is capable of making a positive difference.'[103] Thus, this study focuses on implementation of the experts' recommendations and advice conscious of the myriad other meaningful ways in which the experts' may regulate behaviour. I leave a study of those additional dimensions to other scholars.

Guatemala and New Zealand provide an interesting, and seldom explored, comparison. Guatemala, the most populous Central American state, was colonised by the Spanish from the 1500s; is officially a democratic constitutional republic based on a civil law legal system; has a majority – predominantly Mayan – Indigenous peoples' population, comprised of more than twenty different linguistic groups; and is a lower middle income developing country that has been marred by a protracted internal conflict and continuing instability.[104] In contrast, the small Pacific Island nation of New Zealand has inherited a common law legal system from its British colonisers who arrived mainly in the 1800s; possesses a comparatively low (15 per cent) Māori Indigenous peoples population essentially united linguistically; and is a stable, developed, liberal democracy.[105] Yet, New Zealand and Guatemala are both states that we might expect to fare well in the implementation of special procedures' recommendations and advice regarding Indigenous peoples. New Zealand has a strong human rights reputation. It has long been identified as a source of good practice regarding Indigenous peoples' rights, despite the fact that internationally it demonstrated strong opposition towards the *UNDRIP* at crucial points.[106] In contrast, Guatemala does not have a strong domestic human rights reputation. However, it has a strong reputation for advocating Indigenous peoples' rights on the international stage. Historically, it has cosponsored the thematic resolution on Indigenous peoples before the HRC and previously the CHR.[107] And it was a prominent advocate of the *UNDRIP*.[108] Further, it has been recurrently identified in the literature as a state where the special procedures mechanism has had an impact on state behaviour towards Indigenous peoples.[109]

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[103] Ibid 221.

[104] See Chapter VI, Part B. In this dissertation I use the terms 'developed', 'developing', 'global North' and 'global South' to capture the striking power and wealth disparities between those from wealthy, developed, nations: the global North, and those from poorer, developing, nations: the global South. I acknowledge that these terms are problematic, including because they carry heavily loaded notions of 'progress' and they gloss over the striking discrepancies in wealth within nations. But I engage them as a device for discussing aspects of these disparities. For a similar approach see, eg, Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013) 6 n 3.

[105] See Chapter V, Part B.

[106] See, eg, *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [67]. See also Chapter V.

[107] See, eg, Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 2, 315; OHCHR, 'Council Extends Mandates on Slavery, Peaceful Assembly, Health, Arbitrary Detention, Indigenous Peoples and Mercenaries' (Media Release, 26 September 2013) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13790&LangID=E>; Indigenous Peoples' Center for Documentation Research and Information (doCip), *Human Rights Council* <http://www.docip.org/Human-Rights-Council.64.0.html>.

[108] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 458 n 88; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, appendix [65].

[109] Bray, above n 57, 503; Preston et al, above n 59, 39; Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, appendix E 66.

Guatemala and New Zealand have received the attention of multiple special procedures experts. The Special Rapporteur on Indigenous peoples has visited both case study states more than once. Guatemala has received three country missions from the Special Rapporteur on Indigenous peoples. Stavenhagen visited in 2002, which was his first country mission as Special Rapporteur, and again in 2006.[110] Anaya carried out a special country mission in 2010.[111] He also provided technical advisory assistance to the state in 2011.[112] In fact, Guatemala is one of the states most studied by the special procedures mechanism as a whole. By late 2013 it had received 21 country missions from 13 different thematic special procedures mandates ranging from the experts on torture to food, many of which touched on Indigenous rights concerns. Two further country missions from thematic mandates are planned for the end of 2013, including from one mandate that has not visited the state before.[113] Guatemala was also the subject of successive special procedures country mandates between 1983 and 1997, resulting in numerous country visits, reports and recommendations some of which reference Indigenous peoples.[114] Guatemala is of particular interest given the OHCHR's *Promotion and Protection of Human Rights in Latin America, with Special Focus on Guatemala and Mexico* project, which supported the follow-up of the Special Rapporteur on Indigenous peoples' recommendations in both Guatemala and Mexico over several years.[115] In contrast, New Zealand has received only two country missions from the special procedures, both from the Special Rapporteur on Indigenous peoples. New Zealand received a country mission from Stavenhagen in 2005 and one from Anaya in 2010.[116] In addition to these country missions, both states have been the subject of communications by various thematic special procedures experts, a number of which concern Indigenous peoples and their rights.[117]

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[110] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen Submitted in Accordance with Commission Resolution 2001/57: Mission to Guatemala*, UN Doc E/CN.4/2003/90/Add.2 (24 February 2003) ('*Stavenhagen Report on Guatemala*'). Note that Stavenhagen did not produce a separate country report on his follow-up mission to Guatemala. Instead his brief comments on the mission are contained in his Study on Best Practices: *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [58]-[64].

[111] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3.

[112] Ibid [8]-[10].

[113] In addition to the three country missions by the Special Rapporteur on Indigenous peoples, Guatemala has received country missions from the experts on health, food, the independence of judges, education, migrants, human rights defenders, enforced disappearances, extrajudicial executions, racism, violence against women, the sale of children, and torture, see Chapter VI. The 2013 planned visits are by the experts on peaceful assembly and torture. For comment on the frequency of special procedures experts' visits to Guatemala see Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 43, 10-1.

[114] The Guatemalan country mandates were held by Viscount Mark Colville of Culross from 1983-1987; Hector Gros Espiell from 1987-1990; Christian Tomuschat from 1990-1993; and Monica Pinto from 1993-1997, see Chapter VI, Part C.

[115] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [21], [22], [24]-[26]; Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 55, 122.

[116] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to New Zealand*, UN Doc E/CN.4/2006/78/Add.3 (13 March 2006) ('*Stavenhagen Report on New Zealand*'); *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4.

[117] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Communications Sent, Replies Received and Observations, 2012–2013*, UN Doc A/HRC/24/41/Add.4 (2 September 2013) [121]-[124] ('*Anaya Communications Report 2013*'); HRC, *Communications Report of Special Procedures*,

As the review of the literature above revealed, any attempt to assess the influence of the special procedures is challenging. Even where moves have been made by a government to act on rights issues that form the subject of special procedures' recommendations, assessing whether those actions have been taken in response to the mandate-holders or other actors or considerations is difficult. Governments infrequently acknowledge the motivations for their actions so assessing the special procedures' influence requires imputing motivations.[118] Often a complex combination of actors and factors will be responsible.[119] The circular manner in which special procedures' recommendations are formulated contributes to this difficulty. Domestic actors inform special procedures mandate-holders of key issues and sometimes formulate proposed recommendations, which can then be directly reflected in the mandate-holders' reports and, ultimately, be taken up by the same domestic actors to support their push for resolution of the issue. Despite these difficulties, it is possible to draw some conclusions regarding the mechanism's influence in New Zealand and Guatemala. In notable contrast to the existing literature, my analysis expressly explores the basis for any assessment that it was the work of a special procedures mandate-holder that prompted the state's behavioural change. My analysis goes beyond a reliance on the reflections of special procedures mandate-holders and UN documents, although both are drawn on as sources. I systematically examine the context in which the special procedures experts' recommendations were made; official government statements made in response to the experts and their recommendations; other government statements both public and, where available, private that reference the experts and their recommendations; domestic governmental policy, legislative and budgetary actions that accord, or fail to accord, with the experts' recommendations; the timing of any moves by the government in-line with the experts' recommendations; the actions of other actors, whether domestic, regional or international, regarding the norms the subject of the experts' recommendations; and the perceptions of Indigenous rights advocates of the influence of the experts and their recommendations. I invite the reader to judge the connection between the governments' behaviour and the experts' recommendations based on the evidence shared.

Critical document analysis was the primary method of data collection. A range of official UN documents were examined, including the country, special, communication, thematic and other reports of the special procedures mandate-holders; reports and resolutions of the CHR, HRC and the GA; reports and statements of the High Commissioner for Human Rights (HCHR) and her office, the OHCHR; reports and decisions of other international bodies, including the Permanent Forum on Indigenous Issues (PFII), the Expert Mechanism on the

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UN Doc A/HRC/22/67 (20 February 2013).11, 78, 121 ('*Joint Communications Report February 2013*'). For more examples see Chapter V, Part C and Chapter VI, Part C.

[118] Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 29, 574; Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', above n 30, 220; Flood, *The Effectiveness of UN Human Rights Institutions,* above n 33, 49-50.

[119] See, eg, Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country', above n 23, 258.

Rights of Indigenous Peoples (EMRIP), the former Working Group on Indigenous Populations (WGIP), the UN human rights treaty monitoring bodies, the HRC's Universal Periodic Review (UPR) Working Group, and the International Labour Organization (ILO) Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts); as well as UN media releases, in particular those of the special procedures experts and the OHCHR. Relevant international case law informs the analysis where appropriate. At the domestic level I reviewed publically available government statements, media releases and Parliamentary debates; executive and local government policies, domestic statutes, regulations and case law; internal governmental information, advice and correspondence between officials released to me through requests under the *Official Information Act 1982* (NZ); and domestic media coverage of the work of the special procedures. I complemented this analysis with a review of information collected by domestic, regional and transnational Indigenous peoples' organisations (IPOs) and non-governmental organisations (NGOs). Other secondary sources, including key texts, journal articles, monographs and additional documents concerning Indigenous peoples and their rights under international law, the special procedures, and theories of how to influence state behaviour, have been used to locate the primary sources in context and theory. Documents in Spanish, and English documents requiring translation into Spanish, were translated either by a qualified translator or the author.

The research also involved 18 semi-structured interviews with key actors conducted between 2010 and 2011. The interviews were carried out with the approval of the Australian National University's Human Research Ethics Committee. I adopted a form of 'snowball' methodology, asking interviewees and other contacts to suggest further potential interviewees. I interviewed both the former and current Special Rapporteurs on Indigenous peoples, Stavenhagen and Anaya; a former OHCHR-Geneva bureaucrat who worked on Indigenous rights; a member of the OHCHR's Guatemalan country office; a member of New Zealand's Parliament whose political party held ministerial posts outside of cabinet in the government at the time; Guatemalan Government officials working in departments concerned with Indigenous rights; representatives of both New Zealand and Guatemala's national human rights institutions (NHRI);[120] Indigenous peoples from Guatemala and New Zealand involved in Indigenous rights advocacy, including Indigenous leaders, academics, lawyers and local activists; and other non-Indigenous individuals also involved in Indigenous rights advocacy. Many, although not all, of the interviewees had some exposure to the work of the special procedures mandate-holders, whether through meeting with them during their country missions or in other fora, contributing information to their studies, or leveraging their reports in their own work. I have endeavoured to address the absence of interviews with more members of the executive and legislature – potentially key sources of the motivations of government behaviour – by carefully reviewing

[120] Both New Zealand and Guatemala's national human rights institutions (NHRIs) have been accredited with 'A status' by the International Coordinating Committee of National Human Rights Institutions.

statements by these actors regarding Indigenous peoples' rights and the work of the special procedures, made within and outside of the legislative chambers, in both states.[121] To protect the interviewees, interviewees' names and specific positions are withheld, except in the case of Stavenhagen and Anaya, who both consented to the attributions made to them. In 2013, after having spent more than an additional two years in the role, Anaya updated some of his reflections from the original interview in writing.

I embraced a flexible interview style. Conducting semi-structured interviews allowed participants to speak to the issues of most importance to them. This was particularly appropriate for navigating discussion with Indigenous interview participants around sensitive issues, such as the more egregious examples of Indigenous rights violations. The length of the interviews ranged in time from half an hour to three hours. All of the interviews bar five were conducted in the cities where the participants were based, in Wellington and Christchurch in New Zealand; Guatemala City, Quetzaltenango and Antigua in Guatemala; and Panama City in Panama. Four of the interviews were conducted by telephone and one using Skype as it was not possible to coordinate a face-to-face interview given the schedule of the interviewee. The interviews with Guatemalan participants were conducted with the aid of a qualified interpreter familiar with Indigenous rights issues, except where the interviewee was fluent in English.[122]

These sources were supplemented with participant observation. I observed the interactions of the Special Rapporteur on Indigenous peoples, and both formal and informal discussions concerning the special procedures' work regarding Indigenous peoples, during the annual sessions, side events and global Indigenous caucus meetings held as part of the annual meetings of the EMRIP in Geneva, Switzerland, in 2010, 2011 and 2012 and of the PFII in New York, the United States of America (United States), in 2011.

During the research I remained attentive to the need to privilege Indigenous peoples' voices. In this effort I was inspired by Indigenous critical scholars, including Linda Tuhiwai Smith, Lester-Irabinna Rigney and Robert Williams, as well as post-colonial theorists.[123] I use the plural 'voices' intentionally. There is no unitary 'Indigenous' voice.[124] To presume so would

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[121] A number of members of the legislature in New Zealand and Guatemala were invited to participate in an interview, given that these government actors are key sources of the motivations of government behaviour. But only one agreed to be interviewed. While the research may have benefited from more interviews with these actors it cannot be assumed that they would have been willing to speak frankly regarding their and their political parties' motivations.
[122] Where quotes from the interviews conducted in Spanish appear in this dissertation I have retained fidelity to the translation made by the interpreter even if this does not present as grammatically sound English. I have adopted the same approach with the translations by the UN interpreters of UN sessions.
[123] Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Books, 1999); Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage, 2008); Robert A Williams, 'Vampires Anonymous and Critical Race Practice' (1996-1997) 95 *Michigan Law Review* 741; Lester-Irabinna Rigney, 'Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles' (1999) 14(2) *Reprinted in WICAZO SA review: Journal of Native American Studies* 109; Frantz Fanon, *The Wretched of the Earth* (Grove Press, 1963); Edward Said, *Orientialism* (Pantheon Books, 1978); Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan, 1988) 24; Paulo Freire, *Pedagogy of the Oppressed* (Penguin, 1972).
[124] See, eg, Smith, above n 123, 6-7.

be to deny the diversity of opinion between and within these collectives; even individuals have shifting positions and identities depending on the context.[125] Like Kimberlé Crenshaw I also acknowledge that constructions like ethnicity, gender, class and disability intersect such that Indigenous peoples and persons experience oppression differently.[126] However, as Gayatri Spivak argues, a degree of strategic essentialising is unavoidable in the production of critical analyses,[127] as this is. Thus, although I use terms including 'Indigenous peoples', 'Māori' and 'Maya' throughout this text, I remain conscious of the fact that these essentialisms do not represent reality. In an effort to privilege a diversity of Indigenous voices in my research I sought out Indigenous interviewees from a range of backgrounds, men and women, young and old, parliamentarians to grassroots activists. This was important to understand how different Indigenous peoples perceive and engage with the special procedures mechanism.

I recognise that some Indigenous peoples will dismiss my endeavour to explore the leverage of a 'master's tool' to 'dismantle the master's house'. The 'masters tools' are the structures and processes of the dominant group that have acted to keep non-dominant groups in a position of disadvantage. The term derives from a quote by Audre Lorde '[f]or the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.'[128] It captures the idea that relying on measures that are designed and implemented by the same structure that created the need for the intervention in the first instance will only bring counterfeit gains.[129] The special procedures mechanism is a master's tool because it derives from, and operates within, an international legal framework that both reflects and constitutes colonial power interests.[130] I have enduring respect for those who have the foresight and tenacity to develop their own Indigenous-centred tools for their liberation. This is critical. But given the scope of the task I see value in examining the efficacy of existing mechanisms; especially those to which all UN member states have outwardly committed and that use a discourse – human rights – familiar to

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[125] See, eg, Samia Bano, "Standpoint', 'Difference' and Feminist Research' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 91, 92-3; Floya Anthias, 'Where do I belong?: Narrating Collective Identity and Translocational Positionality' (2002) 2 *Ethnicities* 491.

[126] See, eg, Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

[127] Gayatri Chakravorty Spivak, *The Post-Colonial Critique: Interviews, Strategies, Dialogues* (Routledge, 1990) 45. As Nicholas Buchanan and Darian-Smith point out, law plays an important role in 'essentializing cultural difference'. Nicholas Buchanan and Eve Darian-Smith, 'Introduction: Law and the Problematics of Indigenous Authenticities' (2011) 36(1) *Law & Social Inquiry* 115, 121.

[128] Audre Lorde, *Sister Outsider* (The Crossing Press Feminist Series, 1984) 112 (emphasis in original).

[129] For example, Taiaiake Alfred argues that 'Indigenous leaders engaging themselves and their communities in arguments framed within a liberal paradigm have not been able to protect the integrity of their nations. "Aboriginal rights" and "tribal sovereignty" are in fact the benefits accrued by indigenous peoples who have agreed to abandon autonomy to enter the state's legal and political framework."' Taiaiake Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse' (2001) 3(1) *Indigenous Affairs* 22, 26.

[130] Regarding international law's implication in imperialism see, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Makau Mutua, 'Savages, Victims, and Saviors: the Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201; Dale Turner, 'Vision: Towards an Understanding of Aboriginal Sovereignty' in Ronald Beiner and Wayne Norman (eds), *Canadian Political Philosophy: Contemporary Reflections* (Oxford University Press, 2001) 318; Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003); Makere Stewart-Harawira, *The New Imperial Order: Indigenous Responses to Globalization* (Zed Books 2005).

the state actors with whose behaviour I am concerned.[131] In taking this approach I also honour the choices of the many Indigenous peoples who have engaged with the international human rights system, including the special procedures mechanism, in order to emancipate their peoples and others in similar situations around the globe.

E *Thesis Structure*

My thesis that the special procedures regulate state behaviour towards Indigenous peoples in a muted but palpable way unfolds over seven chapters. In the next chapter I explore the theoretical literature concerning how powerful actors such as states are regulated. The chapter argues that even absent coercive enforcement powers and abundant resources the special procedures have the ability to weave webs of influence that conduce state conformity to the international Indigenous rights norms they push. It unpicks the different possible behavioural responses to normative orders: conformity, innovation, ritualism, retreatism and rebellion.[132] Particular attention is given to the response of ritualism, given evidence of its existence in state responses to international human rights norms.[133] It then considers whether apparently weak actors, such as the special procedures, can influence these responses. A generally constructivist view of how the regulation of states occurs is adopted in order to argue that they can. The mechanics of how the special procedures could do so is outlined. It is based on Braithwaite and Drahos' 'webs of influence' understanding of regulation. This understanding posits that regulation occurs as a result of actors pushing contesting principles using different regulatory mechanisms.[134] I use this approach to identify some potential strategies for flipping states out of non-conforming behaviour, including ritualism.

Chapter III examines the special procedures' role regarding Indigenous peoples. It identifies the mechanism's considerable mandate to advance the realisation of international Indigenous rights norms. It briefly outlines what the special procedures mechanism is in order to contextualise the discussion on its Indigenous mandate. The analysis reveals the ad hoc and piecemeal development of the mechanism. It then traces the development of the mechanism's mandate regarding Indigenous peoples over time focusing on three key moments: the creation of the first special procedures mandate; the issue of the resolution by the CHR recommending that all thematic special procedures mandate-holders pay particular attention to the situation of

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[131] Ignatieff describes human rights as 'the *lingua franca* of global moral thought'. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) 53. On the use of human rights discourse by Indigenous peoples see, for example, Robert Williams who argues that '[t]he discourse of international human rights has enabled indigenous peoples to understand and express their oppression in terms that are meaningful to them and their oppressors.' Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World', above n 3, 701.

[132] Merton, 'Social Structure and Anomie', above n 85; Merton, *Social Theory and Social Structure,* above n 85.

[133] The idea of using Merton's theory of behavioural responses to normative order to analyse state behaviour in respect of international human rights norms is drawn from Hilary Charlesworth, see Charlesworth, above n 23, 11-4.

[134] Braithwaite and Drahos, above n 99, 7, 9.

Indigenous peoples; and the creation of the mandate of the Special Rapporteur on Indigenous peoples. It examines the relationship between the special procedures' mandate regarding Indigenous peoples and the mandates of the constellation of other international mechanisms that also promote the realisation of international Indigenous rights norms, devoting especial attention to the synergies and tensions between the Special Rapporteur and the other Indigenous-exclusive bodies: the former WGIP, the PFII and the EMRIP.

Chapter IV assesses the the key regulatory mechanisms engaged by the special procedures to advance their mandate regarding Indigenous peoples. It argues that the special procedures draw on a mixed toolset of dialogic mechanisms to fulfil their mandate to advance the realisation of international Indigenous rights norms. It briefly examines why it is that the special procedures principally rely on dialogic mechanisms, identifying that the special procedures experts have recommendatory powers only and no coercive power to compel state cooperation with their work. It then analyses the specific types of regulatory mechanisms engaged by the special procedures. It argues that shaming is the central mechanism used by the experts with what I term 'dialogue-building' and capacity-building the two other core mechanisms leveraged. Shaming is engaged primarily through the special procedures country reporting, communications process, special reports on specific cases and media releases. Dialogue-building underlies each of these working methods too, along with the experts' efforts to improve knowledge amongst states and others regarding the content of international Indigenous rights norms through thematic studies and formal and informal dialogues. Capacity-building is employed in the experts' technical advisory assistance work. In addition, this chapter explores the institutional support the special procedures receive in leveraging these regulatory mechanisms. It argues that while the institutional support provided by the UN is insubstantial some mandate-holders, especially the Special Rapporteur on Indigenous peoples, have deftly enrolled the support of institutions outside of the UN in an effort to improve the quality and reach of their work.

Chapters V and VI analyse the influence of the special procedures on state behaviour towards Indigenous peoples through a detailed analysis of their influence in the two case study states: New Zealand and Guatemala. In each state the principal behavioural responses of the governments are explored using three exemplar recommendations concerning the 'hard' international Indigenous rights to self-determination and land and the 'soft' cultural right to education. 'Hard' rights pose a more obvious challenge to existing power and wealth structures than 'soft' rights, although the autonomous dimensions of soft rights can also be very challenging to states.[135] The right to self-determination is the cornerstone of Indigenous peoples'

[135] Sheryl Lightfoot also embraces the 'hard'/'soft' distinction regarding Indigenous peoples' rights norms, see Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada' (2010) 62(1) *Political Science* 84, 96, 103-04.

claims.[136] It is a malleable concept, often associated with secession (the attainment of independent statehood) or the exercise of 'external' self-determination.[137] But it represents a spectrum of norms, including 'internal' self-determination rights to self-government and participation in decision-making; rights that are affirmed in the *UNDRIP* and in the determinations of the UN human rights treaty bodies.[138] The recommendations I examine regarding the right to self-determination concern constitutional recognition of Indigenous peoples' rights, including to self-determination, and Indigenous peoples' right to participate in decision-making that affects them. Land rights are also foundational to Indigenous peoples' claims.[139] Indigenous peoples' rights to their lands and resources are affirmed in various sources, including the *UNDRIP*, the ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* of 1989 (*ILO Convention 169*), which is the main international treaty regarding the rights of Indigenous peoples, and the decisions of the International Court of Justice, regional human rights bodies and the UN human rights treaty bodies.[140] The land rights recommendations I examine concern title over lands and the impact of extractive industries. Education is the primary vehicle for sustaining Indigenous peoples' languages and knowledge and is, thus, intrinsically linked to the maintenance of Indigenous peoples' cultures. Indigenous peoples' right to maintain and develop their cultural identities is recognised in instruments including the *UNDRIP*.[141] The recommendations regarding education I examine involve

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[136] *UNDRIP* art 3. See, eg, Michael Dodson quoted in Craig Scott, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea' (1996) 18 *Human Rights Quarterly* 814, 814; Anaya, *Indigenous Peoples in International Law,* above n 3, 7, 97.

[137] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 3, 7; Chris Tenant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993' (1994) 16 *Human Rghts Quarterly* 1, 29. For general discussion regarding the right to self-determination see, eg, Antonio Cassese, 'The Self-Determination of Peoples' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 92; J Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press, 2001) 7.

[138] See, eg, *UNDRIP* arts 4, 5, 18, 19, 23; Anaya, *Indigenous Peoples in International Law,* above n 3, 150-56, 229-32. Article 46(1) of the *UNDRIP* limits the recognition of Indigenous peoples' rights to self-determination to its internal dimensions, except where the legal justifications for secession are made out, see, eg, Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 460-61. For discussion regarding Indigenous peoples' rights to self-government and to participate in decision-making see, eg, 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) *The International Journal of Human Rights* 1; Steven Wheatley, 'Indigenous Peoples and the Right of Political Autonomy in an Age of Global Legal Pluralism' (2009) 12 *Law and Anthropology: Current Legal Issues* 351.

[139] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 3, 141; Bellier and Préaud, above n 2, 480-81.

[140] See, eg, *UNDRIP* arts 25-30, 32; International Labour Organization's (ILO) *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, ILO Convention No 169, 71 ILO Official Bull 59 (entered into force 5 September 1991) art 14(1) ('*ILO Convention 169*'); *Western Sahara (Advisory Opinion)* 1975 ICJ Rep 12; *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits)* IACHR Series C No 79, 31 August 2001; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ACHPR 276/2003, 4 February 2010; Committee on the Elimination of Racial Discrimination (CERD Committee), 'General Recommendation on the Rights of Indigenous Peoples, Adopted by the Committee, at its 1235th Meeting, on 18 August 1997' in *Report of the Committee on the Elimination of Racial Discrimination* annex V, A/52/18 (1997) [5]. See generally Anaya, *Indigenous Peoples in International Law,* above n 3, 141-48, 229-31.

[141] See, eg, *UNDRIP* arts 13-15, 21. See generally Anaya, *Indigenous Peoples in International Law,* above n 3, 131-41; Bellier and Préaud, above n 2, 478, 480-81.

Indigenous peoples' right to an education tailored to their cultural needs, including one that is in their language.

Chapter V assesses the influence of the special procedures mechanism on New Zealand's behaviour towards Māori. It begins with some contextual background on the Indigenous rights situation in New Zealand. It reveals a stable democratic state but one with a history of violating the rights of Māori that reverberates into the present day. It examines the nature of the special procedures' engagement with New Zealand regarding its Indigenous rights situation. It finds that there has been a focused engagement in which the special procedures' tools of shaming, and to some degree dialogue-building, have been leveraged. It analyses the New Zealand Government's official response to the special procedures' attentions. The Government moved from rejection to a degree of outward commitment to the special procedures' country assessments of the human rights situation of Māori. It then assesses to what extent this rejection and then apparent commitment translated into action to implement the special procedures' recommendations. It finds that the New Zealand Government has implemented few of the special procedures' recommendations in their totality. Ritualism is the Government's dominant behavioural response. New Zealand disguises its inward resistance to special procedures' recommendations regarding hard rights to constitutional protection and land with outward acceptance of those recommendations. It partially commits to recommendations concerning the soft right to education. But then leverages this fractional commitment to deflect attention both from its fuller implementation of that soft right and its resistance to the hard rights. The analysis shows that the special procedures experts' role in bringing about some of the small moves in line with the mandate's recommendations is tangible, although slight.

Chapter VI examines the influence of the special procedures mechanism on Guatemala's behaviour towards the Indigenous peoples of Guatemala. It also begins with an introduction to the Indigenous rights situation in Guatemala, painting a picture of a troubled state facing a critical juncture. It analyses the nature of the special procedures' engagement with Guatemala regarding its Indigenous peoples. The analysis discloses a long history of sustained special procedures' attention in which each of the mechanism's dialogic regulatory tools has been engaged. It explores the Guatemalan Government's official response to the special procedures' attentions. In contrast to the New Zealand Government's early posture, it finds that the Guatemalan Government's official public stance towards the special procedures' Indigenous rights recommendations has been largely positive. Also in contrast to New Zealand, where the experts' influence was more peripheral, there are two noteworthy examples of the mechanism having a direct influence in Guatemala. But ultimately these responses are best characterised as ritualistic. Again, ritualism is apparent in the Government's implementation of aspects of the soft right to education the subject of the special procedures' recommendations. This limited commitment operates to deflect attention from the Government's failure to more fully

implement that soft norm. It also deflects attention from the Government's inward resistance to the hard rights to Indigenous participation in decision-making and land that are reflected in the experts' recommendations, which the Government outwardly commits to.

Chapter VII considers the factors that explain the special procedures' influence in New Zealand and Guatemala and how an understanding of those factors might inform strategies to improve the regulatory impact of the mechanism more generally. It employs Braithwaite and Drahos' 'webs of influence' analysis to unravel the regulatory webs at play in both states. It analyses the key actors, principles and mechanisms relevant to the special procedures' regulation of state behaviour towards Indigenous peoples in New Zealand and Guatemala. It argues that a complex array of factors explains the special procedures' imperfect influence in these two states. Key actors are not engaged, the core principles leveraged by the state are not contested and important regulatory mechanisms are not exploited to their full potential. In the process of making this assessment it offers some suggestions for the mechanism's improved influence that are of broader import than just the two states under study.

Chapter VIII, the final chapter, sets out the overarching conclusions and reflections on the thesis. It argues that the special procedures regulate state behaviour towards Indigenous peoples perceptibly but incompletely. There are instances where the governments of New Zealand and Guatemala have acted upon the special procedures' recommendations regarding Indigenous peoples. However, ritualism is both states' prevailing response. It then uses an understanding of the strategies for improving the influence of the special procedures outlined in Chapter VII to advocate for the improved leverage of the international human rights system to address the Indigenous rights implementation gap. Crucially, it supports a shift in the international human rights system's predominant focus on shaming states for non-compliant behaviour to models that simultaneously shame and praise states, fostering continuous improvement in observing Indigenous rights.

II WEBS OF INFLUENCE: THEORISING REGULATORY POTENTIAL

A *Introduction*

Investigating how the special procedures regulate state behaviour towards Indigenous peoples requires first understanding how powerful actors such as states are regulated. In this chapter I draw heavily on the rich body of regulatory literature to theorise how that occurs. I argue that, even though the special procedures do not have the ability to coercively enforce their recommendations or enjoy access to generous economic resources, they can weave webs of influence that help to bring about state conformity to international Indigenous rights norms. I develop this argument in three steps. First, I explore how states respond to normative orders and the authorities that push them. I argue that states can respond in varying ways, including ways designed to disguise their inward rejection of the goals of the relevant norms. I follow John Braithwaite, Toni Makkai, Valerie Braithwaite and Charlesworth in adapting Robert Merton's theory of individuals' behavioural responses to normative orders – conformity, innovation, ritualism, retreatism and rebellion – to distinguish state responses to norms.[1] I focus especially on ritualism, which Charlesworth has identified in state responses to international human rights regulation.[2] Secondly, I consider whether 'weak' actors, like the special procedures experts, have the ability to effect changes in these responses. I embrace a largely constructivist theoretical stance to argue that they do. Thirdly, I examine the logistics of how it is that such actors can make these shifts happen. To this end, I embrace Braithwaite and Drahos' 'webs of influence' conceptualisation of how regulation happens. It conceives of regulation as occurring through contests of principles between many actors leveraging different mechanisms, rather than simply at the whim of states with the power to coerce and reward. Based on this understanding I argue that the special procedures, like other apparently weak actors, have the potential to weave dialogic webs of influence to significant effect. The chapter addresses each of the steps of my argument in turn.

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[1] Robert K Merton, 'Social Structure and Anomie' (1938) 3(5) *American Sociological Review* 672; Robert K Merton, *Social Theory and Social Structure* (The Free Press, Enlarged ed, 1968); John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007) 6-7, 130-39, 219-88; Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 11-4. I note that Braithwaite, Makkai and Braithwaite use Robert Merton's theory to distinguish organisational, rather than state, responses to norms.

[2] Charlesworth, above n 1, 12.

B *State Responses to Normative Orders and Authorities*

1 *The Mertonian Paradigm of Behavioural Adaptations*

States can respond to normative orders and the authorities that push them in varying ways. Merton's paradigm of individuals' behavioural adaptions to normative orders is an instructive starting point in understanding states' responses to norms. The focus of Merton's paradigm is non-conformity. He theorises that non-conformity or deviance from normative systems is 'a symptom of dissociation between culturally prescribed aspirations and socially structured avenues for realizing these aspirations.'[3] In the course of making his argument, Merton identifies five logically possible behavioural adaptations. The first is conformity, where the individual accepts both the cultural goals and the institutionalised means of achieving them. In his view, conformity is the most common behavioural adaptation. The second is innovation, where the individual accepts the cultural goals but finds alternative means to achieve them.[4] Although in colloquial terms 'innovation' has positive connotations, Merton uses the term to refer to behaviours of crime and delinquency. Ritualism is the third behavioural adaptation. Ritualism, according to Merton, occurs where the individual abandons the cultural goals but 'almost compulsively' abides by the institutionalised norms.[5] Merton points out that this adaptation has not often been viewed as deviant, given that the overt behaviour of the individual aligns with institutionalised norms.[6] The fourth adaptation is retreatism. Retreatism is identified by Merton as the least common behavioural adaptation. It occurs where the individual substantially abandons both the cultural goals and the institutionalised means for achieving those goals.[7] The fifth, and last, is rebellion, which occurs where the individual rejects and substitutes new goals and standards for the cultural goals and the institutionalised means for meeting those goals.[8] Merton cautions that individuals' responses may shift in relation to the same normative order (and, of course, between them); the adaptations do not categorise the totality of individuals' personalities.[9]

Each of Merton's behavioural adaptations is, with some refinement, possible in states' responses to the international Indigenous rights norms pushed by the special procedures. In this context, the cultural goals are the goals of international Indigenous rights norms, such as for all Indigenous peoples to enjoy the right to self-determination or to be free from non-discrimination and so forth. The socially structured avenues for realising those goals are the accepted means for their realisation, such as the enactment of laws and policies affirming and providing for

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[3] Merton, *Social Theory and Social Structure,* above n 1, 188.
[4] Ibid 230-31.
[5] Ibid 238.
[6] Ibid 238, 241.
[7] Ibid 241-42.
[8] Ibid 245.
[9] Merton, 'Social Structure and Anomie', above n 1, 676.

Indigenous peoples' rights to self-determination and non-discrimination. Some states will conform, accepting the goals of the norms and the means of achieving them. This acceptance, or commitment, is the most durable form of regulation as the state will self-regulate compliance to the normative order.[10] Unlike the context in which Merton writes, the rights situation of Indigenous peoples suggests that conformity is not the most common behavioural adaptation to international Indigenous rights norms. A few states will innovate, accepting the goals of the norms but finding other ways to achieve those goals. States will retreat, abandoning the goals of the norms and the accepted means for achieving those goals. States will also rebel, rejecting and substituting new goals and means for meeting those new goals. Given the poor state of Indigenous rights implementation, at first blush retreatism and rebellion are states' expected behavioural responses. Yet, the near universal state endorsement of the *UNDRIP* and evidence of states' domestic steps to legislate for the norms it affirms reveals an apparent disassociation between states' abidance with the socially structured avenues for realising those goals (international and domestic law and policy) and the goals themselves. This suggests that ritualism is a common state response to international Indigenous rights norms: states abandon the goals of the norms but comply with the accepted means of achieving them. The case studies, discussed in Chapters V and VI, bear this out.

2 *Compliance Ritualism*

Braithwaite, Makkai and Braithwaite have adapted and developed Merton's concept of ritualism in the course of a sustained comparative study of regulation. They analyse the regulation of nursing home facilities in the United States, England and Australia over three decades. They found examples of each of Merton's behavioural adaptations in the responses of nursing home operators to their regulation. But they identified ritualism as the most prevalent response.[11] In fact, they identified it as 'the most daunting challenge of regulatory capitalism'.[12] They argue that in order to avoid confrontation with regulators, nursing home operators often agreed to the language and techniques of regulation, such as by changing policies, but without committing to the goal behind those policies. They found that operators were usually successful in this strategy because the regulators did not have sophisticated mechanisms to follow-up and monitor the operators' compliance and because the new policies were capable of perfunctory

[10] Charlesworth, above n 1, 11.
[11] Braithwaite, Makkai and Braithwaite, above n 1, viii.
[12] Ibid 7.

observation.[13] Given the difficulties in assessing commitment to regulatory goals, regulators often equated formal compliance with the rules with commitment.[14]

Braithwaite, Makkai and Braithwaite go on to theorise the contemporary prevalence of ritualism in regulation. They refine Merton's definition of ritualism, defining it as 'acceptance of institutionalised means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves.'[15] They argue that it can take many forms, often simultaneously.[16] For example, rule ritualism, where a rule is produced instead of a solution to the problem; documentation ritualism, where the documentation is right but the actions towards fulfilment of the regulatory goals are wrong; legal ritualism, where the letter rather than the spirit of the law is followed; and, participatory ritualism, where procedures are followed that purport to improve participation but instead alienate the intended participants.[17] These are responses of the regulated, what Braithwaite, Makkai and Braithwaite term 'compliance ritualism'.[18] Regulators can also engage in ritualism. Braithwaite, Makkai and Braithwaite refer to this as 'regulatory ritualism'.[19]

It is a leap to go from an understanding of individuals' behavioural adaptations to ascribing behaviours to states. As Chapter I identified, states are complex. They are conglomerates of individuals and organisations, each of whom may respond with a different behaviour to any single authority or norm. In fact, each individual or organisation within a state may respond with multiple behaviours to a single authority or norm over a course of time. Yet, it is conceivable that a state representative (a government minister or head of a diplomatic mission in Geneva say) or a state institution could be attributed a dominant behavioural adaptation at a point in time. Certainly, the large body of international law and international relations literature that considers state compliance with international norms has no difficulty in imputing prevailing behaviours to states.[20]

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[13] This sentence is paraphrased from Charlesworth's discussion of Braithwaite, Makkai and Braithwaite's findings. Charlesworth, above n 1, 12; Braithwaite, Makkai and Braithwaite, above n 1, 131.
[14] Braithwaite, Makkai and Braithwaite, above n 1, 131-33; Carol A Heimer and J Lynn Gazley, 'Performing Regulation: Transcending Regulatory Ritualism in HIV Clinics' (2012) 46(4) *Law & Society Review* 853, 880.
[15] Braithwaite, Makkai and Braithwaite, above n 1, 7.
[16] Ibid 220-59.
[17] Ibid 221.
[18] Ibid 264, 302.
[19] Ibid 302. Braithwaite, Makkai and Braithwaite argue that '[r]egulatory ritualism induces gaming, defiance and disengagement that in turn produce compliance ritualism.' Gaming, defiance and disengagement are motivational postures, which signal actors' attitudes about how they wish to position themselves in relation to an authority. The idea of motivational postures was developed by Valerie Braithwaite initially on the basis of the nursing home data collected by Braithwaite, Makkai and Braithwaite and later in relation to tax compliance, see Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009).
[20] As John Braithwaite, Hilary Charlesworth and Adérito Soares acknowledge, '[o]f course, states are larger, more complex organisations than nursing homes'. But they see some of the principles born of Braithwaite, Makkai and Braithwaite's research as applicable to state behaviour. John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU EPress, 2012) 34.

Charlesworth is one scholar who has specifically embraced the ascription of ritualism as a behavioural response to states. She does so in the process of examining the international community's role in the protection of human rights in the context of international peace-building efforts. A large part of her focus is on how the international community has engaged in the protection of human rights in Cambodia, with especial emphasis on Kirby's time as the special procedures expert on Cambodia. She draws on Merton, Braithwaite, Makkai and Braithwaite to argue that in 'the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions', including in Cambodia.[21] She argues:

> Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses. Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.[22]

For example, she points out that, despite signing up to several core international human rights treaties, Cambodia has failed to implement these international human rights commitments into domestic law.[23] As the case studies in Chapters V and VI will show, enacting domestic legislation that reflects international human rights commitments can itself be a form of rights ritualism where the policies, processes and resources to give effect to those commitments are lacking. Charlesworth argues that the practice of rights ritualism has been 'tacitly endorsed' by the international community 'perhaps as the path of least resistance in a political system that is inhospitable to human rights claims.'[24] Nor is the tactic restricted to states from the global South. Charlesworth suggests that Australia also engages in rights ritualism.[25] Yet, states display other behaviours too. Charlesworth acknowledges that Cambodia has edged closer to disengaging behaviours at times, resisting human rights when it is the subject of strong criticism.[26] But she posits that it is rights ritualism that has enabled Cambodia to successfully avoid deep international human rights scrutiny.[27] The rights ritualism that Charlesworth focuses on is compliance ritualism: the ritualism engaged in by states. However, in pointing to the international community's tacit endorsement of the practice, she alludes to the regulatory ritualism engaged in by the international authorities advancing human rights norms. As with

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[21] Charlesworth, above n 1, 12-4.
[22] Ibid 12-3.
[23] Ibid 13.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid 14.

Charlesworth, it is 'compliance ritualism' that I am alive to uncovering in the case studies of state responses to the special procedures in Chapters V and VI. Following Charlesworth, I refer to this phenomenon simply as 'ritualism' or 'rights ritualism'.

Other legal scholars have recognised the prevalence of human rights ritualism among states, although they use different terminology. For example, Ryan Goodman and Derek Jinks use the term 'decoupling' to describe three different categories of behaviours, the second of which aligns with rights ritualism.[28] Goodman and Jinks' second category of decoupling occurs where there is a decoupling between public conformity to a social convention and private acceptance and practice.[29] They argue that this is common within international society.[30] In the human rights context, they give the example that 'states ratify international human rights treaties and enact liberal, rights-based constitutions, but these formal changes often do not alter substantially their commitment to human rights standards in day-to-day governance.'[31] In their view, states act this way because they perceive their domestic practices 'to be relatively insulated from global scrutiny.'[32] They identify that '[i]n the human rights context, this is particularly troubling, given the familiar problem of the seemingly "shallow" or disingenuous embrace of international human rights law by many states.'[33]

The language of ritual and its synonyms is prevalent in Indigenous scholars and advocates' reflections on states' domestic protection of international Indigenous peoples' rights too. Ana Pinto observes that the UN's first International Decade of the World's Indigenous People 'has been a good ritual but has not produced the results it could have'.[34] Tauli-Corpuz reflects that the response of most states domestically to international Indigenous rights norms 'has been ceremonial, not actual'.[35] Further, Jeff Corntassel makes a distinction between the recognition of 'paper rights' and the 'actual realization' of Indigenous peoples' rights.[36] 'Ritual' is a word long associated with Indigenous peoples given its frequent use in the countless anthropological studies of Indigenous peoples' social, legal and political systems. Examining states' ritualism turns the gaze back from the 'rituals' of Indigenous peoples to those of the colonial powers.

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[28] Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *The European Journal of International Law* 725, 729-31.
[29] Ibid 731.
[30] Ibid 727, 729; Ryan Goodman and Derek Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges' (2005) 54 *Duke Law Journal* 983, 994; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621, 649.
[31] Goodman and Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges', above n 30, 994 (citations omitted).
[32] Ibid 994.
[33] Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', above n 28, 727.
[34] Ana Pinto in Ellen Lutz, 'Stories From Home: Indigenous Issues Ignored in India' (2004) 28(3) *Cultural Survival* quoted in Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137, 162.
[35] Victoria Tauli-Corpuz in Cultural Survival, *Second International Decade of the World's Indigenous People Renews Hope* (7 January 2005) <http://www.culturalsurvival.org/news/karin-oman/second-international-decade-worlds-indigenous-people-renews-hope> quoted in Corntassel, above n 34, 162.
[36] Corntassel, above n 34, 162.

Merton's behavioural adaptations provide a useful language with which to label state responses to international Indigenous rights norms and the work of the special procedures mandate-holders in pushing them. Braithwaite, Makkai and Braithwaite, Charlesworth and Goodman and Jinks' analyses also highlight the need to remain alert to Indigenous rights ritualism. Their scholarship underscores the importance of carefully inspecting below the surface of states' formal rights practices. However, being able to label state responses is only the first step. Where states are not conforming to international Indigenous rights norms the next vital step is identifying whether it is possible for apparently weak actors, such as the special procedures, to influence states to do so.

C *The Influence of 'Weak' Actors: Rationalism versus Constructivism*

1 *Rationalism and Indigenous Rights Conformity*

Two conventional approaches to understanding state conformity to international norms were introduced in Chapter I: rationalism and constructivism. These approaches offer differing perspectives on the ability of apparently weak actors to wield influence over states.[37] In the broadest brush strokes, rationalist accounts are concerned with interests. Rationalist scholars take the position that states, as rational actors, will only comply with international norms that are in their national interests.[38] The general category of rationalist accounts includes three main approaches: realist,[39] institutionalist,[40] and liberal.[41] Realists emphasise the lack of a centralised law-making authority within an uncertain and anarchic international system.[42] They see unitary nation states as the only international actors that matter, understanding each state as a rational actor with survival as its primary goal. On these accounts state power is central. The goal of survival requires that states maintain sufficient power – understood principally as economic and

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[37] See generally Oona A Hathaway and Harold Hongju Koh (eds), *The Foundations of International Law and Politics* (Foundation Press, 2005).

[38] Rationalist scholars include Jack L Goldsmith and Eric A Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' (2002) 31 *Journal of Legal Studies* 115; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008); Robert O Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard International Law Journal* 487; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51(4) *International Organization* 513; Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (McGraw-Hill, 6 ed, 1993); Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 *American Society of International Law Proceedings* 240.

[39] See, eg, Morgenthau, above n 38.

[40] See, eg, Keohane, 'International Relations and International Law: Two Optics', above n 38; Jack Donnelly, *Realism and International Relations* (Cambridge University Press, 2000); Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984); Jack Donnelly, 'International Human Rights: a Regime Analysis' (1986) 40 *International Organization* 599.

[41] See, eg, Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', above n 38; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6(4) *European Journal of International Law* 503.

[42] Anne-Marie Slaughter, 'International Relations, Principal Theories' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [1], [4].

military assets – to ward off threats of foreign invasion or occupation. Thus, on realist accounts, states can only be bound by coercion (generally, of the military or economic variety) or consent, which will be withheld if it does not accord with the (narrowly defined) rational self-interest of the state. It concludes that it is those states with the greatest military and economic clout that are decisive globally.[43] As a result, realists do not view international norms as influencing state behaviour. In Jutta Brunnée and Stephen Toope's words, '[r]ealist approaches tend to devalue the role of norms in international society, leaving little space for the operation of law.'[44] Norm compliance is simply a reflection of state power and interests: states obey norms when it is in their interests and ignore them when it is not (with any compliance counter to states' interests understood as a consequence of coercion).[45] Accordingly, realists reject the idea that individuals without direct coercive enforcement powers and significant economic resources could wield influence over states.[46] Hans Morgenthau's scholarship typifies such approaches.[47]

Institutionalists modify the realist position slightly. Like realists, institutionalists view the international system as anarchic and uncertain and states as self-interested rational actors geared towards survival through increasing their military and economic power.[48] But they identify an important role for international institutions. According to institutionalists, states design international institutions 'to prevent opportunistic behavior from hindering collectively optimal outcomes'.[49] Such 'institutions do not reconfigure state interests and preferences, but they might, under certain conditions, constrain strategic choices by prescribing and stabilizing mutual expectations about state behavior.'[50] Institutions can do so in several ways: through extending the time horizons relevant to the interactions, increasing the relevance of reputation and punishment; improving information regarding states' behaviour; and increasing efficiency in agreeing a collective course of action.[51] Reputations are relevant instrumentally only: states are concerned about their reputations as a way 'of securing gains to the state by entering into more cooperative agreements' not for honour or prestige.[52] Institutionalists use microeconomic

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[43] Ibid [2]-[4]; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001-2002) 111 *Yale Law Journal* 1935, 1944-47. See generally Morgenthau, above n 38; Edward Hallet Carr, *The Twenty Years' Crisis 1919-1939* (Harper & Row, 1964); Kenneth N Waltz, *Theory of International Politics* (McGraw Hill, 1979).

[44] Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 119, 120.

[45] Slaughter, 'International Relations, Principal Theories', above n 42, [7]; Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 302. 323; Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) 114.

[46] Braithwaite, Charlesworth and Soares, above n 20, ix.

[47] Morgenthau, above n 38.

[48] Slaughter, 'International Relations, Principal Theories', above n 42, [8].

[49] Ryan Goodman and Derek Jinks, 'Toward an Institutional Theory of Sovereignty' (2002) 55 *Stanford Law Review* 1749, 1751.

[50] Ibid 1751. See also Hathaway, above n 43, 1947-52. See generally Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, above n 40.

[51] Slaughter, 'International Relations, Principal Theories', above n 42, [10]-[12].

[52] Rachel Brewster, 'Unpacking the State's Reputation' (2009) 50(2) *Harvard International Law Journal* 231, 236. See also Guzman, above n 38, 35.

and game theories to explain why states may pursue cooperation.[53] Robert Keohane's work is an example of institutionalist scholarship.[54]

Liberalism is a more distinct branch of rationalism. Its central defining thesis is that states' individual national characteristics are relevant to their compliance with international norms.[55] It understands states as comprised of various component parts, each of which may have different interests. One branch of liberalism argues that state behaviour in the international system is a product of the arrangement of the preferences of the individuals and private groups who dominate domestic society. These actors' preferences can include, for example, ideological beliefs rather than simply the acquisition of economic and military power.[56] In this way it contrasts with realist and institutionalist accounts. Another branch focuses on the explanatory power of status as a liberal democratic state, arguing that liberal democracies are more compliant with international law than non-democracies.[57] Andrew Moravcsik has adopted a liberal theoretical stance.[58]

Yet, rationalist accounts struggle to explain the dynamics behind the pockets of state compliance with international Indigenous rights norms that do exist. Following the realist's logic, there is no tenable reason why a rational self-interested state would comply with international Indigenous rights norms. There is no centralised enforcement body with the power to coerce state compliance with international Indigenous rights norms. Even the weakest nation states have more economic and military power than the Indigenous peoples within their borders. As Sheryl Lightfoot explains, 'if states view concessions to indigenous groups as a zero-sum game, then a state would stand only to lose power and capacity by making any domestic changes that would recognize indigenous rights within the state.'[59] Institutionalists' refinement of the realist position cannot explain such compliance either. In the area of Indigenous peoples' rights, neither the idea of reciprocity nor reference to a cooperation or coordination game alone plausibly explains state compliance. States generally do not require the cooperation of other states to realise their own domestic rights recognition so an argument for reciprocal compliance cannot be made in the same way it could for trade agreements, for instance. Reciprocity only persuasively comes into play where there is an agreement to exchange economic aid for

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[53] Slaughter, 'International Relations, Principal Theories', above n 42, [8]-[9]. See generally Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, above n 40.
[54] See, eg, Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, above n 40; Keohane, 'International Relations and International Law: Two Optics', above n 38.
[55] Slaughter, 'International Relations, Principal Theories', above n 42, [14]. See also Hathaway, above n 43, 1952-55; Anne-Marie Slaughter, 'International Law in a World of Liberal States', above n 41, 507-08.
[56] Slaughter, 'International Relations, Principal Theories', above n 42, [16]-[17]. See generally Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', above n 38; Anne-Marie Slaughter, 'International Law in a World of Liberal States', above n 41.
[57] Sheryl Lightfoot, 'Indigenous Rights in International Politics: The Case of "Overcompliant" Liberal States' (2008) 33 *Alternatives* 83, 89. See generally Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', above n 38; Anne-Marie Slaughter, 'International Law in a World of Liberal States', above n 41.
[58] See, eg, Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', above n 38.
[59] Lightfoot, above n 57, 89.

improved domestic rights recognition, for example.[60] Nor would the possibility of acquiring a bad reputation for failing to comply with international Indigenous rights norms explain a rational self-interested state's compliance. It is difficult for other states to detect and verify Indigenous rights violations. Even if they could, there is little instrumental value in having such a reputation;[61] George Downs and Michael Jones find that 'reputation promotes compliance with international law most in trade and security and least in environmental regulation and human rights.'[62] Liberal understandings fall short too. For example, while Lightfoot argues that a higher number of liberal democracies do in fact comply with international Indigenous rights norms than non-democracies, she also identifies that liberal theories struggle to explain the Indigenous rights non-compliance of liberal states such as the United States and the compliance of what she categorises as comparatively illiberal states such as Taiwan. Nor do they explain state recognition of Indigenous peoples' collective rights, given the liberal view that human rights attach to individuals only.[63]

2 *Constructivism and Indigenous Rights Conformity*

(a) Constructivism's Defining Features

Constructivist approaches offer some answers to the failings of rationalist accounts. At heart, constructivism is concerned with the socially constructed nature of identities and meanings and the role and evolution of norms.[64] In marked contrast to rationalist accounts, constructivists argue that norms (along with ideas, culture and knowledge) help to constitute state identities and that these identities then shape political action. The argument is not that norms have a direct causal effect, rather that they shape behaviour by constraining, enabling and constituting states in their choices:[65]

> Norms are…seen to shape states' interests in an international system defined as a social system, in which states organize their conduct not solely according to material interests or the traditional tenets of sovereignty, but because they value the security and legitimacy of a particular identity. In this way, norms are seen, by their constitutive aspects for states' identities, to be relevant during the process by which states define their interests and organize their behaviour, while

[60] See, eg, Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30, 628-29; Simmons, above n 45, 123.
[61] Simmons, above n 45, 124-25.
[62] George W Downs and Michael A Jones, 'Reputation, Compliance, and International Law' (2002) 31 *Journal of Legal Studies* S95, S112. See also Simmons, above n 45, 124.
[63] Lightfoot, above n 57, 89-90.
[64] Brunnée and Toope, 'Constructivism and International Law', above n 44,121; Slaughter, 'International Relations, Principal Theories', above n 42, [19]-[23]; Lightfoot, above n 57, 90; Hathaway, above n 43, 1955-62. See generally John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52(4) *International Organization* 855.
[65] Brunnée and Toope, 'Constructivism and International Law', above n 44, 124; Ruggie, above n 64, 869.

> *principled* ideas and norms, in particular, are understood to mitigate states' self-interested behaviour and to act as a powerful constraint on the established norms of state sovereignty (Robinson 2003, 165-166).[66]

Constructivists do acknowledge that state interests and power disparities matter.[67] However, they 'stress that varying identities and beliefs belie the simplistic notions of rationality under which States pursue simply survival, power, or wealth.'[68] Constructivists have differing perspectives on precisely *how* norms influence state behaviour, variously giving primacy to the explanatory power of factors such as acculturation,[69] persuasion,[70] socialisation,[71] legitimacy,[72] and internalisation.[73] But the best view is that these perspectives operate together to explain why states obey international norms.[74]

Constructivists emphasise the important role of non-state actors in states' norm compliance, which also distinguishes them from most rationalist accounts. Constructivist scholars have highlighted the role of non-state actors as 'norm entrepreneurs'.[75] Norm entrepreneurs influence states through non-coercive mechanisms like persuasion, which can help to change state beliefs and interests.[76] They can include actors such as NGOs who do not have significant economic or military assets; actors ignored by realists. Transnational advocacy networks are identified as having an important role in the socialisation of norms, including by

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[66] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate Publishing Limited, 2011) 51.
[67] Brunnée and Toope, 'Constructivism and International Law', above n 44, 121; Slaughter, 'International Relations, Principal Theories', above n 42, [21].
[68] Slaughter, 'International Relations, Principal Theories', above n 42, [21].
[69] See, eg, Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30; Goodman and Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges', above n 30; Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', above n 28.
[70] See, eg, Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area' (1999) 27(4) *Politics and Society* 529; Thomas Risse, "Let's Argue!': Communicative Action in World Politics' (2000) 54(1) *International Organization* 1.
[71] See, eg, Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887; Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998); Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999).
[72] See, eg, Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); Thomas M Franck, 'Legitimacy in the International System' (1988) 82 *The American Journal of International Law* 705; Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995); Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88.
[73] See, eg, Harold Hongju Koh, 'Transnational Legal Process: The 1994 Roscoe Pound Lecture' (1996) 75 *Nebraska Law Review* 181; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599; Harold Hongju Koh, 'How is International Human Rights Law Enforced?' (1998) 74 *Indiana Law Journal* 1397; Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623.
[74] See, eg, Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area', above n 70, 530.
[75] Martha Finnemore and Kathryn Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics' (2001) 4 *Annual Review of Political Science* 391, 400-01.
[76] Slaughter, 'International Relations, Principal Theories', above n 42, [23]. See generally Keck and Sikkink, above n 71.

Thomas Risse and Sikkink.[77] This is because transnational advocacy networks have the ability to focus international attention on norm violations, which in turn leads to pressure on the target countries 'simultaneously "from above" and "from below"'.[78] Both domestic and transnational actors may engage in 'moral consciousness-raising', such as by mobilising shame to publicise norm-violations in order to embarrass states into compliance.[79] In addition, constructivists have identified 'the role of international institutions as actors in their own right.'[80] Institutionalists tend to view 'institutions largely as the passive tools of States', whereas constructivists identify that the bureaucracies of international institutions sometimes pursue interests contrary to 'the wishes of the States that created them'.[81]

(b) Process-based Micro Analyses of Norm Compliance

Constructivist approaches are process based, emphasising the role of interactions in bringing about norm compliance. In order to catalogue the multiple interests, normative assertions and effects that impact the influence of norms constructivist approaches require 'process-based micro analyses'.[82] Examples of process-based analyses by international law scholars in the constructivist vein include Abram and Antonia Chayes' 'managerial' account of compliance with international law that emphasises how 'an iterative process of discourse' between the parties to international treaties, treaty organisations and the public acts to pressure states into compliance with international treaties;[83] Harold Hongju Koh's 'transnational legal process' theory that sees the multi-stage process of interaction, interpretation and internalisation of international norms as key to explaining why states obey international law;[84] and Goodman and Jinks' state socialisation approach, which argues that states derive their elemental features 'from worldwide models constructed and propagated through global cultural and associational

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[77] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1.
[78] Ibid 5 (citations omitted). See also Keck and Sikkink, above n 71.
[79] Morgan, above n 66, 52. See also Keck and Sikkink, above n 71, 23.
[80] Slaughter, 'International Relations, Principal Theories', above n 42, [23].
[81] Ibid [23]. Regarding the latter approach see generally Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004).
[82] In advocating a pluralist approach to international law Paul Schiff Berman argues that '[s]uch analyses will necessarily go beyond both the simplified models of rational choice realists and the triumphalism that can afflict international law proponents, who have sometimes simply assumed that international law affects state behavior without the essential process-based micro analyses.' Berman, above n 45, 327.
[83] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995). For comment on this approach, including its rationalist dimensions, see Brunnée and Toope, 'Constructivism and International Law', above n 44, 130-31.
[84] Koh, 'Why Do Nations Obey International Law?', above n 73, 2646. See also Koh, 'Transnational Legal Process: The 1994 Roscoe Pound Lecture', above n 73; Koh, 'How is International Human Rights Law Enforced?', above n 73; Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', above n 73. For critical comment on Koh's approach see, eg, Brunnée and Toope, 'Constructivism and International Law', above n 44, 131-32. Later scholars, especially Gregory Shaffer, have further developed Koh's theory see, eg, Gregory Shaffer, 'The Dimensions and Determinants of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2013) 23.

processes' that then 'define and legitimate purposes of state action' as well as shaping 'the organizational structure and policy choices of states'.[85]

(c) A Generally Constructivist Approach

Constructivist approaches offer a hopeful view of state compliance with international Indigenous rights norms. When state behaviour is understood as a product of state identities, which in turn are constituted in part by norms, international Indigenous rights norms and the non-coercive and resource-poor mechanisms and actors that push them have the potential to exercise notable power.[86] Moreover, a constructivist approach enables the discussion to rise above a fixation with the legal status of these norms. This is a factor of some import in the present context given the *UNDRIP*'s orthodox status as 'soft' law. As Brunnée and Toope point out, 'constructivism is a poor fit for those who see the legal status of a norm as exclusively connected to its provenance from a formal source.'[87] On constructivist approaches social interaction and social practices are central to how international norms are made and obeyed, not whether they emanate from a UN treaty or custom or elsewhere.[88]

I embrace a roughly constructivist view of how the regulation of states occurs to argue that apparently weak actors, such as the special procedures, can influence states to conform to international Indigenous rights norms. But I retain some rationalist leanings. I acknowledge that interests and power play a role in shaping state behaviour.[89] However, I do not see them as the end of the story: norms, and actors that lack significant economic and military resources, also matter. I am not alone in such a composite formulation; Brunnée and Toope observe that '[m]any international lawyers appear to have both rationalist and constructivist intuitions.'[90] Embracing a constructivist approach requires that I address the mechanics of *how* it is that international human rights norms and apparently weak actors like the special procedures experts

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[85] Goodman and Jinks, 'Toward an Institutional Theory of Sovereignty', above n 49, 1752. See also Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', above n 28; Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30; Goodman and Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges', above n 30, 983. As Brunnée and Toope identify, this approach has parallels with the work of Finnemore and Sikkink and others who are also concerned with socialisation and internalisation. Brunnée and Toope, 'Constructivism and International Law', above n 44, 133. See Finnemore and Sikkink, 'International Norm Dynamics and Political Change', above n 71.

[86] See, eg, Morgan, above n 66, 145.

[87] Brunnée and Toope, 'Constructivism and International Law', above n 44, 129. For pluralists such as Robert Cover state 'lawmaking' is no more legitimate or authoritative than that of any other normative community. Berman, above n 45, 307.

[88] Brunnée and Toope, 'Constructivism and International Law', above n 44, 129.

[89] In taking this approach I am mindful of Brunnée and Toope's caution that constructivists must 'tackle head-on the internal critique of critical theorists and the external critique of realists that constructivism may privilege agency and neglect the constraints of power relationships.' Ibid 139.

[90] Ibid 129. Other scholars in a constructivist vein similarly acknowledge a role for coercion, see, eg, Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30, 623; Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', above n 73, 633-34. On the advantages of avoiding firmly locating oneself in the either the rationalist or constructivist camp see, eg, Kenneth W Abbott and Duncan Snidal, 'A New Generation of IR-IL Scholarship' in Jeffrey L Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 33.

can wield power; that is, I must outline my process-based micro analysis of influence. In doing so, I once again return to the regulatory literature.

D *How 'Weak' Actors Influence States*

1 *'Webs of Influence'*

I adopt an understanding of regulation as a product of complex webs of influence. On this view, regulation occurs through contests of principles between actors leveraging different mechanisms.[91] I posit that non-coercive and resource-poor actors, such as the special procedures, have the ability to strategically weave dialogic webs to influence state behaviour. In taking this approach I draw heavily on the theoretical work of Braithwaite and Drahos,[92] although I remain informed by international law and international relations scholarship. Braithwaite and Drahos theorise regulation as a product of webs of influence in the course of exploring the globalisation of business regulation. They develop their theoretical offerings from in-depth bottom-up empirical analyses of thirteen business domains, ranging from corporations and securities to the environment and transport. However, their theorising is of wider import: global business regulation is simply a sub-set of the broader movement of the globalisation of norms, standards, principles and rules and their enforcement. In subsequent works John Braithwaite alone, and with Makkai, Valerie Braithwaite, Charlesworth and Adérito Soares, has also supported the application of several of the work's key theoretical conclusions outside of the business domain, including in the regulation of international human rights law.[93] But their application in the human rights context is not explored in depth.

Braithwaite and Drahos do not offer a guidebook for individual regulatory power. Regulation is too dialectical, non-linear and messy for that.[94] Rather, they put forward processes and mechanisms that may be effectively harnessed by comparatively weak actors in order to exert influence.[95] I draw from Braithwaite and Drahos' regulatory theory, although it emanates from a different context, because such an offering is largely missing from the existing body of literature concerned with influencing states. While existing scholarship in a constructivist vein theorises on the mechanics of influencing states' human rights behaviour it is yet to elaborate with specificity the strategies and mechanisms that may be engaged by non-state actors to influence state behaviour or to empirically test those theories. For example, Goodman and Jinks are unable to identify exactly how 'states respond to cultural forces', noting that the issue is 'an

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[91] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 7, 9.
[92] Ibid.
[93] See, eg, Braithwaite, Makkai and Braithwaite, above n 1, 10-1, 303, 305, 322-23; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 201-2; Braithwaite, Charlesworth and Soares, above n 20, 41, 196.
[94] Braithwaite and Drahos, above n 91, 23-4.
[95] Ibid 550-629.

important one that requires rigorous empirical testing'.[96] Koh similarly leaves unanswered how human rights activists are to go about provoking the interactions, interpretations and internalisations central to this theory.[97] Further, other models such as Risse, Ropp and Sikkink's 'spiral model' and Finnemore and Sikkink's concept of a 'norm cascade' theorise the *phases* of international human rights norm socialisation but do not focus on the techniques to instigate movement through those phases.[98]

2 *The Foundational Concepts: Actors, Principles and Mechanisms*

(a) Actors

Actors, principles and mechanisms are the conceptual foundations for my 'webs of influence' understanding of regulation. I follow Braithwaite and Drahos in arguing that within each regulatory domain there are diverse *actors* seeking 'victory at different sites'.[99] These actors include states; organisations of states, such as treaty secretariats; business organisations; corporations; NGOs; mass publics, which are sizeable 'audiences of citizens who…express together a common concern about a regulatory question';[100] and, epistemic communities of actors, which are 'loose collections of knowledge-based experts who share certain attitudes and values and substantive knowledge, as well as ways of thinking about how to use that knowledge'.[101] Although Braithwaite and Drahos do not identify individuals as a recurrent actor in their case studies, they recognise that in some cases they are able to exert genuine influence over global regulation, including when they act as entrepreneurs of models of ways of acting.[102] As identified above, other scholars in a constructivist mould engage some of these conceptual categorisations – such as the idea of norm entrepreneurs – in the context of considering state compliance with international human rights norms.[103]

Consistent with constructivist thought, each of these actors regulates and is regulated. This means that states are just one type of actor that can effectively exert influence. Braithwaite and Drahos find that 'no one actor appears as master of the world',[104] although they find that

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[96] Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30, 654.
[97] See, eg, Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', above n 73. As noted above at n 84, Shaffer builds on Koh's theory.
[98] Finnemore and Sikkink, 'International Norm Dynamics and Political Change', above n 71; Risse, Ropp and Sikkink, above n 71.
[99] Braithwaite and Drahos, above n 91, 23.
[100] Ibid 24.
[101] Ibid 501. Braithwaite and Drahos draw on Peter Haas in describing epistemic communities in this way. Peter M Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control' (1989) 43(3) *International Organization* 377.
[102] See, eg, Braithwaite and Drahos, above n 91, 494-97, 559-63.
[103] See, eg, Finnemore and Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics', above n 75, 400-01.
[104] Braithwaite and Drahos, above n 91, 7.

states (and, in particular, the United States) remain the type of actor that has had the greatest regulatory influence.[105] In recognising the influence of states, they confirm 'the basic tenet of realist international relations theory – that states are the major actors in world affairs'.[106] However, they reject 'the realist model of the global, as bigger- and smaller-state billiard balls using their weight to push one another around a table'.[107] They argue that states are both 'constituted by' and help to 'constitute a web of regulatory controls'.[108]

Each of these actors is relevant in understanding the regulatory domain of Indigenous peoples' rights and the role of the special procedures mandate-holders within that domain. States are crucial given that the focus here is on how the special procedures regulate state behaviour towards Indigenous peoples. States with which the special procedures have engaged are especially relevant. International organisations of states that are important include the HRC, its predecessor the CHR, and the GA. The OHCHR, an international organisation reliant on state funding, is also of note. NGOs of core concern include domestic, regional, international and transnational human rights NGOs and IPOs, especially those that have been involved in special procedures mandate-holders' work in some way. Indigenous peoples and their supporters are the primary relevant mass public, whether as an audience, for example, of Indigenous peoples at large or as an audience of Indigenous women or Indigenous persons with disabilities and so on. Epistemic communities of relevance include academics in the field of Indigenous peoples and their rights. Individual actors, such as the special procedures mandate-holders, Indigenous leaders and advocates, are also relevant. The categories are not exclusive. For example, I understand special procedures mandate-holders as individual actors (because of the uniquely independent nature of their mandates) engaged by an international organisation of states (the HRC) who often belong to epistemic communities of academics, may have associations with NGOs or IPOs and can act as members of mass publics. In international law scholarship the special procedures are also viewed as a 'mechanism' of the international human rights system, although they are not a 'mechanism' as I, and Braithwaite and Drahos, use the term to articulate webs of influence.

(b) Principles

Actors, often in coalitions that vary from domain to domain, push for or against different *principles*. I adopt Braithwaite and Drahos' understanding of principles as unspecific 'abstract prescriptions that guide conduct',[109] and that reflect actors' 'general values, goals and

[105] Ibid 475.
[106] Ibid 478.
[107] Ibid.
[108] Ibid 479.
[109] Ibid 9.

desires'.[110] Principles are the most important component of the regulatory webs because they 'set the direction of regulatory change'.[111] They do this by unifying thinking, giving actors a proposition to fight for.[112] They 'can also operate as tools of capture', providing a concept on which other policies can 'hang'.[113] Different actors can support the same principle for distinct motives. Sometimes this is because single principles are able to encompass different goals or interests, allowing alliances between disparate actors to be forged.[114] The way that principles are used and their status can also change over time.[115]

Principles are rhetorical, symbolic and instrumental. Principles are rhetorical in that they are used to 'attempt to sway judgment' using rhetorical techniques, such as by '[a]rousing passion and emotion'.[116] This is often best achieved through telling stories of effects on human lives; for example, Braithwaite and Drahos identify the important role of stories in triggering the concern of mass publics.[117] They can function symbolically. For instance, where principles are incorporated in framework agreements that require little direct state action their value is primarily symbolic in that they simply 'help to unify perceptions about the importance of an issue' and allow states to further consider the issues.[118] Principles also have an instrumental use, the use identified by Braithwaite and Drahos as most important. Principles are used instrumentally when they are used by actors to secure change consistent with the actors' goals. Principles do this by setting the direction of action and acting as a precursor to rule development. Principles do not themselves change conduct, processes for agreeing rules of conduct then need to take place. Braithwaite and Drahos argue that principles are active, and thus capable of operational effect, when they are used rhetorically or instrumentally. They are passive, and rarely capable of effect, when they are used symbolically (or not at all).[119]

Braithwaite and Drahos identify thirteen key recurring principles in their case studies. Several of these principles could be relevant, with some modification, in the regulatory domain of Indigenous peoples' rights. The principle of continuous improvement could be engaged by special procedures mandate-holders to promote improved state commitment to international Indigenous rights norms. Braithwaite and Drahos define continuous improvement as '[t]he prescription of doing better every year than the previous year in terms of a regulatory objective

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[110] Ibid 19.
[111] Ibid 522.
[112] Ibid 528-29.
[113] Ibid 525.
[114] Ibid 530.
[115] Ibid 529.
[116] Ibid 528.
[117] Ibid 500. Correspondingly, Joseph Nye argues that in the information age the actor with the most power 'may be the state (or non-states) with the best story'. Joseph S Nye, *The Future of Power* (Public Affairs, 2011) xiii. For comment on the power of stories for 'outgroups', including Indigenous peoples see, eg, Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87(8) *Michigan Law Review* 2411, 2413-15; Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660.
[118] Braithwaite and Drahos, above n 91, 529.
[119] Ibid 19, 529.

such as protecting the environment, even if legal requirements were exceeded in the previous year.'[120] So too could the principles of world's best practice, which is the prescription that activity be 'conducted under rules that substantially exceed the requirements set by present practice or regulation',[121] and transparency, which Braithwaite and Drahos define as '[t]he prescription that any person should be able to observe regulatory deliberation or easily discover the outcomes (and their justifications) of the deliberation.'[122] States could foreseeably leverage principles such as rule compliance, which prescribes that actors 'ought to consider that legality exhausts their obligations; to go as far as the rules require (eg in reducing pollution) but no further',[123] and national sovereignty, which prescribes 'that the nation-state should be supreme over any other source of power on matters affecting its citizens or territory.'[124] These principles are indicative only. The principles that may be engaged are limitless as new principles are perpetually invented, acquired from other regulatory domains and revived following defeat.[125]

In setting the direction for action principles are related to 'framing'. The notion of framing comes from social movement theory.[126] Drahos defines framing as 'a form of public dialogue in which actors wishing to change political processes offer an alternative conceptual scheme through which to reinterpret those processes.'[127] As Peggy Levitt and Sally Merry point out, '[f]rames are not themselves ideas, but ways of packaging and presenting ideas that generate shared beliefs, motivate collective action, and define appropriate strategies of action'.[128] Frames signify or assign meanings and they do so with the intention of mobilising potential supporters, securing the support of bystanders and demobilising antagonists.[129] Frames impact how 'problems are defined and understood, how causes of problems and their solutions are theorized and which perspectives are rejected completely.'[130] Characterising an issue as an international Indigenous rights or human rights issue is an example of framing.

The idea of framing shows the sometimes blurred boundaries between the concepts of principles and mechanisms. Drahos argues that where actors find themselves 'on the losing side

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[120] Ibid 25.
[121] Ibid 24.
[122] Ibid 25.
[123] Ibid.
[124] Ibid.
[125] Ibid 23-4.
[126] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38, 41. See generally David A Snow et al, 'Frame Alignment Processes, Micromobilization, and Movement Participation' (1986) 51(4) *American Sociological Review* 464; Sidney G Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge University Press, 3 ed, 2011).
[127] Peter Drahos, 'Does Dialogue Make a Difference? Structural Change and the Limits of Framing' (2008) 117 *The Yale Law Journal Pocket Part* 268, 268.
[128] Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441. 452. In support, Levitt and Merry cite Snow et al, above n 126; Tarrow, above n 126. See also Merry, above n 126, 41.
[129] David A Snow and Robert D Benford, 'Ideology, Frame Resonance, and Participant Mobilization' (1988) 1 *International Social Movement Research* 197, 198 quoted in Merry, above n 126, 41. See also Morgan, above n 66, 45-7.
[130] Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441, 452.

of a global regulatory contest' they 'should reframe that contest using different principles.'[131] On this understanding principles are what are used to reframe debates. But he also comments that framing is 'a mechanism that will rarely work on its own', rather '[i]t needs the support of other mechanisms'.[132] And in so doing he advocates an understanding of framing as a mechanism. David Snow and Robert Benford's understanding of frames also shares characteristics with Braithwaite and Drahos' idea of a mechanism as they posit that frames must have 'prognostic attribution'; that is, they argue that frames must not only identify problems but also propose solutions to those problems.[133] This is similar to the mechanism of modelling, discussed in the next section, for example. I prefer to view framing as related to principles in this context, given that frames, like principles, are a way of packaging ideas to promote regulatory change. As a result, I see frames, like principles, as in need of mechanisms to have effect.

(c) Mechanisms

Actors push for or against different principles using various *mechanisms*. I utilise Braithwaite and Drahos' definition of mechanisms as 'tools that actors use to achieve their goals.'[134] Actors can use mechanisms without principles. But '[m]echanisms need principles to guide action effectively' and '[p]rinciples need mechanisms to be made concrete in a regulatory domain.'[135] Mechanisms can be abstracted to different levels. For example, speech is a mechanism at a high level of abstraction (a 'higher-order mechanism'), as are rational choice and social norms.[136] In contrast, lower-order mechanisms are more concrete specifications of these mechanisms.[137]

Braithwaite and Drahos identify seven lower-order mechanisms that recur in their case studies, each of which may be pertinent to the Indigenous rights domain: military coercion, economic coercion, systems of reward, modelling, reciprocal adjustment, non-reciprocal coordination and capacity-building. Military coercion is 'the threat, fear or use of military force.'[138] Economic coercion is 'the threat, fear or use of economic sanctions.'[139] Systems of reward raise 'the expected value of compliance with a globalizing order (as distinct from coercion, which reduces the expected value of non-compliance).'[140] Modelling is 'action(s) that constitute a process of displaying, symbolically interpreting and copying conceptions of action'

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[131] Drahos, above n 127, 270. In support, Drahos references Braithwaite and Drahos, above n 91, 571-76.
[132] Drahos, above n 127, 272.
[133] David A Snow and Robert D Benford, 'Master Frames and Cycles of Protest' in Aldon D Morris and Carol M Mueller (eds), *Frontiers in Social Movement Theory* (Yale University Press, 1992) 135, 137.
[134] Braithwaite and Drahos, above n 91, 9.
[135] Ibid 530.
[136] Ibid 16.
[137] Ibid 16, 532.
[138] Ibid 25.
[139] Ibid.
[140] Ibid.

and a model is a conception of action displayed during such process.[141] Reciprocal adjustment is 'non-coerced negotiation where parties agree to adjust the rules they follow. This is conceived as cooperative adjustment where reciprocation occurs without coercion'.[142] Non-reciprocal coordination is 'when movement toward common rules happens without all parties believing they have a common interest in that movement. One party believes the new rule is in their interest, but this belief is not reciprocated.'[143] It 'often involves non-reciprocity within an overall reciprocity of issue linkage'.[144] Capacity-building is 'helping actors get the technical competence to satisfy global standards, when they wish to meet them but lack the capacity to do so.'[145] Other mechanisms not identified by Braithwaite and Drahos as recurrent in their study may also be relevant in the Indigenous rights domain. The technique of shaming, which is the expression of disapproval for non-compliance, is one example given its prevalence across the bodies of the international human rights system.[146]

Not all mechanisms are equally available to all. The mechanisms of military coercion, economic coercion and systems of reward are generally only available to powerful actors with 'concentrated and liquid resources', such as states and transnational corporations.[147] For example, in their case studies Braithwaite and Drahos found that '[e]conomic coercion is most effectively applied by the IMF [International Monetary Fund] and the World Bank', then 'dominant states' (the United States above all), and sometimes private corporations.[148] The remaining mechanisms: modelling, reciprocal adjustment, non-reciprocal coordination, capacity-building and shaming are available to both powerful and 'weak' actors, although for reasons discussed below modelling is a mechanism that in certain ways may advantage the 'weak'. Braithwaite and Drahos point out that no one mechanism is all-conquering, how effective a mechanism is will depend on the specific actor or actors engaging it and on the regulatory domain in which it is engaged.[149]

3 *The Importance of Dialogic Webs*

Actors, principles and mechanisms form the basis for webs of influence. Like Braithwaite and Drahos I distinguish between two different types of webs of influence: webs of reward and coercion and dialogic webs. In recognising the relevance of both types of webs I

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[141] Ibid 581.
[142] Ibid 25.
[143] Ibid 25-6.
[144] Ibid.
[145] Ibid 26.
[146] For a definition of 'shame' see, eg, Braithwaite, Makkai and Braithwaite, above n 1, 306. Regarding the prevalence of shaming in the international human rights system see, eg, Elvira Domínguez Redondo, 'The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review* 673, 687.
[147] Braithwaite and Drahos, above n 91, 552.
[148] Ibid 535.
[149] Ibid 546-47.

navigate a course between realist theorists' emphasis on the explanatory power of coercive measures and constructivist theorists' emphasis on the explanatory power of persuasion and other normative or social factors. Webs of reward and coercion include rewards and military and economic coercion and, as identified above, are generally only available to powerful actors. Braithwaite and Drahos frame dialogic webs as webs of persuasion; formal or informal, official or unofficial. Dialogic webs can be woven by all actors. They involve the remaining mechanisms.[150]

Dialogic webs are common. Braithwaite and Drahos argue that the inability of 'weak' actors to access webs of reward and coercion 'leaves resource-poor actors less disadvantaged than might be assumed, because dialogic webs are generally more influential and more common than webs of reward and coercion.'[151] Braithwaite and Drahos posit that most actors prefer to rely on dialogue before activating webs of reward and coercion because states, like individuals, tend to react to threats by redefining 'their interests in the direction of resisting the threat',[152] and 'that extrinsic incentives (rewards or punishments) undermine intrinsic motivations to comply', thus undermining long-term commitment in favour of short-term compliance.[153] Goodman and Jinks make a corresponding argument in support of 'softer' international human rights law enforcement mechanisms such as reporting and monitoring.[154]

Dialogic webs are influential. Braithwaite and Drahos argue that webs of dialogue regularly globalise 'forms of regulation that are complied with moderately well' without activating webs of reward or coercion.[155] They attribute this ability to five characteristics of dialogic engagement. First, dialogue enables actors to define their interests, and then to redefine those interests as an interest in solving a problem.[156] Secondly, it allows actors to understand relationships of what Robert Keohane and Joseph Nye term 'complex interdependency', where issues can only be resolved cooperatively.[157] It also allows actors to identify issue linkage, which can prompt reciprocal adjustment and non-reciprocal coordination, and thus 'motivate agreement and compliance'.[158] This is because 'in a world of complex interdependency' actors

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[150] Ibid 552-57.
[151] Ibid 552.
[152] Ibid 558. Braithwaite and Drahos point to the work of Sharon and Jack Brehm as support for this proposition at the individual level. Sharon S Brehm and Jack Williams Brehm, *Psychological Reactance: A Theory of Freedom and Control* (Harper & Row, 1981).
[153] Braithwaite and Drahos, above n 91, 558. Braithwaite and Drahos rely on Ian Ayres and John Braithwaite in making this point. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 49.
[154] Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 30, 689. Note that Goodman and Jinks use the special procedures as an example of a mechanism that engages in 'monitoring and reporting': at 687. The CHR and UN human rights treaty bodies are given as examples of mechanisms that engage in 'criticizing bad actors': at 688. In contrast, as Chapters IV to VI demonstrate, I argue that shaming is the primary tool engaged by the special procedures experts to advance the realisation of Indigenous peoples' rights norms.
[155] Braithwaite and Drahos, above n 91, 556.
[156] Ibid 553, 556.
[157] Robert O Keohane and Joseph S Nye, *Power and Interdependence* (Scott Foresman and Co, 2 ed, 1989) cited in Braithwaite and Drahos, above n 91, 553.
[158] Braithwaite and Drahos, above n 91, 553, 556.

fear that if they do not comply, even in the absence of sanctions, others 'will not cooperate in solving other agreed problems'.[159] As identified above, arguments for reciprocity and coordination are not as obviously applicable in the Indigenous rights domain. But, as Chapter VII will show, attempts at such linkages have been made. Thirdly, dialogue can constitute normative commitments – actors are persuaded that 'compliance is morally right'.[160] This normative commitment can then be harnessed to develop an agreement on principles, then rules and sometimes a commitment to enforce those rules.[161] Fourthly, dialogue can generate and institutionalise habits of compliance 'into bureaucratic routines or standard operating procedures'.[162] Modelling can also globalise practice.[163] Fifth, and lastly, it can institutionalise 'informal praise and shame for defection from the regime' and build capacity.[164] In Braithwaite and Drahos' case studies, informal praise and shame often played an important influential role in the dialogues within epistemic communities.[165] Overall, they find that '[w]hen many different types of actors use many dialogic mechanisms of this sort, both impressive regime-building and impressive compliance have been repeatedly demonstrated.'[166] The work of constructivist scholars, and some rationalist scholars, discussed in Part C supports the tenor of these conclusions in the domain of international human rights.

The news is not all good though. Braithwaite and Drahos find that powerful states and corporations still tend to dominate dialogic webs of control. As they assert, '[h]egemony means that within dialogic webs there is more reason to hear the voices of those with a capacity to escalate to webs of reward and coercion.'[167] Or, as Braithwaite, Makkai and Braithwaite phrase it, '[c]onversation works better when we have an aura of power in the eyes of the other.'[168] Because of this Braithwaite, along with Ian Ayres and others, has advocated for a networked escalation regulatory enforcement pyramid based on principles of responsive regulation.[169] Such a pyramid dictates soft and weak dialogic webs of regulation at the base of the pyramid and progressively moves up to measures that are more coercive.[170] It hypothesises that persuasion should presumptively be tried first, with punishment meted where persuasion is unsuccessful.[171]

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[159] Ibid 553. Braithwaite and Drahos draw on Robert Keohane in describing complex interdependency in this way. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, above n 40.
[160] Braithwaite and Drahos, above n 91, 553, 556.
[161] Ibid 553-54.
[162] Ibid 553-54. Braithwaite and Drahos rely on Oran Young in formulating this understanding of institutionalised habits. Oran R Young, *Compliance and Public Authority: A Theory with International Implications* (John Hopkins University Press, 1979) 39-41.
[163] Braithwaite and Drahos, above n 91, 554.
[164] Ibid 32, 556.
[165] Ibid 555.
[166] Ibid 32.
[167] Ibid 551.
[168] Braithwaite, Makkai and Braithwaite, above n 1, 315. See also John Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475, 489.
[169] See, eg, Braithwaite, Makkai and Braithwaite, above n 1; Ayres and Braithwaite, above n 153; John Braithwaite, 'Rewards and Regulation' (2002) 29(1) *Journal of Law and Society* 12; Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 168, 475.
[170] Braithwaite, Makkai and Braithwaite, above n 1, 276-80, 315.
[171] Ibid 276-77.

Braithwaite observes that '[t]he paradox of responsive regulation is that by having a capability to escalate to tough enforcement, most regulation can be about collaborative capacity building.'[172] Braithwaite, Makkai and Braithwaite's enforcement pyramid moves from '[e]ducation and persuasion about a problem' to '[s]hame for inaction' to '[s]anctions to deter' to '[e]scalated sanctions' to 'capital punishment'.[173] The emphasis is on minimising 'the escalation of coercion' and avoiding threats as 'threat and coercion undermine goodwill and, therefore, the trust that makes cooperative compliance work'.[174] It also works on the basis that where 'regulation is seen as more legitimate and more procedurally fair, compliance with the law is more likely.'[175] Special procedures acting alone do not have the ability to mete out sanctions or to incapacitate states. But they can network in other actors who can.

Networking is a central component of the pyramid. Braithwaite identifies that actors that do not have the ability to control a situation should 'consider networking with partners horizontally, or better still with partners who can *de-escalate* coercion, before considering vertical escalation.'[176] He also posits that where vertical escalation is required but the regulator does not have the power or resources to do so, the regulator should 'scan creatively and optimistically for potential network partners' who have the resources required.[177] 'Weak' actors can also be useful. Braithwaite suggests searching 'for other weak actors whose combined power tied in a node governs the situation with greater power than the sum of its parts.'[178] Commenting on the strategy of escalated networking in the regulation of human rights specifically, Braithwaite, Charlesworth and Soares explain:

> In practice, responsive regulation of states that perpetrate human rights abuses tends to be accomplished by escalated networking of informal sanctioning by more network partners in the international system – states, businesses, media organisations, human rights NGOs, traditional chiefs, UN agencies, foundations and other donors – becoming enlisted in a widening web of sanctions against the rights-abusing state: naming and shaming, withdrawal of donor support, trimming trade links, cutting defence support, cutting diplomatic support, terminating the membership of international organisations, and so on.[179]

Although special procedures mandate-holders do not have coercive powers, they could temper this handicap by networking in other actors to escalate up the pyramid as Braithwaite, Charlesworth and Soares suggest.

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[172] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 168, 475.
[173] Braithwaite, Makkai and Braithwaite, above n 1, 319.
[174] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 168, 488-89.
[175] Ibid 486.
[176] John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 99 (emphasis in original).
[177] Ibid.
[178] Ibid.
[179] Braithwaite, Charlesworth and Soares, above n 20, 38. See also Braithwaite, Makkai and Braithwaite, above n 1, 303.

4 *A Micro-Macro Theory of the Processes of Globalisation*

(a) Entrepreneurial Individuals

Multiple processual theories of norm compliance are possible. Braithwaite and Drahos put forward three processual theories of globalisation. In one, entrepreneurial individuals are central, in the other two individuals play a more minor role.[180] As I am concerned with strategies that may be engaged by entrepreneurial individuals – the special procedures mandate-holders – I focus on the dimensions of the former theory. It is a proactive micro-macro theory. Its sequence is 'individual entrepreneurship, enrolment of organizational power, modelling and then globalization of standards.'[181] Each of the components of this sequence demands some attention. Entrepreneurial individuals are pivotal. Entrepreneurial individuals are savvy actors that can guide the actions of even the most powerful actors. Braithwaite and Drahos point out that many entrepreneurial individuals do not see themselves 'as passive puppets of inexorable global forces', but rather:

> ...as deft puppeteers, capable of pulling strings and moving big players that remain passive until activated by someone who can show them where their interests lie. Then they help link principles to those interests. Their view is that large corporations and state bureaucracies tend to dither, paralyzed by the complexity of world regulatory networks, craving guidance by someone who can see a clear path of interest-enhancing action through the complexity.[182]

Special procedures experts could fulfill the role of deft puppeteer when it comes to regulating state behaviour towards Indigenous peoples.

(b) Enrolment

The enrolment of power is crucial to the process. Power, according to Braithwaite and Drahos, 'is diffused by the actions of chains of agents, each of whom "translates" it according to their own projects' and in the process of translation draws power away from the powerful's control.[183] It draws on Bruno Latour's theory of power as translation or enrolment of the

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[180] Braithwaite and Drahos, above n 91, 551, 559-62. Individuals can still play a role in Braithwaite and Drahos' *reactive* micro-macro theoretical sequence of the processes of globalisation. In this sequence individual entrepreneurs respond to media hyped disasters that trigger mass publics to desire regulatory innovation: at 561-62. Relying as it does on a crisis or disaster that triggers anxiety in a mass public this theory is less empowering for entrepreneurial individuals, such as special procedures mandate-holders. But it highlights the special procedures' ability to steer the direction of regulation on the back of Indigenous rights crises.

[181] Ibid 561.

[182] Ibid 495.

[183] Ibid 482.

capacities of other actors.[184] Braithwaite and Drahos argue 'that effectiveness at enrolling others to one's projects is a more important determinant of the effective exercise of power than resources possessed.'[185] Actors 'who exercise the greatest power are those who enrol many others with more resources and authority than themselves, and, more importantly, those who can enrol others who are even better at enrolling others than themselves.'[186] Braithwaite and Drahos underscore the sometimes key role of intellectuals in enrolling powerful actors given their ability to 'synthesize more clearly than others the direction where much thinking and innovative practice is going.'[187] This is promising for a number of the special procedures experts for whom the moniker aptly fits. Braithwaite and Drahos also identify treaty secretariats as sites where powerful individuals can often 'enrol the power of many business, state and NGO actors', given they are sited in metropole's 'where many enrolled heads of power come together.'[188] The special procedures experts' access to the HRC, GA and other UN bodies such as the PFII and EMRIP is an advantage as they are sites where state, NGO, and IPO actors meet. Additionally, actors, such as special procedures experts, can harness fissions within governments to enrol state actors because, as Braithwaite and Drahos explain, states are not unitary in the way that realists propose.[189]

(c) Modelling

Modelling is also decisive in the proactive sequence. Braithwaite and Drahos identify modelling as 'the most consistently important mechanism of globalization'.[190] Compliance, they find, 'globalizes more through modelling than by legal enforcement.'[191] Modelling works because the complexity of regulatory environments gives an advantage to those entrepreneurs who can identify a clear and 'plausibly interest-enhancing path'.[192] The tool is particularly useful for weaker actors because 'battles over models are not just battles won and lost in terms of economic interests (if this were true, the stronger interests would always prevail), but are also

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[184] Ibid 482, 495. See generally Bruno Latour, 'The Powers of Association' in John Law (ed), *Power, Action and Belief. A New Sociology of Knowledge?* (Routledge & Kegan Paul plc, 1986) 264.
[185] Braithwaite and Drahos, above n 91, 482 n 4.
[186] Ibid. Simmons also implies the importance of enrolling the power of others, explaining that '[o]ne of the most important resources for a movement's success has been found to be support from actors who are not direct beneficiaries of the movement's goals.' Simmons, above n 45, 137.
[187] Braithwaite and Drahos, above n 91, 560.
[188] Ibid.
[189] Ibid 483-84. Braithwaite and Drahos tie this idea into Robert Putnam's theory of international negotiations as a two-level game, where one game concerns 'domestic interest-group politics' and the other 'international deal-making to avert threats to national interests': at 484. In this two-level game 'moves that are rational for a player at one board…may be impolitic for that same player at the other board', moves at one board can also 'trigger realignments on other boards', see Robert Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1998) 42 *International Organization* 425, 434.
[190] Braithwaite and Drahos, above n 91, 34.
[191] Ibid 615.
[192] Ibid 548.

battles over identities.'[193] Braithwaite and Drahos point out that the significance of modelling is 'neglected in the regulatory and international relations literatures', which 'is a pity, because modelling works with a subtlety that is intriguing, and intriguingly connected to normative theories of global politics.'[194]

The modelling process involves the work of four key actors: model makers, model missionaries, model mercenaries and model mongers. According to Braithwaite and Drahos, those on the periphery 'imputed low status by a dominant power' are able to develop models, or adapt existing models from other polities, that oppose or 'invert the hegemonic status system'.[195] I term these actors 'model makers' (they can also be model takers). Braithwaite and Drahos identify that '[e]pistemic communities of the excluded are the incubus of regulatory models for asserting the claims of the excluded'.[196] They illustrate the roles of these actors with examples drawn from the feminist movement. For example, they identify women who inverted 'the housewifely virtues' in the 1960s in order to pursue careers as fulfilling the role of model makers.[197]

'Model missionaries' and 'model mercenaries' then create an opening for the models. Model missionaries are the actors that popularise the oppositional models. Braithwaite and Drahos use the example of popular feminist authors such as Germaine Greer in the 1970s. Once model missionaries have secured 'a toehold' it is then up to model mercenaries to turn these 'toeholds into footholds'.[198] They cite publishers who 'promote women's magazines with a feminist orientation' as an example.[199]

The role of 'model mongers' in this process is critical. Model mongers float multiple different models, as opposed to a single model, in order to make the most of scarce resources. This prevents limited resources from being expended on losing campaigns. Braithwaite and Drahos give the example of Australian women promoting feminist models during international conferences, including the 1995 Beijing Congress on Women. They point out that dominant actors generally do not engage in model mongering. Instead, they focus on defending the existing models that grant their privilege. As a result, oppositional groups have the ability to set the framework for the discussion. Braithwaite and Drahos argue that, '[b]ecause the model has a power that is independent of the interests that advocate it, a weak interest group with a strong model can defeat a strong interest group.'[200]

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[193] Ibid 594.
[194] Ibid 546-47.
[195] Ibid 579.
[196] Ibid 594.
[197] Ibid 579.
[198] Ibid.
[199] Ibid.
[200] Ibid.

(d) The Power of Models

The power of models lies in their ability to instigate identity crises. Braithwaite and Drahos argue that '[m]odel mongering is a key to the powerless acquiring a strategic advantage over the powerful because persistent application of the strategy eventually draws out contradictions in the identities propagated by dominant models'.[201] Model mongers are successful 'when they experiment with insurgent models until they strike one that poses an insoluble collective-action problem for the dominant group.'[202] Braithwaite and Drahos term this 'political ju-jitsu', using the identitive power of existing majoritarian models against the power structures they support.[203] Keeping with their examples drawn from the feminist movement, they point to the way that feminist models that highlighted contradictions between the patriarchy that exists and 'and a national identity valuing equality of opportunity' led to 'identity crises among nations that claim to be democracies' causing 'a succession of nations to give women the vote'.[204] It put 'powerful actors on the spot', forcing 'them to choose between their egalitarian and patriarchal identities.'[205] Braithwaite and Drahos note that pre-packaged models have particular appeal to actors in the legislative and executive branches of states who have limited time and resources to devote to finding solutions to all of the issues regarding which states 'would like to be seen to be making progress'.[206] They also identify the mobilisation of mass media and the Internet as important throughout the modelling process.[207]

The special procedures experts can foreseeably assume each of the roles in the modelling process that Braithwaite and Drahos describe. Mandate-holders can develop or adapt models that oppose the dominant status system. They can operate as model missionaries to popularise the oppositional models that are produced or as model mercenaries to capitalise on the openings made by model missionaries. They may also play the role of model monger, experimentally floating different oppositional models. Goodman and Jinks and Jim Ife have referenced the idea of models in deliberation on the influence of international human rights norms, although neither explores the concept in depth or discusses models in relation to the special procedures.[208]

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[201] Ibid 579. In the same vein, Kimberlé Crenshaw argues that '[p]owerless people can sometimes trigger...a crisis by challenging an institution internally, that is, by using its own logic against it. Such [a] crisis occurs when powerless people force open and politicize a contradiction between the dominant ideology and their reality.' Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101(7) *Harvard Law Review* 1331, 1367 (citations omitted).

[202] Braithwaite and Drahos, above n 91, 580.

[203] Ibid 595.

[204] Ibid 579.

[205] Ibid 594. Braithwaite and Drahos further argue that while initially disapproval is mobilised regarding 'shocking instances of denying the ideal of equality of opportunity' later it can be mobilised 'against more subtle manifestations of patriarchy.'

[206] Ibid 589.

[207] Ibid 591, 594-95. Regarding the power of a simple message and the Internet in law making see also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 94-5.

[208] For example, Goodman and Jinks observed that '[i]n many important respects, states are enactors and enactments of models that are substantially organized and legitimated through global culture.' Goodman and Jinks, 'Incomplete

Three features of modelling make it a particularly useful mechanism for weaker actors, such as the special procedures experts. First, Braithwaite and Drahos' data on modelling indicates that whether a model is effective depends more on the power of the model than of the resources and capacities of the model monger promoting it.[209] Secondly, weaker actors have less to lose by mongering multiple models until a chord is struck in the identity of mass publics. They argue:

> Those with little to lose can take the risks of setting a hundred agendas running. For those who have entrenched power, it is foolish…to start a hundred agendas, any one of which could unseat them if it ran out of control. The vaster the organizational empires controlled by the powerful, the more profound their collective-action problems, the more fissures that can be prised open to turn part of the empire against itself. Strength engenders specific weaknesses that can be exploited by the strategy of model mongering.[210]

Thirdly, modelling has the ability to globalise regulation even absent enforcement mechanisms.[211] There is also an important psychological dimension to models that is of especial relevance to Indigenous peoples: they are empowering. Braithwaite and Drahos point out that '[p]owerlessness begets hopelessness and political paralysis. What the powerless need to conquer the psychology of defeatism is models of other powerless actors in similar circumstances in other places prevailing against powerful odds.'[212] Mechanisms that further empower Indigenous peoples, and those who advocate for their rights, are emphatically required.

Modelling does have limitations for less powerful actors. Braithwaite and Drahos point out that while weaker actors, such as individuals, can use modelling to frame the terms of the debate, they tend not to have the resources to sufficiently monitor implementation of the model. As a result, other actors can – and often do – 'wage an effective war of resistance at the implementation stage.'[213] In such cases, the reward is largely symbolic – powerful actors protect their interests by failing to implement the model.[214] Braithwaite and Drahos contend that '[e]ven the symbolic victories are important, however, in sustaining an international momentum for citizen empowerment.'[215] Given that I am interested in strategies the special procedures mandate-holders can institute to counter the implementation gap in Indigenous peoples' rights I

Internalization and Compliance with Human Rights Law', above n 28, 730 (citations omitted). In the context of discussion on Indigenous peoples' rights, Jim Ife argues that '[o]ne of the most effective forms of human rights education is through modelling human rights.' Jim Ife, *Human Rights From Below: Achieving Rights Through Community Development* (Cambridge University Press, 2010) 204.

[209] Braithwaite and Drahos, above n 91, 595.

[210] Ibid 600.

[211] Ibid 615.

[212] Ibid 595.

[213] Ibid 599.

[214] Ibid.

[215] Ibid.

am interested in more than simply symbolic victories in the recognition of those rights. Yet, symbolic reforms might also bring gains in the longer term. For example, Goodman and Jinks theory of acculturation suggests that even shallow reforms can translate into absolute gains given time.[216]

5 *Harnessing Continuous Improvement*

Braithwaite and Drahos synthesise their extensive analysis by identifying strategies that NGOs – one of the weakest actors in regulating global business behaviour – can leverage to improve global standards.[217] One of those strategies is a potentially powerful weapon for the special procedures in the regulatory domain of Indigenous peoples' rights: continuous improvement. Continuous improvement was identified above as a recurrent principle in webs of influence. It is a management philosophy capturing the notion of an ongoing effort to improve or ratchet-up standards. Braithwaite and Drahos emphasise the importance of working with target actors to change their practices in accordance with the principle of continuous improvement. They argue that persuading both 'an innovator to lead the pack' and 'the pack that continuous improvement is a good thing (so it has to catch up with the leader)' can matter enormously.[218]

Notably, continuous improvement is identified in the regulatory literature as a principle that can help to move beyond ritualism. A strengths-based regulatory approach that fosters continuous improvement features centrally in Braithwaite, Makkai and Braithwaite's strategy for transcending ritualism in aged care regulation. In Braithwaite, Makkai and Braithwaite's view, one way to move beyond ritualism is to develop a new regulatory environment that has two linked and complementary models. On the one hand, 'a regulatory model backed by enforcement', which they conceive as a regulatory enforcement pyramid. And, on the other hand, 'a strengths-based model backed by rewards', which they conceive as a strengths-based pyramid.[219] The enforcement pyramid, which was introduced above, is designed to use networked escalation (from deterrent to incapacitative sanctions) to 'solve a problem', ensuring that the minimum standards set by the regulator are met.[220] In contrast, the strengths-based pyramid is designed to 'expand a strength' building from micro to macro strengths in order to lift the standards 'beyond the minimum to continuously higher levels.'[221] It engages 'praise and pride' for realising strengths 'that might take the industry up through a ceiling', rather than the

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[216] Goodman and Jinks argue that'[s]hallow commitments to human rights norms will often evolve into deeper commitments via the process Jon Elster calls the "civilizing force of hypocrisy".' Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', above n 28, 738 (citations omitted).
[217] Braithwaite and Drahos, above n 91, 612-20.
[218] Ibid 615-16.
[219] Braithwaite, Makkai and Braithwaite, above n 1, 330.
[220] Ibid 320, 322.
[221] Ibid 322, 330.

regulatory pyramids 'disapproval and shame for failing to manage a risk'.[222] Braithwaite, Makkai and Braithwaite's strengths-based pyramid goes from '[e]ducation and persuasion about a strength', '[i]nformal praise for progress', '[p]rize or grant to resource/encourage/facilitate strength-building', '[e]scalated prizes or grants to resource/encourage/facilitate strength-building' to the highest award.[223] The strengths-based approach rests on the theory that eventually the actors' 'strengths will grow to conquer more weaknesses, or to compensate for them.'[224] It also posits that regulators will 'often achieve more by working with the friends of continuous improvement than by working against its enemies'.[225] Braithwaite argues that the approach can help to reengage those regulatees who have disengaged from the regulatory system because, when the focus is on what an actor is good at, it 'provides a point of entry to getting them engaged with projects of continuous improvement that regulator and regulatee can begin to see as shared projects.'[226] This is the basis for expanding strengths using the strengths-based pyramid.[227] Ultimately, Braithwaite, Makkai and Braithwaite hypothesise that in the long run 'the most important thing regulators do is catalyse continuous improvement.'[228]

The value of the principle of continuous improvement in promoting compliance with international human rights norms has been recognised. This is despite the fact that the principle is counter-intuitive to many legal scholars: legal rights imply accountability or punishment for a breach rather than support to promote improved recognition.[229] Charlesworth argues that the principle of continuous improvement's focus on a learning culture, rather than a culture of blame, could be useful in fostering improved human rights protection:

> How can we work against human rights ritualism, so often present in international peacebuilding? The regulatory literature offers the idea of continuous improvement, which emphasises incremental, constantly monitored steps, rather than great leaps forward. It means 'doing better every year than the previous year in terms of a regulatory objective'. This can be achieved by moving from a culture that administers blame to a culture that encourages learning, a development that would be useful in the field of international human rights protection.[230]

Charlesworth emphasises that moving 'to a learning culture requires the engagement of local actors, above all.'[231] This means translating human rights so that they are relevant to local contexts. She also suggests that strategies such as fostering a free and professional media can be

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[222] Ibid 320. Carol Heimer and Lynn Gazley, in the course of analyzing ethnographic data from five HIV clinics, similarly argue that more cooperative interactions between regulators and regulatees provide an opportunity for transcending ritualism. Heimer and Gazley, above n 14, 853.
[223] Braithwaite, Makkai and Braithwaite, above n 1, 319.
[224] Ibid 317.
[225] Ibid 317 (citations omitted).
[226] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 168, 501.
[227] Ibid.
[228] Braithwaite, Makkai and Braithwaite, above n 1, 322.
[229] See, eg, Domínguez Redondo, above n 146, 674.
[230] Charlesworth, above n 1, 14-5 (citations omitted).
[231] Ibid 15.

engaged. But she cautions that it is necessary to be vigilant to 'the process of continuous improvement itself becoming ritualised.'[232] Braithwaite promotes restorative regulatory processes to continuously improve respect for human rights too. He argues that human rights reporting teams should couple persuasion with offers of capacity-building assistance as a first strategy in seeking to improve poor human rights performance. In his view, praise should have a role where human rights performance is reliably shown to have improved. While he favours '[c]arrots more than sticks' he also sees a role for 'a degree of shaming at meetings in Geneva' where there is not continuous improvement in the human rights situation (or reporting on it).[233] He acknowledges that this approach may take time to see results. In his words, it 'requires patience, eschewing the quick fix in favour of the long haul'.[234]

E *Conclusion: The Regulatory Power of the 'Weak'*

The message of this chapter is one of hope. Even without coercive capability and plentiful capital the special procedures have the strength to weave webs of influence that can lead to state conformity to the international Indigenous rights norms they push. States can respond to international Indigenous rights norms in various ways. They can conform, innovate, ritualise, retreat or rebel. Existing scholarship underscores the need to remain alert to states engaging in Indigenous rights ritualism, which disguises actors' inward rejection of the goals of the relevant norms. Regulators, such as the special procedures experts, need to tailor their regulatory interventions to match these behaviours. Importantly for the experts, when state behaviour is understood as a product of state identities, which in turn are constituted in part by norms, international Indigenous rights norms and the special procedures that push them are imbued with the power to regulate states. Understanding regulation as a product of webs of influence opens up a host of regulatory strategies to the special procedures. Special procedures experts can weave dialogic webs, which are often more influential and common than webs of reward and coercion. They can be proactive in micro-macro processes of globalisation as individual entrepreneurs, enrolling organisational power and promoting models that highlight contradictions in majoritarian identities. They can leverage the principle of continuous improvement to build on states' latent strengths. These strategies are drawn together in the idea of two regulatory pyramids, one focused on enforcement and the other on building strengths. Having established the special procedures' potential to wield influence over states, I turn to focus on the actualities of their work. In Chapters IV to VII the strategies engaged by special procedures mandate-holders to influence state behaviour towards Indigenous peoples are

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[232] Ibid 15 (citations omitted).
[233] Braithwaite, *Restorative Justice and Responsive Regulation,* above n 93, 202. Drawing on the idea of networking, he suggests strengthening this dialogic diplomacy by linking it 'to preventive diplomacy by the major powers.'
[234] Ibid 205.

explored both in general terms and in relation to the two case study sites. In the next chapter I examine the special procedures experts' mandate regarding Indigenous peoples.

III REALISING INDIGENOUS RIGHTS: THE MANDATE

A *Introduction*

The special procedures are mandated to advance the realisation of international Indigenous rights norms. In this Chapter I analyse the dimensions of that mandate. I begin by briefly outlining what the special procedures mechanism is. The existing literature explores the nature of the mechanism in depth so that is not attempted here. Rather, a basic understanding of its core features is provided in order to situate its Indigenous mandate. The discussion highlights the unsystematic evolution of the mechanism. The mechanism's mandate regarding Indigenous peoples' rights is examined with reference to three defining moments: the creation of the first special procedures mandate, a time when Indigenous peoples' barely registered on the UN's radar; the issue of the CHR's 1993 resolution recommending that all thematic special procedures mandate-holders pay particular attention to the situation of Indigenous peoples, prompted by increased focus on the position of Indigenous peoples by the greater UN apparatus; and the creation of the mandate of the Special Rapporteur on Indigenous peoples, the thematic mandate devoted to Indigenous peoples. I go on to explore the connections between the special procedures' Indigenous mandate and the mandates of the array of other international mechanisms that also promote the realisation of international Indigenous rights norms. I focus in particular on the relationship between the mandates of the Special Rapporteur on Indigenous peoples, the PFII, the EMRIP and the EMRIP's predecessor: the WGIP. Understanding these relationships is important for grasping the boundaries of the special procedures' mandate regarding Indigenous peoples in practice.

B *Afterthought to Centrepiece: The Evolution of the Mechanism*

1 *Origins*

The 'special procedures' is the general name given to the collection of UN mandates established to address human rights concerns either on a thematic or country-specific basis. The mechanism was developed by the CHR, a commission composed of 53 member states, which was the UN's primary body for the promotion and protection of human rights from 1946 to 2006. The CHR itself was created by the Economic and Social Council (ECOSOC) under the authority of Article 68 of the UN Charter.[1] The special procedures are thus a Charter-based

[1] *United Nations Charter*, signed 26 June 1945, TS 993 (entered into force 24 October 1945).

mechanism because their legal basis is ultimately derived from the UN Charter, rather than a treaty.[2] In 2006 the CHR was replaced by the HRC, a council composed of 47 member states, amid criticisms of the CHR's politicisation and ineffectiveness.[3] In the process the HRC assumed responsibility for the special procedures. The historical precursor to the current system of special procedures was the CHR's creation in 1967 of an ad hoc working group of experts to investigate the human rights situation in South Africa.[4] This was a significant step as the CHR, along with its parent body the ECOSOC, had previously resolved that the CHR had 'no power to take any action in regard to any complaints concerning human rights.'[5] But the CHR yielded to the mounting pressure to deal with the host of individual petitions for action emanating from South Africa and created the working group. The creation of the working group in turn led ECOSOC (at the CHR's prompting) to adopt resolution 1235 (XLII) in 1967. The resolution authorises the CHR 'to examine information relevant to gross violations of human rights and fundamental freedoms' and, 'in appropriate cases', to carry out 'a thorough study of situations which reveal a consistent pattern of violations of human rights'.[6] The CHR interpreted the wording of ECOSOC Resolution 1235 as providing implicit authorisation for it to appoint experts to examine information on human rights violations and report on the result of those studies. Following the resolution the CHR slowly began creating more mandates, initially focused on country situations, including the occupied Palestinian territories (OPT) in 1969 and Chile in 1975. Later it created mandates regarding thematic human rights concerns, beginning

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[2] Philip Alston, 'Critical Appraisal of the UN Human Rights Regime' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Calrendon Press, 1992) 1, 4.

[3] See, eg, David Weissbrodt, 'United Nations Charter-Based Procedures for Addressing Human Rights Violations: Historical Practice, Reform, and Future Implications' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, 2011) 13, 15-16; Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act' (2011) 15(2) *The International Journal of Human Rights* 162, 165; Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185, 187-204; Matthew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 *Alternatives: Global, Local, Political* 449, 451-59.

[4] CHR Res 2 (XXIII) (6 March 1967). See, eg, Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 419, 419.

[5] CHR *Report of the First* Session, UN Doc E/259 (1947) [22]; *Communications Concerning Human Rights*, Economic and Social Council (ECOSOC) Res 75(V), 5th sess, UN Doc E/573 (5 August 1947) 20. See, eg, Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 205-06; Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia, 2006) 41-5; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 8-9.

[6] ECOSOC Res 1235 (XLII), 42 UN ESCOR Supp (No 1) 17, UN Doc E/4393 (1967) paras 2-3. A later resolution established a procedure to deal confidentially with complaints relating to a consistent pattern of gross violations of human rights: *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms,* ECOSOC Res 1503 (XL VIII), 163rd plen mtg (27 May 1970). For background on the 1503 and 1235 procedures see Philip Alston, 'The Commission on Human Rights' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992) 126,145-81; Manfred Nowak, 'Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission' (1991) 22 *Netherlands Yearbook of International Law* 39; Gutter, above n 5, 55-69; Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 13-6, 36-41.

with the Working Group on enforced disappearances in 1980. Thus, the special procedures mechanism was progressively (and unsystematically) born.[7]

The number of special procedures mandates has grown rapidly since the 1980s making the mechanism the HRC's primary instrument for monitoring and promoting state compliance with international human rights norms. In October 2013 there were 51 special procedures mandates in existence, comprised of 14 country mandates and 37 thematic mandates.[8] The country mandates concern states including Haiti, Belarus, Sudan, Cambodia, the Democratic People's Republic of Korea, Mali, the Syrian Arab Republic and the OPT.[9] As O'Flaherty points out, '[t]here is no particular logic to the list of countries subject to the mandate of country-specific special mechanisms', with many countries that would benefit from devoted attention absent from the list.[10] Initially thematic mandates focused on civil and political rights but they have moved to focus on a host of economic, social and cultural rights too.[11] The 37 thematic mandates concern issues including racism, education, arbitrary detention, food, minorities, human rights defenders, torture, cultural rights, extrajudicial executions, the sale of children, extreme poverty, truth and justice, health, freedom of religion, transnational corporations, democracy, the environment, housing, and enforced disappearances.[12] Country mandates generally have a term of one year, which is capable of renewal,[13] although the mandate regarding the OPT was established to function until the occupation ends.[14] Thematic mandates are generally established for a term of three years, which is also capable of renewal. Mandate-holders may serve a maximum of six years in the role.[15] But they will subsequently be eligible for appointment to a different mandate. Several experts have held more than one appointment.[16]

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[7] See generally Gutter, above n 5, 66-7, 75-100; Elvira Dominguez-Redondo, *Los Procedimientos Publicos Especiales de la Comision de Derechos Humanos de Naciones Unidas* (Tirant lo Blanch, 2005) part 1; Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 17-9; Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1995-1996) 28 *Journal of International Law and Politics* 785, 789-791, 795-97; Oliver Hoehne, 'Special Procedures and the New Human Rights Council - A Need for Strategic Positioning' (2007) 4(1) *Essex Human Rights Review* 48, 49-52.

[8] The figures are correct as at 1 October 2013. For the latest figures see OHCHR, *Special Procedures of the Human Rights Council* <http://www2.ohchr.org/english/bodies/chr/special/index.htm>. Between 2000 and 2010 alone there was an almost fifty per cent increase in the number of thematic mandates, see Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 209. For some time the number of country mandates was in decline but this trend has since reversed. Baldwin-Pask and Scannella, above n 4, 419.

[9] For the full list see OHCHR, *Country Mandates* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx>.

[10] Michael O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3(1) *Human Rights Law Review* 53, 68.

[11] See, eg, Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299, 299; Hoehne, above n 7, 51.

[12] For the full list see OHCHR, *Thematic Mandates* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>.

[13] Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010) 5-6.

[14] *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine*, CHR Res 1993/2, 49th sess, UN Doc E/CN.4/RES/1993/2 (19 February 1993).

[15] Special Procedures, *Manual of Operations of the Special Procedures of the Human Rights Council* (Office of the High Commissioner for Human Rights, 2008) [7] ('*Manual of Operations*').

[16] See, eg, Pinheiro, above n 3, 163.

Special procedures experts hold their positions either as Special Rapporteurs, Independent Experts or members of Working Groups. Working Groups are usually composed of five independent experts one from each of the UN recognised geographical regions.[17] Formerly, the experts could also hold the position as Representatives of the CHR and Representatives and Special Representatives of the Secretary-General.[18] Historically, the different titles were intended to reflect the mandates' different focuses: 'Special Rapporteurs' were purportedly concerned with fact-finding and monitoring whereas 'Special Representatives' and 'Independent Experts' were focused on technical assistance and advisory services, for example.[19] Today, the various titles do not reflect any major differences in the general responsibilities and methods of work of the experts, if historically they ever did in practice.[20] All of these terms – especially Rapporteurs and Working Groups – are commonly used throughout the UN system (and beyond) to refer to investigators and groups tasked with specific areas of work. Therefore, not all references to UN 'Special Rapporteurs' are references to special procedures mandate-holders, for example. Whether they qualify as a special procedures mandate will depend on the authority under which they were created and the nature of their task.[21]

2 *Catalysing Rights Improvements*

The mandates of the special procedures are established and defined by the individual resolutions that create each specific role. The resolutions often give the experts significant latitude.[22] Usually they will be called on 'to examine, monitor, advise and publicly report on

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[17] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 13, 27.

[18] Moves towards greater uniformity in the titles given to mandate-holders followed the HRC's 2007 resolution that '[i]t should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more understandable.' *Institution-Building of the United Nations Human Rights Council* HRC Res 5/1, UN Doc A/HRC/RES/5/1 (18 June 2007) annex para 59 ('*HRC Institution Building*'). See generally Baldwin-Pask and Scannella, above n 4, 429 n 33.

[19] See, eg, *Manual of Operations,* above n 15, 6 n 5; Janusz Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate, 2003) 51; Hoehne, above n 7, 52-3; Jernow, above n 7, 791-92. For example, regarding the intention behind the different titles given to the country mandate-holder on Guatemala, see Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994) 133-35. Note that some, such as the former expert on transnational corporations, attach greater standing to the title of 'Special Representative of the Secretary-General' over that of 'Special Rapporteur', see Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?' (2011) 52(2) *Harvard International Law Journal* 561, 570 n 26.

[20] See, eg, Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 19, 570.

[21] See, eg, Baldwin-Pask and Scannella, above n 4, 422. Especial confusion is possible in the Indigenous rights field as to whether experts such as the Chairperson-Rapporteur of the HRC's EMRIP, Permanent Forum on Indigenous Issues (PFII) and former Working Group on Indigenous Populations (WGIP), or the former Special Rapporteur entrusted to conducted a study on treaties, agreements and other constructive arrangements between States and indigenous populations, qualify as 'special procedures'. They do not. Their titles simply reflect the common usage of the term 'Rapporteur' to refer to reporters within the UN system. Similarly, the WGIP was not a special procedures mandate, given the authority under which it was created. The EMRIP, PFII and WGIP are discussed in Part D of this chapter.

[22] See, eg, Menno T Kamminga, 'The Thematic Procedures of the UN Commission on Human Rights' (1987) 34 *Netherlands International Law Review* 299, 322; Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *The International Journal*

human rights situations in specific countries or territories…or on major phenomena of human rights violations worldwide'.[23] Awareness-raising is thus a central feature of the experts' function. Most also understand the experts as having a role in helping to catalyse tangible human rights improvements. For example, Joanna Naples-Mitchell, who interviewed a collection of special procedures mandate-holders, their assistants, other OHCHR staff and human rights experts, found that '[t]he ultimate purpose of the country missions and communications, in the view of everyone I interviewed, is to promote the concretisation of human rights norms in specific contexts.'[24] The *Universal Declaration of Human Rights* (UDHR),[25] key international human rights treaties, other human rights instruments and customary international law provide the mandates' normative framework.[26] But one of the unique and positive features of the special procedures is their ability 'to investigate the situation of human rights in all parts of the world, irrespective of whether a particular government is a party to any of the relevant human rights treaties' or has expressed support for a declaration of the GA.[27] In addition, the special procedures are not constrained by the UN human rights treaty bodies' standard operating procedure of only considering the human rights situation in a state when a periodic report has been submitted.[28] Alston, Morgan-Foster and Abresch argue that '[t]his greater breadth as compared to treaty bodies is a virtue of the system'.[29]

The special procedures carry out various activities to fulfil their mandates, which are examined in finer detail in the next chapter. But I introduce these activities now. Most mandate-holders conduct country assessments, where they undertake country visits to investigate specific human rights violations and report their findings and recommendations following those missions to their parent body.[30] Country missions break down the linguistic, financial and visa barriers that inhibit Indigenous peoples' access to the UN because they bring the UN to Indigenous peoples. The experts' ability to shuttle 'between these two worlds – the headquarters, as centre, and the field, as periphery' distinguishes the special procedures from

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of Human Rights 232, 234; Taryn Lesser, 'The Role of United Nations Special Procedures in Protecting the Human Rights of Migrants' (2010) 28(4) *Refugee Survey Quarterly* 139, 141.

[23] OHCHR, *Human Rights Bodies* <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.

[24] Naples-Mitchell, above n 22, 240. Compare Lempinen who argues 'that it is not the task of a Special Rapporteur to improve the situation of human rights in a particular country, but to raise awareness of that situation'. Miko Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Abo Akademi University, 2001) 119.

[25] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[26] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 209; Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'' (2008) 19(1) *The European Journal of International Law* 183, 201-02; Naples-Mitchell, above n 22, 233.

[27] *Manual of Operations,* above n 15, [4]; Lempinen, above n 24, 1; Jernow, above n 7, 802.

[28] See generally O'Flaherty, above n 10, 67; Sir Nigel Rodley, 'The United Nations Human Rights Council, its Special Procedures and its Relationship with Treaty Bodies: Complementarity or Competition?' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 49, 58-65.

[29] Alston, Morgan-Foster and Abresch, above n 26, 202.

[30] See, eg, Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 13, 9-11.

myriad other UN human rights mechanisms.[31] For example, UN human rights treaty bodies do not generally conduct on-site country visits.[32] Mandate-holders receive information on allegations of human rights violations and request state governments to clarify the facts, which are called 'communications'. Unlike complaints made to UN human rights treaty bodies, domestic remedies do not have to be exhausted before the special procedures will action a complaint. Further, while few states have ratified the protocols permitting treaty bodies to review individual complaints, the special procedures can send communications to any state.[33] Mandate-holders have a promotional role, promoting best practice through technical advisory assistance and their dialogues with various actors. They also conduct and participate in thematic studies on issues or themes relevant to their mandates, which in turn can assist in the development of international norms.[34] The parallels between their working methods and the methods of NGOs are apparent. Central features such as the communications process have been borrowed directly from NGO practice.[35] But a core distinguishing feature between the work of the experts and that of NGOs is that their association with the UN often enables them to access the highest levels of the UN and governments, including heads of state.[36] The experts present their work to the HRC (and formerly the CHR) annually. Some experts also report to the GA.[37] A small number have informally briefed the UN Security Council.[38] In addition, the experts meet with high-level government representatives during their country missions and engage with Geneva-based diplomats in the course of their work.

3 *The Centrality of Independence*

The mandate-holders enjoy an unusual position within the UN human rights system. They are independent, which is a cornerstone of their work.[39] Special procedures experts are not

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[31] Hoehne, above n 7, 56. See also Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity, 2007) 61-2.

[32] See, eg, Sir Nigel Rodley, 'The United Nations Human Rights Council, its Special Procedures and its Relationship with Treaty Bodies: Complementarity or Competition?', above n 28, 61.

[33] See, eg, ibid 63-5; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 209; Ingrid Nifosi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 389, 405.

[34] Oberleitner, above n 31, 59-60.

[35] See, eg, Jernow, above n 7, 787, 809-10.

[36] Interview 9 (Telephone Interview, 6 September 2010). See also Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 211.

[37] Ibid 207. Piccone recounts that '[s]ome rapporteurs reported a higher quality, more substantive interactive dialogue in New York': at 228 n 21.

[38] See, eg, *Manual of Operations,* above n 15, [89]; Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 59.

[39] See, eg, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, HRC Res 5/2, 9th mtg, UN Doc A/HRC/Res/5/2 (18 June 2007) art 3 ('*Code of Conduct*'); *Manual of Operations,* above n 15, [11]; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5, 212. See generally Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 19; Rhona K M Smith, 'The Possibilities of an Independent Special Rapporteur Scheme' (2011) 15(2) *The International Journal of Human Rights* 172.

representatives of their government, the UN Secretary General or particular rights groups.[40] They are not UN staff members – they serve in their personal capacities – and do not receive salaries.[41] However, all of the experts are considered as an 'expert on mission' within the meaning of the 1946 *Convention on Privileges and Immunities of the United Nations*.[42] And the UN does pay mandate-holders a per diem allowance and their travel expenses for around two country missions per year, as well as some travel to Geneva (and, for some experts, New York).[43] These payments should not be discounted – as one ex-OHCHR bureaucrat pointed out '[a]lthough it may not be much to a United States law professor, for some others to receive US$7,000-8,000 or US$12,000 is not peanuts.'[44] But the absence of a salary is exacerbated by the fact that while the UN advises mandate-holders that they need to commit around three months of time to the mandate each year, in reality, the workload is full-time.[45] It is a feature of the mandates repeatedly raised by the experts; in the words of one, '[i]t is full-time. It is major full-time'.[46] As Baldwin-Pask and Scannella explain, '[i]t is a remarkable testament to the commitment and dedication of mandate-holders that they are prepared to devote significant amounts of their own time to perform their functions as Special Procedures, and that they do so for an extended period.'[47] However, not all mandate-holders can commit to the role full-time, with some relying heavily on UN support to perform the work. The lack of financial remuneration is touted as an important part of the mandates' independence and impartiality.[48] This independence affords the mechanism flexibility that other institutionalised UN mechanisms do not have, a characteristic that Alison Jernow suggests is 'the clue to their strength'.[49] At the same time, it can make commitment to, and performance of, the role problematic for many experts. The time commitment means that those best positioned to perform the role are often tenured academics, especially those based at universities in the global North who receive financial and institutional support from their home institutions such as a reduced teaching load and student support with research and administration.[50]

Mandate-holders receive some personnel, policy, research and logistical support from the OHCHR and formerly the UN Centre for Human Rights. This support is discussed in

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[40] *Code of Conduct,* UN Doc A/HRC/Res/5/2, art 3; *Manual of Operations,* above n 15, [9].
[41] Ibid [10]. See also, eg, Nifosi-Sutton, above n 33, 391; Naples-Mitchell, above n 22, 234.
[42] *Convention on Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946); *Manual of Operations,* above n 15, [13]-[15]. See generally Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 49-55.
[43] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 224.
[44] Interview 9 (Telephone Interview, 6 September 2010).
[45] See, eg, Baldwin-Pask and Scannella, above n 4, 454; Smith, 'The Possibilities of an Independent Special Rapporteur Scheme', above n 39, 177.
[46] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[47] Baldwin-Pask and Scannella, above n 4, 473.
[48] See, eg, Naples-Mitchell, above n 22, 234.
[49] Jernow, above n 7, 835. See also Naples-Mitchell, above n 22, 233; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5, 225.
[50] See generally Naples-Mitchell, above n 22, 242; Golay, Mahon and Cismas, above n 11, 309; Smith, 'The Possibilities of an Independent Special Rapporteur Scheme', above n 39, 177; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 225.

Chapter IV, along with its limitations. A former member of the OHCHR summed up the relationship between the OHCHR and the special procedures mandate-holders as 'delicate'.[51] In part this is a product of the tensions that arise where the OHCHR seeks to exercise control over the special procedures' work and the mandate-holders, emphasising their independence, resist those efforts.[52] The OHCHR's attempts at control are rooted in the reality that, ultimately, the OHCHR's budget (and existence) is controlled by states.[53]

The experts' independence is promoted through the formal appointment process. According to the HRC, experts are selected for their expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity.[54] Experts have included former diplomats, academics, judges, lawyers, members of NGOs, economists and former UN staff.[55] Consideration is given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems, but the emphasis is on finding individuals with expertise.[56] Today, special procedures experts are appointed via an open process: vacancies are advertised; various actors can nominate candidates (governments, regional groups, international organisations, NGOs, other human rights bodies, individuals, and NHRIs compliant with the Paris Principles); the OHCHR prepares a public list of candidates who will apply for each specific vacancy; shortlisted candidates are interviewed by a Consultative Group, which provides the President of the HRC with a list of suitable candidates; following consultations the President of the HRC identifies an appropriate candidate (justifying the decision if the order of priority proposed by the Consultative Group is not followed); and, the candidate is appointed following the approval of the HRC.[57] Previously, appointments were closed and made by the Chairperson of the CHR, the Secretary-General or the HCHR upon request from the CHR.[58]

As independent experts appointed on an ad hoc basis, special procedures mandate-holders were not originally part of any special procedures 'system'. However, they have banded together as such.[59] The experts have held annual meetings since 1994 'to harmonize and rationalize their work.'[60] In 2005 the special procedures established a Coordination Committee

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[51] Interview 9 (Telephone Interview, 6 September 2010).
[52] Ibid. See generally Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 210; Theodore J Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 58.
[53] Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 59.
[54] *HRC Institution Building*, UN Doc A/HRC/RES/5/1, annex [39].
[55] See, eg, Rhona K M Smith, *Texts and Materials on International Human Rights* (Routledge, 2 ed, 2010) 200.
[56] *HRC Institution Building*, UN Doc A/HRC/RES/5/1, annex [40]-[41].
[57] Ibid [42]-[53]; *Review of the Work and Functioning of the Human Rights* Council, HRC Res 16/21, 16th sess, UN Doc A/HRC/RES/16/21 (25 March 2011) annex para 22. See generally Baldwin-Pask and Scannella, above n 4, 452-61; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 227 n 9.
[58] See generally Pinheiro, above n 3, 164; Baldwin-Pask and Scannella, above n 4, 453.
[59] See generally Oberleitner, above n 31, 60-1; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 14-5.
[60] World Conference on Human Rights, *Vienna Declaration and Programme of Action* UN Doc A/CONF.157/23 (25 June 1993) pt II [95].

composed of five mandate-holders supported by the OHCHR to further coordinate their work; liaise with the OHCHR, the larger UN system and NGOs; raise mandate-holders' concerns before the HRC; and promote the standing of the special procedures, including through encouraging state cooperation with the experts.[61] Further, the experts adopted both a revised Manual of Operations and an Internal Advisory Procedure in 2008.[62] The Manual of Operations provides guidance to mandate-holders on how to perform the role. The Internal Advisory Procedure allows stakeholders to bring concerns regarding the special procedures' working methods, acts and practices to the attention of the Coordination Committee.[63] In addition, mandate-holders sometimes undertake joint country missions and often issue joint statements and communications on matters of shared concern.[64] Since 2011 the special procedures have reported on their communications jointly.[65] Systematising the special procedures' operations both helps to professionalise the experts' work and protect the experts.[66] But, despite these efforts at coordination and integration, there is agreement that the mandates remain fragmented.[67]

4 *Parent-body Politics*

The human rights concerns the subject of the special procedures' attentions are political issues. As a result, while the special procedures' current and former – state populated – parent bodies have continually created more mandates, they have also placed constraints on the experts' work. Despite opposition from many special procedures mandate-holders and human rights NGOs, in 2007 the HRC imposed a Code of Conduct on the special procedures.[68] The Code of Conduct sets out the responsibilities and expected practices and behaviour of mandate-

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[61] OHCHR, *Coordination Committee of Special Procedures* <http://www2.ohchr.org/english/bodies/chr/special/ccspecialprocedures.htm>. Stavenhagen sat on the Coordination Committee in its first year, from 2005 to 2006.

[62] Coordination Committee of Special Procedures, *Internal Advisory Procedure to Review Practices and Working Methods* (Office of the High Commissioner for Human Rights, 2008) ('*Internal Advisory Procedure*'); *Manual of Operations,* above n 15. The original Manual of Operations was adopted at the special procedures' sixth annual meeting in 1999.

[63] *Internal Advisory Procedure*, above n 62. See generally Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 224; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 89.

[64] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 222-23.

[65] HRC *Communications Report of Special Procedures*, UN Doc A/HRC/18/51 (9 September 2011) [2] ('*Joint Communications Report September 2011*').

[66] See, eg, Sir Nigel Rodley quoted in Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 122.

[67] Baldwin-Pask and Scannella argue that the 2006-2007 and 2011 institutional reviews of the HRC represented two 'missed opportunities' to create 'a comprehensive and coherent system of special procedures'. Baldwin-Pask and Scannella, above n 4, 423-24. See also Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 15-7.

[68] *Code of Conduct*, UN Doc A/HRC/RES/5/2. See generally Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 19, 582-601; Sir Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15(2) *The International Journal of Human Rights* 319; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 223-24; Baldwin-Pask and Scannella, above n 4, 463-70.

holders.[69] Core aspects of the code are highlighted in Chapter IV. While most agree that the Code was designed to constrict the experts' activities, opinion on its practical effect is divided. Sir Nigel Rodley, a former mandate-holder, argues that it contains 'little that did not reflect existing best practice,'[70] whereas other experts have reported that 'it has had a chilling effect on their ability…to speak out clearly against violations.'[71] As state-based bodies, the HRC and CHR have also been unwilling to action recommendations made in the mandate-holders' reports, particularly where it involves singling out individual states for disapproval.[72] The bodies' lack of meaningful engagement with the special procedures' findings and concerns has prompted criticism from frustrated experts, as has the sometimes absent support from the UN hierarchy when the experts come under attack.[73] Some negative judgements of the experts' work are credible, but overwhelmingly they are retaliatory remarks by states affronted by the experts' assessment of their domestic rights situation.[74] Despite these clashes, all mandates, bar two (on Cuba and Belarus), were retained following the HRC's 2006-2007 institutional review.[75] While further moves to rein-in the special procedures were expected in 2011 when the HRC's functioning and work was again reviewed, the mechanism came out largely unscathed with several new country and thematic mandates subsequently created.[76]

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[69] Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?', above n 19; Sir Nigel Rodley, 'On the Responsibility of Special Rapporteurs', above n 68; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5.

[70] Sir Nigel Rodley, 'On the Responsibility of Special Rapporteurs', above n 68, 321.

[71] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 224.

[72] See, eg, Lempinen, above n 24, 105-09; Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 134-35; Kamminga, above n 22, 317; Pinheiro, above n 3, 169-70; Amnesty International, *Organization of the Work of the Session: Written Statement Submitted by Amnesty International, a Non-Governmental Organization in Special Consultative Status,* UN Doc E/CN.4/2006/NGO/250 (27 March 2006) 2; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, UN Doc A/HRC/14/24 (20 May 2010) [91]. Regarding the highly politicised nature of actions taken based on the experts' reports see, eg, Davies, above n 3, 453; Katarina Tomaševski, 'Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004' (2005) 5(2) *Human Rights Law Review* 205, 213.

[73] See, eg, Tomaševski, above n 72, 208; Yash Ghai, former expert on Cambodia, quoted in Michael Kirby, 'UN Special Procedures - Reflections on the Office of the UN Special Representative for Human Rights in Cambodia' (2010) 11 *Melbourne Journal of International Law* 491, 503. Tomaševski went so far as to recommend that the mandate on education not be renewed, see CHR, *The Right to Education: Report Submitted by the Special Rapporteur, Katarina Tomasevski*, UN Doc E/CN.4/2004/45 (15 January 2004) [1]. See generally Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5, 224-25.

[74] See, eg, Sir Nigel Rodley, 'On the Responsibility of Special Rapporteurs', above n 68, 319-20; Baldwin-Pask and Scannella, above n 4, 469; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 88, 131; Kamminga, above n 22, 305-07. Surya Subedi, the expert on Cambodia, has remarked that '[b]ecause this institution is more robust and effective than are many other human rights mechanisms, it is natural that it comes under greater scrutiny as well as stronger concerted attacks.' Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5, 228.

[75] See, eg, Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) 882. The 2006-2007 review was provided for in *Human Rights Council*, GA Res 60/251, UN Doc A/RES/60/251 (3 April 2006) para 6.

[76] The 2011 review was provided for in *Human Rights Council*, GA Res 60/251, UN Doc A/RES/60/251 (3 April 2006) para 16. To see a list of the mandates created since 2006 see the 'Recent Developments' subsection of OHCHR, *Special Procedures of the Human Rights Council: Introduction* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>. On the reviews generally see Baldwin-Pask and Scannella, above n 4, 423-29.

C *The Indigenous Mandate*

1 *Indigenous Rights on the Fringe*

The special procedures mechanism enjoys a mandate to advance the realisation of international Indigenous rights norms. There are three key defining moments in the development of the special procedures' mandate regarding Indigenous peoples. The first was the creation of the special procedures mechanism itself. When the historical forerunners to the special procedures were first established in the late 1960s the concept of Indigenous peoples was relatively new to the UN. Augusto Willemsen Díaz, a former UN bureaucrat, has recounted some of the challenges involved in getting the UN to examine Indigenous peoples' rights in the mid-1950s when the concept of 'Indigenous peoples' was not well understood.[77] Over time this position changed. In 1971 the CHR's Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) authorised Martínez Cobo to conduct his well-known study on discrimination against 'Indigenous populations'.[78] In 1977 the Sub-Commission organised a conference concerning discrimination against 'Indigenous populations' in the Americas. In 1981 there was a UN conference regarding Indigenous peoples and land. Eventually, in 1982, the first Indigenous-focused UN body was created: the WGIP.[79] However, it was not until the late 1980s that the term 'Indigenous peoples' came into common usage.[80] Accordingly, Indigenous peoples and their rights were not of central concern to the UN when the earliest special procedures mandates were established, even though Indigenous rights concerns were present in the states subject to early mandates such as South Africa and Chile. As momentum regarding Indigenous peoples' rights slowly grew within the UN so too did the attention of mandate-holders to Indigenous peoples and their rights. For example, during the 1980s country mandate-holders, including the expert on Guatemala, and thematic mandate-holders, including the expert on

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[77] 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* (IWGIA, 2009) 16, 17. Note that the first of the ILO treaties regarding Indigenous peoples was adopted in 1957: *ILO Convention 107*.

[78] CHR, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (First Part) Submitted by the Special Rapporteur, Mr José R Martínez Cobo* E/CN.4/Sub.2/476 (1981); CHR, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Supplementary Part) Submitted by the Special Rapporteur, Mr José R Martínez Cobo* E/CN.4/Sub.2/1982/2 (1982); CHR, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Last Part) Submitted by the Special Rapporteur, Mr José R Martínez Cobo* E/CN.4/Sub.2/1983/21 (1983); CHR, José Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations - Volume 5: Conclusions, Proposals and Recommendations,* UN Doc E/CN.4/Sub.2/1986/7/Add.4 (March 1987). See generally S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2 ed, 2004) 62.

[79] See, eg, David Barton Bray, 'Rodolfo Stavenhagen: The UN Special Rapporteur on Indigenous Peoples' (2011) 113(3) *American Anthropologist* 502, 502; Anaya, *Indigenous Peoples in International Law,* above n 78, 57, 63. For background on the WGIP see, eg, 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* (IWGIA, 2009) 32; Douglas Sanders, 'The UN Working Group on Indigenous Populations' (1989) 11(3) *Human Rights Quarterly* 406.

[80] See, eg, Bray, above n 79, 502. See generally Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003).

torture, referred at least in passing to the position of Indigenous peoples in their reports.[81] But even as the *UNDRIP* began its long drafting process and *ILO Convention 169* was adopted, Indigenous rights did not feature centrally in special procedures experts' reports. The CHR recognised this lacuna.

2 *A Call for Thematic Attention*

The second defining moment in the development of the special procedures' Indigenous mandate was the issue of CHR Resolution 1993/60. The 1993 resolution recommended 'all thematic rapporteurs, special representatives, independent experts and working groups to pay particular attention, within the framework of their mandates, to the situation of indigenous people.'[82] It was the first time the CHR had issued a recommendation explicitly recognising the relevance of Indigenous rights concerns to the mandates of all thematic special procedures. The recommendation was issued to further the UN's International Year of the World's Indigenous People in 1993.[83] It was passed without a vote, reflecting the general state support for its contents. It was a call later repeated by the CHR. For example, in a 2004 resolution concerning the UN's first International Decade of the World's Indigenous Peoples, the CHR again invited all thematic special procedures 'to take duly into account in their deliberations the particular situation of indigenous people and to ensure that it is properly reflected in their periodic reports to their superior bodies'.[84] It was also a sentiment echoed in resolutions of the Sub-Commission regarding the WGIP, which invited all thematic special procedures and treaty bodies to advise WGIP 'how they take into account…the promotion and protection of indigenous peoples' rights'.[85]

The CHR's resolution was significant because it recognised the relevance of the human rights of Indigenous peoples to all thematic special procedures' mandates. Special procedures mandates established at the time of the resolution concerned topics including arbitrary detention, the sale of children, enforced disappearances, extrajudicial executions, freedom of

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[81] See, eg, CHR, *Report by the Expert, Mr Héctor Gros Espiell, on Guatemala, prepared in accordance with paragraph 11 of Commission resolution 1987/53* UN Doc E/CN.4/1988/42 (10 December 1987) [59](b); CHR *Question of the Human Rights of All Persons Subjected to any form of Detention or Imprisonment, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur, Mr P Kooijmans, pursuant to Commission on Human Rights resolution 1989/33* UN Doc E/CN.4/1990/17 (18 December 1989) [74].

[82] CHR Res 1993/30, UN Doc E/CN.4/RES/1993/30, para 2.

[83] *International Year for the World's Indigenous People*, GA Res 45/164, UN Doc A/RES/45/164 (18 December 1990). The GA proclaimed the first International Decade of the World's Indigenous People commencing on 10 December 1994, see *International Decade of the World's Indigenous People,* GA Res 47/75, UN Doc A/RES/48/163 (21 December 1992). The GA proclaimed a Second International Decade of the World's Indigenous People in 2005, see *Second International Decade of the World's Indigenous People*, GA Res 59/174, UN Doc A/RES/59/174 (20 December 2004).

[84] *Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights, and the International Decade of the World's Indigenous Peoples*, CHR Res 2004/58, UN Doc E/CN.4/RES/2004/58 (20 April 2004) para 4.

[85] See, eg, *Working Group on Indigenous Populations,* Sub-Commission on the Promotion and Protection of Human Rights Res 2006/13, UN Doc A/HRC/Sub.1/RES/2006/13 (24 August 2006) para 5.

religion and torture. As identified above, the list has expanded substantially in the intervening years. While Indigenous peoples' rights are relevant to all of the thematic mandates some mandates particularly lend themselves to Indigenous rights concerns, including those concerning racism, cultural rights, education, food, health, human rights defenders, transnational corporations, water, the environment, freedom of religion, housing, extreme poverty, torture and violence against women.[86] A number of thematic mandate-holders have heeded the CHR and Sub-Commission's recommendations, as Chapters IV to VI will show.

The CHR's resolution did not recognise the relevance of Indigenous peoples' human rights situation to country mandates. This is despite the fact that the position of Indigenous peoples was relevant to many of the country mandates in existence at this time. Guatemala is a striking example, which is considered in Chapter VI. The situation of Indigenous peoples was also topical in places such as Cambodia, Myanmar, the OPT and Somalia, all of which had country mandates in 1993.[87] Regardless, some country mandate-holders continued to comment on the position of Indigenous peoples in the course of their work, for example, the expert on Cambodia.[88]

Despite the CHR's directive, the degree of attention special procedures experts have paid to the human rights situation of Indigenous peoples – and the quality of that attention – has depended highly on the individual mandate-holder. For example, while the expert on racism has devoted sizeable attention to the human rights situation of Indigenous peoples, the expert on the sale of children has not.[89] Even where attention has been given it has sometimes been incomplete. For example, the expert on racism noted that during his 1994 mission to the United States he was repeatedly asked to address the issue of Indigenous self-determination, but he was of the view that the issue did not fall within the purview of his mandate and so he did not take it

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[86] See, eg, Victoria Tauli-Corpuz and Erlyn Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and Challenges* (Tebtebba Foundation, 2004) 21-2; Luis Rodriguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 314, 330-34; Luis Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial' in Mikel Berraondo et al (eds), *Los Derechos de los Pueblos Indígenas en el Sistma Internacional de Naciones Unidas* (Instituto Promocion Esudios Sociales, 2010) 109, 124-26.

[87] For access to the enabling resolutions of each of these mandates see OHCHR, *Country Mandates* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx>.

[88] See, eg, CHR, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in Accordance with Commission Resolution 1997/49*, UN Doc E/CN.4/1998/95 (20 February 1998) [147]-[153].

[89] See eg, CHR, *Report by Mr Maurice Glélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on his Mission to the United States of America from 9 to 22 October 1994, Submitted Pursuant to Commission on Human Rights resolutions 1993/20 and 1994/64,* UN Doc E/CN.4/1995/78/Add.1 (16 January 1995) [6], [8], [24], [26], [28], [52], [83], [88] ('*Expert on Racism United States 1995*'); CHR, *Report by Mr Maurice Glélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on his Mission to Brazil from 6 to 17 June 1995, Submitted Pursuant to Commission on Human Rights resolutions 1993/20 and 1995/12,* UN Doc E/CN.4/1996/72/Add.1 (23 January 1995) [32], [37], [61], [70]; CHR, *Report by Mr Maurice Glélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Addendum Mission to Colombia,* UN Doc E/CN.4/1997/71/Add.1 (13 January 1997) [4], [6]-[10], [12], [14], [17]-[19], [21], [31]-[33], [40], [46], [47], [49], [50], [53], [57], [59], [61]-[64], [67], [68].

up in his report.[90] Examples such as this signalled the need for directed attention by a special procedures mandate created specifically to deal with the human rights situation of Indigenous peoples.

3 *Creation of the Special Rapporteur on Indigenous Peoples*

(a) The Fruition of Indigenous Demands

The third, key, moment in the development of the special procedures' mandate regarding Indigenous peoples was the creation of the thematic mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. The mandate was created by consensus resolution of the CHR on 24 April 2001, despite the reported strong objections of the United States, Canada, New Zealand, Australia and Russia.[91] An Indigenous-focused special procedures mandate was a long-standing demand of Indigenous peoples that had been raised at various international conferences, including the World Conference on Human Rights in 1993.[92] Such a mandate was seen as necessary to receive and investigate complaints regarding violations of Indigenous peoples' human rights.[93] The International Indian Treaty Council (IITC), one of the IPOs that spearheaded the establishment of the mandate, commented '[w]e saw an urgent need to have a UN mechanism that could put a stop to these gross and massive attacks on the survival of Indigenous communities or at least denounce them for the grave violations that they are.'[94] Following lobbying by IPOs and NGOs the Governments of Mexico and Guatemala agreed to cosponsor the resolution that led to the creation of the mandate, securing the support of the Group of Latin American and Caribbean Countries (GRULAC) and others.[95]

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[90] *Expert on Racism United States 1995,* UN Doc E/CN.4/1995/78/Add.1, [8].

[91] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57. The mandate was subsequently renewed through the following resolutions: *Human Rights and Indigenous Issues,* CHR Res 2004/62, UN Doc E/CN/4/RES/2004/62 (21 April 2004) para 1 ('*CHR Res 2004/62*'); *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, HRC Res 6/12, UN Doc A/HRC/RES/6/12 (28 September 2007) ('*HRC Res 6/12*') para 1; *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples*, HRC Res 15/14, UN Doc A/HRC/RES/15/14 (30 September 2010) ('*HRC Res 15/14*') para 1; *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples*, HRC Res 24/9, UN Doc A/HRC/24/9 (26 September 2013) para 1. Regarding state objections to the resolution see Tauli-Corpuz and Alcantara, above n 86, 5-6.

[92] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); Jens Dahl, *The Indigenous Space and Marginalized Peoples in the United Nations* (Palgrave Macmillan, 2012) 61-2.

[93] See, eg, Alberto Saldamando, 'The United Nations Special Rapporteur on Indigenous Human Rights' (2002) 5(1) *Indigenous Affairs* 32, 33-4.

[94] International Indian Treaty Council (IITC), *The United Nations Special Rapporteur on Indigenous Human Rights* <http://www.treatycouncil.org/section_21141712111.htm>. See also Tauli-Corpuz and Alcantara, above n 86, 5.

[95] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 86, 114.

(b) Breadth and Flexibility

The Special Rapporteur's enabling resolution afforded the expert a broad mandate to investigate, and provide suggestions on how to prevent and remedy, specific violations of Indigenous peoples' human rights. The CHR resolved:

> to appoint, for a three-year period, a special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, with the following functions:
> (*a*) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms;
> (*b*) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people;
> (*c*) To work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the request of the Commission contained in resolution 1993/30;...[96]

The Special Rapporteur was also invited to pay 'special attention' to discrimination against Indigenous women and violations of Indigenous children's rights in fulfilling the mandate as well as taking into account a gender perspective.[97] This is a huge mandate. As one of the experts who took on the role has commented, it was 'a mandate that was difficult to put into practice because all the rights that humanity has ever invented affect Indigenous peoples.'[98] At the same time, the mandate is constrained by the types of remedial action possible to take to address Indigenous rights violations, a factor considered in Chapter IV. In order to fulfil the mandate the CHR encouraged the UN, states, regional intergovernmental organisations, NGOs, Indigenous peoples, independent experts and interested institutions to cooperate fully with the mandate.[99] Further, the UN Secretary-General and HCHR were requested to provide the expert with 'all the necessary human, technical and financial assistance'.[100]

The resolution itself offered the Special Rapporteur little guidance as to how to implement the mandate. The resolution establishing a special procedures mandate can provide guidance on particular human rights concerns. But the CHR resolution simply cited the UDHR

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[96] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 1.
[97] Ibid paras 2-3.
[98] Stavenhagen quoted in Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007) 11. Similarly, Anaya has observed, '[m]y mandate is worldwide and simply the magnitude of the kinds of problems, the extent and breath of them, is a challenge.' Anaya quoted in GA, 'Implementation of Indigenous Rights Declaration Should Be Regarded as Political, Moral, Legal Imperative without Qualification, Third Committee Told' (Press Release, UN Doc GA/SHC/3982, 18 October 2010).
[99] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, paras 6-8. This is discussed in Chapter IV.
[100] Ibid para 11.

and the problems faced by Indigenous peoples 'in areas such as human rights, the environment, development, education and health.'[101] As with other resolutions creating special procedures' mandates, the resolution did not dictate specific working methods for the Special Rapporteur, beyond obtaining and exchanging information from a vast range of sources;[102] working closely with other experts, including considering the relevant recommendations of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the WGIP and the PFII;[103] and requiring the expert to present annual reports on the mandate's activities to the CHR.[104] This provided the Special Rapporteur with significant leeway to determine the mandate's approach. As with the special procedures more generally, each Special Rapporteur on Indigenous peoples has acted to fulfil the mandate in practice by taking on the four roles identified above, which are explored in the next chapter: conducting country assessments, issuing communications, promoting best practice and preparing thematic studies.[105]

The title of the original mandate – the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – reflected the debate over Indigenous peoplehood that had been ongoing within the UN. The absence of a pluralised 'people' in the title suggested the UN did not view Indigenous peoples as 'peoples' who enjoyed the right to self-determination under international law.[106] IPOs who lobbied for the term 'peoples' to be used were told at the time 'that it was not possible to use "Indigenous Peoples" in the title because this term had not yet been accepted by the UN system.'[107] Late in 2010 this was addressed. The title of the mandate was shortened to 'the Special Rapporteur on the rights of indigenous peoples'.[108] Notably, the word 'people' was pluralised in order to conform to the terminology of the *UNDRIP* and to affirm Indigenous peoples' right to self-determination. A small number of states, including some who had voted in favour of the *UNDRIP*, objected to the change. But Indigenous delegates, Mexico and Guatemala (who again took the lead in drafting the resolution) and other states were eventually successful in securing agreement for use of the term 'peoples'. The Executive Director of IITC remarked 'it is an historic, if overdue, step for the UN's main Human Rights body to decide to use the term "Indigenous Peoples" in the

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[101] Ibid Preamble paras 2, 4. The Preamble to the resolution also references aspects of the recommendations adopted by the Vienna World Conference on Human Rights.
[102] Ibid para 1(a); *CHR Res 2004/62* UN Doc E/CN/4/RES/2004/62, para 5; *HRC Res 6/12,* UN Doc A/HRC/RES/6/12 para 1(b); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14 para 1(b).
[103] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, paras 1(c), 4, 5. The Special Rapporteur has been encouraged to coordinate its work with other bodies, both those that focus exclusively on Indigenous rights and those with a more general human rights focus, in the resolutions that define and revise its mandate. This is considered below in Part D.
[104] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, paras 4, 5, 10.
[105] See generally Preston et al, above n 98.
[106] Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137, 160.
[107] IITC, 'UN Human Rights Council Renews the Mandate and Changes the Name of United Nations Special Rapporteur on the Rights of Indigenous Peoples' (Press Release, 30 September 2010) <http://www.treatycouncil.org/PDF/Press%20release%20HRC%20SR%2093010finrev1.pdf>.
[108] *HRC Res 15/14,* UN Doc A/HRC/RES/15/14.

Rapporteur's title. It has now been brought into line with existing international standards, in particular the UN Declaration on the Rights of Indigenous Peoples.'[109]

(c) Bringing in the Experts

As identified in Chapter I, two experts have held the role of Special Rapporteur on Indigenous peoples. The first expert to hold the position was Rodolfo Stavenhagen. In the resolution creating the mandate the CHR requested 'the Chairperson of the Commission, following formal consultations with the Bureau and the regional groups through the regional coordinators, to appoint as special rapporteur an individual of recognized international standing and experience'.[110] IPOs, such as the IITC, encouraged the appointment of a Rapporteur with knowledge of the UN system, an understanding of Indigenous peoples' cultures and a willingness to consult with Indigenous peoples in the exercise of the mandate. Many Indigenous peoples also called for the appointment of an Indigenous expert. The list of candidates suggested to the Chair of the CHR included Indigenous rights experts: James Anaya (who would later become the second expert in the role) and Nobel Laureate Rigoberta Menchú Tum of Guatemala. It also included non-Indigenous experts: former Chair of the WGIP Erica-Irene Daes of Greece; Willemsen Díaz of Guatemala, a former UN bureaucrat mentioned earlier in this chapter; and Stavenhagen.[111] Stavenhagen was announced as the first Special Rapporteur on Indigenous peoples on 25 June 2001.[112] Stavenhagen held the role through to April 2008, seeing it through two extensions of the mandate in 2004 and 2007.[113] He attributes his successful appointment in part to the support of GRULAC, reflecting that although the nomination process for the role was open, given Guatemala and Mexico's lead role in securing the creation of the mandate, GRULAC decided to support a candidate put forward by those two states.[114]

Stavenhagen had a breadth of expertise for the role. Stavenhagen is a noted sociologist. He had researched and published on the position of Indigenous peoples and held a research professorship at El Colegio de México.[115] He had a distinguished background in human rights, including having been founding president of the Mexican Academy for Human Rights.[116] He

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[109] IITC, *UN Human Rights Council Renews the Mandate and Changes the Name of United Nations Special Rapporteur on the Rights of Indigenous Peoples*, above n 107.
[110] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 9.
[111] IITC, *The United Nations Special Rapporteur on Indigenous Human Rights* <http://www.treatycouncil.org/section_21141712111.htm>.
[112] Ibid.
[113] *CHR Res 2004/62,* UN Doc E/CN/4/RES/2004/62; *HRC Res 6/12,* UN Doc A/HRC/RES/6/12.
[114] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).
[115] See, eg, Rodolfo Stavenhagen, 'The Right to Cultural Identity' in Jon Berting et al (eds), *Human Rights in a Pluralist World: Individuals and Collectivities* (Meckler, 1990) 255; Rodolfo Stavenhagen, 'Indigenous Peoples: Emerging Actors in Latin America' in Ralph Espach (ed), *Ethnic Conflict and Governance in Comparative Perspective* (Woodrow Wilson Center, 1995) 112; Rodolfo Stavenhagen, 'Indigenous Rights: Some Conceptual Problems' in Elizabeth Jelin and Eric Hershberg (eds), *Constructing Democracy: Human Rights, Citizenship and Society in Latin America* (Westview, 1996) 141.
[116] See, eg, IITC, *The United Nations Special Rapporteur on Indigenous Human Rights*, above n 111.

also had extensive experience in the international sphere, including as a former Deputy General Director of the UN Educational, Scientific and Cultural Organization (UNESCO).[117] Stavenhagen had connections with the Mexican Government too. He had worked for a time as a public servant, was a representative of the Mexican Government in the ILO at the time that *ILO Convention 169* was drafted and he had attended sessions of the WGIP as an observer 'at some points for the Mexican Government'.[118] Although Stavenhagen was non-Indigenous, his appointment as Special Rapporteur was welcomed by high profile Indigenous delegates to the UN. For example, Tauli-Corpuz, the former Chair of the PFII, commented along with Alcantara '[w]e have no doubt that Mr Stavenhagen is an excellent choice. His track record in terms of support for indigenous peoples is excellent and he has the trust of both indigenous peoples and most governments.'[119]

The second expert to hold the role of Special Rapporteur on Indigenous peoples was James Anaya. Anaya is Indigenous, of Apache and Purepecha descent. Anaya was appointed to the position on 26 March 2008, despite opposition to his appointment from the United States and other governments. Anaya reflects, 'I understand that when my name was being put forward there were countries that said that I was too partial, that I could not be objective or independent' because he identified as Indigenous.[120] What was most striking about Anaya's appointment is that it was reportedly one of the only times that a special procedures mandate-holder has been appointed without the sponsorship of a state. Instead, he was nominated and supported in his nomination by IPOs, including the Saami Council and the Asia Pacific Indigenous Peoples Coalition.[121] Thus, his eventual appointment is a testament to the clout of the global Indigenous movement.[122]

Anaya was an obvious choice for the role. He is a leading expert in Indigenous peoples' rights under international law. He is the author of the preeminent treatise on the topic, amongst many other scholarly contributions in the area.[123] He is a law Professor at the University of

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[117] See, eg, Bray, above n 79, 502.
[118] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); Rodolfo Stavenhagen, *Pioneer on Indigenous Rights* (Springer and El Colegio de Mexico, 2013) 3.
[119] Tauli-Corpuz and Alcantara, above n 86, 6-7.
[120] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[121] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 86, 117.
[122] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). Regarding the general necessity of state support or at least acquiescence, see Pinheiro, above n 3, 164.
[123] Anaya, *Indigenous Peoples in International Law,* above n 78. See also, eg, James Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 3 *Transnational Law and Contemporary Problems* 131; James Anaya and Claudio Grossman, 'The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19(1) *Arizona Journal of International and Comparative Law* 1; James Anaya and Robert A Williams, 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33; S James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 *Arizona Jounral of International & Comparative Law* 1; S James Anaya, 'International Human Rights and Indigenous Peoples: The Move towards the Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law* 13; S James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 237; S James

Arizona. He has extensive experience as an advocate for Indigenous peoples' rights in different international fora, including before the UN bodies responsible for drafting the *UNDRIP*, the Committee on the Elimination of Racial Discrimination (CERD Committee) and the Inter-American system.[124] He was lead counsel for the Indigenous parties in the landmark case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits)*,[125] in which the Inter-American Court of Human Rights (Inter-American Court) held for the first time 'that the international human right to enjoy the benefits of property, particularly as affirmed in the *American Convention on Human Rights*, includes the right of indigenous peoples to the protection of their customary land and resource tenure.'[126] Anaya's appointment was extended for a second term in 2010 and will expire at the end of April 2014.[127] A new expert will be appointed to the role at the HRC's 25th session in March 2014. Indigenous delegates in some international fora began informally discussing potential candidates in 2012.[128]

(d) Convergence and Divergence in Interpretation

Stavenhagen and Anaya both understand their role as Special Rapporteur on Indigenous peoples as multifaceted, variously describing their function as independent fact-finders, giving voice to Indigenous peoples and, depending on the mandate-holder, either engaging in diplomacy or the provocation of dialogue. Anaya remarks, '[w]hen I sit down with government I want them to see me as someone who is concerned about the truth and not simply in framing facts for one particular agenda or another.'[129] In a similar vein, Stavenhagen has emphasised the independent orientation of the mandate, 'I report to the UN but I don't work for the UN. …I don't work for any government…I don't work for NGOs either, and I certainly don't work for, in the sense of employment, Indigenous peoples.'[130] Anaya also understands his role as being an 'interlocutor' or 'sort of quasi-diplomat', viewing his search for the truth as a foundation for diplomatic engagement.[131] Stavenhagen makes no such connection. Rather, he sees the mandate's role in sparking debate 'one of the tasks of a Special Rapporteur is to be provocative, to consciously put something on paper that will eventually generate a negative reaction…to get people debating the issue for, against, how, when, why.'[132] The experts' different conceptualisations of this aspect of their role plays out in their contrasting work styles, as

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Anaya, 'Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law' (2006) 22 *Washington University Journal of Law & Policy* 107.

[124] The University of Arizona, *Faculty Profile: James Anaya* <http://www.law.arizona.edu/depts/iplp/faculty/facultyDetail.cfm?facultyid=31>.

[125] IACHR Series C No 79, 31 August 2001.

[126] Anaya and Grossman, above n 123, 1.

[127] *HRC Res 15/14,* UN Doc A/HRC/RES/15/14 [1].

[128] Fleur Adcock 'Meeting Notes: Expert Mechanism on the Rights of Indigenous Peoples: Fifth Session' (July 2012).

[129] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[130] Stavenhagen quoted in Jennifer Preston et al, above n 98, 12.

[131] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[132] Stavenhagen quoted Preston et al, above n 98, 11.

Chapters IV to VI demonstrate. But both experts underscore their central role in giving voice to Indigenous peoples. Anaya identifies his key role as Special Rapporteur 'as really trying to give a voice to Indigenous peoples and their concerns' in a system where Indigenous peoples' perspectives have historically been excluded.[133] Similarly, Stavenhagen has described his role as a kind of 'spokesperson' for Indigenous peoples before the UN.[134]

At the same time, both Special Rapporteurs expressed an expectation that their work would go beyond simply awareness-raising and have some practical impact. Stavenhagen remarked, '[o]f course I think it is the hope and expectation of every Rapporteur that his or her recommendations to governments will be taken up and will be followed by the governments concerned' as well as by the other actors to whom recommendations are made.[135] However, he was under no illusions that his recommendations acted as some sort of 'magic fix'.[136] Anaya was more cautious in his expectations of what the mandate of the Special Rapporteur could achieve:

> I think it can have some effect if only…to help to raise the voices of Indigenous peoples to be heard, and maybe arrest a little bit of what governments might do if no one knew what was happening, and if you have *that* as the measure of effectiveness then I think that, yeah, yeah, the mandate can be effective. But [if] the measure of effectiveness [is]: are we going to bring about change, are we talking about major dramatic change? No, the mandate cannot do that. It is all part of a broader process.[137]

While Anaya's more wary assessment does not contemplate significant direct change through the work of the mandate, it does envisages a role (albeit limited) for the mandate beyond acting solely as a mouthpiece.

(e) Normative Framing from the UNDRIP and Beyond

The normative framework that informs the mandate of the Special Rapporteur on Indigenous peoples is drawn from an extensive collection of instruments, including treaties and declarations of the GA, as well as customary international law. The *UNDRIP* is the guiding instrument. Following the adoption of the *UNDRIP* in 2007 the HRC requested the Special

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[133] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[134] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011). See also Bertrand G Ramcharan, *The Protection Role of National Human Rights Institutions* (Martinus Nijhoff Publishers, 2009) 10. Anaya and Stavenhagen are not alone in conceptualising their role as one of many hats. Subedi, the expert on Cambodia, states that 'I have tried to play the role of an international diplomat, a human rights activist, a human rights academic, and a government adviser - simultaneously.' Surya P Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' (2011) 15(2) *The International Journal of Human Rights* 249, 262.
[135] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).
[136] *Study on Best* Practices, UN Doc A/HRC/4/32/Add.4, [79].
[137] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

Rapporteur '[t]o promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate'.[138] Anaya has expressly embraced the *UNDRIP* as the guiding framework for his work as Special Rapporteur,[139] whether or not the particular state he is examining voted in support of, or has endorsed, the instrument.[140] The approach has not met with public resistance from states. Anaya remarks that he has received 'no push back at least outwardly, no one went on record saying that I should not do that, no one went on record saying "that is not the standard", so from the very beginning I have used the Declaration as the benchmark'.[141] Anaya's approach is an example of what Nifosi has described as the special procedures 'augmenting the legal force of soft law instruments by constantly urging states to comply with them and monitoring such compliance.'[142] She argues that such approaches 'have established a sort of *mandatory significance* of such instruments which is in between the exhortative power of a UN Declaration and the legal force of a human rights Convention.'[143] As identified in Chapter I, given my theoretical perspective the ascription of 'hard' and 'soft' status to the legal instruments leveraged by the experts is of little concern here. But the boldness of Anaya's explicit embrace of this declaration as the guiding framework in his dealings with all states is noteworthy. Anaya has commented that having the standards in the *UNDRIP* agreed on 'is an advantage I have over my predecessor'.[144] But even prior to its adoption Stavenhagen drew on the draft *UNDRIP* in performing his role as Special Rapporteur.[145]

A host of other international instruments inform the Special Rapporteur's work too. *ILO Convention 169* is relevant, as is its now discredited, assimilation driven, predecessor the ILO's *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (*ILO Convention 107*) for those states to

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[138] *HRC Res 6/12,* UN Doc A/HRC/RES/6/12, para 1(g). See also *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(g).

[139] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya* UN Doc A/HRC/9/9 (11 August 2008) [34]-[43] ('*Anaya Annual Report 2008*'). See also General Assembly (GA), *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/68/317 (14 August 2013) [3], [57] ('*Anaya Report to GA 2013*').

[140] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). Note that UN human rights treaty bodies have similarly advocated use of the *UNDRIP* as a guide in interpreting the treaties they monitor regardless of states' position on the *UNDRIP*, see, eg, CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (8 May 2008) [29].

[141] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[142] Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 5, 134.

[143] Ibid (emphasis in original). See also Alston, Morgan-Foster and Abresch, above n 26, 201; Jernow, above n 7, 807.

[144] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[145] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57,* UN Doc E/CN.4/2002/97 (4 February 2002) [15]-[16], [55], [78], [99] ('*Stavenhagen Annual Report 2002*'). Stavenhagen also pushed for the *UNDRIP*'s adoption in the form proposed by Indigenous peoples. Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen*, UN Doc A/HRC/4/32 (27 February 2007) [78]-[80] ('*Stavenhagen Annual Report 2007*'); CHR, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen,* UN Doc E/CN.4/2005/88 (6 January 2005) [9] ('*Stavenhagen Annual Report 2005*').

which it still applies.[146] As Stavenhagen remarked in 2006, although *ILO Convention 169* has only been ratified by a small number of states (22 countries by late 2013) 'it is of decisive regional influence since it has been ratified by virtually all the countries of Latin America, is used as a framework for donor countries' cooperation activities and serves as an influential model in Asia and, more recently, in Africa.'[147] Anaya made similar remarks in 2008.[148] In addition, the Special Rapporteur's work is informed by all of the core international human rights instruments, the UDHR, *International Covenant on Civil and Political Rights* (*ICCPR*);[149] *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*);[150] *International Convention on the Elimination of All Forms of Racial Discrimination* (*CERD*);[151] *Convention on the Elimination of All Forms of Discrimination against Women* (*CEDAW*);[152] *Convention on the Rights of the Child* (*CRC*);[153] the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*);[154] and the *Convention on the Rights of Persons with Disabilities* (*CRPD*).[155] Each of these instruments is relevant to Indigenous peoples. For example, the *ICCPR* and *ICESCR* in a shared article 1 affirm the right to self-determination, the bedrock of Indigenous claims;[156] the CERD Committee has issued a General Recommendation regarding Indigenous peoples;[157] the *CRC* specifically references Indigenous children in article 30;[158] and the *CRPD* refers to Indigenous peoples in its preamble.[159] Other non-human rights instruments, such as the *Convention on Biological Diversity* (*CBD*) with its article 8(j) concerning Indigenous peoples' rights regarding their traditional knowledge, are also relevant.[160] Instruments directly authored by Indigenous peoples have a bearing on the mandate

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[146] *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, ILO Convention No 107 (entered into force 2 June 1959) ('*ILO Convention 107*'). See generally Lee Swepston, 'The ILO Indigenous and Tribal Peoples Convention (No 169): Eight Years After Adoption' in Cynthia Price Cohen (ed), *The Human Rights of Indigenous Peoples* (Transnational Publishers, 1998) 17.

[147] *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78, [57].

[148] *Anaya Annual Report 2008,* UN Doc A/HRC/9/9, [33].

[149] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[150] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

[151] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

[152] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

[153] *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

[154] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*').

[155] *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3 (entered into force on 3 May 2008) ('*CRPD*').

[156] *ICCPR* art 1; *ICESCR* art 1.

[157] CERD Committee, 'General Recommendation on the Rights of Indigenous Peoples, Adopted by the Committee, at Its 1235th Meeting, on 18 August 1997' in *Report of the Committee on the Elimination of Racial Discrimination* annex V, A/52/18 (1997).

[158] *CRC* art 30.

[159] *CRPD* Preamble para (p).

[160] *Convention on Biological Diversity,* opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 19 December 1993) ('*CBD*'). Regarding the normative framework of the mandate of the Special Rapporteur on

too. For example, in 2013 Anaya stated that the outcome document from Indigenous peoples' global meeting in preparation for the 2014 high-level plenary meeting of the GA to be known as the World Conference on Indigenous Peoples 'is an important normative instrument and plan of action in its own right' and its recommendations will 'guide my approach to issues I examine within the scope of my mandate.'[161]

There is no accepted definition of who constitute 'Indigenous peoples' in these instruments or elsewhere, although *ILO Convention 169* provides some guidance in its statement of who the convention applies to.[162] As a result, both experts have had to navigate their own path regarding this contested issue. Both have embraced an expansive understanding of the term. Anaya has avoided defining the term in the abstract for the purposes of his mandate.[163] Instead he focuses on how the attributes of the particular collective he is examining align with the objectives of the *UNDRIP*, international programmes and his mandate:

> I look at the particular issues that have been raised and if I find that those particular issues fall within a concern of the objectives of the Declaration, say, and other international programmes and with what I see as the objectives of my mandate then I consider them within my mandate. Groups that are disadvantaged because of their historical occupation of territory, that have been moved off them, that are trying to retain their identities and transmit them to future generations, these are the issues I am concerned with, so I look at it from that standpoint.[164]

Stavenhagen's first annual report to the CHR identified the ongoing debate over the definition of who is Indigenous but did not settle on a definition.[165] In practice, when challenged by governments that his attentions were unnecessary because there were no Indigenous peoples within their territories, Stavenhagen adopted an approach similar to Anaya. He would look to the particular circumstances of the country under study: '[t]here was no hard and fast definition,

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Indigenous peoples generally see OHCHR, *Normative Framework* <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/NormativeFramework.aspx>.

[161] James Anaya, 'Statement on Panel on the World Conference on Indigenous Peoples' (Statement to EMRIP, Geneva, 8 July 2013) <http://unsr.jamesanaya.org/statements/statement-by-the-special-rapporteur-on-panel-on-the-world-conference-on-indigenous-peoples-6th-session-of-the-expert-mechanism>.

[162] *ILO Convention 169*, arts 1-3.

[163] Anaya has pointed to the usefulness of the definition in *ILO Convention 169* for companies seeking clarity regarding who is Indigenous. HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*, UN Doc A/HRC/15/37 (19 July 2010) [52] ('*Anaya Annual Report 2010*').

[164] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: The Situation of Indigenous Peoples in Botswana* UN Doc A/HRC/15/37/Add.2 (2 June 2010) [15] ('*Anaya Report on Botswana*'); HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Report on the Situation of Indigenous Peoples in Nepal,* UN Doc A/HRC/12/34/Add.3 (20 July 2009) [11]-[16] ('*Anaya Report on Nepal*').

[165] *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [92]-[100].

certainly no legal definition that had a worldwide acceptance so in every case we had to work with the particular circumstances of a particular country.'[166]

(f) Emphasising Effective Protection and Further Developments

The Special Rapporteur's mandate has developed over the years. Subsequent emphasis has been placed on the Special Rapporteur's role in securing the *effective* protection of Indigenous peoples' rights. For example, from 2002 the Special Rapporteur was encouraged to identify ways to overcome 'obstacles to the full and effective protection' of Indigenous peoples' rights,[167] and in 2005 the expert was requested to prepare the Study on Best Practices regarding implementation of his general and country recommendations.[168] As a result, Rhiannon Morgan has remarked that the expert's role is 'a clear opportunity to encourage implementation' of Indigenous peoples' rights.[169] The Special Rapporteur has been instructed to carry out additional tasks, including advancing debate on the then draft *UNDRIP*;[170] working to institute preventative measures regarding the protection of Indigenous peoples from genocide;[171] submitting recommendations to the outcome of the Durban Review Conference;[172] and assisting to explore modalities for the World Conference on Indigenous Peoples.[173] Since 2004 the Special Rapporteur has been requested to report on the mandate's activities to the GA.[174] Additionally, in 2012 the HRC encouraged 'relevant United Nations mechanisms', which would

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[166] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011). See also GA, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/62/286 (21 August 2007) [45].

[167] *Human Rights and Indigenous Issues,* CHR Res 2002/65, UN Doc E/CN.4/RES/2002/65 (25 April 2002) para 2 ('*CHR Res 2002/65*'); *Human Rights and Indigenous Issues,* CHR Res 2003/56, UN Doc E/CN.4/RES/2003/56 (24 April 2003) para 2 ('*CHR Res 2003/56*'); *CHR Res 2004/62,* UN Doc E/CN/4/RES/2004/62, para 3; *Human Rights and Indigenous Issues,* CHR Res 2005/51, UN Doc E/CN/4/RES/2005/51 (20 April 2005) para 2 ('*CHR Res 2005/51*'); *HRC Res 6/12,* UN Doc A/HRC/RES/6/12, para 1(a). In the resolutions from 2002 to 2005 the Special Rapporteur on Indigenous peoples was also requested 'to respond effectively' to information the mandate received regarding violations of the human rights of Indigenous peoples: *CHR Res 2002/65,* UN Doc E/CN.4/RES/2002/65, para 4; *CHR Res 2003/56*, UN Doc E/CN.4/RES/2003/56, para 4; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 5; *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 4.

[168] *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 9. The Special Rapporteur was further instructed to identify, exchange and promote 'best practices' to overcome obstacles to the protection of Indigenous peoples' rights, see *HRC Res 6/12,* UN Doc A/HRC/RES/6/12, para 1(a); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(a).

[169] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate Publishing Limited, 2011) 160.

[170] *CHR Res 2002/65*, UN Doc E/CN.4/RES/2002/65, para 5; *CHR Res 2003/56*, UN Doc E/CN.4/RES/2003/56, para 5; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 6; *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, paras 5, 7.

[171] *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 10.

[172] *Human Rights and Indigenous Peoples,* HRC Res 9/7, UN Doc A/HRC/RES/9/7 (18 September 2008) ('*HRC Res 9/7*').

[173] *Human Rights and Indigenous Peoples,* HRC Res 18/8, UN Doc A/HRC/Res/18/8 (29 September 2011) para 4 ('*HRC Res 18/8*') para 12.

[174] *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 14; *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 18; *Indigenous Issues,* GA Res 63/161, UN Doc A/RES/63/161 (18 December 2008) para 1 ('*GA Res 63/161*'); *Human Rights and Indigenous Peoples,* HRC Res 12/13, UN Doc A/HRC/RES/12/13 (12 October 2009) para 3; *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 3; *HRC Res 18/8*, UN Doc A/HRC/Res/18/8, para 3; *Human Rights and Indigenous Peoples,* HRC Res 21/24, UN Doc A/HRC/RES/21/24 ('*HRC Res 21/24*') (28 September 2012) para 3; *Human Rights and Indigenous Peoples*, HRC Res 24/L.22, UN Doc A/HRC/24/L.22 (26 September 2013) para 3. The Special Rapporteur on Indigenous peoples did not report to the GA in 2008.

include all special procedures mandates, 'to increase their attention to the human rights of indigenous persons with disabilities'.[175] Moves to confine the parameters of the Special Rapporteur's mandate have been evident in slight language shifts too, such as inclusion of reference to the Code of Conduct in the preamble to the renewing resolutions since 2007.[176]

4 *The Continuing Role of All Special Procedures*

The creation of the mandate of the Special Rapporteur on Indigenous peoples does not remove the role of examining Indigenous rights issues from the purview of other special procedures mandates, whether country or thematic. Indigenous peoples continue to call on other thematic special procedures experts to address their rights concerns, in acknowledgement of their particular expertise. For example, speaking before the PFII in 2003 the PFII member from Canada stated that the right to health of the Indigenous peoples of the Treaty Number 6 Territory of Western Canada 'was one that must be addressed by the Special Rapporteur on Health.'[177] Further, in 2013, IPOs from Asia called for various experts, including those on extrajudicial executions, internally displaced persons, violence against women and religious intolerance, to carry out country missions in Asia.[178] Since 2006 the PFII has invited different thematic mandate-holders to participate in its annual sessions in recognition of their important role in advancing the realisation of Indigenous peoples' rights.[179] It has also directed requests for action at different thematic experts.[180] The same normative framework that guides the Special Rapporteur on Indigenous peoples informs other special procedures' mandates when they consider Indigenous peoples' rights too, directed by the focus of the relevant expert's particular mandate.[181] While the enabling resolutions of other special procedures' mandates may not reference the *UNDRIP*, the *UNDRIP* itself recognises a role for these mandates in realising the rights it affirms. Articles 41 and 42 of the *UNDRIP* state that the 'organs and specialized

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[175] *HRC Res 21/24,* UN Doc A/HRC/RES/21/24, para 17.
[176] *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, Preamble; *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, Preamble. The language of the resolutions has also moved from requesting the usual report on the expert's 'activities' to asking the expert to 'report on the implementation of his/her mandate', see, eg, *CHR Res* 2001/57, UN Doc E/CN.4/RES/2001/57, [10]; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(j). The reports of the Special Rapporteur on Indigenous peoples have been received with differing levels of enthusiasm by the mandate's parent body over the years. For example, the expert's report received a 'welcome' in 2002, was taken 'note of' in 2004 and was taken 'note with appreciation of' in 2012 and 2013. *CHR Res 2002/65*, UN Doc E/CN.4/RES/2002/65, para 1; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 2; *HRC Res 21/24,* UN Doc A/HRC/RES/21/24, para 2; *Human Rights and Indigenous Peoples*, HRC Res 24/L.22, UN Doc A/HRC/24/L.22 (26 September 2013) para 2.
[177] PFII, 'Speakers in Permanent Forum Highlight Violations of Rights of Indigenous Peoples, During Human Rights Discussion' (Press Release, UN Doc HR/4673, 20 May 2003).
[178] World Conference on Indigenous Peoples 2014, *A Call to Action from Indigenous Peoples in Asia to the World Conference on Indigenous Peoples* (2012) <http://wcip2014.org/regions-caucuses/asia> 8-9.
[179] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 86, 127.
[180] Ibid 127. See, eg, PFII, *Report on the Seventh Session (21 April – 2 May 2008)*, UN Doc E/C.19/2008/13 (2008) [74], [136].
[181] Rodríguez-Piñero Royo sets out in tabular form the primary normative framework of the different thematic special procedures mandates, and the Indigenous rights, and associated *UNDRIP* articles, with which they align. Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 86, 331-34.

agencies of the United Nations system shall contribute to the full realization of the provisions of the Declaration' and that 'the United Nations and its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies....shall promote respect and full application of the provisions of this Declaration and follow-up on the effectiveness of this Declaration', respectively. The 'organs' and 'bodies' referred to in these articles include the special procedures mechanism. Consistent with this view, the special procedures experts were briefed on the *UNDRIP* at their 2008 annual meeting, which followed the *UNDRIP*'s adoption.[182]

Coordination and collaboration between the Special Rapporteur on Indigenous peoples and other special procedures mandate-holders on Indigenous rights issues occurs on an erratic basis. There is no formal process for collaboration, where it happens it happens informally according to the interests and agendas of the individual experts. Stavenhagen recalled exchanging information on the position of Indigenous women with the expert on violence against women 'very often', for example.[183] Anaya worked with Ruggie, the former expert on transnational corporations, on the question of corporate responsibility for Indigenous rights violations.[184] But in some instances Anaya viewed it as appropriate to leave consideration of Indigenous rights issues to different special procedures experts, 'there certainly are other mandate-holders who are doing very important work relevant to Indigenous peoples that I think needs to happen, but that work does not necessarily need my involvement given all the other issues I have.'[185] Stavenhagen suggested that the differing agendas and concerns of the experts can make coordination difficult '[s]ome of us were very eager to work together but it did not work out very well because every mandate-holder has his or her agenda, his or her particular concerns, and so it is a bit difficult.'[186] Correspondingly, Anaya identified that coordination between the experts is 'complicated' by their differing working methods.[187] Further examples of the experts' joint efforts on Indigenous rights concerns are considered in the next chapter.

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[182] Julian Burger, 'Making the Declaration Work for Human Rights in the UN System' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 304, 304, 312 n 13.

[183] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

[184] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). Anaya also promoted Ruggie's framework in his reports, see, eg, *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [70].

[185] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[186] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

[187] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

D *Commonality, Competition and Cooperation: The Mandate in Context*

1 *Carving Space amongst the Indigenous-exclusive UN Bodies*

(a) Cooperation with the WGIP and PFII

The special procedures are not the sole international mechanism with a mandate to advance the realisation of Indigenous rights norms. The experts join a legion of international mechanisms in this effort, most notably the other UN mandates with an Indigenous-exclusive focus: the former WGIP, the EMRIP and the PFII.[188] At the time that the Special Rapporteur on Indigenous peoples' mandate was established concerns were expressed regarding how the mandate would sit with the WGIP and the then newly established PFII. Some states and Indigenous representatives thought the Special Rapporteur would duplicate or diminish the role of the existing bodies.[189] The WGIP, which consisted of five experts, was established in 1982 under the CHR's subsidiary body: the Sub-Commission. Its mandate was twofold: 'to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations' and 'to give special attention to the evolution of standards concerning the rights of indigenous populations'.[190] It was in accordance with the latter dimension of its mandate that the WGIP developed the initial draft of the *UNDRIP*. The Special Rapporteur shares a similar mandate in that the expert examines ways of protecting Indigenous peoples' human rights and, before its adoption by the GA, the expert was instructed to assist in advancing the debate on the draft *UNDRIP*.[191]

The PFII's mandate also overlaps with that of the Special Rapporteur and, previously, the WGIP. The PFII, composed of sixteen experts, was created in 2000 as a high level advisory body to the ECOSOC.[192] It held its first annual session in 2002; a year after the mandate of the Special Rapporteur was created. Human rights are one of six of the PFII's mandated focuses. The PFII is mandated to discuss 'indigenous issues' relating to economic and social

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[188] As identified in Chapter I, Charters provides an in-depth and insightful analysis of the jurisdictional competition and efforts at coordination between the Indigenous-exclusive UN bodies. In this examination, although I am heavily informed by her discussion, I focus on how that competition and cooperation impacts the mandate of the Special Rapporteur in particular. Claire Charters, *The Legitimacy of Indigenous Peoples' Norms Under International Law* (PhD Thesis, University of Cambridge, 2011) 63-5, 67-8, 75-80, 88-91.

[189] See, eg, Saldamando, above n 93, 33.

[190] *Study on the Problem of Discrimination against Indigenous Populations,* ECOSOC Res 1982/34, UN Doc E/RES/1982/34 (7 May 1982) [1]-[2]. See generally Anaya, *Indigenous Peoples in International Law,* above n 78, 63, 221-22.

[191] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 1(b); *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 3, 6; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(a), (g); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(a), (g). Later the Special Rapporteur was requested to advance the *UNDRIP* and other international instruments relevant to Indigenous peoples: *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(g); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(g).

[192] *Establishment of a Permanent Forum on Indigenous Issues,* ECOSOC Res 2000/22, UN Doc E/2000/INF/2/Add.2 (28 July 2000) 50-2 ('*ECOSOC Res 2000/22*'). The PFII was created following extensive lobbying by Indigenous peoples with the support of NGOs and some states. Tauli-Corpuz and Alcantara, above n 86, 19-20. See generally Anaya, *Indigenous Peoples in International Law,* 219-20.

development, culture, the environment, education, health and human rights. Specifically the PFII's mandate is to:

> (a) Provide expert advice and recommendations on indigenous issues to the Council [ECOSOC], as well as to programmes, funds and agencies of the United Nations, through the Council;
> (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; [and]
> (c) Prepare and disseminate information on indigenous issues;...[193]

The Special Rapporteur shares with the PFII a mandate to examine Indigenous rights issues.[194]

Despite the overlap there is a central distinction between these three mandates. Neither the former WGIP nor the PFII's mandate formally includes the investigation of allegations of specific human rights violations or the assessment of states' Indigenous rights situations. In fact, the Chair of the WGIP would frequently interrupt Indigenous speakers' oral interventions concerning Indigenous rights violations during its sessions to warn them that the mechanism could not address specific cases of human rights violations.[195] Thus, the Special Rapporteur's mandate complements the work of the two bodies by permitting the investigation of specific complaints of violations of Indigenous peoples' rights and of the Indigenous rights situations in states.[196]

To address the overlapping dimensions of the mandates, cooperation between the three mechanisms was encouraged by the CHR, the Sub-Commission and later the HRC. The resolution that created the Special Rapporteur on Indigenous peoples invited the expert to consider recommendations made by the WGIP and the PFII relevant to the mandate.[197] The Special Rapporteur was requested to participate in the PFII's annual sessions.[198] The Special Rapporteur was also invited to coordinate with the PFII and the WGIP.[199] Similar requests were made of the PFII and WGIP.[200] Stavenhagen reflects that he 'tried to be as close to them [the PFII and WGIP] as possible and both the groups always counted on me as well.'[201] He attended

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[193] *ECOSOC Res 2000/22,* UN Doc E/2000/INF/2/Add.2, [2].
[194] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 1(b); *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 3; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(a), (g); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(a), (g).
[195] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 78, 222.
[196] See, eg, IITC, *The United Nations Special Rapporteur on Indigenous Human Rights*, above n 111; Tauli-Corpuz and Alcantara, above n 86, 20.
[197] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 4.
[198] See, eg, *CHR Res 2002/65*, UN Doc E/CN.4/RES/2002/65, para 7; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 8; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(e); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(e).
[199] See, eg, *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 11.
[200] See, eg, *Working Group on Indigenous Populations,* Sub-Commission on the Promotion and Protection of Human Rights Res 2006/13, UN Doc E/CN.4/2006/13 (24 August 2006) paras 8-11. Cooperation was also encouraged between the WGIP and the special procedures more generally: at para 6.
[201] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

their annual sessions and kept them updated on his activities.[202] He viewed the three mechanisms as complementary in mandate and practice, identifying that human rights were only a small part of the PFII's focus and the WGIP's mandate was to draft the *UNDRIP* '[s]o we had a sort of division of labour which was very clear on paper and in reality and fact between the Permanent Forum, the Working Group and the Special Rapporteur.'[203] Cooperation between the three mechanisms functioned to contain, in a large part, the cross-over between their mandates, but was complicated by the creation of the EMRIP and subsequent moves by the PFII.

(b) Negotiating Jurisdiction with the PFII and EMRIP

(i) Overlaps and Encroachments

In 2007, during the institutional reform of the UN's human rights activities, the WGIP was replaced by the EMRIP. The EMRIP, composed of five experts, was established as a subsidiary body to the HRC.[204] The EMRIP is mandated to provide the HRC with expert thematic advice on the rights of Indigenous peoples, mainly in the form of studies and research, as directed by the HRC. The EMRIP may also suggest proposals to the HRC for its consideration and approval.[205] Its mandate is not as far-reaching as that of the former WGIP and it is more restrictive than Indigenous peoples had lobbied for. For example, its enabling resolution excludes a role for the EMRIP in monitoring the implementation of the *UNDRIP*, which Indigenous peoples had advocated for.[206] Indigenous peoples argued that an institution to provide advice on Indigenous rights issues to the HRC was needed partially because of the characteristics of the existing mechanisms: the Special Rapporteur's mandate focused on the implementation of Indigenous peoples' rights and the PFII operated under the ECOSOC rather than the UN's human rights machinery.[207] Thus, the view was that a body focused on providing thematic advice concerning the human rights situation of Indigenous peoples would supplement the bodies' mandates. However, Rodríguez-Piñero counters that the EMRIP's establishment

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[202] See, eg, CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in accordance with Commission Resolution 2001/65*, UN Doc E/CN.4/2003/90 (21 January 2003) [4] ('*Stavenhagen Annual Report 2003*'); CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in accordance with Commission Resolution 2001/65*, UN Doc E/CN.4/2004/80 (26 January 2004) [5] ('*Stavenhagen Annual Report 2004*').

[203] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

[204] *Expert Mechanism on the Rights of Indigenous Peoples,* HRC Res 6/36, UN Doc A/HRC/ RES/6/36 (14 December 2007) paras 1, 3 ('*HRC Res 6/36*').

[205] Ibid paras 1, 2.

[206] Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 86, 127; Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 86, 334-35.

[207] IITC and the International Organization of Indigenous Resource Development, *Memorandum on the Indigenous Peoples Human Rights Expert Body to the Human Rights Council, Submitted by the International Indian Treaty Council (IITC) and the International Organization of Indigenous Resource Development (IOIRD), July 2007,* UN Doc IMWGIP/2007/CRP.6 (2007).

'can actually be explained more as a response to the demands of indigenous peoples, afraid of "losing" an institutional space within the new Human Rights Council machinery...than as [a] conscious step towards cohesive institution building.'[208] Given the commonalities between the mandates explored below, his argument has merit.

The mandates of the three current Indigenous-exclusive mechanisms – the Special Rapporteur, the PFII and the EMRIP – also overlap. All three mechanisms have a thematic dimension. The Special Rapporteur has a mandate to examine ways of protecting Indigenous peoples' human rights, which has prompted the Special Rapporteur to dedicate the mandate's annual reports to particular Indigenous rights topics.[209] Thematic reports were a central focus of Stavenhagen's work as Special Rapporteur.[210] The EMRIP is mandated to provide thematic expert advice on Indigenous rights topics to the HRC.[211] The PFII also organises its sessions thematically every second year.[212]

In addition, following the creation of the EMRIP, the PFII made moves to encroach upon the Special Rapporteur's role in investigating allegations of specific human rights violations and of assessing the Indigenous rights situations in states. The PFII is the only one of the three Indigenous-exclusive UN mechanisms expressly named in the *UNDRIP* as having a role in promoting and following-up on the effectiveness of the *UNDRIP*.[213] Buoyed by this reference the PFII has undertaken activities to investigate specific rights infractions and conducted country visits to Bolivia, Paraguay and Colombia, for which it has issued reports and recommendations, as well as carried out follow-up during its annual sessions.[214] The PFII's extension of its mandate in this manner was enterprising. As identified above, human rights are only one of six issues the PFII focuses on, whereas it is the sole focus of the Special Rapporteur

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[208] Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 86, 334.

[209] *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 1(b); *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 3; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(a), (g); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(a), (g). For comment by Anaya on the overlaps between the mandates see HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*, UN Doc A/HRC/12/34 (15 July 2009) [7]-[14] ('*Anaya Annual Report 2009*').

[210] Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', above n 86, 334; Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial', above n 86, 127.

[211] *HRC Res 6/36,* UN Doc A/HRC/ RES/6/36, para 1.

[212] At the PFII's first six sessions a different theme was discussed each year. Since its sixth session the PFII has alternated between theme years and review years. PFII, *The Sessions of UNPFII* <http://undesadspd.org/IndigenousPeoples/UNPFIISessions.aspx>.

[213] *UNDRIP* art 42.

[214] PFII, Lars-Anders Baer, *Study on the Status of Implementation of the Chittagong Hill Tracts Accord of 1997, Submitted by the Special Rapporteur,* UN Doc E/C.19/2011/6 (18 February 2011); PFII, *Summary and Recommendations of the Report of the Mission of the Permanent Forum on Indigenous Issues to the Plurinational State of Bolivia*, UN Doc E/C.19/2010/6 (21 January 2010); PFII, *Summary and Recommendations of the Report of the Mission of the Permanent Forum on Indigenous Issues to Paraguay*, UN Doc E/C.19/2010/5 (21 January 2010); PFII, *Situation of Indigenous Peoples in Danger of Extinction in Colombia: Summary of the Report and Recommendations of the Mission by the Permanent Forum to Colombia*, UN Doc E/C.19/2011/3 (11 February 2011). The PFII has followed-up the visits with an in-depth dialogue with members of the PFII, the relevant state, UN country teams and affected Indigenous peoples during its sessions, see, eg, PFII, *Report on the Ninth Session (19-30 April 2010)*, UN Doc E/C.19/2010/15 (2010) [54]-[90]. See generally Lola García-Alix, 'UN Permanent Forum on Indigenous Issues' in Kathrin Wessendorf (ed), *The Indigenous World 2011* (IWGIA, 2011) 492, 495-96.

and the EMRIP. And the Special Rapporteur's mandate expressly authorises the expert to receive allegations of Indigenous rights violations, while the PFII's mandate does not. To some extent the PFII's moves to extend its mandate were prompted by pressure from Indigenous peoples unconcerned with the particularities of its enabling mandate who frequently demanded action regarding the rights violations they raised during the PFII's annual sessions.[215] Anaya himself is not opposed to the PFII conducting country visits, recognising the different strengths of the two bodies: '[t]hey are not as agile as I might be able to be in sort of getting around different areas in a country, finding things out. At the same time, they do not have the sort of diplomatic constraints that I might either so they might be able to take a stronger stand'.[216] But he is of the view that strategic thought needs to be directed at the methodology and ultimate purpose of such visits as the PFII has 'no specific rules of engagement for county visits'.[217] He also argues for greater coordination between the PFII and the Special Rapporteur regarding the visits, reflecting 'that has not happened as much as it should'.[218]

(ii) Functioning Together

Efforts at cooperation and coordination between the Special Rapporteur, the PFII and the EMRIP have been made, however. The three bodies have held meetings at least annually 'to share work agendas, identify the strengths and limitations of our respective mandates, and explore methods of channeling our work in ways that it will be most effective.'[219] They have participated in one another's annual meetings.[220] In 2012 the EMRIP instituted a new practice of hosting an interactive dialogue with the Special Rapporteur on Indigenous peoples and a representative of the PFII concerning the *UNDRIP*, allowing for a dynamic exchange between the three bodies and EMRIP participants on efforts to promote implementation of the instrument.[221] The three bodies have jointly participated in other international meetings regarding Indigenous peoples.[222] The Special Rapporteur has contributed to the thematic work

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[215] Charters, above n 188, 63-5, 92.
[216] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[217] Ibid.
[218] Ibid.
[219] James Anaya, 'Statement to the Permanent Forum on Indigenous Issues' (New York, 15 May 2012) James Anaya <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-permanent-forum-on-indigenous-issues-2012>; *Anaya Report to GA 2013,* UN Doc A/68/317, [44].
[220] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, UN Doc A/HRC/24/41 (1 July 2013) annex [4] (*'Anaya Annual Report 2013'*).
[221] EMRIP, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its Fifth session (Geneva, 9-13 July 2012)*, UN Doc A/HRC/21/52 (17 August 2012) [57]-[74] (*'EMRIP Report on 5th Session'*). See also *Anaya Report to GA 2013,* UN Doc A/68/317, [45]. In 2013 the panel participating in the dialogue was extended to include other actors, including a member of the CERD Committee. EMRIP, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its Sixth session (Geneva, 8-12 July 2013)* UN Doc A/HRC/EMRIP/24/49 (31 July 2013) [91]-[104].
[222] See, eg, HRC, *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [6].

of the EMRIP and the PFII.[223] This cooperation has been promoted by the HRC, with the Special Rapporteur's mandate revised to request the Rapporteur '[t]o work in close cooperation and coordination' with the EMRIP.[224] This is in addition to the request that the expert work cooperatively with the PFII, as noted above. Coordination between the EMRIP and other special procedures experts has been advocated too. In 2012 the EMRIP proposed that the HRC request that the special procedures, and other actors, 'utilize the recommendations and advice of the Expert Mechanism within their activities'.[225] In the same year, the Chair of the EMRIP also identified the importance of collaboration between the Working Group on transnational corporations and the Indigenous-exclusive mechanisms, in order to promote implementation of the *UNDRIP* in relation to Ruggie's *Guiding Principles on Business and Human Rights*, which elaborate on corporate responsibility for human rights.[226]

The Special Rapporteur on Indigenous peoples has been especially proactive in promoting coordination between the three Indigenous-exclusive mechanisms. Anaya has emphasised his 'clear mandate to investigate and make recommendations on specific human rights situations of indigenous peoples', in contrast to the mandates of the EMRIP and the PFII.[227] He has reminded the PFII that multiple mechanisms have a role in implementing the *UNDRIP* despite the fact that the PFII is the only body expressly mentioned in the instrument. In his 2012 report to the GA he commented:

> Although the Permanent Forum on Indigenous Issues is specifically mentioned in article 42 of the Declaration, the mandate to promote respect for the Declaration clearly applies throughout the United Nations system and in particular to United Nations institutions that in some way touch upon indigenous issues.[228]

He has also encouraged the PFII to focus its attentions on its mandate of advising the UN system on Indigenous matters, which he sees as 'an extremely important task' for which 'there

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[223] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, UN Doc A/HRC/21/47 (6 July 2012) [6] ('*Anaya Annual Report 2012*'); *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [3].

[224] See, eg, *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(d).

[225] *EMRIP Report on 5th Session,* UN Doc A/HRC/21/52, 6, proposal 8(c).

[226] Ibid [25]. In 2011 the HRC endorsed the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' proposed by John Ruggie, then the expert on transnational corporations, see *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN Doc A/HRC/C/RES/17/4 (6 July 2011) para 1. The Guiding Principles are contained in Ruggie's 2011 report to the HRC, see HRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Ruggie's Annual Report 2011*'). See generally Susan Ariel Aaronson and Ian Higham, '"Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35(2) *Human Rights Quarterly* 333.

[227] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [11].

[228] GA, James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/67/301 (13 August 2012) [27] ('*Anaya Report to GA 2012*').

is a huge need'.[229] In addition to participating in the annual sessions of both the PFII and the EMRIP, since 2009 Anaya has met privately with Indigenous peoples attending those sessions who wish to raise allegations of specific rights violations.[230] In 2012 he described these parallel meetings as '[a]n especially important part of the Special Rapporteur's coordination with the Permanent Forum and Expert Mechanism'.[231]

The three bodies have also taken steps to refine the work they do in order to avoid duplication. Anaya has limited his thematic work in order not to replicate the work of the EMRIP. In 2009 Anaya commented:

> taking into consideration the establishment of the expert mechanism on the rights of indigenous peoples, 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 in carrying out thematic studies as secondary to the other areas of his work.[232]

In the same year he indicated that he would focus 'mainly on providing observations on the core issues that have arisen during his work' that 'will, for the most part, be practically oriented and identify best practices, where they exist.'[233] The EMRIP has emphasised that its mandate is 'strictly thematic, in contrast to the Special Rapporteur'.[234] And the PFII has since recognised that the Special Rapporteur and the EMRIP also have a role to play in implementing the *UNDRIP*.[235] As a result, the three mechanisms maintain a degree of concordance between their respective mandates.[236] But negotiations over the boundaries will be ongoing: reflecting on how the mandates of the Special Rapporteur, the PFII and the EMRIP fit together Anaya has commented 'I like to think of them all as complementary but we have not quite worked that out yet.'[237] Accordingly, he has advocated for '[g]reater efforts…to systematize methods of

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[229] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). See also, eg, *Anaya Report to GA 2012,* UN Doc A/67/301, [31]; James Anaya, 'Statement to the Permanent Forum on Indigenous Issues' (New York, 19 May 2011) <http://unsr.jamesanaya.org/statements/statement-unsr-tenth-session-of-the-un-permanent-forum-on-indigenous-issues>.

[230] See, eg, *Anaya Report to GA 2012,* UN Doc A/67/301, [4]. See generally *Anaya Report to GA 2013,* UN Doc A/68/317, [46].

[231] *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [4]. Anaya's 2012 report to the GA focused on the need to harmonise the UN's activities regarding Indigenous peoples, see *Anaya Report to GA 2012,* UN Doc A/67/301.

[232] GA, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/64/338 (4 September 2009) [26].

[233] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [13].

[234] OHCHR, *International Expert Seminar on the Role of UN Mechanisms with Specific Mandate Regarding the Rights of Indigenous Peoples, Madrid, 4-6 February 2009* (2009) [22]. As with sessions of the PFII and the former WGIP, respective Chairs of the EMRIP have reminded Indigenous participants that the EMRIP does not have a mandate to hear allegations of specific rights violations. Fleur Adcock 'Meeting Notes: UN Expert Mechanism on the Rights of Indigenous Peoples' (July 2010); Fleur Adcock 'Meeting Notes: UN Expert Mechanism on the Rights of Indigenous Peoples' (July 2011); Fleur Adcock 'Meeting Notes: UN Expert Mechanism on the Rights of Indigenous Peoples' (July 2012); Fleur Adcock 'Meeting Notes: Permanent Forum on Indigenous Issues: Tenth Session' (May 2011). The practice was less pronounced at EMRIP's 2012 annual meeting.

[235] See, eg, PFII, *Report of the Eighth Session (18-29 May 2009)*, UN Doc E/C.19/2009/14 (2009) [24].

[236] Charters, above n 188, 80.

[237] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

cooperation, especially in regard to the flow of information on matters of mutual concern.'[238] It should be borne in mind that the jurisdictional competition that remains can be constructive too. It can be a source of innovation, help to address oversights by the individual mandates and promote the robust articulation and promotion of Indigenous rights norms,[239] although this does not detract from the need for continuing dialogue between the three bodies.

2 *Reaching Out to the Wider International System*

(a) Intermittent Coordination with Treaty Bodies

Beyond the PFII and the EMRIP there are a host of international mechanisms whose mandates overlap with, and complement, the special procedures' Indigenous mandate, the UN human rights treaty bodies in particular. The UN human rights treaty bodies monitor the implementation of human rights treaty obligations by state parties. The bodies require state parties to periodically report on their conformity to the rights set out in the relevant treaty.[240] The treaty bodies responsible for monitoring compliance with the *CERD*, *ICCPR*, *ICESCR*, *CEDAW* and *CRC* – all instruments that contribute to the Special Rapporteur's normative framework – have each interpreted state parties' conformity to Indigenous peoples' rights norms as relevant to their guiding treaties.[241] For example, the CERD Committee has commented frequently on the rights of Indigenous peoples in the course of its concluding observations and has also heard a number of complaints regarding Indigenous peoples' rights under its Early Warning and Urgent Action Procedure.[242] But, beyond the CERD Committee,[243] the treaty bodies receive complaints on violations of individuals' rights only, not the rights of

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[238] *Anaya Report to GA 2013,* UN Doc A/68/317, [86].

[239] For comment on the advantages of having 'multiple overlapping jurisdictional assertions' generally see Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 302, 308. See also Charters, above n 188, 93.

[240] Sir Nigel Rodley and Lempinen provide detailed analyses of the relationship between the special procedures' mechanism and the UN human rights treaty bodies. Sir Nigel Rodley, 'UN Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights - Complementarity or Competition' (2003) 25 *Human Rights Quarterly* 882; Sir Nigel Rodley, 'The United Nations Human Rights Council, its Special Procedures and its Relationship with Treaty Bodies: Complementarity or Competition?', above n 28; Lempinen, above n 24, 181-232. For comment on some of the limitations of the treaty bodies, see Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998) 36-8.

[241] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 78, 112, 130-37, 139, 141, 155, 228-32.

[242] See, eg, CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (8 May 2008) [19], [29]-[30]. See generally Claire Charters and Andrew Erueti, 'Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004' (2005) 36 *Victoria University of Wellington Law Review* 257; Anaya, *Indigenous Peoples in International Law,* above n 78, 231. For additional examples from across the different UN human rights treaty bodies see Fleur Adcock, 'Indigenous Peoples Rights Under International Law: The Year in Review' (2011) 9 *New Zealand Yearbook of International Law* 296, 303-06; Fleur Adcock and Claire Charters, 'Indigenous Peoples' Rights Under International Law: The Year in Review' (2010) 8 *New Zealand Yearbook of International Law* 203, 211-12 ('*Adcock and Charters 2010*'); Fleur Adcock and Claire Charters, 'Indigenous Peoples' Rights Under International Law: The Year in Review' (2009) 7 *New Zealand Yearbook of International Law* 308, 314-19 ('*Adcock and Charters 2009*').

[243] *CERD*, art 14.

collectives.[244] As identified in Part B above, the treaty bodies' mandates and working methods differ from the mandate and methods of the Special Rapporteur in several respects too.

Cooperation and coordination between the treaty bodies and the special procedures is advocated. The Manual of Operations encourages '[c]ross-fertilization between the work of Special Procedures and that of the treaty bodies'.[245] Also, the Special Rapporteur on Indigenous peoples is mandated to consider relevant recommendations, observations and conclusions of treaty bodies.[246] Steady 'cross-fertilization' remains an unrealised ideal. But, in practice, efforts at coordination have been made. For example, the CERD Committee has encouraged states to receive country missions from the Special Rapporteur.[247] At times it has referred favourably to the work of the Special Rapporteur on Indigenous peoples and other special procedures experts regarding Indigenous peoples.[248] The CRC Committee has also encouraged states to take into account the recommendations of the Special Rapporteur and referenced Ruggie's 2008 *Protect, Respect and Remedy Framework on Business and Human Rights*, which informed his *Guiding Principles on Business and Human Rights*.[249] And the Human Rights Committee regularly consults special procedures experts' reports regarding states under review, drawing attention to the experts' recommendations in their dialogues and reports.[250] The Special Rapporteurs have frequently referenced the work of treaty bodies, including the CERD Committee, the Human Rights Committee, the CRC Committee and the Committee monitoring the CESCR, in their annual reports.[251] Less emphasis is given to the Special Rapporteurs' direct engagement with the treaty bodies in the reports of the experts, although some efforts are noted. For example, Stavenhagen identifies that he transmitted a statement to the CRC Committee during its

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[244] See generally Anaya, *Indigenous Peoples in International Law,* above n 78, 253-58. However, in respect of the Human Rights Committee, Anaya notes that the Committee's restriction to hearing complaints from individuals 'has constituted mostly a limitation of form for admissibility purposes and has not kept the committee from adjudicating…group rights': at 254.

[245] *Manual of Operations,* above n 15, [119]. It is a point repeated at annual meetings of the special procedures too, see, eg, HRC, *Report on the Eighteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairs of Working Groups of the Special Procedures of the Human Rights Council*, UN Doc A/HRC/18/41 (21 July 2011) [12], [27], [28] ('*Report of the Special Procedures' 18th Meeting*'). Regarding efforts at coordination between the treaty bodies and special procedures generally see, eg, Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 52, 65-6.

[246] See, eg, *CHR Res 2002/65*, UN Doc E/CN.4/RES/2002/65, para 6; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, paras 4, 7; *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(i); *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(i).

[247] CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bolivia (Plurinational State of)*, UN Doc CERD/C/BOL/CO/17-20 (10 March 2011) [6].

[248] See, eg, CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname,* UN Doc CERD/C/SUR/CO/12 (13 March 2009) [8]; CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico,* UN Doc CERD/C/MEX/CO/16/17 (4 April 2012) [15].

[249] See, eg, CRC Committee, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: New Zealand*, UN Doc CRC/C/NZL/CO/3-4 (11 April 2011) [22]-[23], [57].

[250] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 13, 42-3.

[251] See, eg, *Anaya Annual Report 2010,* UN Doc A/HRC/15/37, [40]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [40], [41]; *Anaya Annual Report 2008,* UN Doc A/HRC/9/9, [22]-[25]; *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [13], [61], [70], [74], [75]; *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78, [22], [52]-[55]; *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [42]; *Stavenhagen Annual Report 2004,* UN Doc E/CN.4/2004/80, [5], [34], [40]; *Stavenhagen Annual Report 2003*, UN Doc E/CN.4/2003/90, [18], [24]; *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [50], [98], [104], [107], [110].

discussion on the rights of Indigenous children in 2003.[252] And Anaya states that he 'has, on occasion, coordinated with United Nations human rights treaty bodies, especially the Committee on the Elimination of Racial Discrimination and the Human Rights Committee,' both in relation to their periodic reviews of states and their consideration of specific complaints.[253]

(b) Occasional Collaboration with Others

Other mechanisms hailing from across the international system whose mandates overlap with that of the Special Rapporteur abound. Many international mechanisms consider allegations of specific violations of Indigenous peoples' human rights or assess the Indigenous rights situations in states. There are the three ILO monitoring bodies, including the ILO Committee of Experts that monitors the implementation of all ILO Conventions, such as ILO Conventions 169 and 107. The ILO Committee of Experts regularly fields concerns regarding the application of the *ILO Convention 169* from trade unions in cooperation with IPOs.[254] The HRC's UPR process, by which all UN member states are examined for compliance with international human rights norms by other states, has seen a number of states questioned on their treatment of Indigenous peoples.[255] Regional human rights courts and commissions are also relevant. In particular, the Inter-American system is playing a lead role in promoting Indigenous rights.[256] It has had its own Special Rapporteur on the Rights of Indigenous Peoples since 1990 and drafting of the Organization of American States' (OAS) *American Declaration on the Rights of Indigenous Peoples* continues.[257] The African Commission on Human and

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[252] *Stavenhagen Annual Report 2004,* UN Doc E/CN.4/2004/80, [5]. Regarding efforts at coordination between Stavenhagen and the UN human rights treaty bodies generally see Preston et al, above n 98, 22-3.

[253] *Anaya Report to GA 2013,* UN Doc A/68/317, [49].

[254] Under the ILO's tripartite system workers' organisations can submit information to the ILO monitoring bodies. See, eg, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Individual Observation Concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Guatemala (Ratified 1996)*, ILO Doc 062006GTM169 (2006). See generally Anaya, *Indigenous Peoples in International Law,* above n 78, 226-28; Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime, 1919-1989* (Oxford University Press, 2005); Swepston, above n 146.

[255] See, eg, HRC, *Report of the Working Group on the Universal Periodic Review: New Zealand*, UN Doc A/HRC/12/8 (4 June 2009) [27]-[30], [33], [36], [40], [44], [46], [49]-[50], [62]-[64], [66]-[67] ('*HRC UPR New Zealand*'). For further examples see Adcock, above n 242, 306-07; Adcock and Charters 2010, above n 241, 213; Adcock and Charters 2009, above n 242, 310-11, 319-20.

[256] The Inter-American system has produced an important body of case law regarding the rights of Indigenous peoples, see, eg, *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits)* IACHR Series C No 79, 31 August 2001; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* IACHR Series C No 172, 28 November 2007; *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs)* IACHR Series C No 125, 17 June 2005; *Maya Indigenous Communities of the Toledo District v Belize (Merits)* IACHR Report No 40/04, Case 12.053 12 October 2004 <www.cidh.oas.org>; *Mary and Carrie Dann v United States* IACHR Report No 75/02, Case 11.140, 27 December 2002 <www.cidh.oas.org>. See generally Luis Rodríguez-Piñero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 457; Isabel Madariaga Cuneo, 'The Rights of Indigenous Peoples and the Inter-American Human Rights System' (2005) 22(1) *Arizona Journal of International and Comparative Law* 53, 53-4; Anaya, *Indigenous Peoples in International Law,* above n 78, 70, 114-15, 134, 140-41, 145-48, 185-86, 232-34, 258-71.

[257] *Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session)*

Peoples Rights (ACHPR) has also devoted increasing attention to Indigenous rights issues and has had a Working Group on Indigenous Populations/Communities since 2000.[258] The European Council has played a lesser role, lacking a mechanism with a specific mandate to protect Indigenous rights,[259] as has the Association of Southeast Asian Nations (ASEAN).[260] Further, bodies such as the World Bank hear complaints, including on behalf of Indigenous peoples, that its actions do no accord with its own policies and procedures.[261] Other actors play a role in developing or interpreting Indigenous rights norms too, including the *CBD* secretariat, the World Intellectual Property Organization (WIPO), UNESCO, the UN Development Programme (UNDP), the World Health Organization, the World Bank Group,[262] the UN Population Fund,[263] the UN Development Fund for Women,[264] the UN's Inter-Agency Support Group on Indigenous Issues (which, together with the PFII, plays a coordination role on Indigenous issues within the UN system),[265] and the OHCHR.[266]

Varying degrees of collaboration and dialogue between the Special Rapporteur and these additional bodies have occurred. Cooperation is promoted in the resolutions that define and revise the expert's mandate,[267] other resolutions of the HRC,[268] and the special procedures' Manual of Operations.[269] In practice, the Special Rapporteur has referred to the work of the ILO

OEA/Ser/L/V/.II.95 Doc.6 (1997); Anaya, *Indigenous Peoples in International Law,* above n 78, 66, 87; Cuneo, above n 256, 53; Mauro Barelli, 'The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 *Human Rights Quarterly* 951, 962-63.

[258] See, eg, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ACPHR 276/2003, 4 February 2010; *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria* ACHPR 155/96 (2001); *Katangese Peoples' Congress v Zaire (Merits)* ACHPR 75/92 (1995). See generally Anaya, *Indigenous Peoples in International Law,* above n 78, 66; Barelli, above n 257, 964-66.

[259] However, there is the Council of Europe's *Framework Convention for the Protection of National Minorities*, opened for signature 1 February 1995, CETS No 157 (entered into force 1 February 1998). See generally Barelli, above n 257.

[260] The heads of state of the Association of Southeast Asian Nations (ASEAN) member states adopted the *ASEAN Human Rights Declaration* on 18 November 2012. It is silent regarding Indigenous peoples. The declaration can be accessed from <http://aichr.org/documents/>. See generally Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 13(3) *Human Rights Law Review* 557.

[261] See generally Céline Germond-Duret, *Banque Mondiale, Peuples Autochtones et Normalisation* (Karthala, 2011).

[262] See, eg, Anaya, *Indigenous Peoples in International Law,* above n 78, 67, 88-9 n 126, 91 n 137, 132-33, 140, 145, 149, 150, 155, 176 n 168.

[263] See, eg, Director of the Asia and the Pacific Region at United Nations Population Fund, 'Statement to the Permanent Forum on Indigenous Issues: Sixth Session' (New York, 21 May 2007) <http://www.unfpa.org/rights/people.htm>.

[264] See, eg, PFII, *Report on the Fourth Session*, UN Doc E/C.19/2005/9 (2005) [119].

[265] See, eg, PFII, *Report of the Interagency Support Group on Indigenous Issues,* UN Doc E/C.19/2008/6 (1 February 2008) annex.

[266] See, eg, HRC, *Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples*, UN Doc A/HRC/24/26 (1 July 2013).

[267] See, eg, *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(d), (f); *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(d), (f), (i); *CHR Res 2003/56*, UN Doc E/CN.4/RES/2003/56, para 3; *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 4; *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 3.

[268] For example, the HRC has encouraged the UN Indigenous Peoples' Partnership (UNIPP) established in 2011 to perform its mandate regarding the *UNDRIP* in 'close cooperation' with 'Human Rights Council mechanisms, United Nations bodies and agencies relating to indigenous peoples', amongst others, which include the Special Rapporteur on Indigenous peoples as well as other special procedures mandates, see *HRC Res 18/8*, UN Doc A/HRC/Res/18/8, para 20. For information on the UNIPP see the United Nations Indigenous Peoples' Partnership, *Strategic Framework 2011-2015* (2011).

[269] See, eg, *Manual of Operations,* above n 15, [130].

Committee in the mandate's annual reports.[270] The UPR draws on the work of the special procedures: country reviews are based on three official documents one of which is a compilation of information from UN sources, including relevant special procedures experts' reports.[271] During the UPR states have referred back to the special procedures' work regarding Indigenous peoples too.[272] The experts have engaged with the regional systems. For example, in 2005 Stavenhagen participated in a plenary session of the ACHPR in Banjul and also met with the Commission's Working Group on Indigenous Populations/Communities.[273] He directed recommendations to both the Inter-American system and the African system in his reports.[274] Anaya has coordinated especially closely with the Inter-American system,[275] a structure with which he has had a long professional relationship. He has exchanged information with the Inter-American Commission on Human Rights (Inter-American Commission) on alleged violations of Indigenous peoples' rights.[276] He has also presented expert testimony regarding Indigenous peoples' right to be consulted before the Inter-American Court.[277] The reports of the Special Rapporteur on Indigenous peoples have been drawn upon by a number of these regional bodies.[278] The Special Rapporteur has engaged with other regional actors to a lesser extent, although in 2013 Anaya participated in an exchange workshop on Indigenous peoples' rights with the ASEAN Inter-Governmental Commission on Human Rights, the Inter-American Commission and the ACHPR, along with the expert on minority issues.[279] Further, the experts have fed into the work of international bodies such as the UNDP concerning Indigenous

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[270] See, eg, *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78, [57], [66]; *Stavenhagen Annual Report* 2002, UN Doc E/CN.4/2002/97, [12], [85], [106], [109], [110].

[271] See, eg, Oliver de Frouville, 'Building a Universal System for Protection of Human Rights: The Way Forward' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 241, 251. Several authors identify the importance of the HRC's Universal Periodic Review (UPR) for following-up on, and bringing attention to, special procedures experts' recommendations, see, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 8, 218; Golay, Mahon and Cismas, above n 11, 311; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 5, 204.

[272] See, eg, *HRC UPR New Zealand,* UN Doc A/HRC/12/8, [36], [40], [46], [62]-[63]. See generally *Anaya Report to GA 2013,* UN Doc A/68/317, [50].

[273] Preston et al, above n 98, 25.

[274] *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [80].

[275] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [53]-[54].

[276] See, eg, *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [7].

[277] *Kichwa Indigenous Peoples of Sarayaku v Ecuador (Merits and Reparations)* IACHR Series C No 245, 27 June 2012; James Anaya, 'La Norma de Consulta Previa: Introducción a Peritaje ante la Corte Interamericana de Derechos Humanos, Caso Sarayaku' (Media Release, 7 July 2011) <http://unsr.jamesanaya.org/statements/la-norma-de-consulta-previa-introduccion-a-peritaje-ante-la-corte-interamericana-de-derechos-humanos-caso-sarayaku>.

[278] See, eg, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ACPHR 276/2003, 4 February 2010 [147], [149], [154], [157], [245], [293]; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* IACHR Series C No 172, 28 November 2007 [98], [135]-[136]; *Escué-Zapata v Colombia (Merits, Reparations and Costs)* IACHR Series C No 165, 4 July 2007 [46], [48]. See generally *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [11]. Other special procedures experts' reports have sometimes been drawn on too. For example, the Inter-American Court of Human Rights drew on the report of the expert on extrajudicial executions in *Moiwana Community v Suriname (Preliminary Objection, Merits, Reparations and Costs)* IACHR Series C No171 (15 June 2005) 31 nn 26, 28, 32 n 30.

[279] *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, annex [6]; African Union African Commission on Human & Peoples' Rights, *Final Communiqué of the Exchange Workshop on Indigenous Peoples' Rights between the Inter-American Commission on Human Rights, the ASEAN Inter-Governmental Commission on Human Rights and the African Commission on Human and Peoples' Rights* (6 April 2013). See also *Anaya Report to GA 2013,* UN Doc A/68/317, [55].

rights,[280] some examples of which are highlighted in the next chapter. However, overall, mandate-holders, including Anaya, have identified that there is scope for greater coordination between the various experts.[281]

E *Conclusion: A Broad Indigenous Mandate*

The special procedures mechanism has a wide mandate to help realise international Indigenous rights norms that largely complements the Indigenous rights mandates of other bodies within the international system. The special procedures have evolved from their haphazard creation to become the HRC's primary instrument for monitoring and advancing state compliance with international human rights norms. The specific roles of these independent, unsalaried, experts are established and defined by their individual enabling resolutions, although the experts often enjoy significant licence. There were three landmarks in the development of the experts' mandate regarding Indigenous peoples' rights. The first was the creation of the special procedures mechanism itself. The second was the issue of the CHR's 1993 resolution, which recognised the relevance of the human rights of Indigenous peoples to all thematic special procedures' mandates; but not the country mandates. The third was the creation of the thematic mandate of the Special Rapporteur on Indigenous peoples, a position held first by Stavenhagen and subsequently by Anaya. The Special Rapporteur's enabling resolution affords the expert a substantial mandate to investigate, and provide suggestions on how to prevent and remedy, specific violations of Indigenous peoples' human rights. Later revisions to the terms of the mandate have seen the Special Rapporteur's role in securing the *effective* protection of Indigenous peoples' rights emphasised. Other international mechanisms enjoy an overlapping role, in particular the PFII and the EMRIP, although consequent efforts at cooperation and coordination have mostly contained the crossover. Even with the establishment of the mandate of the Special Rapporteur on Indigenous peoples, all special procedures experts retain a role in advancing the realisation of international Indigenous rights norms, which some experts have embraced. In the next chapter I explore the tools that the experts have engaged to give effect to this mandate.

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[280] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [14].
[281] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [51], [56].

IV DIALOGIC POWER: THE EXPERTS' WORKING REPERTOIRE

A *Introduction*

The special procedures draw on an assorted set of techniques to perform their mandate to advance the realisation of international Indigenous rights norms. In this chapter I critically analyse the major mechanisms they leverage. All of the core regulatory mechanisms the experts wield are dialogic. But their powers are not inconsequential: my theoretical framework acknowledges the pivotal role of dialogue in bringing about norm conformity. I begin by outlining the basis for the special procedures' reliance on dialogic mechanisms: the experts do not have the authority to coerce compliance with their recommendations. I then examine the variety of dialogic mechanisms the experts engage. While the individual working styles of the special procedures mandate-holders differ there are a number of commonalities. I argue that shaming is the overriding mechanism engaged by the experts, with dialogue-building and capacity-building the two other significant tools invoked. Shaming permeates the experts' country missions and reports, communications, 'special' missions and reports on specific cases, and media releases. Dialogue-building can be engaged through each of these outputs too, with the experts' commentary acting as a witness to rights violations and some experts offering praise to encourage states for positive developments. But it is most evident in the experts' efforts to improve knowledge regarding the substance of international Indigenous rights norms. The experts do this above all through their thematic studies, although it can also drive their dialogues with different actors. Capacity-building is deployed through the special procedures' technical advisory assistance, which forms part of the experts' mandate to promote 'best practice'. I close by exploring the, insufficient, UN institutional support afforded the experts in exploiting these mechanisms.

B *Dialogue by Design: The Mechanism's Lack of Coercive Authority*

The special procedures engage dialogic regulatory mechanisms because those are the tools available to them. States are not obliged to cooperate with the special procedures' mandate-holders in their work. According to Piccone, this renders state cooperation 'highly uneven and generally disappointing, with some notable exceptions.'[1] The same instrument that

[1] Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 210. Other actors, such as companies, are similarly not obliged to cooperate with the experts, see, eg, Miko Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Abo Akademi University, 2001) 298.

is the ultimate authority for the creation of the special procedures – the UN Charter – also affirms the principles of national sovereignty and non-interference in domestic affairs.[2] States may refuse to permit a mandate-holder to conduct a country visit to assess the human rights situation of its Indigenous peoples, neglect to respond to the request or consistently delay an agreed visit. Even where a state has issued a standing invitation, meaning that in principle the state is willing to receive a country visit from any thematic special procedures mandate-holder, state consent to each visit is still required.[3] Further, states may elect not to respond to special procedures experts' communications regarding alleged violations of Indigenous peoples' rights. Research suggests that half of special procedures experts' communications to states go unanswered, with the Special Rapporteur on Indigenous peoples' communications no exception;[4] although states may act on the matter the subject of the communication even if they do not respond to it.[5] States may also provide a perfunctory and immaterial response to special procedures experts' communications, simply acknowledging the communication's receipt, denying the allegations without providing any supporting evidence, responding to only part of the allegations or setting out irrelevant information that does not address the allegations in question. When such responses are taken into account the response rate is far lower.[6]

The special procedures' parent body, the HRC (and before it the CHR), does not have any power to compel states or other bodies to cooperate with special procedures' experts. However, it has encouraged states to do so, as has the GA. The Code of Conduct adopted by the HRC 'urges all States to cooperate with, and assist, the special procedures in the performance of

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[2] *Charter of the United Nations*, art 2(7) ('*UN Charter*').

[3] *Code of Conduct,* UN Doc A/HRC/Res/5/2, art 11(b). As at 3 September 2013 a total of 95 states had issued standing invitations to thematic special procedures, see OHCHR, *Standing Invitations* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx>. Regarding state cooperation generally see Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 419, 440-44; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 209-10, 213; Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010) ix; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 65-6; Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998) 126; Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299, 312-13; Ingrid Nifosi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 389, 394; Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *The International Journal of Human Rights* 232, 237-38; Michael O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3(1) *Human Rights Law Review* 53, 69.

[4] See, eg, HRC *Annual Report of the United Nations High Commissioner for Human Rights,* UN Doc A/HRC/22/17 (13 December 2012) [81]; *Joint Communications Report September 2011,* UN Doc A/HRC/18/51, 8; Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, x, 23-4, 75.

[5] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, 31; Golay, Mahon and Cismas, above n 3, 307.

[6] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, x, 23-24, 75; Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'' (2008) 19(1) *The European Journal of International Law* 183, 190-91.

their tasks'.[7] The CHR strongly encouraged states to cooperate with the experts and to extend standing invitations to thematic special procedures.[8] Purportedly the GA takes into account '[t]he extension of a standing invitation, and the overall cooperation afforded to Special Procedures' when assessing the 'pledges and commitments' states make when seeking election to the HRC.[9] But states that have not issued standing invitations have been elected to the HRC, for instance.[10] The enabling resolutions of some special procedures mandates also call on states to cooperate. For example, in the resolution creating the mandate of the Special Rapporteur on Indigenous peoples the CHR '[r]equests all Governments to cooperate fully with the special rapporteur in the performance of the tasks and duties mandated, to furnish all information requested and to react promptly to his/her urgent appeals' and '[e]ncourages all Governments to give serious consideration to the possibility of inviting the special rapporteur to visit their countries'.[11] Further, the HCHR has urged states to fully cooperate with the experts;[12] as have some states.[13]

States are similarly not obliged to comply with any findings that the special procedures experts may make. Even if a mandate-holder is able to conduct a country visit to assess the human rights situation of the country's Indigenous peoples the expert can offer only recommendations to the state, the same applies in their annual reports and other interactions with states.[14] Even if the experts' findings were binding, the special procedures (like other international human rights bodies) would not possess the power to directly coercively enforce compliance with them. Nor does the special procedures' parent body have any power to compel states to take any action in response to the experts' recommendations. It has encouraged their implementation, for example calling upon states 'to study carefully the recommendations addressed to them by special procedures and to keep the relevant mechanisms informed without undue delay on the progress made towards their implementation'.[15] It may pass a resolution

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[7] *Code of Conduct,* UN Doc A/HRC/Res/5/2, art 1. See also Special Procedures, *Manual of Operations of the Special Procedures of the Human Rights Council* (Office of the High Commissioner for Human Rights, 2008) [58] ('*Manual of Operations*').

[8] CHR Res 2004/76, UN Doc E/CN.4/RES/2004/76, arts 1-3.

[9] *Manual of Operations,* above n 7, [58]. See generally *Human Rights Council*, GA Res 60/251, UN Doc A/RES/60/251 (3 April 2006) para 9.

[10] See, eg, Human Rights Watch, *World Report 2010* (2010) 269. See generally Theodore J Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 100.

[11] CHR Res 2001/57, UN Doc E/CN.4/RES/2001/57, paras 7-8. The same injunctions are repeated in later years regarding the Special Rapporteur on Indigenous peoples, see, eg, HRC Res 15/14, UN Doc A/HRC/RES/15/14, paras 2-4.

[12] See, eg, Navi Pillay, 'Statement to the United Nations General Assembly' (New York, 24 October 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12690&LangID=E>.

[13] See, eg, Danish Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* (20 September 2011) James Anaya <http://unsr.jamesanaya.org/videos/webcast-18th-session-of-the-human-rights-council-statement-of-special-rapporteur-and-interactive-dialogue>.

[14] See, eg, Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 203; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights,* above n 3, 146. Flood argues that the corollary of membership to the UN, which draws states under the authority of the *UN Charter*, is an obligation to recognise the validity of the special procedures as a mechanism and the experts' 'decisions'. Flood, above n 3, 91-2.

[15] *CHR Res 2004/76*, UN Doc E/CN.4/RES/2004/76, para 3.

condemning a state's actions or inactions. Special procedures experts have occasionally asked the HRC or CHR to do so. But, as Chapter III noted, rarely have those requests been acted on. Additionally, as Part D of this chapter will show, the experts are acutely under-resourced by the UN, which inhibits their ability to incentivise state compliance through economic rewards. Acting within these constraints special procedures experts have sought to leverage the dialogic regulatory mechanisms available to them to advance the realisation of international Indigenous rights norms.

C *Shaming, Dialogue-Building and Capacity-Building: The Key Regulatory Tools*

1 *The Primacy of Shaming*

Shaming is the central regulatory mechanism engaged by the experts to fulfil their Indigenous mandate. It is the primary regulatory mechanism engaged by much of the UN human rights machinery.[16] However, the gusto with which it is embraced depends on the individual expert. For example, Stavenhagen's style of reporting was more forthright than Anaya's. As Chapter II identified, shaming involves expressing disapproval for non-compliance with a standard.[17] In this context shaming is reliant on the state being made aware in private or in public that it is non-compliant with international Indigenous rights norms and that this non-compliance is disapproved of. The idea being that this disapproval will shame or embarrass states into better compliance. At the least, knowing that its Indigenous rights situation is being monitored may prevent a state from allowing a situation of concern to escalate even if it does not result in a resolution to the rights issue.[18] Crucially, it requires that the state concerned cares about whether it has a positive or negative Indigenous rights reputation. A state may be concerned to have a reputation as an Indigenous rights respecter for a host of reasons: to maintain investment and aid flows, ensure stability within the state or maintain an image as a responsible member of the international community. As identified above, the tool of shaming is engaged primarily through the special procedures' country reporting, communications process, Anaya's special reports on specific cases, and media releases.

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[16] See, eg, Elvira Domínguez Redondo, 'The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review* 673, 687.
[17] See, eg, John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007) 306.
[18] The experts can also act as a form of early warning system for the international system regarding serious rights violations, see, eg, Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights*, above n 3, 134-35, 152; Oliver Hoehne, 'Special Procedures and the New Human Rights Council - A Need for Strategic Positioning' (2007) 4(1) *Essex Human Rights Review* 48, 57; Baldwin-Pask and Scannella, above n 3, 437-39.

(a) Multifaceted Shaming in Country Missions and Reports

(i) A Defining Attribute

Special procedures experts' country missions and reports on those missions are a defining feature of their work. Both thematic and country mandate-holders conduct country visits to investigate first-hand the human rights situation at a national level.[19] Hundreds of missions have been undertaken to countries from across the world; in 2012 alone special procedures experts conducted 80 country missions to 55 states and territories.[20] Most special procedures mandate-holders conduct two country visits per year, with each mission lasting around one to two weeks, visiting the capital and other sites of concern.[21] Anaya has generally secured funding to conduct at least three missions per year, a situation he describes as 'lucky'.[22] Occasionally the experts undertake country missions jointly.[23] Factors that influence whether a country mission is undertaken include the 'expected impact of the visit and the willingness of national actors to cooperate with the mandate-holder, [and] the likelihood of follow-up on any recommendations made'.[24] The agenda for each country mission is determined by the relevant expert often with the assistance of the OHCHR.[25] The special procedures adopted terms of reference for their country visits in 1998, providing for freedom of movement and inquiry amongst other things, which act as a guide to governments in the conduct of visits.[26] The experts meet with a wide range of actors during the missions, including state representatives, such as members of the executive, legislature and judiciary as well as regional and local authorities; members of the NHRI, if one exists; NGOs and victims of human rights violations; the UN and other inter-governmental agencies with a presence there; academics and business actors, where relevant; and the domestic press. Where experts consider Indigenous rights concerns they will generally meet with Indigenous leaders, representatives of IPOs and Indigenous communities, as well as Indigenous individuals who have experienced rights violations. During the visits the experts also receive written submissions, documents and other information from different

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[19] *Manual of Operations,* above n 7, [52]. Note that not all thematic special procedures mandates conduct country missions and that some experts have conducted missions to international organisations, such as the World Bank, and transnational corporations, see, eg, Golay, Mahon and Cismas, above n 3, 312.
[20] OHCHR, *United Nations Special Procedures: Facts and Figures 2012* (2013) 13.
[21] *Manual of Operations,* above n 7, [53]; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 212.
[22] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). He includes in this figure 'special' country missions, which are discussed separately below.
[23] Golay, Mahon and Cismas, above n 3, 309.
[24] For other considerations see *Manual of Operations,* above n 7, [57].
[25] Ibid [64]. Preston et al suggest that, formerly at least, governments exercised significant say over the Special Rapporteur on Indigenous peoples' itinerary and meetings, see Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007) 34.
[26] *Manual of Operations,* above n 7, annex III.

sources often in quantities impossible to digest in the timeframe or 10,000 word limit available for the report on the mission.[27]

The action is not over when the missions end. Following their visits, special procedures' mandate-holders submit a report on the mission to the HRC (previously the CHR) setting out their findings and recommendations.[28] A few experts issue short preliminary notes soon after the mission setting out their key findings in order to capitalise on media interest generated during the visit, as it often takes many months for the final report to be released.[29] In exceptional cases governments provide formal written responses to the reports, which are attached as addenda to the reports.[30] Most do not, meaning that state views on the reports have to be gleaned from statements made by the government during the interactive dialogue where the report is presented to the special procedures' parent body and in media releases.[31]

(ii) Expansive Indigenous Rights Scrutiny

The Special Rapporteur on Indigenous peoples has conducted country missions to a large number of countries from both the global North and South. By late 2013 the mandate had conducted missions to 26 countries from across Africa, Asia, Central and South America and the Caribbean, the Arctic, Eastern Europe, North America and the Pacific, some of them multiple times.[32] Both experts conducted country missions to their home states: Stavenhagen to Mexico and Anaya to the United States. The majority of states that Stavenhagen carried out missions to were in Central and South America, reflecting his scholarly and physical connection to the region, the openness of these states to the missions, the large populations of Indigenous peoples there and the grave Indigenous rights abuses that persist in the region. Stavenhagen conducted country missions to Guatemala and the Philippines in 2002;[33] Mexico and Chile in 2003;[34] Colombia and Canada in 2004;[35] South Africa and New Zealand in 2005;[36] Ecuador and

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[27] Ibid [85]; Interview 9 (Telephone Interview, 6 September 2010).
[28] Ibid [84].
[29] See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Preliminary Note on the Situation of Sami People in the Sápmi Region spanning Norway, Sweden and Finland,* UN Doc A/HRC/15/37/Add.6 (7 July 2010).
[30] *Code of Conduct,* UN Doc A/HRC/Res/5/2, art 8(d); *Manual of Operations,* above n 7, [74].
[31] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 208.
[32] The mandate-holders have visited many more countries in their role as Special Rapporteur on Indigenous peoples, these are simply the countries where an official country mission to assess the general Indigenous rights situation has been conducted. See generally Preston et al, above n 25, 30-47.
[33] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2; CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted in Accordance with Commission on Human Rights Resolution 2002/65: Mission to the Philippines,* UN Doc E/CN.4/2003/90/Add.3 (5 March 2003).
[34] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Mexico,* UN Doc E/CN.4/2004/80/Add.2 (23 December 2003); CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2003/56: Mission to Chile,* UN Doc E/CN.4/2004/80/Add.3 (17 November 2003).
[35] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of*

Kenya in 2006;[37] and Bolivia in 2007.[38] Stavenhagen also conducted two follow-up country missions to assess the impact of his earlier recommendations to Guatemala and Mexico in 2006.[39] The recurrent feature of Guatemala and Mexico in his visits reflects the lead taken by these states in supporting his work and in the creation of the mandate of the Special Rapporteur on Indigenous peoples.

Anaya has conducted country missions to a more diverse mix of states. Anaya conducted country missions to Brazil and Nepal in 2008;[40] Australia, Botswana and the Russian Federation in 2009;[41] the Sápmi region of Norway, Sweden and Finland, and the Republic of the Congo in 2010;[42] New Caledonia and Argentina in 2011;[43] the United States, El Salvador and Namibia in 2012;[44] and to Panama in 2013.[45] Anaya had a further visit planned for the end of

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Indigenous People, Mr Rodolfo Stavenhagen: Mission to Colombia, UN Doc E/CN.4/2005/88/Add.2 (10 November 2004); CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Canada,* UN Doc E/CN.4/2005/88/Add.3 (2 December 2004).

[36] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to South Africa,* UN Doc E/CN.4/2006/78/Add.2 (15 December 2005); *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3.

[37] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Ecuador,* UN Doc A/HRC/4/32/Add.2 (28 December 2006); HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Kenya,* UN Doc A/HRC/4/32/Add.3 (26 February 2007).

[38] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Bolivia,* UN Doc A/HRC/11/11 (18 February 2009) ('*Stavenhagen Report on Bolivia 2009*').

[39] *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [23], [24], [58]-[70]. In the same report Stavenhagen also commented on recent developments in Canada, Chile and Colombia despite not having conducted follow-up country visits to those states: at [42]-[57], [71]-[76]. Stavenhagen conducted a form of follow-up mission to the Philippines, organised by IPOs and NGOs (rather than an official mission at the state's invitation), see HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: General Considerations on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in Asia*, UN Doc A/HRC/6/15/Add.3 (1 November 2007) [4]. Stavenhagen also conducted a joint visit to Mexico with the expert on housing in 2007, which is discussed below.

[40] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Report on the Situation of Human Rights of Indigenous Peoples in Brazil,* UN Doc A/HRC/12/34/Add.2 (26 August 2009); *Anaya Report on Nepal,* UN Doc A/HRC/12/34/Add.3.

[41] HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010); *Anaya Report on Botswana,* UN Doc A/HRC/15/37/Add.2; HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Situation of Indigenous Peoples in the Russian Federation,* UN Doc A/HRC/15/37/Add.5 (23 June 2010).

[42] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland,* UN Doc A/HRC/18/35/Add.2 (6 June 2011) ('*Anaya Report on Sápmi Region 2011*'); HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in the Republic of the Congo,* UN Doc A/HRC/18/35/Add.5 (11 July 2011). The report on the Sápmi region was the first country report by the Special Rapporteur specifically examining Indigenous peoples' rights across state borders.

[43] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Kanak People in New Caledonia, France*, UN Doc A/HRC/18/35/Add.6 (23 November 2011); HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in Argentina,* UN Doc A/HRC/21/47/Add.2 (4 July 2012).

[44] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in the United States of America,* UN Doc A/HRC/21/47/Add.1 (30 August 2012) ('*Anaya Report on US 2012*'); HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in El Salvador*, UN Doc A/HRC/24/41/Add.2 (25 June 2013); HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in Namibia*, UN Doc A/HRC/24/41/Add.1 (25 June 2013).

[45] James Anaya, 'Declaración del Relator Especial sobre los Derechos de los Pueblos Indígenas al Concluir su Visita Oficial a Panamá' (Media Release, 26 July 2013) <http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama>.

2013, to Peru. He also hoped to visit 'one or two final countries before his mandate ends in April 2014.'[46] In addition, Anaya has conducted several follow-up missions to assess the impact of Stavenhagen's recommendations: to Chile in 2009,[47] Colombia in 2009,[48] New Zealand in 2010,[49] and Canada in 2013.[50]

Other special procedures mandate-holders have also directed attention at Indigenous rights concerns in the course of their country visits and follow-up reports. An array of thematic experts have done so, including those regarding freedom of religion,[51] housing,[52] violence against women,[53] slavery,[54] mercenaries,[55] internally displaced persons,[56] extrajudicial executions,[57] education,[58] racism,[59] human rights defenders,[60] health,[61] enforced

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[46] *Anaya Report to GA 2013,* UN Doc A/68/317, [20].
[47] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: The Situation of Indigenous Peoples in Chile: Follow-up to the Recommendations made by the Previous Special Rapporteur,* UN Doc A/HRC/12/34/Add.6 (5 October 2009).
[48] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr James Anaya: The Situation of Indigenous Peoples in Colombia: Follow-up to the Recommendations made by the Previous Special Rapporteur*, UN Doc A/HRC/15/37/Add.3 (25 May 2010).
[49] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4.
[50] James Anaya, 'United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Statement upon Conclusion of the Visit to Canada' (Media Release, 15 October 2013) <http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.
[51] See, eg, HRC, *Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt: Mission to Paraguay,* UN Doc A/HRC/19/60/Add.1 (26 January 2012); CHR, *Report Submitted by Mr Abdelfattah Amor, Special Rapporteur on the Question of Religious Intolerance, in Accordance with Commission on Human Rights Resolution 1998/18: Visit to the United States of America,* UN Doc E/CN.4/1999/58/Add.1 (9 December 1998).
[52] See, eg, HRC, *Raquel Rolnik Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik: Mission to Argentina,* UN Doc A/HRC/19/53/Add.1 (21 December 2011); HRC, *Miloon Kothari Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Australia,* UN Doc A/HRC/4/18/Add.2 (11 May 2007).
[53] See, eg, HRC, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo: Follow-up Mission to El Salvador,* UN Doc A/HRC/17/26/Add.2 (14 February 2011); CHR, *Yakin Ertürk Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk: Mission to Mexico,* UN Doc E/CN.4/2006/61/Add.4 (13 January 2006).
[54] See, eg, HRC, *Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences, Gulnara Shahinian Addendum Mission to Peru,* UN Doc A/HRC/18/30/Add.2 (15 August 2011) ('*Expert on Slavery Peru 2011*').
[55] See, eg, HRC, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination Chairperson-Rapporteur, Mr José Luis Gómez del Prado: Mission to Peru,* UN Doc A/HRC/7/7/Add.2 (4 February 2008).
[56] See, eg, HRC, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin: Mission to Colombia,* UN Doc A/HRC/4/38/Add.3 (24 January 2007).
[57] HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Mission to Ecuador,* UN Doc A/HRC/17/28/Add.2 (9 May 2011); HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Mission to Colombia,* UN Doc A/HRC/14/24/Add.2 (31 March 2010).
[58] See, eg, HRC, *Report of the Special Rapporteur on the Right to Education, Vernor Muñoz: Mission to Mexico*, UN Doc A/HRC/14/25/Add.4 (2 June 2010); HRC, *Report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos: Mission to Malaysia,* UN Doc A/HRC/11/8/Add.2 (20 March 2009).
[59] See, eg, CHR, *Report Submitted by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Mission to Brazil,* UN Doc E/CN.4/2006/16/Add.3 (28 February 2006); CHR, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène: Mission to Japan,* UN Doc E/CN.4/2006/16/Add.2 (24 January 2006).
[60] See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya: Mission to India,* UN Doc A/HRC/19/55/Add.1 (6 February 2012).
[61] See, eg, HRC, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Mission to Australia,* UN Doc A/HRC/14/20/Add.4 (3 June 2010).

disappearances,[62] terrorism,[63] independence of judges,[64] food,[65] water,[66] cultural rights[67] toxic wastes,[68] and extreme poverty.[69] Country mandate-holders, such as the experts on Cambodia and Guatemala, have considered the human rights situation of Indigenous peoples during their country missions too.[70]

(iii) Shaming through Speech Acts from the Field

Special procedures experts engage the mechanism of shaming to advance their Indigenous rights mandate in several ways throughout the country visit and reporting process. They do so through speech acts while in the target country. They shame state actors during meetings. Special procedures mandate-holders often have access to very high levels of government, including heads of state, government ministers, senior government bureaucrats, and members of the legislature both from inside and outside of the governing political party or parties. This is an important attribute of the mechanism. It is access that many Indigenous peoples and Indigenous rights advocates do not have.[71] Mandate-holders will usually meet with

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[62] See, eg, CHR, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Colombia,* UN Doc E/CN.4/2006/56/Add.1 (17 January 2006).

[63] See, eg, HRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Peru,* UN Doc A/HRC/16/51/Add.3 (15 December 2010).

[64] See, eg, HRC, Gabriela Carina Knaul de Albuquerque e Silva, *Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to Mexico,* UN Doc A/HRC/17/30/Add.3 (18 April 2011); CHR, *Follow-up Report Submitted by the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: Follow-up Mission to Ecuador,* UN Doc E/CN.4/2006/52/Add.2 (31 January 2006).

[65] See, eg, HRC, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Mission to Canada*, UN Doc A/HRC/22/50/Add.1 (24 December 2012); HRC, *Report of the Special Rapporteur on the Right to Food, Jean Ziegler: Mission to Bolivia,* UN Doc A/HRC/7/5/Add.2 (30 January 2008).

[66] See, eg, HRC, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque: Mission to the United States of America,* UN Doc A/HRC/18/33/Add.4 (2 August 2011); HRC, *Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque: Mission to Bangladesh (3-10 December 2009),* UN Doc A/HRC/15/55 (22 July 2010) ('*Experts on Poverty and Water Bangladesh 2010*').

[67] See, eg, HRC, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed: Brazil,* UN Doc A/HRC/17/38/Add.1 (21 March 2011).

[68] See, eg, HRC, *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, Calin Georgescu: Mission to the Marshall Islands (27-30 March 2012) and the United States of America (24-27 April 2012),* UN Doc A/HRC/21/48/Add.1 (3 September 2012); HRC, *Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu: Mission to the United Republic of Tanzania,* UN Doc A/HRC/9/22/Add.2 (18 August 2008).

[69] See, eg, *Experts on Poverty and Water Bangladesh 2010*, UN Doc A/HRC/15/55 (22 July 2010).

[70] See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P Subedi,* UN Doc A/HRC/18/46 (2 August 2011); CHR, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht,* UN Doc E/CN.4/2005/116 (20 December 2004); CHR, *Report by the Independent Expert, Mrs Mónica Pinto, on the Situation of Human Rights in Guatemala, Prepared in Accordance with Commission Resolution 1993/88,* UN Doc E/CN.4/1994/10 (20 January 1994) ('*Pinto Report 1994*'); CHR, *Report by the Independent Expert, Mr Christian Tomuschat, on the Situation of Human Rights in Guatemala, Prepared in Accordance with Paragraph 14 of Commission Resolution 1990/90*, UN Doc E/CN.4/1991/5 (11 January 1991) ('*Tomuschat Report 1991*').

[71] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). See also Katarina Tomaševski, 'Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004' (2005) 5(2) *Human Rights Law Review* 205, 311.

the government authority responsible for the visit, often the Ministry of Foreign Affairs, at the beginning and end of their visit. The experts use these meetings to raise Indigenous rights concerns and shame, gently or forcefully depending on the expert, state representatives into addressing those concerns.[72] During the initial meeting the government is usually informed of the visit's purpose, the key issues to be addressed and the mandate-holders' anticipated approach. During the departing meeting the mandate-holder typically shares his or her preliminary findings and recommendations with the government, the process for preparing the report and any follow-up measures.[73] The fact that the experts are physically present in the country, looking government actors in the eye during these conversations, is an advantage of the mechanism.

Special procedures mandate-holders shame states through the media as part of their country visits. It is uncommon for experts to speak with domestic media regarding specific rights concerns during their visits because it can suggest a pre-determined position on the rights situation and can put the government, with whom the expert is seeking cooperation, offside. Most experts hold-off engaging with the media on rights concerns until the end of their country visit. At the end of the country visit experts customarily hold a press conference where they discuss their visit and, in some instances, highlight key preliminary findings drawing public attention to their concerns.[74] For example, in the media statement at the end of his country mission to Namibia in September 2012 Anaya commented, 'I have detected a lack of coherent Government policy that assigns a positive value to the distinctive identities and practices of…indigenous peoples, or that promotes their ability to survive as peoples'.[75] Stavenhagen and other special procedures experts have similarly highlighted Indigenous rights concerns in the media statements they have issued at the conclusion of their country visits.[76] Piccone argues that, from the perspective of domestic human rights advocates, it these media statements made by the experts while they are in the country that matter most, given the momentum sapping time lags between when the visits occur and when the final country reports are produced and presented to the HRC.[77]

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[72] Jernow has described mandate-holders behaviour generally as located 'along a scale from low-key diplomatic negotiations to full-blown exposure.' Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1995-1996) 28 *Journal of International Law and Politics* 785, 810.

[73] *Manual of Operations,* above n 7, [71].

[74] Ibid [72]; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 212; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 27, 72.

[75] James Anaya, 'Namibia: UN Expert Calls for Greater Inclusion of Indigenous Peoples at All Levels' (Media Release, 28 September 2012) James Anaya <http://unsr.jamesanaya.org/statements/namibia-un-expert-calls-for-greater-inclusion-of-indigenous-peoples-at-all-levels>.

[76] See, eg, OHCHR, 'Special Rapporteur of United Nations on the Human Rights and Fundamental Freedoms of Indigenous People Concludes Visit to South Africa' (Media Statement, 8 August 2005) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=458&LangID=E>; OHCHR, 'United Nations Special Rapporteur on Right to Food Concludes Mission to Bolivia' (Media Statement, 23 May 2007) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=433&LangID=E>.

[77] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 212.

(iv) Shaming via Text

Shaming is prominently leveraged as a regulatory tool in the experts' elaboration of rights concerns in their country reports, including reports regarding follow-up country missions. Following the mission the expert produces a report assessing the general rights situation of the relevant country, highlighting areas where the state is falling short of international human rights norms. The reports have been described as the experts' most visible and important human rights contribution,[78] although their style and quality varies across experts as well as across missions by the same expert.[79] Naming and shaming is at their centre. Gerd Oberleitner goes as far as describing the reports as fulfilling a '"prosecutorial" function'.[80] He argues that 'however cautiously worded or academically paraphrased some of these assessments may be, they inevitably speak out on 'right' and 'wrong'. This comes close to the work of a prosecutor in national legal systems'.[81] Before the reports are made public mandate-holders give the concerned state an opportunity to comment on the factual content of an advance draft,[82] which also provides states with an opportunity to prepare a strategy to manage any anticipated fallout from the report. Indigenous peoples and their organisations have no comparable opportunity, although the special procedures' Manual of Operations provides that the experts may solicit comments on the draft report from UN country teams 'and other appropriate sources',[83] and Anaya remarks that 'on a number of occasions' he has advised Indigenous peoples of recommendations directed at them before making them public.[84]

Indigenous peoples' rights to their land and natural resources are the centrally recurring concern across special procedures experts' statements regarding Indigenous peoples in their country reports. They feature in every country report of the Special Rapporteur on Indigenous peoples. For example, in his report on Chile in 2003 Stavenhagen identified '[o]ne of the most serious long-standing problems affecting indigenous peoples in Chile relates to land ownership and territorial rights, as a result of a long process that has left them stripped of their lands and resources',[85] while in his report on Botswana in 2010 Anaya devoted especial attention to the

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[78] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) 894; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 211.

[79] See, eg, Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994) 127.

[80] Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity, 2007) 58.

[81] Ibid 58 (citations omitted).

[82] *Code of Conduct,* UN Doc A/HRC/Res/5/2, art 13(c). See generally Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 212.

[83] *Manual of Operations,* above n 7, [74]

[84] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

[85] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2003/56: Mission to Chile,* UN Doc E/CN.4/2004/80/Add.3 (17 November 2003) 2.

removal of Indigenous peoples from the Central Kalahari Game Reserve.[86] Other special procedures mandate-holders have similarly expressed concerns regarding land and natural resources, including the experts on internally displaced persons concerning Colombia,[87] slavery regarding Peru,[88] racism in respect of Japan,[89] and Cambodia in relation to that state.[90]

Indigenous rights concerns that also feature frequently in special procedures experts' reports include those regarding Indigenous peoples' participation in decision-making; racism and discrimination; rights to culture, especially regarding bilingual education; social welfare and development; access to justice; and conflict and violence. As an illustration, in his 2004 report on Colombia Stavenhagen identified core concerns regarding the armed conflict in Indigenous areas; violence, drug trafficking and human rights; the environment, land and human rights; access to justice and Indigenous law; the situation of Indigenous women; sustainable development and the recognition of Indigenous identity; as well as the extension of basic social services.[91] Anaya examined similar issues in his 2011 report on New Caledonia, where he focused on the UN-supported decolonisation process and human rights issues regarding customary authority and the administration of justice; Kanak participation in the political arena and governance; lands and resources; the Kanak language; maintaining and broadening awareness of Kanak culture and heritage; persistent social and economic disparities; children and youth; and issues confronting Kanak women.[92] Additional special procedures' mandate-holders have also touched on these issues. For example, the expert on terrorism has expressed concerns regarding Indigenous peoples' right to culture in respect of Peru;[93] the expert on health has highlighted the need for Indigenous participation in decision-making in Australia;[94] and the expert on the independence of judges has highlighted access to justice issues for Indigenous peoples in Mexico.[95]

The experts further leverage the regulatory power of shaming through the recommendations that they offer in each country report. At the end of each country report the

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[86] *Anaya Report on Botswana,* UN Doc A/HRC/15/37/Add.2, 1-2.
[87] HRC, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin: Mission to Colombia,* UN Doc A/HRC/4/38/Add.3 (24 January 2007) [80](d).
[88] *Expert on Slavery Peru 2011*, UN Doc A/HRC/18/30/Add.2, [73](c), (d), (f), (g).
[89] CHR, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène: Mission to Japan,* UN Doc E/CN.4/2006/16/Add.2 (24 January 2006) [85]-[87].
[90] HRC, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai,* UN Doc A/HRC/4/36 (30 January 2007) [108].
[91] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen: Mission to Colombia,* UN Doc E/CN.4/2005/88/Add.2 (10 November 2004) [23]-[89].
[92] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Kanak People in New Caledonia, France*, UN Doc A/HRC/18/35/Add.6 (23 November 2011) [18]-[63].
[93] HRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Peru,* UN Doc A/HRC/16/51/Add.3 (15 December 2010) [39].
[94] HRC, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Mission to Australia,* UN Doc A/HRC/14/20/Add.4 (3 June 2010) [100].
[95] HRC, Gabriela Carina Knaul de Albuquerque e Silva, *Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to Mexico,* UN Doc A/HRC/17/30/Add.3 (18 April 2011) [94](jj), (kk).

special procedures mandate-holder sets out a suite of recommendations. The vast majority of these recommendations are directed to the government of the country concerned, but the experts also sometimes direct recommendations to the UN and international system, Indigenous peoples, business actors and civil society. The Code of Conduct requires that the recommendations are 'objective' and the Manual of Operations that they are 'SMART: specific, measurable, attainable, realistic, and time-bound.'[96] The nature and formulation of the recommendations varies between the experts and the states concerned. But the recommendations issued touch on all of the core concerns identified above. The Special Rapporteur on Indigenous peoples' recommendations have included that 'special priority should be accorded to the agrarian land regularization process' in Bolivia;[97] '[a] comprehensive programme of law and policy reform should be in place to advance, in consultation with indigenous peoples, implementation of Nepal's commitments under Convention 169 and the United Nations Declaration';[98] and that '[t]he Aboriginal and Torres Strait Islander peoples should be fully consulted about all initiatives being developed to overcome indigenous disadvantage' in Australia.[99] Additional special procedures mandate-holders have also issued recommendations directed at shaming states into Indigenous rights conformity, including the expert on Cambodia who recommended that the Government '[b]an the sale of land and the granting of economic land and other concessions in areas occupied by indigenous communities, pending the registration of indigenous claims over traditional lands and the collective titling process';[100] the expert on education who recommended that the Government of Paraguay '[d]evelop initiatives to promote and enhance the status of indigenous languages and cultures, so that all social groups, including non-indigenous groups, can see the benefits of intercultural education';[101] and the Working Group on mercenaries who recommended to the Peruvian Government that '[t]he mechanisms of prior consultation established under the 1989 ILO Convention No. 169...should be observed.'[102]

(v) Follow-up as Repeat Shaming

Shaming is a particular focus of special procedures mandate-holders follow-up country visits. Mandate-holders sometimes conduct follow-up visits to a country they, or their

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[96] *Code of Conduct,* UN Doc A/HRC/Res/5/2, arts 12(a), 13(b); *Manual of Operations,* above n 7, [98].
[97] *Stavenhagen Report on Bolivia 2009,* UN Doc A/HRC/11/11, [87].
[98] *Anaya Report on Nepal,* UN Doc A/HRC/12/34/Add.3, [78].
[99] HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010) [92].
[100] HRC, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai,* UN Doc A/HRC/4/36 (30 January 2007) [108].
[101] See, eg, HRC, *Report of the Special Rapporteur on the Right to Education, Mr Vernor Muñoz: Mission to Paraguay,* UN Doc A/HRC/14/25/Add.2 (16 March 2010) [82](k).
[102] HRC, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination Chairperson-Rapporteur, Mr José Luis Gómez del Prado: Mission to Peru,* UN Doc A/HRC/7/7/Add.2 (4 February 2008) [75](j).

predecessors in the mandate, visited before them in order to assess the extent to which the earlier recommendations have been implemented. According to the Manual of Operations, follow-up 'is considered to be a crucial element in ensuring that appropriate measures are taken in response to the work of the Special Procedures.'[103] These visits give experts an opportunity to shame states by highlighting areas where the state continues to be noncompliant with international Indigenous rights norms, as well as to praise any progress made. Given resource constraints follow-up missions are limited in number, with many experts preferring to visit a wide number of states rather than to continually follow progress in only a few.[104] As a result, the experts are heavily reliant on the efforts of IPOs, NGOs, NHRIs and UN actors such as OHCHR country teams to follow-up on implementation of their recommendations.[105] But the Special Rapporteur on Indigenous peoples is one of the mandates to have conducted the most follow-up visits.[106] As identified above, Stavenhagen conducted follow-up missions to Mexico and Guatemala. In Mexico Stavenhagen reported some moves to implement his recommendations, including the adoption of legislative measures at state level recognising Indigenous peoples' rights; steps to review the administration of justice in order to address Indigenous peoples' needs; and efforts to improve the institutions of, and resources available to, bilingual intercultural education. But he found that '[d]espite these positive steps, many important human rights concerns pointed out in the Special Rapporteur's recommendations have still not been addressed.'[107] He identified some positive advances in Guatemala too,[108] which are considered in Chapter VI.

Anaya conducted follow-up missions to Chile, Colombia, New Zealand and Canada where he saw mixed results. In Chile Anaya noted some progress, including ratification of *ILO Convention 169*, constitutional reform initiatives regarding Indigenous peoples and the development of plans in response to Stavenhagen's recommendations. But he identified major challenges yet to be addressed, particularly regarding 'consultation and cooperation, rights to land and territory, development of natural resources, and policies on conflicts connected with claims to Mapuche lands.'[109] In Colombia Anaya identified few positive developments. He acknowledged the Government's 'readiness' to recognise Indigenous peoples' rights and the

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[103] *Manual of Operations,* above n 7, [88].
[104] See, eg, Baldwin-Pask and Scannella, above n 3, 447-448; Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, 19-20.
[105] Some of these actors undertake impressive activities in this regard. See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Study Regarding Best Practices Carried Out to Implement the Recommendations Contained in the Annual Reports of the Special Rapporteur*, UN Doc A/HRC/4/32/Add.4 (26 February 2007) [21], [27], [30], [31], [38]-[41].
[106] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 227 n 40.
[107] *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [65]-[70].
[108] Ibid [58]-[64].
[109] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: The Situation of Indigenous Peoples in Chile: Follow-up to the Recommendations Made by the Previous Special Rapporteur,* UN Doc A/HRC/12/34/Add.6 (5 October 2009) 1-2.

proposals developed to address Stavenhagen's recommendations. However, he expressed concern at the grave situation of Indigenous peoples there, including the lack of laws, programmes and policies ensuring the effective protection of Indigenous peoples rights to their lands and natural resources, prior consultation, and economic, social and cultural rights, which was aggravated by the continuing internal conflict.[110] In the press conference at the close of his October 2013 visit to Canada Anaya identified that Canada had 'addressed some of the concerns that were raised by my predecessor', including actions to address gender concerns in the country's *Indian Act*. Yet, he identified that 'daunting challenges remain' and concluded 'that Canada faces a crisis when it comes to the situation of indigenous peoples of the country.'[111] Anaya noted the most positive developments in New Zealand,[112] which are examined in the next chapter.

(vi) Constrained Dissemination

Wide dissemination of the reports and media statements is crucial to their coming to the attention of actors who may bring pressure to bear on the concerned state to action them. The country reports are publicised and made publically available but primarily over the Internet. The reports are presented annually to the HRC (and before it the CHR). Summaries are also sometimes presented to the GA; the Special Rapporteur on Indigenous peoples is one mandate that presents annually to the GA.[113] Advance unedited versions of the country reports are released to the public in advance of their submission to the HRC. The advance and final reports are available online through the OHCHR's website and, where they exist, the personal websites set up by special procedures mandate-holders to promote their work. Additional efforts are sometimes made to share the reports' findings with Indigenous peoples and other actors at the country-level, such as through video conferences or meetings.[114]

Since 2003, country reports are also publicised to an international audience during the interactive dialogue before the HRC (and formerly the CHR) at which each mandate annually presents its reports. These dialogues are now webcast over the Internet, opening them up to a broader audience. They provide the mandate-holder with an opportunity to publically raise concerns regarding the Indigenous rights situation in countries they have visited that year and

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[110] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr James Anaya: The Situation of Indigenous Peoples in Colombia: Follow-up to the Recommendations Made by the Previous Special Rapporteur,* UN Doc A/HRC/15/37/Add.3 (25 May 2010) 1-2.
[111] James Anaya, *United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Statement upon Conclusion of the Visit to Canada,* above n 50. The Act referred to is the *Indian Act*, RSC 1951 C I-5.
[112] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, 1-2.
[113] Since 2004 the Special Rapporteur on Indigenous peoples has been requested to present almost annually to the GA. *CHR Res 2004/62*, UN Doc E/CN/4/RES/2004/62, para 14; *CHR Res 2005/51*, UN Doc E/CN/4/RES/2005/51, para 18; *GA Res 63/161*, UN Doc A/RES/63/161, para 1; *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 3; *HRC Res 18/8*, UN Doc A/HRC/Res/18/8, para 3; *HRC Res 21/24,* UN Doc A/HRC/RES/21/24, para 3.
[114] See, eg, OHCHR, *United Nations Special Procedures: Facts and Figures 2010* (2011) 12; *Anaya Report to GA 2013,* UN Doc A/68/317, [25].

the representatives of the concerned countries then have an opportunity to comment.[115] Since 2011 this has been followed by an opportunity for the representative of the NHRI from the concerned country to speak.[116] The mandate-holder also has an opportunity to respond to state and NHRI's comments. In principle the dialogue is an excellent innovation. It provides for a more dynamic exchange of information between core interested parties regarding countries' rights situations. However, in practice it is constrained by the minimal amount of time available to those speaking: participants have only a few minutes to present their concerns and comments. And rarely have mandate-holders used the interactive dialogue as an opportunity to express especial criticism of states' Indigenous rights situations preferring to make generalised statements of thanks for state cooperation and to make fleeting or opaque comments regarding areas requiring attention by states.[117] Some states, on the other hand, have not held back in voicing their opposition to the contents of special procedures experts' reports regarding their Indigenous rights situations, personally attacking the experts and occasionally requesting that experts' reports be withdrawn.[118] For example, during the interactive dialogue at which Stavenhagen's country report on the Philippines was presented, the Philippine delegation reportedly described Stavenhagen as having 'malicious intentions' and his report on the country as 'nothing more than a litany of unsubstantiated allegations and ridiculous recommendations.'[119] A scathing response is sometimes the cost of shaming governments. But it might bring other benefits. Preston et al observed that the severity of the Philippine's response inspired great curiosity about Stavenhagen's report.[120]

(vii) Publicising Unresponsiveness

Where a request to visit a state has been sent and a positive response has not been received from the relevant government some mandate-holders will note with regret that this is the case in their annual reports, before international fora, or in the media in order to shame states into agreeing to the visit. Anaya has previously identified, inter alia, India, Indonesia, Bangladesh, Cambodia, Malaysia, Papua New Guinea, the United States and Canada as states

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[115] *Manual of Operations,* above n 7, [86].
[116] See, eg, New Zealand Human Rights Commission (NZHRC) commissioner, Rosslyn Noonan, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue,* above n 13.
[117] See, eg, James Anaya speaking in ibid. Piccone states of the practice generally it 'is typically neither interactive nor a dialogue.' Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 52.
[118] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).
[119] Philippine Government representative, Denis Yap Lepatan, cited in CHR, 'Special Rapporteur on Indigenous People Presents Report to Commission on Human Rights', (Press Release, UN Doc HR/CN/1028, 10 April 2003) ('*Press Release CHR 2003*'). Stavenhagen recounts that he was also 'accused of giving support to terrorist organisations… once or twice'. Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).
[120] Preston et al, above n 25, 33. Regarding the heightened attention negative government responses to the experts can garner see generally Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 116.

with outstanding requests to visit.[121] The dominance of Asian states in this list is notable. It prompted Anaya to conduct a two-day 'consultation' in Kuala Lumpur early in 2013, circumventing the requirement for state consent to a country visit, where he met with Indigenous peoples from Cambodia, India, Indonesia, Nepal, the Philippines, Viet Nam, Bangladesh, Japan, Malaysia, Thailand, and Myanmar. He presented his findings as a special report on the situation of Indigenous peoples in Asia in 2013 and subsequently engaged with the relevant governments on the concerns raised.[122] He has since expressed the hope 'that Asian Governments will show increased openness to engaging on indigenous issues and will increase cooperation with the mandate'.[123] At times the experts' tactic of shaming states with outstanding requests has been successful: Anaya ultimately conducted country missions to the United States and Canada.[124] At other times mandate-holders do not single out specific states but rather encourage states generally to respond positively to their request.[125] A periodically updated table of the status of requests for country visits is maintained on the OHCHR's website, which further draws attention to recalcitrant states for those actors who know where to look.[126]

(b) Communications and the Art of Subtle Shaming

(i) Elemental Device

Communications are another fundamental aspect of most special procedures experts' shaming repertoire, although the shaming techniques engaged are more indirect. Communications comprise a large portion of many thematic special procedures mandate-holders' work and feature in some country mandate-holders working methods too.[127] Communications in the thousands have been sent to all regions of the world; during 2012 alone over 600 communications were sent to the governments of 127 countries.[128] Some are also sent

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[121] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [31], [60]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [16].

[122] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Consultation on the Situation of Indigenous Peoples in Asia*, UN Doc A/HRC/24/41/Add.3 (31 July 2013). See also *Anaya Report to GA 2013,* UN Doc A/68/317, [19], [23]-[24].

[123] *Anaya Report to GA 2013,* UN Doc A/68/317, [24].

[124] For example, during the interactive dialogue in the HRC the United States assured Anaya that its failure to respond was 'an administrative oversight,' stated that it would respond promptly and invited Anaya to visit in 2012. United States Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Part II, Clustered Interactive Dialogue on Indigenous Peoples, 19th Plenary Meeting* (21 September 2011) United Nations <http://www.unmultimedia.org/tv/webcast/2011/09/part-ii-clustered-interactive-dialogue-on-indigenous-peoples-19th-plenary-meeting.html>. Preston et al noted that Stavenhagen had issued requests to visit the Russian Federation and Malaysia, visits that did not transpire, although Anaya later conducted a mission to the Russian Federation. Preston et al, above n 25, 32.

[125] See, eg, *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [19].

[126] *Manual of Operations,* above n 7, [56].

[127] For an example of a country mandate-holder that has sent communications see HRC, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana,* UN Doc A/HRC/19/67 (7 March 2012) [5].

[128] OHCHR, *United Nations Special Procedures: Facts and Figures 2012* (2013) 10. Note that the High Commissioner for Human Rights (HCHR) identifies the number of countries as slightly lower at 125. HRC, *Annual*

to non-government actors, such as companies.[129] Communications refer to the letters and follow-up letters special procedures experts send to governments, via diplomatic channels, regarding specific allegations of human rights violations that fall within their mandates. Communications can include reference to individual cases; general trends and patterns; violations affecting a particular group; the content of legislation incompatible with international human rights standards; and rights violations that have occurred or are ongoing or that have a high risk of occurring. They can be sent by one expert alone or, more commonly, jointly with one or more others.[130] Three-quarters of the communications sent in 2012 were sent jointly by two or more mandate-holders.[131]

Communications take two forms: urgent appeals or letters of allegation. Urgent appeals 'communicate information in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature' that require urgent intervention.[132] Letters of allegation 'communicate information about violations that are alleged to have already occurred' and are of a less urgent nature.[133] In both instances the general process entails sending a communication to the concerned government 'requesting information, commenting on the allegation and suggesting that preventive or investigatory action be taken.'[134] Communications are confidential until their publication in reports presented to the special procedures' parent body.[135] This means that those who share information regarding alleged rights violations can be left in the dark about any action taken by the experts for long periods.[136] Mandate-holders are not required to inform those who provide information of any action taken (although the Manual of Operations encourages it), and resourcing issues prevent many experts from doing so.[137] As a result, valuable time in which those individuals or groups could be leveraging the shame factor associated with the experts' involvement can be lost. As identified in the previous chapter, since 2011 mandate-holders have produced a joint communications report, although a few experts, such as Anaya, still prepare individual communications reports to set out their observations and analysis on the cases.[138]

Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17 (13 December 2012) [81].

[129] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [34].

[130] See, eg, *Manual of Operations,* above n 7, [28]-[48]; OHCHR, *Special Procedures of the Human Rights Council* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>; OHCHR, *OHCHR Report 2011* (2012) 441.

[131] HRC, *Annual Report of the United Nations High Commissioner for Human Rights,* UN Doc A/HRC/22/17 (13 December 2012) [81].

[132] *Manual of Operations,* above n 7, [43].

[133] Ibid [46].

[134] OHCHR, *Special Rapporteur on the Rights of Indigenous Peoples: Communications* <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Communications.aspx>. See also OHCHR, *Special Procedures of the Human Rights Council: Communications* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>.

[135] See, eg, Golay, Mahon and Cismas, above n 3, 307.

[136] See, eg, Baldwin-Pask and Scannella, above n 3, 446.

[137] *Manual of Operations,* above n 7, [25], [48], [95]. This has attracted criticism from NGOs, see, eg, Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 58.

[138] For access to Anaya's communications reports see James Anaya, *Communications – Cases Examined* <http://unsr.jamesanaya.org/list/communications-cases-examined>.

Whether a mandate-holder intervenes on the basis of information it receives is at the discretion of the expert. Given the volume of cases mandate-holders receive most are not able to respond to every situation.[139] Since 2007 the assessment of whether to act has been guided by the admissibility criteria set out in the special procedures' Code of Conduct. Experts will usually look to 'the reliability of the source and the credibility of information received; the details provided; and the scope of the mandate', although the specific requirements will depend on the expert.[140] For example, Anaya 'gives priority consideration to those cases involving infringements of the collective rights of indigenous peoples',[141] in recognition of the fact that other special procedures' mandates and UN bodies can consider individual rights violations of Indigenous persons, and where he 'has a reasonable chance of having a positive impact'.[142] In contrast to other human rights mechanisms, information regarding an alleged rights violation can be provided to the mandate-holder by any person or organisation, no relationship to the alleged victim or victims is necessary; the experts can send communications regardless of whether the alleged victim has exhausted all domestic remedies; and a detailed legal argument regarding the case is not required. The emphasis is on rapid action to protect victims and potential victims.[143]

(ii) Concerted Focus on Indigenous Rights

Special procedures experts issue many communications to states around the world each year concerning alleged violations of Indigenous peoples' rights. Stavenhagen instituted the practice early on in the mandate of the Special Rapporteur on Indigenous peoples.[144] Shortly after taking on the role Anaya described communications as the central aspect of his work,[145] towards the end of his term he described them as 'a cornerstone' of it.[146] Since the creation of the mandate the Special Rapporteur on Indigenous peoples has reported on close to 400 communications to states, most frequently directing its communications to Mexico, Colombia, Chile, India and Guatemala.[147] These are just the communications reported on; figures cited by

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[139] See, eg, *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [34].
[140] OHCHR, *Special Procedures of the Human Rights Council: Communications*, above n 134. See also *Manual of Operations,* above n 7, [38]-[42]; OHCHR, *Special Procedures of the Human Rights Council: Urgent Appeals and Letters of Allegation on Human Rights Violations* <http://www2.ohchr.org/english/bodies/chr/special/docs/communicationsbrochure_en.pdf>.
[141] OHCHR, *Special Rapporteur on the Rights of Indigenous Peoples: Communications*, above n 134.
[142] HRC, *Report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Communications Sent, Replies Received and Follow-up,* UN Doc A/HRC/18/35/Add.1 (22 August 2011) [7] ('*Anaya Communications Report 2011*').
[143] *Manual of Operations,* above n 7, [38], [39], [42]; OHCHR, *Special Rapporteur on the Rights of Indigenous Peoples: Communications*, above n 134; OHCHR, *Special Procedures of the Human Rights Council*, above n 130. For discussion see, eg, Golay, Mahon and Cismas, above n 3, 307; Jernow, above n 72, 802.
[144] *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [103], [112], [118].
[145] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [32], [60]. See generally Preston et al, above n 25, 48-51.
[146] *Anaya Report to GA 2013,* UN Doc A/68/317, [38].
[147] This figure is the author's own calculation based on the communications reported in the Special Rapporteur on Indigenous peoples' communications reports each year.

Rodriguez-Piñero Royo suggest that the actual number may be dramatically higher.[148] As the list of frequently targeted countries implies, Latin America is the region to which most communications have been addressed.[149] To give a flavour of the response rate to the expert, of the 232 communications the Special Rapporteur sent between 2004 and 2008, Piccone identifies that 55.2 per cent received no response or an immaterial response and only in 9.9 per cent of cases did the response indicate that steps had been taken to address the allegation.[150] A number of the communications issued by the Special Rapporteur on Indigenous peoples have been joint communications. Most often these have been issued with the experts on food, housing and the situation of human rights defenders. But they have also been issued with other experts, including those concerning torture, extreme poverty, extrajudicial executions, cultural rights, arbitrary detention, violence against women, freedom of opinion, internally displaced persons, minority issues and freedom of religion.[151]

The Special Rapporteur on Indigenous peoples' communications canvas a wide range of issues reflecting the broad framing of the mandate. They have been issued to countries in all regions including Australia,[152] Brazil,[153] China,[154] Ethiopia,[155] Finland,[156] Israel,[157] Thailand,[158]

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[148] Luis Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial' in Mikel Berraondo et al (eds), *Los Derechos de los Pueblos Indígenas en el Sistma Internacional de Naciones Unidas* (Instituto Promocion Esudios Sociales, 2010) 109, 123.

[149] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [35].

[150] In the remainder of cases either the violation was rejected without substantiation or an incomplete response was received. The precise meanings of these categories are outlined in Piccone's report. Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, 23, 75-7. For comment regarding the low response rate to the Special Rapporteur on Indigenous Peoples' communications see Preston et al, above n 25, 51. See also *Anaya Report to GA 2013,* UN Doc A/68/317, [36], [38].

[151] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Communications Sent, Replies Received, and Follow-up,* UN Doc A/HRC/21/47/Add.3 (7 September 2012) [8], [12], [45], [60], [69], [82] ('*Anaya Communications Report 2012*'); *Anaya Communications Report 2011,* UN Doc A/HRC/18/35/Add.1, 5-7, 10, 11, annex VII [1]; HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Cases Examined by the Special Rapporteur,* UN Doc A/HRC/15/37/Add.1 (15 September 2010) [32], [37], [38], [169], [177], [198], [272], [386], [397] ('*Anaya Communications Report 2010*'); HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Summary of Communications Transmitted and Replies Received,* UN Doc A/HRC/12/34/Add.1 (18 September 2009) [5], [72], [133], [148], [156], [192], [219], [225], [242], [281], [348], [364], [404], [405], [430], [466] ('*Anaya Communications Report 2009*'); HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya: Summary of Cases Transmitted to Governments and Replies Received,* UN Doc A/HRC/9/9/Add.1 (15 August 2008) [8] ('*Anaya Communications Report 2008*'); HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/6/15/Add.1 (20 November 2007) [65], [74], [88], [97], [256], [359], [376], [394], 76.

[152] See, eg, CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Analysis of Country Situations and Other Activities of the Special Rapporteur*, UN Doc E/CN.4/2005/88/Add.1 (16 February 2005) [9] ('*Stavenhagen Communications Report 2005*').

[153] See, eg, CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Analysis of Country Situations and Other Activities of the Special Rapporteur*, UN Doc E/CN.4/2006/78/Add.1 (18 January 2006) [19]-[25] ('*Stavenhagen Communications Report 2006*').

[154] See, eg, *Anaya Communications Report 2010,* UN Doc A/HRC/15/37/Add.1, [169]-[173].

[155] See, eg, *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [199]-[206].

[156] See, eg, *Anaya Communications Report 2012,* UN Doc A/HRC/21/47/Add.3, [47]-[51].

[157] See, eg, *Anaya Communications Report 2011,* UN Doc A/HRC/18/35/Add.1, annex VI.

[158] See, eg, CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Analysis of Country Situations and Other Activities of the Special Rapporteur*, UN Doc E/CN.4/2004/80/Add.1 (6 February 2004) [74] ('*Stavenhagen Communications Report 2004*').

and the United States.[159] Recurring issues include violations of Indigenous peoples' rights to participate in decision-making, particularly in relation to natural resource extraction and other development projects, and to their lands and resources; violence or threats against Indigenous persons, including those defending Indigenous rights; and constitutional or legislative reforms that are incompatible with Indigenous peoples' rights.[160] Anaya has used the communications process as a form of follow-up on key issues identified in his country reports,[161] such as regarding the settlement negotiations process for historical grievances between Māori and the New Zealand Government.[162] Other special procedures mandate-holders acting alone also send communications to states concerning alleged violations of Indigenous peoples' rights. For example, in 1995 the expert on extrajudicial executions sent a communication to the Canadian Government urging it to investigate allegations that an Indigenous Chippewa individual was killed by police during an unarmed defence of a sacred burial ground.[163]

(iii) Implied Accusations

Communications rely on shaming states even though the communications process is not intrinsically accusatory. According to the OHCHR, communications are not intended to convey a value judgment by the mandate holder or to be accusatory per se. Rather, '[t]heir main purpose is to obtain clarification in response to allegations of violations and to promote measures designed to protect human rights.'[164] But the attribution of wrongdoing to the state or other parties over whom the state should exercise control is often implied in the text of the communications, particularly in the experts' commentary on the exchanges where such commentary is offered.[165] Where a response has been received, mandate-holders publish this or a summary or excerpt in their reports inviting the public to assess its veracity and providing an opportunity for pressure to be placed on states where incorrect information has been supplied. Generally the mandate-holders themselves do not offer any substantive analysis of the

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[159] See, eg, CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2002/65*, UN Doc E/CN.4/2003/90/Add.1 (21 January 2003) [26]-[29].

[160] See, eg, *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, annex [19]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [16], [17]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [33]; *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, 4, [103], [107], [108].

[161] *Anaya Report to GA 2013,* UN Doc A/68/317, [20].

[162] *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [121]-[124]; *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78.

[163] CHR, *Report by the Special Rapporteur, Mr Bacre Waly Ndiaye, Submitted Pursuant to Commission on Human Rights Resolution 1995/73*, UN Doc E/CN.4/1996/4 (25 January 1996) [98]-[100]; CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Canada,* UN Doc E/CN.4/2005/88/Add.3 (2 December 2004) [59].

[164] *Manual of Operations,* above n 7, [30]. See generally Sir Nigel Rodley, 'The United Nations Human Rights Council, its Special Procedures and its Relationship with Treaty Bodies: Complementarity or Competition?' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 49, 63.

[165] See, eg, *Anaya Communications Report 2012,* UN Doc A/HRC/21/47/Add.3, [16].

response;[166] although Anaya is one of a few who does. In his words, '[t]he Special Rapporteur is aiming to avoid the "revolving door" approach of simply sending a communication and receiving a response from the Government concerned'.[167] In 2004 Anaya had criticised Stavenhagen's tendency not to offer proposals on how to remedy the rights violations identified through the communications procedure: '[w]ith time it can be expected that the special rapporteur will more fully develop his mandate to examine violations and formulate proposals to remedy them, much like other thematic mechanisms of the Commission on Human Rights have done.'[168] Stavenhagen did engage in some detailed back and forth exchanges with governments regarding communications too, even where his reported observations were light.[169]

All communications sent by special procedures' mandate-holders and the responses received are eventually published in a report to the HRC (and previously the CHR), providing a public avenue for shaming the concerned states. However, the communications reports are published in English, French and Spanish only – and often individual communications are published in only one of those – restricting the audience that can read them. The report is available online through the OHCHR's webpage and the personal webpages of some mandate-holders. Where a communication has been sent and no response (or no substantive response) has been received from the relevant government, mandate-holders will typically note with regret that this is the case in the public communications report, with the intention of shaming the government into responding with material information.[170] Sometimes mandate-holders will encourage states to respond to unanswered communications without naming particular states in their annual reports or in the interactive dialogues before the HRC or GA, directing further public attention to a generalised failure to respond.[171] In particularly grave situations, or where 'a Government has repeatedly failed to provide a substantive response to communications,' a mandate-holder may issue a media statement or hold a media conference to draw public attention to the case and shame the government into action.[172] Sometimes the experts will follow-up the situation with further communications or, in Anaya's case, a special country mission.

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[166] See, eg, Baldwin-Pask and Scannella, above n 3, 447; Menno T Kamminga, 'The Thematic Procedures of the UN Commission on Human Rights' (1987) 34 *Netherlands International Law Review* 299, 315.

[167] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [35]. See, eg, *Anaya Annual Report 2008,* UN Doc A/HRC/9/9, [13]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [17]. See generally *Anaya Report to GA 2013,* UN Doc A/68/317, [29]-[30].

[168] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2 ed, 2004) 224.

[169] See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/4/32/Add.1 (19 March 2007) [272]-[297] ('*Stavenhagen Communications Report 2007*').

[170] See, eg, *Anaya Communications Report 2012,* UN Doc A/HRC/21/47/Add.3, [16].

[171] See, eg, *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [112]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [60]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [16]; GA, 'Special Rapporteur Highlights 'Negative, Even Catastrophic' Impact of Extractive Industries on Rights of Indigenous Peoples, in Third Committee Statement' (Press Release, UN Doc GA/SHC/4013, 17 October 2011) ('*GA 3rd Committee Press Release 2011*').

[172] *Manual of Operations,* above n 7, [49]. See, eg, OHCHR, 'Bangladesh Open-Pit Coal Mine Threatens Fundamental Rights, Warn UN Experts' (Media Release, 28 February 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11878&LangID=E>; *Anaya Communications Report 2012,* UN Doc A/HRC/21/47/Add.3, [12], [13].

(c) *Innovating Shame Practices through Special Missions*

Anaya has taken the innovative step of occasionally conducting country missions to investigate specific Indigenous rights violations, rather than the usual assessment of a country's overall Indigenous rights situation. Most of the special country missions conducted by Anaya have been to Central and South America, namely Panama, Peru, Costa Rica and Guatemala.[173] He also produced a special report on Australia's Northern Territory intervention following his standard country mission there.[174] With the consent of states he conducts these missions to investigate more deeply concerns brought to his attention through the communications process.[175] The working method allows impressive speed in responding to rights concerns: Anaya's special mission to Peru in 2009 occurred a week after he issued a press release regarding violent clashes between Indigenous protestors and police, which in turn had been issued only days after the clashes had begun.[176] However, Anaya faced resistance from some within the OHCHR in Geneva to the innovation of special country missions with the move perceived to be beyond his mandate. But he pointed to how the visits complied with the Code of Conduct and persisted despite the opposition.[177] As the approach was outside of the special procedures' standard working methods, Anaya was also forced to secure funding for these missions from beyond the UN, which he did.[178] Other special procedures experts have undertaken similar missions on a smaller scale. For example, in 2007 Stavenhagen undertook a joint mission with the expert on housing to Mexico to examine Indigenous rights issues regarding the construction of the Parota hydroelectric project, producing joint findings and recommendations on the issue that are reported in the expert on housing's communications

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[173] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Observations on the Situation of the Charco la Pava Community and Other Communities Affected by the Chan 75 Hydroelectric Project in Panama,* UN Doc A/HRC/12/34/Add.5 (7 September 2009); HRC, *Informe del Relator Especial sobre la Situación de los Derechos Humanos y las Libertades Fundamentales de los Indígenas, S James Anaya: Observaciones sobre la Situación de los Pueblos Indígenas de la Amazonía y los Sucesos del 5 de Junio y Días Posteriores en las Provincias de Bagua y Utcubamba, Perú,* UN Doc A/HRC/12/34/Add.8 (18 August 2009); HRC, *Informe del Relator Especial sobre los Derechos de los Pueblos Indígenas, James Anaya: La Situación de los Pueblos Indígenas Afectados por el Proyecto Hidroeléctrico El Diquís en Costa Rica,* UN Doc A/HRC/18/35/Add.8 (11 July 2011); *Anaya Special Report on Guatemala 2011,* UN Doc A/HRC/18/35/Add.3. Anaya has produced special reports on other country missions, including on Suriname, Ecuador and Chile, which are considered below as examples of capacity-building. In addition, in 2013 Anaya issued a special report on Indigenous peoples in Asia, which is noted in the discussion on country and thematic reports.

[174] HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010), appendix B.

[175] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [18].

[176] HRC, *Informe del Relator Especial sobre la Situación de los Derechos Humanos y las Libertades Fundamentales de los Indígenas, S James Anaya: Observaciones sobre la Situación de los Pueblos Indígenas de la Amazonía y los Sucesos del 5 de Junio y Días Posteriores en las Provincias de Bagua y Utcubamba, Perú,* UN Doc A/HRC/12/34/Add.8 (18 August 2009) [2], [42]-[47].

[177] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). He pointed out that he received support from those at the mid-higher level within the OHCHR for the innovation.

[178] *Anaya Report to GA 2013,* UN Doc A/68/317, [33].

report.[179] Yet, Anaya is alone in including the technique as part of his standard working methods and in publishing a separate special report on his missions.

As with the special procedures' general country missions, shaming is engaged in the special country visits and reports in several ways. It is engaged in meetings with state representatives, in the observations made in the special report prepared following the mission, in the recommendations issued in those reports and in statements made to the media regarding the situation. During each of Anaya's special country missions he raised concerns regarding violations of Indigenous peoples' rights to their lands and natural resources and of their right to be appropriately consulted on matters affecting them. For example, Anaya visited Costa Rica in 2011 to investigate the situation of Indigenous peoples affected by the proposed construction of the Diquís hydroelectric project on the Grande de Térraba river recommending, inter alia, that as a priority steps be taken to find solutions by which Indigenous peoples can recover land within their territories.[180] The Government's public response was very positive.[181] Other states, such as Panama, have publically rejected the criticisms made of their Indigenous rights situations in Anaya's special reports.[182]

(d) Shaming by Media Spotlight

Shaming is further engaged through the special procedures mandate-holders' use of the media. In addition to drawing attention to their general and special country visits, the special procedures mandate-holders engage the media to publicise especially flagrant or urgent rights violations that they become aware of, bypassing the communications and country mission processes at least initially.[183] This step is generally only taken in the most serious of cases: the Manual of Operations encourages it to be used as a means of last resort.[184] The Special Rapporteur on Indigenous peoples has issued public statements on concerns including the Chilean Government's response to protests by Indigenous peoples in Rapa Nui,[185] a hunger

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[179] HRC, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Miloon Kothari: Summary of Communications Sent and Replies Received from Governments and Other Actors*, UN Doc A/HRC/7/16/Add.1 (4 March 2008) [72]-[100].

[180] HRC, *Informe del Relator Especial sobre los Derechos de los Pueblos Indígenas, James Anaya: La Situación de los Pueblos Indígenas Afectados por el Proyecto Hidroeléctrico El Diquís en Costa Rica,* UN Doc A/HRC/18/35/Add.8 (11 July 2011) [44]. In 2012 Anaya returned to Coast Rica to follow-up on his 2011 visit. *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [15].

[181] Costa Rican Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 13.

[182] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Observations on the Situation of the Charco la Pava Community and Other Communities Affected by the Chan 75 Hydroelectric Project in Panama,* UN Doc A/HRC/12/34/Add.5 (7 September 2009) appendix.

[183] See, eg, *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [35]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [19]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [18]; *Anaya Report to GA 2013,* UN Doc A/68/317, [31]. See generally Golay, Mahon and Cismas, above n 3, 308.

[184] *Manual of Operations,* above n 7, [49]-[51].

[185] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [19].

strike by Chief Theresa Spence of the Attawapiskat First Nation in Canada,[186] and a proposal to repeal core laws and policies concerning the Sami in Norway.[187] Anaya has also used international media interviews on his thematic work to highlight country specific concerns, including regarding Argentina, Panama and Guatemala.[188] As with communications, media releases can be issued jointly. For example, in 2012 the experts on Indigenous peoples, human rights defenders, extrajudicial executions and peaceful assembly issued a media release urging the Guatemalan Government to impartially investigate acts of violence against Indigenous peoples in Cumbre de Alaska.[189] At times other special procedures mandate-holders go it alone and issue media statements on Indigenous rights concerns. For instance, in July 2013 the expert on terrorism urged the Chilean Government to stop using anti-terrorism legislation against Indigenous Mapuche peoples seeking to recover their ancestral lands.[190]

The engagement of the media relies heavily on shaming states to act to address the relevant rights concern. At the least, it is about making the concerned state aware in public that it is being watched. The degree to which mandate-holders utilise the media differs depending on the expert, with some engaging it very rarely while others use it frequently as a routine component of their work.[191]

2 *The Ancillary Role of Dialogue-Building*

Dialogue-building is the second major regulatory mechanism engaged by the special procedures experts, although it is less prominent than the technique of shaming. By the term 'dialogue-building' I refer to the experts' efforts to create conditions for dialogue between states and Indigenous peoples' representatives, and other relevant actors. Both Stavenhagen and Anaya have identified the promotion of dialogue as central to the work of the Special Rapporteur on Indigenous peoples.[192] Anaya, in particular, has oriented his work methods

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[186] *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [20]; OHCHR, 'Canada: UN Expert Calls for Meaningful Dialogue with Aboriginal Leaders After Weeks of Protests' (Media Release, 8 January 2013) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12917&LangID=E>.

[187] James Anaya, 'Norway Could Lose Lead in the Recognition and Protection of Indigenous Peoples' Rights – UN Expert' (Public Statement, 28 October 2011) <http://unsr.jamesanaya.org/notes/norway-could-lose-its-lead-in-the-recognition-and-protection-of-indigenous-peoples-rights>.

[188] Efe Agency, 'Relator de la ONU Aboga por Derechos de los Pueblos Indígenas', *Prensa Libre* (online), 9 April 2012 <http://www.prensalibre.com/economia/Relator-ONU-empresas-promover-derechos-pueblos-indigenas_0_679132237.html>.

[189] James Anaya, 'Guatemala: UN Experts Call for an Investigation into the Violence in Santa Catarina Ixtahuacán' (Press Release, 12 October 2012) <http://unsr.jamesanaya.org/notes/guatemala-un-experts-call-for-an-investigation-into-the-violence-in-santa-catarina-ixtahuacan>. This was followed by a joint allegation letter three days later. *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [87]-[91].

[190] Ben Emmerson, 'Chile Must Stop Using Anti-Terrorism Law Against Mapuche Indigenous Group – UN Expert' (Press Release, 31 July 2013) <http://www.un.org/apps/news/story.asp?NewsID=45538&Cr=indigenous&Cr1#.UfqsaawXd_B>.

[191] Naples-Mitchell, above n 3, 234-35; Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act' (2011) 15(2) *The International Journal of Human Rights* 162, 168; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 116-17.

[192] See, eg, *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [71]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [18]; *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [83]; Stavenhagen quoted in Preston et

'towards constructive dialogue with Governments, indigenous peoples', NGOs, UN agencies and others.[193] However, the extent to which dialogue-building is mobilised depends highly on the individual mandate-holder. For example, the expert on violence against women has argued that mandate-holders must 'speak truth to power very clearly' rather than create spaces for dialogue.[194] The technique of dialogue-building seeks to influence state behaviour mainly through contributing to a common understanding of the international Indigenous rights framework, but also through the acts of witnessing and praising.

(a) Witnessing 'Truth'

The technique of witnessing underlies the special procedures' country reports, communications, special reports on specific cases, and media releases. It is not concerned with shaming states and other actors per se. Rather it is concerned with establishing 'truth', setting out evidence or proof of particular events.[195] In this scenario 'truth' is projected as having an intrinsic power: the ability to give voice to the otherwise voiceless, to heal and to facilitate reconciliation. Because of these qualities truth telling has come to play a pivotal role in reconciliation processes globally.[196] Witnessing is a more circuitous regulatory tool than the other mechanisms engaged by the experts. It seeks to influence state behaviour by empowering Indigenous peoples and Indigenous rights advocates. When Indigenous peoples and Indigenous rights advocates are empowered they are in a better position to mobilise and advocate for the realisation of Indigenous rights. Witnessing also creates spaces for dialogue – the experts' 'truth' can provide a starting point for discussions between parties with competing perspectives.

Witnessing is evident most prominently in the reports on common and special country missions that the experts prepare, but also in some communications exchanges and media releases. In the case of reports on country missions, the expert has spent time in the country, listening to the perspectives of different actors, and sets out in the report an assessment of the Indigenous rights situation under study. Usually communications will invite states to respond to allegations of rights violations without conducting thorough investigations and typically without

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al, above n 25, 13-4.

[193] *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [7]; *Anaya Report to GA 2013,* UN Doc A/68/317, [5].

[194] Radhika Coomaraswamy quoted in Naples-Mitchell, above n 3, 239.

[195] Robert Joseph points out that it is not necessarily about presenting new information, rather the 'public recognition of what is already known'. Robert Andrew Joseph, 'A Jade Door: Reconciliatory Justice as a Way Forward Citing New Zealand Experience' in Marlene Brant Castellano, Linda Archibald and Mike DeGagné (eds), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation, 2008) 205, 214. Lempinen is one scholar that has privileged the experts' fact-finding role specifically as a means for 'enhancing a dialogue between all parties concerned'. Lempinen, above n 1, 117, 119.

[196] See, eg, Karen Brounéus, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health' (2010) 54(3) *The Journal of Conflict Resolution* 408; Melissa Ballengee, 'The Critical Role of Non-Governmental Organizations in Transitional Justice: A Case Study of Guatemala' (1999-2000) 4 *UCLA Journal of International Law and Foreign Affairs* 477; Megan K Donovan, 'The International Commission Against Impunity in Guatemala: Will Accountability Prevail?' (2008) 25(3) *Arizona Journal of International and Comparative Law* 779.

expressly attributing blame. Often media releases follow the same approach. However, in some instances experts will provide observations and analysis of rights situations the subject of communications and media releases. In such cases the experts invite the reader to accept their narratives of the Indigenous rights situation in their reports, communications and media releases as 'truth'.

The mandate-holders endeavour to convince their audience that they present the truth by becoming what Clifford Geertz has coined in the anthropological field an 'I-witness'.[197] Typically the experts do this by taking on the role of Geertz's highly scientific 'Complete Investigator' a figure 'rigorously objective, dispassionate, thorough, exact, and disciplined' and dedicated to truth.[198] The special procedures experts' reports, communications and media releases follow this format. They tend to be written in the UN's favoured quasi-legal style in order to convey objectivity and authority: 'facts' are dispassionately stated, human rights instruments are cited, gaps in rights implementation are identified.[199] To take one example, in his 2003 country report on the Philippines Stavenhagen reduces the profound impact on Indigenous peoples of the militarisation of their territories to an assorted list of unlawful acts:

> The Special Rapporteur is concerned about multiple reports of serious human rights violations involving indigenous peoples, within the framework of a process of militarization of indigenous areas. Such abuses include attacks upon the physical integrity and security of indigenous persons, dispossession and destruction of property, forced evacuation and relocation, threats and harassment, disruption of the cultural and social life of the community, in other words, the violation of civic, economic, social and cultural rights.[200]

As the Philippine Government's scathing response noted above reveals, the approach did not protect Stavenhagen and his report from attack.

Less frequently, presumably given experts' perceptions of the independence and objectivity demanded by the mandates' terms, the experts adopt the role of empathetic advocate. In adopting this role they ask readers to see them as truth tellers given their understanding of what it means to have one's rights violated.[201] The experts do this by drawing in readers with

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[197] Clifford Geertz, *Works and Lives: the Anthropologist as Author* (Polity Press, 1988) 73-101 cited in John Morton, 'I-witnessing I the Witness: A Response to Ken Maddock on Courtly Truth and Native Title Anthropology' (2002) 3(2) *The Asia Pacific Journal of Anthropology* 89, 89.

[198] Geertz, above n 197, 79 quoted in Morton, above n 197, 89.

[199] See generally Stanley Cohen, 'Witnessing the Truth' (1996) 1 *Index on Censorship* 36; Rosanne Kennedy, 'Moving Testimony: Human Rights, Palestinian Memory, and the Transnational Public Sphere' in Chiara De Cesari and Ann Rigney (eds), *Trans-national Memory: Beyond Methodological Nationalism* (de Gruyter, forthcoming 2014). Regarding the special procedures specifically, see Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 6.

[200] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted in Accordance with Commission on Human Rights Resolution 2002/65: Mission to the Philippines,* UN Doc E/CN.4/2003/90/Add.3 (5 March 2003) [62].

[201] The empathetic advocate is similar to Clifford Geertz's 'Absolute Cosmopolite', who is 'a figure of such enlarged capacities for adaptability and fellow feeling, for insinuating himself into practically any situation, as to be able to see

emotive text, such as direct quotes from rights victims. For example, in his 2012 country report on his mission to the United States Anaya quoted a young student from a high school where a majority of the students are from a nearby reservation: 'I'm going to be honest with you, sometimes I don't eat. I've never told anyone this before, not even my mom, but I don't eat sometimes because I feel bad about making my mom buy food that I know is expensive. And you know what? Life is hard enough for my mom, so I will probably never tell her.'[202] The use of testimonies is contemplated by the special procedures' Manual of Operations.[203] Direct quotes can be particularly empowering as they allow the rights victims, and others in a similar position, to literally see themselves and their struggles recognised and acknowledged in the text.

(b) Praising the Positives

At times special procedures experts engage praise in their country reports, communications, special reports on specific cases, annual reports, media releases, and other work too. It is standard for special procedures experts' country reports, and Anaya's special reports on specific cases, to praise states for positive developments in recent years or since a previous visit of a special procedures mandate-holder. For example, in his 2004 report on Canada Stavenhagen remarked:

> The Special Rapporteur is encouraged by Canada's commitment to ensure that the country's prosperity is shared by Aboriginal people, a goal to which the federal, provincial and territorial governments devote an impressive number of programmes and projects and considerable financial resources, as well as by Canada's commitment to close the unacceptable gaps between Aboriginal Canadians and the rest of the population in terms of educational attainment, employment and access to basic social services.[204]

However, in the Indigenous rights domain the technique is most readily flexed by Anaya. He has collected examples of good practices regarding Indigenous rights recognition that can be understood as a form of praise for the subject state. In his 2011 report on his mission to the Sápmi region he observed that, '[i]n many respects, initiatives related to the Sami people in the Nordic countries set important examples for securing the rights of indigenous peoples.'[205] He

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as [others] see, think as [others] think, speak as [others] speak, and on occasion even feel as they feel and believe as they believe.' Geertz, above n 197, 79 quoted in Morton, above n 197, 89 (edits to the quote are Morton's).

[202] *Anaya Report on US 2012,* UN Doc A/HRC/21/47/Add.1, [32]. Anaya also used the technique in, for example, his press statement at the close of his 2013 mission to Canada. James Anaya, *United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Statement upon Conclusion of the Visit to Canada*, above n 50.

[203] *Manual of Operations,* above n 7, [73].

[204] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Canada,* UN Doc E/CN.4/2005/88/Add.3 (2 December 2004) [5].

[205] *Anaya Report on Sápmi Region 2011,* UN Doc A/HRC/18/35/Add.2 (6 June 2011) 1. See generally *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [29].

has used his annual thematic reports to recognise positive developments, such as praising states' endorsement of the *UNDRIP*.[206] He has praised states during the interactive dialogue before the HRC, including Peru in 2011 for a new law concerning consultation with Indigenous peoples.[207] He sometimes refers to positive developments in his observations on communications.[208] He has also occasionally praised states' Indigenous rights situations in the media. For example, in 2009 he 'commended the Government of Nicaragua for taking affirmative steps to implement' the decision of the Inter-American Court in *Mayagna (Sumo) Community of Awas Tingni v Nicaragua*,[209] which awarded the Awas Tingni peoples title to their ancestral lands.[210] Praise is typically a minor component of all mandate-holders' commentary, however. In the reports it is generally restricted to a short paragraph or two, appearing more as a diplomatic nicety than a concerted effort to leverage the regulatory power of the principle of continuous improvement.

(c) Clarifying and Constructing Knowledge

More commonly the special procedures experts engage in dialogue-building through efforts to lift knowledge amongst states and others regarding the content of international Indigenous rights norms. In building knowledge around the content of international Indigenous peoples' rights norms the experts seek to impact state behaviour in varying ways. The experts seek to avoid claims by states that they were unaware of the nature of their Indigenous rights obligations or that the content of those rights is unsettled. They seek to add clarity to the law, offering up their own interpretations of the content of international Indigenous rights norms and even who counts as 'Indigenous'. The mandate-holders endeavour to ensure that Indigenous peoples and Indigenous rights advocates are aware of the content of Indigenous peoples' rights so that they may then use that information to lobby states. This educative dimension is central as the content of international Indigenous rights norms is not generally well known beyond a small pool of experts. In performing this work the experts both 'translate' human rights ideas and institutions into local contexts for local consumption, as well as translating local concerns and ideas into the language of the international human rights system. Sally Engle Merry terms this a process of 'vernacularization'.[211] The experts further seek to develop the law, reflecting their role as norm-makers.[212]

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[206] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [25]; *Anaya Annual Report 2010,* UN Doc A/HRC/15/37, [13], [14]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [10]. See generally *Anaya Report to GA 2013,* UN Doc A/HRC/9/9 [9].

[207] James Anaya, final remarks, in HRC, *Webcast Human Rights Council Eighteenth Session: Part II, Clustered Interactive Dialogue on Indigenous Peoples, 19th Plenary Meeting*, above n 124.

[208] OHCHR, *Special Rapporteur on the Rights of Indigenous Peoples: Communications*, above n 134.

[209] IACHR Series C No 79, 31 August 2001.

[210] Anaya's press release is cited in *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [21].

[211] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006) 220; Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38, 40. Similarly, Piccone argues 'that the special procedures play a unique role as independent, flexible and practical instruments for translating international norms to

Efforts at enhancing knowledge are evident in a variety of the experts' working methods. They are seen in the experts' country reports, communications, special reports on specific cases, and media releases. These working methods help to build knowledge of the content of international Indigenous rights norms and its application in specific cases. The experts' observations and recommendations can provide a basis for finding solutions to the rights issues identified. They may inform state policies and legislation and the decisions of domestic courts.[213] Efforts at improving knowledge are also evident in working methods that have not yet been analysed, including the experts' thematic studies.

(i) Elevating Knowledge in Thematic Studies

(a) Primary Tool

Thematic studies, which are included in the special procedures' annual reports and special reports, are the experts' primary tool for improving knowledge regarding Indigenous rights norms. They are focused on awareness-raising,[214] with several experts developing analytical frameworks or guidelines regarding particular rights issues in their reports.[215] The studies are produced by thematic mandate-holders, and occasionally by country mandate-holders.[216] A wide variety of actors are generally invited to contribute to the reports, including Indigenous peoples, governments and civil society.[217] Many special procedures experts conduct questionnaires or surveys to collect the views of relevant actors, including Anaya's questionnaire on the impact of extractive industries operating within or near indigenous territories, and Stavenhagen's questionnaire on domestic legislation, policies and programmes regarding Indigenous peoples' rights.[218] Expert seminars, conferences and meetings also feed

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practical outcomes.' Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 225.

[212] See, eg, Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 205; Surya P Subedi et al, 'The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 155, 159; Golay, Mahon and Cismas, above n 3, 303; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights*, above n 3, 64-5; Alston, Morgan-Foster and Abresch, above n 6, 202; Naples-Mitchell, above n 3, 233; José L Gómez del Prado, 'Extra-Conventional Protection of Human Rights' in Felipe Gómez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context: Achievements and Challenges* (University of Deusto, 2006) 285, 335.

[213] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [70], [71].

[214] *Manual of Operations,* above n 7, [106]. See generally Oberleitner, above n 80, 59-60.

[215] See, eg, CHR, *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33*, UN Doc E/CN.4/1999/49 (13 January 1999) [51]-[74]. See generally Golay, Mahon and Cismas, above n 3, 300-01.

[216] See, eg, HRC, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia Surya P Subedi,* UN Doc A/HRC/18/46 (2 August 2011) [36]-[54]. See generally Rodriguez-Piñero Royo, above n 148, 125.

[217] See, eg, *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, annex [21]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [35]. Indigenous peoples sometimes request topics for study by the experts. For example, in 2011 the Pacific Indigenous Caucus requested that the Special Rapporteur on Indigenous peoples 'study climate change and IPs' [Indigenous peoples'] rights in the Pacific region.' doCip, *Update No 94-95* (2011) (January/April) <http://www.docip.org/All-Issues.121.0.html> 14.

[218] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [27]; *Stavenhagen Annual Report 2004,* UN Doc

into many of the thematic reports.[219] Unlike the country reports, and occasionally the communications, the thematic reports do not contain recommendations directed at specific states. Typically they contain conclusions and recommendations directed at states and the international system more generally. Because the recommendations are generalised the thematic reports do not endeavour to shame states into Indigenous rights conformity in the same way as other of the experts' working methods.

The mandate of the Special Rapporteur on Indigenous peoples is a key source of thematic studies on Indigenous peoples' rights. The Special Rapporteur conducts studies on issues relevant to Indigenous peoples across the world.[220] As identified in the previous chapter, since the creation of the EMRIP with its singular role of providing thematic expert advice to the HRC the Special Rapporteur has made the production of thematic reports a secondary aspect of the mandate's work, focusing on the preparation of 'practically oriented' studies.[221] Nevertheless, the Special Rapporteur has produced a host of thematic reports. Generally, a different theme has been studied each year, although both experts have considered the content of the international instruments relevant to Indigenous peoples' rights, development projects, and the rights of Indigenous peoples in Asia.

Stavenhagen's thematic reports covered an assortment of topics. He produced reports concerning the international norms regarding the rights of Indigenous peoples and the major human rights issues confronting Indigenous peoples in 2002;[222] the impact of large-scale development projects on Indigenous peoples' rights, with a focus on dams, in 2003;[223] access to justice and the relationship between Indigenous customary law and national legal institutions in 2004;[224] Indigenous peoples and education systems in 2005;[225] the implementation of domestic laws and international standards to protect Indigenous peoples' rights in 2006;[226] and trends concerning the situation of the rights of Indigenous peoples around the world in 2007.[227]

E/CN.4/2004/80, [7]. Other special procedures experts also issue questionnaires, such as the expert on cultural rights. OHCHR, *Independent Expert in the Field of Cultural Rights: Questionnaire on Access to Cultural Heritage* (2010) <http://www2.ohchr.org/english/issues/cultural_rights/cultural_heritage.htm>.

[219] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [42]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [37]; *Anaya Annual Report 2010,* UN Doc A/HRC/15/37, [18]; CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen: Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and the Administration of Justice*, UN Doc E/CN.4/2004/80/Add.4 (27 January 2004) 2; CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and Education*, UN Doc E/CN.4/2005/88/Add.4 (15 December 2004) 2; CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Summary Report of the Conclusions and Recommendations from the International Seminars on Constitutional Reforms, Legislation and Implementation of Laws Regarding the Rights of Indigenous Peoples*, UN Doc E/CN.4/2006/78/Add.5 (17 January 2006) 3.

[220] See generally Preston et al, above n 25, 18-20.

[221] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [13]; GA, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/64/338 (4 September 2009) [26].

[222] *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97.

[223] *Stavenhagen Annual Report 2003*, UN Doc E/CN.4/2003/90.

[224] *Stavenhagen Annual Report 2004,* UN Doc E/CN.4/2004/80.

[225] *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88.

[226] *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78.

[227] *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32.

Stavenhagen also published several special reports with a thematic focus, outlining general considerations regarding the rights of Indigenous peoples in Asia in 2007,[228] and publishing the Study on Best Practices in 2007,[229] and a progress version of that report in 2006.[230]

The themes of Anaya's reports were also diverse. He prepared reports regarding operationalising the *UNDRIP* in 2008, 2009, 2010 and 2013;[231] the duty of states to consult with Indigenous peoples and obtain their consent before carrying out matters affecting them in 2009 and 2011;[232] the responsibilities of corporations regarding Indigenous peoples' rights in 2010 and 2011;[233] the rights of Indigenous peoples' to development with culture and identity and to participate in decision-making in 2010;[234] violence against Indigenous women and the need to harmonise UN activities regarding Indigenous peoples in 2012;[235] and extractive industries operating within or near Indigenous territories in 2011, 2012 and 2013.[236] Anaya's focus on the impact of extractive industries followed his identification of the issue as 'one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights.'[237] Anaya expressed an intention to elaborate a set of guidelines or principles to guide protection of Indigenous rights in this context, building on Ruggie's *Guiding Principles on Business and Human Rights*.[238] Accordingly, his final thematic report in 2013 included a set of '[c]onditions for getting to and sustaining indigenous peoples' agreement to extractive activities promoted by the State or third party business enterprises'.[239] Anaya also prepared a special report on the situation of Indigenous peoples in Asia in 2013,[240]

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[228] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: General Considerations on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in Asia*, UN Doc A/HRC/6/15/Add.3 (1 November 2007).
[229] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4.
[230] CHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2005/51: Progress Report on Preparatory Work for the Study Regarding Best Practices Carried Out to Implement the Recommendations Contained in the Annual Reports of the Special Rapporteur*, UN Doc E/CN.4/2006/78/Add.4 (26 January 2006) ('*Progress Report on Study on Best Practices*').
[231] *Anaya Annual Report 2008,* UN Doc A/HRC/9/9; GA, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/64/338 (4 September 2009); GA, *Interim Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/65/264 (9 August 2010); *Anaya Report to GA 2013,* UN Doc A/HRC/9/9.
[232] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34; GA, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/66/288 (10 August 2011) ('*Anaya Report to GA 2011*').
[233] *Anaya Annual Report 2010,* UN Doc A/HRC/15/37; *Anaya Report to GA 2011,* UN Doc A/66/288.
[234] GA, *Interim Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/65/264 (9 August 2010).
[235] *Anaya Annual Report 2012,* UN Doc A/HRC/21/47; *Anaya Report to GA 2012,* UN Doc A/67/301.
[236] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47; *Anaya Annual Report 2013,* UN Doc A/HRC/24/41.
[237] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [57]. Stavenhagen reached a similar conclusion in 2007, see *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [17].
[238] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [62], [74]-[76], [89]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47 [74]-[75], [86]-[89].
[239] *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [41]-[78].
[240] HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Consultation on the Situation of Indigenous Peoples in Asia*, UN Doc A/HRC/24/41/Add.3 (31 July 2013).

as noted above, and on the outcomes of the international expert seminar on the role of the UN mechanisms with a specific mandate regarding the rights of Indigenous peoples in 2009.[241]

(b) Variable Elevation

The degree to which the Special Rapporteur on Indigenous peoples' thematic studies can actually be said to elevate knowledge of the content of international Indigenous rights norms varies. Stavenhagen's thematic reports typically had the sense of summaries of submissions made to him regarding the relevant topic, grouped by theme, suggesting that much reliance was placed on the veracity of the submissions. It also meant that his thematic reports were predominantly comprised of descriptions of situations in various countries with little high-level discussion of the key issues. With a social sciences background the reports contain little analysis of the international legal framework, bar those reports that expressly examine that infrastructure. But they expertly identify underlying socio-political issues. When the reports did seek to outline the scope of existing law at times the assessments conflicted with later assessments by Anaya, a preeminent legal scholar in the field. For example, Stavenhagen and Anaya differed on when Indigenous peoples' right to free prior and informed consent applied.[242] The recommendations in Stavenhagen's reports further tended to be broad and loosely framed.[243] Yet, Rodriguez-Piñero Royo and Preston et al argue that Stavenhagen's thematic reports have contributed to debates regarding Indigenous rights norms within academia, human rights bodies and international agencies.[244]

In contrast, Anaya's thematic reports more confidently elucidate the content of international Indigenous rights norms. Reflecting his legal expertise Anaya's thematic studies contain sophisticated legal analyses of the content of the particular international Indigenous rights norms under study. The reports are erudite, comprehensive and bring clarity to the substantive content of Indigenous norms.[245] But they reflect the opinion – albeit skilfully argued and articulated – of one person. There is a danger that the authority that attaches to the mandate can contribute to drown out other, equally valid, interpretations and understandings of the same norms. Anaya's thematic reports typically refer to specific countries only to illustrate general principles and reflect independent research and analysis in addition to the content of

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[241] HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Conclusions and Recommendations of the International Expert Seminar on the Role of United Nations Mechanisms with a Specific Mandate Regarding the Rights of Indigenous Peoples*, UN Doc A/HRC/12/34/Add.7 (1 September 2009).

[242] *Stavenhagen Annual Report 2003*, UN Doc E/CN.4/2003/90, [73]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [46]-[49].

[243] See, eg, *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [33].

[244] Rodriguez-Piñero Royo, above n 148, 120; Preston et al, above n 25, 20, 54.

[245] Anaya's commentary on Indigenous peoples' right to be consulted on decisions affecting them is one example. *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [36]-[57], [61]-[74]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [45]-[76], [79]-[87]; *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [18]-[40], [49]-[51], [58]-[71].

submissions made to him. His reports are also focused on providing guidance on how Indigenous rights norms can be given effect in practice, embracing a strategy of 'principled pragmatism',[246] as his identification of key conditions for agreements for resource extraction on Indigenous peoples' territories reveals. Anaya has described the influence of his thematic reports as 'discernible', citing their use in two decisions of the Constitutional Court of Colombia in support.[247]

The Special Rapporteur on Indigenous peoples is not the only UN expert to have contributed to knowledge on the content of these themes, which further affects the degree to which the reports add to knowledge of the content of international Indigenous rights norms. Speaking to the jurisdictional competition between the three Indigenous-exclusive bodies discussed in Chapter III, the WGIP considered topics including land rights, development, cultural heritage and intellectual property, health, and education in its annual reports to the Sub-Commission.[248] It also looked at the role of companies with regard to Indigenous rights,[249] as did the PFII,[250] and the OHCHR.[251] During the PFII's first session in 2002 a parallel panel discussion on Indigenous peoples and large-scale development projects was held.[252] The PFII touched on issues regarding consultation and development projects in its thematic focus on territories, lands and natural resources and, like Anaya, has devoted attention to the position of Indigenous women.[253] It also considered the theme of Indigenous education.[254] The EMRIP has followed the Special Rapporteur's lead in producing thematic studies regarding education,[255] the right to participate in decision-making,[256] the extractive industries,[257] and access to justice.[258] It

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[246] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [72], [80].
[247] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [71].
[248] See, eg, CHR, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) [106]-[122], [123]-[130], [137]-[139]. See generally *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [7].
[249] See, eg, CHR, *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights*, UN Doc E/CN.4/Sub.2/AC.4/2002/3 (17 June 2002).
[250] See, eg, PFII, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility*, UN Doc E/C.19/2009/CRP.8 (4 May 2009).
[251] See, eg, HRC, *International Workshop on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution,* UN Doc A/HRC/EMRIP/2009/5 (3 July 2009).
[252] UN *Parallel Events* (2002) <http://www.un.org/rights/indigenous/events.htm>.
[253] *PFII, Report on the Sixth Session, UN Doc E/C.19/2007/12 (*2007) [4]-[38]; PFII, *Report on the Third Session*, UN Doc E/C.19/2004/23 (2004) 30-1. Anaya's commentary on violence against Indigenous women was a reproduction of views he expressed at an expert seminar convened by the PFII on the topic in 2012. PFII, *Report on the Eleventh Session*, UN Doc E/C.19/2012/13 (2012) [19]-[28].
[254] *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [80].
[255] EMRIP, *Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education: Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UN Doc A/HRC/12/33 (31 August 2009).
[256] EMRIP, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UN Doc A/HRC/15/35 (23 August 2010); EMRIP, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UN Doc A/HRC/18/42 (17 August 2011).
[257] EMRIP, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries,* UN Doc A/HRC/21/55 (16 August 2012).
[258] EMRIP, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/24/50 (30 July 2013). The only study by the EMRIP to date that has not already been a focus of thematic study by either Stavenhagen or Anaya is the EMRIP's

has devoted attention to the implementation of the *UNDRIP* in several sessions.[259] For the most part the crossover has been complementary and constructive. The themes are far larger than a single short report can address. The Special Rapporteurs have taken account of, and contributed to, the thematic issues examined by the PFII and the EMRIP.[260] However, Anaya's frustration at the EMRIP's decision to focus on extractive industries and its suggestion that it develop guidelines jointly with Anaya was thinly veiled.[261] Nevertheless, he indicated his intention to coordinate his work with that of the EMRIP on the topic, which he did.[262]

Many other special procedures mandate-holders conduct thematic studies as a component of their mandate. It is less common for other mandate-holders to explore the specific dimensions of Indigenous peoples' rights in a significant way in the course of their thematic studies, reflecting the different focus of their mandates. But there are exceptions. In 2013 the Working Group on transnational corporations presented a thematic report to the GA on 'the challenges faced in addressing adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the United Nations Guiding Principles on Business and Human Rights.'[263] Further, several experts devote notable, and adroit, attention to the particular impact of the rights concerns they examine on Indigenous peoples. For example, the expert on housing developed basic principles and guidelines on development-based evictions and displacement that devoted especial attention to Indigenous peoples;[264] and the expert on food examined the threat posed by increasing pressures on land on Indigenous peoples, including referencing Indigenous peoples' right to self-determination.[265] Some states have claimed that these reports have influenced their understanding of the rights issues addressed, including as they affect Indigenous peoples.[266]

2012 study on languages and cultures: EMRIP, *Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples: Study of the Expert Mechanism on the Rights of Indigenous Peoples,* UN Doc A/HRC/21/53 (16 August 2012).

[259] For example, at its annual sessions the EMRIP has an agenda item on the *UNDRIP*, see EMRIP, *Annotated Provisional Agenda*, UN Doc A/HRC/EMRIP/2013/1/Add.1 (26 April 2013) 2-3. Further, in 2012 the EMRIP produced a report on its questionnaire on implementation of the *UNDRIP*, see EMRIP, *Summary of Responses from the Questionnaire Seeking the Views of States on Best Practices Regarding Possible Appropriate Measures and Implementation Strategies in Order to Attain the Goals of the United Nations Declaration on the Rights of Indigenous Peoples: Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UN Doc A/HRC/21/54 (16 August 2012).

[260] See, eg, *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [80]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [20].

[261] *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [42]-[43].

[262] Ibid [42]-[44]; *Anaya Report to GA 2013,* UN Doc A/68/317, [47].

[263] GA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc A/68/279 (7 August 2013) 2.

[264] HRC, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Doc A/HRC/4/18 (5 February 2007) annex 1 ('*Basic Principles and Guidelines on Development-Based Evictions and Displacement*').

[265] GA, Olivier De Schutter, *Report of the Special Rapporteur on the Right to Food,* UN Doc A/65/281 (11 August 2010) [1], [3], [10]-[13], [23], [40](c), [43](a)(ii); HRC, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, UN Doc A/HRC/13/33/Add.2 (28 December 2009) [30].

[266] See, eg, Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Seventeenth Session: Item 3* (30 May 2011) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=110530>.

The content of the thematic studies are publically disseminated, helping to draw attention to the knowledge they impart. The studies are presented to the HRC (and previously the CHR) annually. Some are presented, in full or in summary form, to the GA. They are published on the OHCHR's website and, where they exist, on the personal websites of mandate-holders. Information gathered in preparation of the studies can also be made available on the OHCHR's website. Occasionally the studies are promoted in media releases, media conferences, conference presentations and meetings.[267] But dissemination is restricted to the main languages of the UN and is generally dependent on readers having Internet access.

(ii) Knowledge Advancing Dialogues

The special procedures mandate-holders regularly engage in formal and informal dialogue with a range of actors, including governments, Indigenous peoples, UN agencies, regional rights bodies, civil society and corporations. The mandate-holders use these discussions to advance knowledge about the content of Indigenous rights norms and to advocate for their greater protection. For example, Anaya presented expert testimony before both the Inter-American Court concerning Indigenous peoples' consultation rights and the United States Committee on Indian Affairs regarding the domestic policy implications of the *UNDRIP*.[268] As identified in the previous chapter, the Special Rapporteur on Indigenous peoples shares information regarding its activities (including its thematic work) at the annual sessions of the PFII and the EMRIP, as do other special procedures experts.[269] Since 2011 the HRC has held an annual half day panel on an Indigenous rights theme, which the Special Rapporteur participates in too.[270] In addition, the experts contribute to conferences and seminars regarding Indigenous peoples' rights beyond the UN. For example, Stavenhagen participated in a seminar on multiculturalism in Africa organised by NGOs with the support of the OHCHR and UNDP in Gaborone in 2002,[271] and the expert on violence against women participated, along with Anaya, in a regional consultation on

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[267] See, eg, Efe Agency, above n 188. This practice is encouraged in the Manual of Operations. *Manual of Operations,* above n 7, [107].

[268] James Anaya, 'La Norma de Consulta Previa: Introducción a Peritaje ante la Corte Interamericana de Derechos Humanos, Caso Sarayaku' (Media Release, 7 July 2011) <http://unsr.jamesanaya.org/statements/la-norma-de-consulta-previa-introduccion-a-peritaje-ante-la-corte-interamericana-de-derechos-humanos-caso-sarayaku>; James Anaya, 'Testimony before the Senate Committee on Indian Affairs' (Media Release, 10 June 2011) <http://unsr.jamesanaya.org/statements/testimony-before-the-senate-committee-on-indian-affairs>.

[269] See, eg, Catarina de Albuquerque, 'Statement to the Permanent Forum on Indigenous Issues' (New York, 24 May 2011) <http://www.un.org/esa/socdev/unpfii/documents/session_10_statement_SR_water.pdf>.

[270] HRC Resolution 18/8 *Human Rights and Indigenous Peoples* A/HRC/Res/18/8 (2011) para 14. See, eg, HRC, *Panel (Half-Day) on Language and Indigenous Peoples, 17th Plenary Meeting* (20 September 2011) United Nations <http://www.unmultimedia.org/tv/webcast/2011/09/panel-half-day-on-language-and-indigenous-peoples-17th-plenary-meeting.html>. Further, the Working Group on transnational corporations' inaugural annual Forum on Business and Human Rights in 2012 included a panel discussion concerning the impact of business on Indigenous peoples. HRC, *Summary of Discussions of the Forum on Business and Human Rights, Prepared by the Chairperson, John Ruggie*, UN Doc A/HRC/FBHR/2012/4 (23 January 2013) [111]-[118].

[271] CHR, *Report on the Third Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples*, UN Doc E/CN.4/Sub.2/AC.4/2002/4 (17 June 2002); *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [3].

violence against Indigenous women in the Asia Pacific organised by NGOs in India in 2008.[272]

3 *Capacity-building on the Periphery*

The third and final core regulatory mechanism engaged by the special procedures is that of capacity-building. Recall, as discussed in Chapter II, that Braithwaite and Drahos define capacity-building as 'helping actors get the technical competence to satisfy global standards, when they wish to meet them but lack the capacity to do so.'[273] In the present context, I use the concept of capacity-building to refer to situations where specific technical assistance is provided to improve a state's conformity to international Indigenous rights norms. It does not necessarily require the provision of financial resources, which would shift the mechanism from a dialogic tool to more of a reward-based one. Capacity-building differs from the technique of shaming in that it is proactive rather than simply reactive, developing capacity to avoid further rights violations rather than only responding to existing violations. In fact, positive encouragement is an important component of capacity-building. It differs from creating conditions for dialogue, in particular the technique of improving knowledge, because although it builds knowledge and dialogue actual assistance is provided to a state or other actor to realise particular Indigenous rights norms. Knowledge is not shared nor is dialogue built in a generalised sense.

The special procedures mandate-holders engage capacity-building as a tool primarily through the technical advisory assistance they provide to states in order to promote best practices. But it is not a commonplace tool. Naples-Mitchell identifies the experts' 'tension between competing obligations to treat sovereign states as partners and as adversaries';[274] in practice, the latter approach tends to trump, relegating this method to the periphery. However, the Special Rapporteur on Indigenous peoples' mandate expressly envisages a role for the expert in providing technical advisory assistance to states.[275] The Special Rapporteur fulfils this aspect of the mandate through 'encouraging domestic legal, administrative, and programmatic reforms that comply with the standards of the United Nations Declaration on the Rights of Indigenous Peoples and other relevant human rights instruments.'[276] Anaya sees this practical oriented work as significant to his mandate.[277] He also points out that it has involved moving away from the 'standard work areas' of the special procedures, requiring 'resourcefulness and innovation' on his part.[278] It often, although not always, involves a short visit to the state concerned. It can be ongoing; for example, Anaya has furnished technical assistance to Ecuador

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[272] *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [28].
[273] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 26.
[274] Naples-Mitchell, above n 3, 232. See generally Pinheiro, above n 191, 166.
[275] *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para 1(f).
[276] The University of Arizona Indigenous Peoples Law and Policy Program, *The Role of the UN Special Rapporteur on the Rights of Indigenous Peoples within the United Nations Human Rights System: A Handbook for Indigenous Leaders in the United States* (2012) 19.
[277] See, eg, *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [26], [69], [70].
[278] *Anaya Report to GA 2013,* UN Doc A/68/317, [8].

on multiple occasions. Given the cooperative nature of this work it is dependent on states first requesting assistance, which several have.

Anaya has provided technical advisory assistance to Ecuador, Chile, Mexico, Colombia, Suriname, Peru, Brazil and Guatemala; all Latin American countries and all developing states. Suggestions regarding processes and laws for appropriately consulting with Indigenous peoples have dominated his technical advisory work, including in respect of Chile in 2009 and 2012,[279] Colombia in 2010,[280] Guatemala in 2011,[281] Peru in 2011 and 2012,[282] and Brazil in 2012.[283] Anaya's advice to the Guatemalan Government regarding a draft instrument on consultation is explored in Chapter VI. Regarding Ecuador, Anaya provided technical advisory assistance to the Government on several occasions between 2008 and 2011, suggesting content for new constitutional provisions affirming Indigenous peoples' collective rights, as well as providing comments on new legislation aimed at bettering Indigenous peoples' access to justice and coordinating Indigenous justice systems with the national justice system.[284] Anaya's 2011 visit to Suriname was conducted to provide assistance to the Government on the development of laws and administrative measures to secure the rights of its Indigenous and tribal peoples, particularly regarding their lands and natural resources.[285] In 2013 Anaya provided advice on a protocol for justice administrators prepared by the Supreme Court of Mexico concerning the rights of Indigenous peoples and individuals.[286] In the process of providing his advice Anaya has sometimes suggested that countries seek out capacity-building assistance from other bodies, such as the Inter-American Commission, UNDP, ILO and World Bank too.[287]

The Special Rapporteur on Indigenous peoples also builds the capacity of other actors to realise Indigenous peoples' rights, notably Indigenous peoples themselves and international bodies. Anaya has provided observations on initiatives regarding Indigenous peoples to a host of UN and international organisations during his time in the mandate, including the OHCHR, UNESCO, the UNDP, the Food and Agriculture Organization, the International Finance

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[279] HRC, *Relator Especial de Naciones Unidas sobre la Situación de los Derechos Humanos y las Libertades Fundamentales de los Indígenas: Principios Internacionales Aplicables a la Consulta en Relación con la Reforma Constitucional en Materia de Derechos de los Pueblos Indígenas en Chile,* UN Doc A/HRC/12/34/Add.6 (24 April 2009); *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, annex [9].

[280] *Anaya Annual Report 2010,* UN Doc A/HRC/15/37, [16].

[281] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [8]-[10].

[282] *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [10]; *Anaya Report to GA 2013,* UN Doc A/68/317, [11].

[283] *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [10]; *Anaya Report to GA 2013,* UN Doc A/68/317, [11].

[284] *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, annex 1 ('*Observaciones del Relator Especial sobre la Situación de Derechos Humanos y Libertades Fundamentales de los Indígenas Acerca del Proceso de Revisión Constitucional en el Ecuador*'); HRC, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Observations on the Progress Made and Challenges Faced in the Implementation of the Constitutional Guarantees of the Rights of Indigenous Peoples in Ecuador*, UN Doc A/HRC/15/37/Add.7 (13 September 2010) [11]-[12]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [13].

[285] HRC, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Addendum Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname* A/HRC/18/35/Add.7 (18 August 2011) [2].

[286] *Anaya Report to GA 2013,* UN Doc A/68/317, [12].

[287] See, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Measures Needed to Secure Indigenous and Tribal Peoples' Land and Related Rights in Suriname*, UN Doc A/HRC/18/35/Add.7 (18 August 2011) [27]-[28].

Corporation of the Word Bank Group and WIPO.[288] For example, in 2011 Anaya provided observations on the UNDP's draft guidelines regarding consultation with Indigenous peoples for activities carried out in the context of the climate change mitigation programme for reducing emissions from deforestation and forest degradation, also known as REDD.[289]

Capacity-building to advance the realisation of Indigenous peoples' rights has not been a core component of other special procedures experts' work. Capacity-building did not feature prominently in Stavenhagen's work in the role in part because the mandate of the Special Rapporteur on Indigenous peoples was not extended to include reference to 'technical cooperation at the requests of Governments' until the mandate was renewed in 2007, shortly before Stavenhagen completed his final term in the role.[290] But Stavenhagen did receive requests for technical advisory assistance from states. For example, the Spanish Government provided Stavenhagen with a copy of a draft strategy for cooperation with Indigenous peoples 'for study and possible comments'.[291] Examples of other special procedures mandate-holders furnishing technical advisory assistance to states regarding Indigenous peoples' rights are scarce, given the differing subject matter of their mandates. States too are likely to direct such requests to the Special Rapporteur on Indigenous peoples, or be directed there by other mandate-holders or actors. However, in 2011 the HRC encouraged all mandate-holders to 'pay attention to the technical assistance and capacity-building needs of States in their thematic and country mission reports' suggesting that this tool may play an enhanced role in other mandate-holders' work, including regarding Indigenous peoples, in the future.[292]

D *Emaciation and Enrolment: The Experts' Institutional Support*

1 *Slender UN Assistance*

The special procedures receive insubstantial institutional support from the UN in leveraging these regulatory mechanisms. The OHCHR is the primary source of UN support.[293] It delivers assistance through the Human Rights Council and Special Procedures Division and,

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[288] See, eg, *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, annex [11]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [11], [14]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [6], [14]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [15]. See generally *Anaya Report to GA 2013,* UN Doc A/68/317, [13]-[14].

[289] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [14].

[290] *HRC Res 6/12*, UN Doc A/HRC/RES/6/12, para 1(f).

[291] *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [11]. It is not clear whether Stavenhagen provided comments on the draft.

[292] *HRC Res 16/21,* UN Doc A/HRC/RES/16/21, para 25.

[293] Special procedures mandates' enabling resolutions typically request the UN Secretary-General and the HCHR to provide the relevant mandate with 'all the necessary human, technical and financial assistance'. See, eg, *CHR Res 2001/57*, UN Doc E/CN.4/RES/2001/57, para 11. See also *Manual of Operations,* above n 7, [20]-[22]. Before the OHCHR the mandates were supported by the UN Centre for Human Rights. Some ad hoc assistance is also provided by other UN bodies and programmes. See, eg, *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [12]; *Stavenhagen Annual Report 2004,* UN Doc E/CN.4/2004/80, [7].

within this, the Special Procedures Branch.[294] According to the Manual of Operations, the Division 'provides support to thematic Special Procedures with thematic, fact-finding, policy and legal expertise, research and analytical work, and administrative and logistical services.'[295] A small number of thematic mandates are supported by a different division of the OHCHR: the Research and Right to Development Division. The country mandates receive support from yet another section – the Field Operations and Technical Cooperation Division.[296] The OHCHR provides common coordination services, including looking after the Quick Response Desk for communications, and maintaining the thematic database on communications and internal electronic discussion forum for mandate-holders and their staff.[297] Other divisions assist with the media, administration, and coordinating interactions with the treaty bodies, amongst other things.[298] But in practice the efficacy of this support is severely hampered.

The OHCHR is chronically underfunded and understaffed. The OHCHR's budget for 2010-2011 was less than five per cent of the UN's overall budget, despite the fact that the OHCHR provides support to the steadily increasing number of special procedures mandates, the UPR process, the treaty bodies, maintains nearly 60 human rights field presences, conducts country missions, furnishes technical assistance to states, and organises activities to promote human rights, amongst other tasks.[299] The OHCHR receives only approximately a third of its funding requirements from the UN's regular budget, it is otherwise reliant on voluntary contributions from states.[300] In 2012 the HCHR described the Office as 'stretched to breaking point'.[301] Although the lack of funding is endemic to the UN human rights system as a whole, the absence of financial support for the special procedures is especially striking and is a criticism well documented in the literature.[302] Anaya has raised the possibility that the lack of funding is an intentional systemic flaw, 'one can interpret it as sort of a way in which institutionally the special procedures are in fact inhibited from doing much'.[303] Tomaševski and

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[294] See, eg, Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 3, 6.
[295] *Manual of Operations,* above n 7, [21].
[296] Ibid [22].
[297] Ibid [21].
[298] Ibid [22].
[299] GA, *Report of the United Nations High Commissioner for Human Rights,* UN Doc A/67/36 (3 August 2012) [5]; International Service for Human Rights, *High Commissioner Calls 3% UN Budget for Human Rights 'Scandalous', in Third Committee Dialogue* (31 October 2011) <http://www.ishr.ch/news/high-commissioner-calls-3-un-budget-human-rights-scandalous-third-committee-dialogue>. See generally Baldwin-Pask and Scannella, above n 3, 471.
[300] OHCHR, *About OHCHR Funding* <http://www.ohchr.org/EN/ABOUTUS/Pages/FundingBudget.aspx>.
[301] Navi Pillay, 'Opening Statement' (Statement to the HRC, Geneva, 10 September 2012) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12486&LangID=e>.
[302] See, eg, Baldwin-Pask and Scannella, above n 3, 470-78; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 224-26; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 47-52; Lempinen, above n 1, 165-80; Subedi et al, above n 212, 160; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 217-18; Pinheiro, above n 191, 168; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005), above n 3, 148-49; Hoehne, above n 18, 54; Kamminga, above n 166, 323; O'Flaherty, above n 3, 69; Tomaševski, above n 71, 218-19; Victoria Tauli-Corpuz and Erlyn Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and Challenges* (Tebtebba Foundation, 2004) 30-1; Naples-Mitchell, above n 3, 241-42.
[303] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

Hoehne concur.[304] Anaya estimated that half of the missions he undertakes in the role are funded by the OHCHR and the other half by external sources.[305] He has invited increased financial support for the mandate before the GA and the HRC.[306]

The strain on funding affects staffing levels within the OHCHR, which in turn affects the personnel available to provide support to special procedures mandate-holders. Generally thematic mandate-holders have only one assistant provided by the OHCHR in Geneva. Country mandate-holders receive even less staff support, with the country desk officers that assist them also assigned other tasks, such that the expert on Cambodia has described country mandate-holders as 'a one-man or one-woman army'.[307] The OHCHR lacks the resources to conduct follow-up monitoring to assess whether states have implemented special procedures experts' recommendations, although some OHCHR country offices encourage domestic actors in this work.[308] In the context of mandates that are essentially fulltime but unpaid, and so require most experts to concurrently remain in fulltime employment, the low level of institutional assistance is conspicuous.

A related issue is the quality of the technical policy and research support the OHCHR provides. The OHCHR's Geneva based staff members are not necessarily well versed in the human rights issue the subject of each mandate. This is exacerbated by the fact that OHCHR staff members are rotated through the Office and so, even where expertise is developed, the staff member can be transferred to support another mandate.[309] Anaya has received varying levels of support from the OHCHR-Geneva staff, recounting having the support of OHCHR-Geneva staff unfamiliar with even the basics of international Indigenous peoples' rights law. He comments, '[i]t has been mixed. In the past, for example, the staff I have had have [asked things like]…"Well, what are Indigenous peoples? Why do you have the 's' behind it?" At the moment the staff member who supports me is excellent. But the support is just from one person.'[310] Stavenhagen was fortunate in that for the latter part of his time in the mandate he had the support of an OHCHR-Geneva staff member expert in international Indigenous rights law.[311] As

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[304] Tomaševski, above n 71, 215; Hoehne, above n 18, 58. The constrained funding is both attributable to a lack of state funding and to the way funds are allocated within the OHCHR. Baldwin-Pask and Scannella, above n 3, 474.
[305] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[306] See, eg, GA, 'Implementation of Indigenous Rights Declaration Should Be Regarded as Political, Moral, Legal Imperative without Qualification, Third Committee Told' (Press Release, UN Doc GA/SHC/3982, 18 October 2010); *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [89].
[307] Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 217. See also Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 210.
[308] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 218; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 216-17; Baldwin-Pask and Scannella, above n 3, 447.
[309] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 225; Interview 9 (Telephone Interview, 6 September 2010).
[310] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). The question regarding the 's' in peoples reflects a lack of knowledge of the long debate over Indigenous peoplehood, mentioned in Chapter III, which was finally resolved with the reference to 'peoples' in the *UNDRIP*.
[311] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); Interview 9 (Telephone Interview, 6 September 2010).

a result, Stavenhagen praised the high level of support he received, both substantively and administratively, from the OHCHR's Indigenous Peoples and Minorities Section (prior to the creation of a dedicated special procedures section within the OHCHR, the mandates' support teams were divided thematically so Stavenhagen was directly supported by that Section).[312] In contrast, OHCHR country teams (where they exist) are routinely praised for the logistical support they provide; linking the mandate-holders with IPOs, NGOs and government actors; providing analysis and advice on local issues; disseminating the experts' reports; and promoting the reports' implementation. For example, of the OHCHR country teams, Anaya remarks 'I have had excellent support and cooperation with them, when I have worked with them, in almost all cases.'[313] But, in some states UN country teams have been more peripheral to the special procedures' work, sometimes because of capacity issues and at other times because they wish to distance themselves from the sensitive issues that the experts raise.[314] Where there is a UNDP or other UN presence, but no OHCHR team, these actors also occasionally provide logistical assistance.[315]

2 *Meaningful Outsider Contributions*

A few special procedures mandate-holders have supplemented the sparse UN assistance by enrolling the financial and personnel support of non-UN institutions. The Special Rapporteur on Indigenous peoples has been especially deft at enrolling external support. Special procedures mandate-holders have secured funding from external institutions, a move supported by the Manual of Operations.[316] However, one concern with sourcing funding from outside of the UN, including from states, is that the funding can be tied to particular criteria. This potentially compromises, or gives the appearance of compromising, the independence of the expert.[317] This is exacerbated by the lack of transparency surrounding the external funding sources of special

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[312] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011). Other mandate-holders interested in Indigenous rights issues also received support from the OHCHR's Indigenous Peoples and Minorities Section during that period. Interview 9 (Telephone Interview, 6 September 2010).

[313] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). See generally Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 218.

[314] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 217; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 61; HRC, *Report of the Fourteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council and of the Advisory Services Programme*, UN Doc A/HRC/7/29 (13 December 2007) [77] ('*Report of the Special Procedures' 14th Meeting*').

[315] Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 218. But see Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 10, 63. Assistance from the UNDP and others is encouraged in the Manual of Operations, see *Manual of Operations,* above n 7, [124]-[127].

[316] *Manual of Operations,* above n 7, [11].

[317] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). See generally Rhona K M Smith, 'The Possibilities of an Independent Special Rapporteur Scheme' (2011) 15(2) *The International Journal of Human Rights* 172, 179; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 14, 218; Baldwin-Pask and Scannella, above n 3, 474-75.

procedures mandate-holders.[318] The Special Rapporteur on Indigenous peoples has successfully secured significant funding from private sources including the Ford Foundation, for example.[319] In addition, the Special Rapporteur receives some financial support via a fund controlled by a board comprised of Indigenous rights focused NGOs, including the International Work Group for Indigenous Affairs (IWGIA).[320] The additional funding allows the Special Rapporteur on Indigenous peoples to conduct more country visits than would otherwise be possible and helps to fund non-UN based expert personnel to support the mandate's work.

Personnel and expert technical support is also provided to the special procedures by some non-UN institutions, including universities and research institutions. Mostly this support is secured by experts from or based in the global North, revealing the inequitable position of experts from the global South.[321] The Special Rapporteur on Indigenous peoples is supported by the University of Arizona Support Project for the United Nations Special Rapporteur on Indigenous Peoples (Support Project). The Support Project is based out of the University of Arizona, where Anaya holds a professorship. Anaya and his staff provided some support to Stavenhagen while he was in the role too, although the Support Project did not formally exist at that point.[322] As a result, Stavenhagen was more reliant on UN support, although he continued to receive his salary from El Colegio de México and was given a reduced teaching load during the term of his mandate.[323] The Support Project has several staff members. All are lawyers with experience in Indigenous rights issues.[324] The team provides around the clock assistance to Anaya in his work, travelling with him on his country missions and attending international fora.[325] Anaya is further supported by students from the Special Rapporteur Support Team Workshop, a part of his university's law curriculum, which offers students the opportunity to conduct research to assist the Special Rapporteur.[326] Anaya similarly enjoys a reduced formal teaching load.[327]

The Support Project enables Anaya to address Indigenous rights concerns quickly, to publicise his work and findings immediately on the non-UN webpage hosted by his university (as well as through his personal Special Rapporteur-branded twitter feed, YouTube channel and other social media tools), and to draw on expert assistance. This is an arrangement that Anaya sees benefitting both the mandate and the university – the mandate's work gets done, students have an opportunity to work on projects connected with the mandate and the university gets to

[318] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 225; Baldwin-Pask and Scannella, above n 3, 474-75.
[319] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[320] Ibid.
[321] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 225; Naples-Mitchell, above n 3, 242; Golay, Mahon and Cismas, above n 3, 309.
[322] See, eg, *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78, [4].
[323] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).
[324] James Anaya, *Support for the Special Rapporteur* <http://unsr.jamesanaya.org/support/support-for-the-special-rapporteur>.
[325] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).
[326] James Anaya, *Support for the Special Rapporteur*, above n 324.
[327] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013).

promote the international dimension of one of its flagship areas: 'native studies'.[328] Anaya reflects that if he had limited himself to the resources and support provided by the UN 'I would do maybe 20% of what I have been able to do, whatever that is worth.'[329] The levels of support he received from the OHCHR improved towards the end of his time in the mandate, although the Support Project retained a central role. Anaya remarks:

> I am comfortable saying that, during the first four or five years of my mandate, 90-95% of the substantive work – the writing of the reports, the research that goes into the reports, the examination of cases, the drafting of the commentary on cases, the observations we do, the preparations for country missions – 90-95% of what was done on the substantive work was by the Support Project. That changed, however, a couple of years ago, and the OHCHR staff member assigned to me does a significant amount of the substantive work in close cooperation with the Arizona team.[330]

But his steps to move the functioning of the mandate away from the UN attracted criticism from a former OHCHR-bureaucrat, who equated it with a 'privatisation' of the role: '[i]t used to be that "the UN" was intervening, now it's "Anaya" intervening.'[331] However, Anaya is not the only special procedures mandate-holder to maintain a non-UN website on his work in the mandate, or to draw on significant financial and personnel support from external sources.[332] And the same former OHCHR bureaucrat acknowledged that '[t]he Special Rapporteur for Indigenous peoples is doing great work.'[333]

The special procedures receive further informal assistance from a host of other institutions and actors, including academics, IPOs and NGOs. The experts are heavily dependent on this support, particularly in relation to follow-up.[334] But these actors often face their own funding and personnel constraints. As Piccone points out, NGO follow-up campaigns regarding special procedures experts' recommendations are often 'ad hoc, under-resourced or overcome by more urgent matters.'[335] This leaves gaps in the pressure placed on states to implement the experts' recommendations.

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[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Interview 9 (Telephone Interview, 6 September 2010).
[332] Experts, including those on housing and food, have maintained similar websites, see Right to Housing <http://righttohousing.org/en/about/direitoamoradia.org>; Right to Food <http://www.righttofood.org/>. In addition, other special procedures experts, including 'Katarina Tomasevski, Paul Hunt, Jean Ziegler, Olivier de Schutter – have created or made use of independent academic/research projects to support their mandates'. Golay, Mahon and Cismas, above n 3, 309.
[333] Interview 9 (Telephone Interview, 6 September 2010).
[334] See, eg, *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [2]; *Anaya Annual Report 2010,* UN Doc A/HRC/15/37, [3]; *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [12].
[335] Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 218.

E *Conclusion: A Dialogic Toolset*

Shaming, dialogue-building and capacity-building are the major regulatory mechanisms engaged by the experts to fulfil their Indigenous mandate. Shaming is the leading tool utilised. It is a preeminent feature of the experts' country missions and reports, which are one of the experts' fundamental work methods. Using this mode, a host of experts, particularly the Special Rapporteur on Indigenous peoples, have shamed states for Indigenous rights violations (especially related to land rights) through speech acts from the field and through the texts of their country reports and associated media releases. Shaming is leveraged with more subtlety in the experts' communications, a further central work method, with the experts' wide-ranging accusations of Indigenous rights violations more implied than express. Anaya has broken new ground in making special country missions to investigate specific cases a regular part of his work, which shame states in much the same way as the experts' general country missions and associated reports. The media spotlight is also harnessed by the experts in the most serious and urgent cases. In the hands of some mandate-holders, dialogue-building features in these approaches too. The technique of dialogue-building is harnessed through the act of witnessing the 'truth' of encroachments on Indigenous rights, mainly in the role of Geertz's 'Complete Investigator' and, occasionally, through praising states for Indigenous rights improvements. However, mostly it guides the experts' thematic studies on Indigenous peoples' rights (and also their dialogues with assorted players), which endeavour to build understanding concerning this body of norms. Capacity-building is not a common mechanism wielded by the experts as a whole. But Anaya stands out for the attention he has devoted to the provision of technical advisory assistance to a variety of Latin American states. All three of these prime mechanisms are dialogic because the special procedures system was created with no coercive capability. Nor are the experts in a financial position to mobilise economic rewards: the support the experts receive from the UN is strikingly low, although the Support Project is a shining example of the significant non-UN institutional support a few experts have enrolled. The pressing question now is the extent to which these tools have advanced the realisation of Indigenous peoples' rights in practice; that question is the focus of the following two chapters.

V STRATEGIC DEFLECTION: NEW ZEALAND'S RESPONSE

A *Introduction*

In order to discern the influence of the special procedures mechanism on state behaviour towards Indigenous peoples it is necessary to take a closer look at the mechanism's impact on specific states. In this chapter I analyse the influence of the special procedures mechanism on state behaviour towards Indigenous peoples in New Zealand. New Zealand is an instructive state to examine as it is a stable, comparatively wealthy, liberal democracy, with a minority Indigenous peoples population; it is frequently celebrated for its domestic Indigenous rights record; and it has been praised for its 'significant strides' to address the special procedures' concerns regarding the rights of Māori.[1] Further, although it has only received two country visits by a special procedures mandate both visits have concerned the human rights situation of Māori.[2] It has also been the subject of several reported communications from special procedures experts, two of which directly concerned Māori.[3] Despite this focused attention, in New Zealand we see few examples of moves towards full implementation of the special procedures' recommendations and little persuasive evidence that these moves can be attributed to the mechanism in anything other than a peripheral way. Recalling the different behavioural responses to normative orders discussed in Chapter II, I argue that ritualism is the New Zealand Government's prime behavioural response to the international Indigenous rights norms the subject of the special procedures' recommendations. New Zealand deflects deeper scrutiny of its Indigenous rights record by disguising its inward resistance to the special procedures' recommendations regarding hard rights with outward acceptance of those recommendations. It leverages its partial commitment to recommendations concerning soft rights to deflect attention both from its fuller implementation of those soft rights and its resistance to the hard rights. The chapter begins with a précis of New Zealand's Indigenous rights situation; moves to consider the shaming and dialogue-building tools engaged by the special procedures in the country; outlines the Government's official response to the special procedures' attentions, which shifted from rejection to a degree of outward commitment; assesses the Government's action to implement the special procedures' recommendations using three exemplar recommendations concerning the hard norms of constitutional protection and land, and the soft cultural right to education; and concludes with comment on the state's strategy of deflection.

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[1] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [66].
[2] Ibid; *Stavenhagen Report on New Zealand,* UN Doc E/CN.4/2006/78/Add.3.
[3] *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [121]-[124]; *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78; *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [339]-[357].

B *Background*

New Zealand is a stable liberal democracy. The country's population of close to 4.5 million is increasingly diverse, with Māori comprising around 15 per cent; *Pākehā* (European New Zealanders) the majority at around 75 per cent; and, people from Asia and the Pacific sizeable portions.[4] New Zealand inherited the democratic institutions of its British coloniser: it is a constitutional monarchy with the British sovereign as head of state, a unicameral elected House of Representatives and an independent judiciary. Two parties dominate domestic politics, the centre-right National Party and centre-left Labour Party. In the 2011 general elections the National Party returned to power with the support of three smaller parties, including the Māori Party, which focuses on Māori concerns. New Zealand is a comparatively wealthy country, with a Gross Domestic Product (GDP) per capita that places it in the upper quartile globally.[5] It scores high on human development indices, with the UNDP ranking it 6th out of 187 countries.[6] It is regarded as a peaceful country, with one index positioning it as third most peaceful country globally.[7] It has long championed itself internationally as a leader in Indigenous rights recognition, identifying Indigenous peoples' rights as 'of profound importance' to the state and 'integral to its identity'.[8] And it has ratified the core international human rights instruments (the *ICCPR*, *ICESCR*, *CERD*, *CEDAW*, *CRC*, *CAT* and *CRPD*) that inform the content of international Indigenous rights norms, as well as belatedly endorsing the *UNDRIP* in 2010.[9] But it has a dark colonial history that continues to manifest itself in the human rights situation of Māori today.

Māori and the lands they knew as Aotearoa were colonised by the British from the early 19th century. The British Crown proclaimed sovereignty over New Zealand on the combined basis of a treaty of cession – the 1840 *Treaty of Waitangi* (*Treaty*) – and discovery.[10] Yet, the *Treaty*'s effect as a transfer of sovereignty is contested,[11] in part because it has English and

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[4] United Nations Development Programme (UNDP), *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World* (2013) 194; New Zealand Ministry of Social Development, *The Social Report 2010* (2010) 10, 16.

[5] Central Intelligence Agency, *The World Factbook: New Zealand* <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html>.

[6] UNDP, above n 4, 143.

[7] Institute for Economics and Peace, *Global Peace Index 2013: Measuring the State of Global Peace* (2013) 5.

[8] New Zealand Government representative, Rosemary Banks, cited in GA, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President' (Press Release, UN Doc GA/10612, 13 September 2007). See generally Moana Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa' in S Greymorning (ed), *A Will to Survive: Indigenous Essays on the Politics of Culture, Language and Identity* (McGraw-Hill, 2004) 95.

[9] HRC, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (B) of the Annex to Human Rights Council Resolution 5/1: New Zealand*, UN Doc A/HRC/WG.6/5/NZL/2 (11 March 2009) 2.

[10] Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, 1990) 97.

[11] See generally F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, 1999).

Māori language versions that provide for very different exchanges.[12] Under the Māori text, the British Crown receives governorship and *iwi* (nations) and *hapū* (kinship groups) are guaranteed *tino rangatiratanga* (self-determination) over their lands, villages, and tangible and intangible treasures.[13] Whether the governance granted to the Crown was over British settlers solely or over Māori too is debated; only five years earlier the British Crown had recognised New Zealand's independence under the rule of a collection of *rangatira* (leaders) in the 1835 *Declaration of Independence*.[14] In contrast, the English text of the *Treaty* grants the British Crown sovereignty and guarantees *iwi* and *hapū* 'the full, exclusive, and undisturbed possession of their Lands and Estates, Forests Fisheries and other properties'.[15] Most Māori signed the Māori language version.[16] Nevertheless, two decades after the *Treaty* was signed the British had assumed control over much of the country.[17]

The violence that followed Britain's assumption of sovereignty had a swift and devastating impact on Māori. The Māori population was rapidly overrun by the influx of settlers and greatly reduced by foreign disease and warfare, including extensive British military action against *iwi* and *hapū* to free up land for settlers.[18] By the beginning of the 1900s most of New Zealand's lands and resources were out of Māori hands, a product of the individualisation of property titles, confiscations following the military conflicts, and substantial land cessions.[19] Māori systems of law and governance were usurped by the imposition of a common law legal system. Māori culture was also repressed, including through the suppression of *te reo* Māori (the Māori language) and Māori health practices.[20] Māori actively resisted the force of colonisation from the earliest times,[21] with Māori protest movements peaking during the 1960s and 1970s, epitomised in the 1975 march to end the alienation of Māori land.[22]

Prompted by Māori activism and lobbying, the New Zealand Government has made some efforts at redress. In 1975 the Waitangi Tribunal, an independent commission of inquiry with mostly recommendatory powers, was established to hear Māori claims regarding breaches

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[12] See generally Walker, above n 10, 90-4; David V Williams, 'Te Tiriti o Waitangi - Unique Relationship Between Crown and Tangata Whenua?' in I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 64, 76-80.
[13] Walker, above n 10, 290.
[14] Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 100-01.
[15] Walker, above n 10, 289. The Treaty of Waitangi has three written articles and a fourth oral promise. See generally Claudia Orange, *The Treaty of Waitangi* (Bridget Williams Books, 2 ed, 2011); Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited - Perspectives on the Treaty of Waitangi* (Oxford University Press, 2 ed, 2004).
[16] See, eg, Williams, above n 12, 76.
[17] See generally Walker, above n 10, 98-152.
[18] Ibid 98-134; Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 103-04.
[19] Walker, above n 10, 139.
[20] Ibid 146-48, 181. See, eg the *Tohunga Suppression Act 1907* (NZ).
[21] See, eg, Walker, above n 10, 111-34, 148-85. See generally Lindsay Cox, *Kotahitanga: The Search for Māori Political Unity* (Oxford University Press, 1993).
[22] See, eg, Walker, above n 10, 209-19; Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Books, 1999) 109; Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 104.

of the *Treaty* by the Crown.[23] The courts moved to identify the *Treaty* as part of New Zealand's constitutional canon in the 1980s.[24] A process of settlement negotiations for redress for *Treaty* grievances was instituted by the Government in the 1990s, with a number of important *iwi* and pan-Māori settlements agreed.[25] The common law doctrine of aboriginal title was judicially recognised.[26] In the 1996 elections the number of seats guaranteed to Māori in Parliament, which had been static at four since 1867 (when Māori made up half of the population), was made proportional to the number of Māori registered on the Māori electoral roll; the current allocation is seven seats.[27]

The recognition of the rights of Māori as Indigenous peoples is wanting, however. Expressions of Māori self-determination are limited by the state to statutorily-constrained forms of *iwi* self-management of *Treaty* settlement assets and minority participation in the Westminster-derived political institutions of the state.[28] The 2011 elections saw the number of Māori with seats in the House of Representatives align roughly proportionally with the number of Maori in the population. But the number of Māori represented in local government is far lower, averaging around five per cent.[29] Even with the operation of the *Treaty* settlement process, only approximately five per cent of New Zealand land is in Māori ownership.[30] *Treaty* settlements return an estimated one to three per cent of the value of the economic loss to *iwi* and *hapū*;[31] a figure that also ignores the political, social and cultural losses they have endured. Public backlash against the recognition of Māori rights in New Zealand is strong: Indigenous rights are portrayed as privileges creating dual classes of citizenship.[32] Negative stereotypes of Māori abound in the mainstream media.[33] The health of the Māori language is fragile.[34] On almost every socio-economic indicator Māori fare worse than *Pākehā*: one in three Māori

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[23] *Treaty of Waitangi Act 1975* (NZ). See generally Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 105-06.
[24] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 655, 664 per Cooke P. See generally Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 106.
[25] See, eg, *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ); *Waikato Raupatu Claims Settlement Act 1995* (NZ); *Ngāi Tahu Claims Settlement Act 1998* (NZ).
[26] See, eg, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
[27] This was made possible by the *Electoral Act 1993* (NZ), ss 45, 76-9, 269. The original four seats were created by the *Maori Representation Act 1867* (NZ).
[28] Annette Sykes, 'The Politics of the Brown Table' (Bruce Jesson Lecture 2010, The University of Auckland, 27 October 2010) 4.
[29] Janine Hayward, 'Mandatory Maori Wards in Local Government: Active Crown Protection of Maori Treaty Rights' (2011) 63(2) *Political Science* 186, 187.
[30] New Zealand Ministry of Justice, *Māori Land Court* <http://www.justice.govt.nz/courts/maori-land-court>.
[31] See, eg, Toon Van Meijl, 'Conflicts of Redistribution in Contemporary Maori Society: Leadership and the Tainui Settlement' (2003) 112(3) *The Journal of the Polynesian Society* 260, 260. Anaya recognised this fact, see *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [40].
[32] See eg, ACT Party, *Fed Up with Pandering to Maori Radicals?* (Advertisement, 11 July 2011) <http://www.act.org.nz/files/MaoriRadicals.pdf>; Don Brash, 'Nationhood' (Address to the Orewa Rotary Club, 27 January 2004) National Party <http://www.national.org.nz>. See generally NZHRC, *Tūi Tūi Tuituiā: Race Relations in 2012* (2013) 63 ('*Race Relations 2012*').
[33] See, eg, NZHRC, 'Press Council Decisions on Commentators Show Need for Accuracy to Support Viewpoints' (Media Release, 15 June 2012) <http://www.hrc.co.nz/newsletters/diversity-action-programme/nga-reo-tangata/2012/06/press-council-decisions-on-commentators-show-need-for-accuracy-to-support-viewpoints/>.
[34] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity - Te Taumata Tuarua/Volume 2* (2011) 441.

children live in poverty, twice the rate for *Pākehā* children;[35] the Māori unemployment rate is more than triple that of *Pākehā*;[36] there is a greater than six year gap in life expectancy between Māori and non-Māori;[37] and, Māori comprise more than 50 per cent of the country's prison population despite making up only 15 per cent of the state's total population.[38] The contemporary Indigenous peoples' rights situation of Māori demands attention and action.

C *Engaging on Māori Rights*

1 *Shaming at the Forefront*

The special procedures have a short history of engagement on Indigenous rights issues in New Zealand. The special procedures' attentions began soon after New Zealand issued a standing invitation to all thematic special procedures in 2004.[39] Shaming has been the principal regulatory tool leveraged by the mandate-holders. It has been engaged through the two country missions from the Special Rapporteur on Indigenous peoples, and the accompanying country reports and media releases, as well as through two communications.[40] Altogether, the special procedures have issued around 40 recommendations to the New Zealand Government to address its Indigenous rights situation concerning the spectrum of Indigenous rights norms.

(a) Stavenhagen's Maximal Approach

The special procedures first began to take a specific interest in New Zealand's treatment of Māori in 2005 when Stavenhagen conducted a country mission to the state. His mission was

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[35] Bryan Perry, *Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982 to 2011* (Ministry of Social Development, 2012) 19.
[36] New Zealand Council of Christian Social Services, *Vulnerability Report: Issue 14* (2013) 4; Innovation and Employment New Zealand Ministry of Business, *Maori Labour Market Factsheet - March 2013* (2013).
[37] International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: New Zealand*, UN Doc HRI/CORE/NZL/2010 (11 March 2011) 22.
[38] Ibid 37.
[39] OHCHR, *Standing Invitations* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx>. Anaya and Stavenhagen are not the only UN human rights experts with mandates on Indigenous peoples to have conducted official visits to New Zealand. The former Chairperson-Rapporteur of the WGIP visited in 1992 and the then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1997. Erica-Irene A Daes, *Indigenous Peoples: Keepers of Our Past - Custodians of Our Future* (IWGIA, 2008) 42; CHR, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report by Miguel Alfonso Martínez, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) [26].
[40] OHCHR, 'UN Expert on Human Rights of Indigenous People Concludes Visit to New Zealand' (Press Statement, 25 November 2005) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=3021&LangID=E>; *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3; *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [339]-[357]; *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4; 'New Zealand: More to be done to Improve Indigenous People's Rights, Says UN Expert' (Press Statement, 23 July 2010) <http://unsr.jamesanaya.org/statements/new-zealand-more-to-be-done-to-improve-indigenous-peoples-rights-says-un-expert>; HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Preliminary Note on the Mission to New Zealand (18 to 24 July 2010)*, UN Doc A/HRC/15/37/Add.9 (26 August 2010) ('*Anaya Preliminary Note on New Zealand*'); *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [121]-[124]; *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78.

prompted by the CERD Committee's findings that legislation extinguishing Māori property rights in New Zealand's foreshore and seabed through the *Foreshore and Seabed Act 2004* (NZ) (*Foreshore and Seabed Act*) discriminated against Māori.[41] The nature and impact of this legislation is considered in more detail in Part E. During his eleven day visit Stavenhagen met with various domestic actors, including high-level Government representatives; representatives of *iwi*, *hapū* and Māori IPOs; and, members of the New Zealand Human Rights Commission (NZHRC, the country's NHRI), the Waitangi Tribunal, the Māori Land Court (a specialist court that hears matters concerning Māori-owned land) and academics.[42] Stavenhagen skilfully engaged the technique of shaming through the media at the close of his country mission. His visit had been closely followed by the media.[43] On the last day of his mission Stavenhagen issued a press release that criticised the 'significant disparities between Maori and Pakeha in regard to social and human development indicators'; the 'inadequate' resourcing of Maori-medium schools; the fact 'Maori are grossly over-represented in the criminal justice system'; and, described redress for land grabs as 'only partially successful', expressing specific concern at the effect of the *Foreshore and Seabed Act*.[44] The media release foreshadowed the issues that Stavenhagen devoted attention to in his final report.

Shaming was a central focus of Stavenhagen's final report on his country mission. Stavenhagen's report was highly critical of the human rights situation of Māori. He concluded that the lack of constitutional recognition for Māori rights and traditional governance bodies had fuelled Māori perceptions that they are the junior partners in the Māori-*Pākehā* relationship, a situation best illustrated by the 'sporadic and insufficient redress' Māori had received for the dispossession 'of most of their lands and resources', including the foreshore and seabed.[45] He also identified continuing disparities between Māori and non-Māori across a range of socio-economic indicators, including employment, health and education;[46] an absence of 'self-

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[41] The *Foreshore and Seabed Act 2004* (NZ); CERD Committee, *Decision 1 (66): New Zealand Foreshore and Seabed Act 2004*, UN Doc CERD/C/66/NZL/Dec.1 (11 March 2005); Internal Memorandum to Minister of Foreign Affairs, Winston Peters, 'Visit of UN Special Rapporteur for Indigenous Issues', 9 November 2005, obtained under *Official Information Act 1982* (NZ) (*'OIA'*) request from the Ministry of Foreign Affairs and Trade (MFAT), 1-2.

[42] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [3]-[5]. Stavenhagen also received background information on the position of Maori from various sources. I contributed information related to my Master of Laws thesis on affirmative action measures for Māori through an academic colleague who was collating background information for him from different scholars.

[43] See, eg, Cherie Taylor 'UN Rep Hears Tearful Plea to Help Maori', *New Zealand Herald* (online), 23 November 2005 <http://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=10932502>; 'Maori Denied Rights, UN Man Told' *New Zealand Herald* 21 November 2005 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10356212>; Ruth Berry, '"One Law for All Races" Risky Says Expert', *New Zealand Herald* (online), 21 November 2005 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10356201>; Ruth Berry, 'UN to Check Whether Foreshore Law Breaches Maori Rights', *New Zealand Herald* (online), 14 November 2005 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10355092>.

[44] OHCHR, *UN Expert on Human Rights of Indigenous People Concludes Visit to New Zealand*, above n 40.

[45] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [78]-[79].

[46] Ibid [80].

governance mechanisms based on the recognition of the right of indigenous peoples to self-determination';[47] and an increasing return to 'assimilationist models' in public discourse.[48]

Stavenhagen's recommendations to the New Zealand Government to address these concerns were far reaching. They included that the *Treaty* be constitutionally entrenched;[49] *iwi* and *hapū* be favoured as the groupings with which the national and local government engages;[50] the Waitangi Tribunal be granted binding powers of adjudication;[51] entrenchment of the *New Zealand Bill of Rights Act 1990* (NZ) (which affirms, inter alia, the right to be free from discrimination and the rights of minorities to their culture, religion and language);[52] the repeal and replacement of the *Foreshore and Seabed Act* by a settlement that recognises 'the inherent rights of Maori in the foreshore and seabed';[53] that *iwi* and *hapū* be able 'to self-determine an appropriate corporate structure for receipt and management' of Treaty settlement assets';[54] the Crown negotiate 'a more fair and equitable settlement policy and process' with Māori;[55] more resources be allocated to Māori education at all levels;[56] Māori sacred sites and other places of cultural significance be 'incorporated permanently into the national cultural heritage of New Zealand';[57] social delivery services, particularly health and housing, continue to be targeted and tailored to the needs of Māori;[58] the Government support achievement of the *UNDRIP* by consensus;[59] and that the Government ratify *ILO Convention 169*.[60] Stavenhagen's report received significant attention in domestic mainstream and Māori media when it was released, helping to draw attention to the persisting violations of Māori rights he identified.[61]

(b) Anaya's Moderate Course

The technique of shaming was further leveraged by Special Rapporteur Anaya in his 2010 follow-up country mission to New Zealand. Even though it was a follow-up mission, Anaya did not attempt to follow-up on all of the issues covered in Stavenhagen's 2006 report.

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[47] Ibid.
[48] Ibid [81].
[49] Ibid [85].
[50] Ibid [87].
[51] Ibid [89].
[52] Ibid [91]. See *New Zealand Bill of Rights Act 1990* (NZ), ss 19 and 20.
[53] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [92].
[54] Ibid [94].
[55] Ibid [95].
[56] Ibid [97].
[57] Ibid [99].
[58] Ibid [101].
[59] Ibid [102].
[60] Ibid [103].
[61] See, eg, Tracy Watkins, 'Labour Defiant over UN Rebuke', *The Dominion Post* (Wellington), 5 April 2006; 'No Consensus Over UN Report', *Television New Zealand* (online), 5 April 2006 <http://tvnz.co.nz/content/695498/425825.html>; Dan Eaton, 'Pressure Mounts on Govt over UN Report', *The Press* (Christchurch), 6 April 2006; Moana Jackson, *The United Nations on the Foreshore: A Summary of the Report of the Special Rapporteur* (2006) Converge <http://www.converge.org.nz/pma/mj050406.htm>; New Zealand Press Association, 'Urban Maori? UN Envoy was "Stunned"' *New Zealand Herald* (online), 6 April 2006 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10376254>; Kim Triegaardt, 'Search for Calm Waters' (2009) 45 *Te Karaka* 29, 29.

His chief focus was an examination of the process for settling claims under the *Treaty*, although other issues were also addressed. Anaya's mission was initiated by the New Zealand Government itself following New Zealand's eventual endorsement of the *UNDRIP*;[62] conceivably out of a belief that the report would highlight positive steps taken following the change from a Labour to a National-led Government in 2008, which could garner Māori electoral support for the election the following year.[63] During Anaya's six day visit he too met with a range of Government, Māori and civil society actors.[64] He also leveraged the impressive domestic media attention his visit garnered by issuing a press statement on the last day of the mission outlining his initial thoughts.[65] In the statement Anaya expressed concern at 'the extreme disadvantage in the social and economic conditions of Maori', highlighted complaints regarding the *Treaty* settlement process, called for legislation replacing the Foreshore and Seabed Act to avoid 'any discriminatory effects' and protect *iwi* rights, and urged the Government 'to provide constitutional security' to the *Treaty* principles and international human rights.[66] Anaya raised these issues again in more detail in his preliminary note on the mission, which was released around a month after his visit, but it failed to garner domestic media attention.[67]

Shaming was core to Anaya's full country report, although his approach was more moderate than Stavenhagen's. While the report did identify some positive developments, some of which are considered below, it also identified persisting rights concerns, including regarding Māori political participation, consultation of Māori on decisions affecting them, the work of the Waitangi Tribunal, the *Treaty* settlement process, the domestic insecurity of Māori rights, and Māori development. A number of these had been signalled in the earlier press statement and

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[62] *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9, [2].
[63] Interview 2 (Wellington, 5 May 2011).
[64] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [2].
[65] James Anaya, 'New Zealand: More to be Done to Improve Indigenous People's Rights, Says UN Expert', above n 40. Regarding the media attention his visit attracted see, eg, Adam Bennett, 'UN Visitor Checks NZ Race Relations', *New Zealand Herald* (online), 20 July 2010 <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10659949>; 'UN Expert Reports on NZ Race Relations', *New Zealand Herald* (online), 21 July 2010 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10660311>; New Zealand Press Association, 'UN Expert Targets Maori Disadvantage', *New Zealand Herald* (online), 26 July 2010 <http://www.nzherald.co.nz/maori/news/article.cfm?c_id=252&objectid=10661297>; 'NZ Must Improve Indigenous People's Rights – UN', *Scoop* (online), 24 July 2010 <http://www.scoop.co.nz/stories/WO1007/S00461/nz-must-improve-indigenous-peoples-rights-un.htm>; 'More Needed to Improve Indigenous People's Rights', *Scoop* (online), 24 July 2010 <http://www.scoop.co.nz/stories/PO1007/S00300/more-needed-to-improve-indigenous-peoples-rights.htm>; Melissa Davies, 'UN: NZ Moving in the Right Direction on Race Relations', *3 News* (online), 21 July 2010 <http://www.3news.co.nz/UN-NZ-moving-in-the-right-direction-on-race-relations/tabid/419/articleID/166837/Default.aspx>; Melissa Davies, 'UN Rep Visits Waitangi Marae', *3 News* (online), 21 July 2010 <http://www.3news.co.nz/UN-rep-visits-Waitangi-marae/tabid/419/articleID/166792/Default.aspx>; Hemopereki H Simon, 'Political Storm on the Horizon', *Tangatawhenua* (online), 26 July 2010 <http://news.tangatawhenua.com/archives/6321>; 'Indigenous Rights Rapporteur will Shape Views', *Te Karere Ipurangi: Maori News Online*, 25 July 2010 <http://maorinews.com/karere/2010/indigenous-rights-rapporteur-will-shape-views/>; 'Professor Anaya Meets More Ministers this Morning Before Heading to Auckland' *Te Karere Maori News* (online), 20 July 2010 <http://www.youtube.com/watch?v=zr4k0QiOWqo&feature=channel>.
[66] James Anaya, 'New Zealand: More to be Done to Improve Indigenous People's Rights, Says UN Expert', above n 40.
[67] *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9.

preliminary note. Anaya's recommendations to the New Zealand Government to address these concerns were not as far-reaching as Stavenhagen's. For example, whereas Stavenhagen recommended that the Waitangi Tribunal be granted binding powers of adjudication, Anaya recommended that decisions by the Government to act contrary to the Tribunal's recommendations should simply 'be accompanied by a written justification', although he stated that the justification should accord 'with the principles of the Treaty and international human rights standards'.[68] While Stavenhagen recommended constitutional entrenchment of the *Treaty* and the *Bill of Rights Act*, Anaya recommended that the *Treaty* principles 'and related internationally-protected human rights' be afforded 'security' in New Zealand's legal system, such as through (at a minimum) the development of vetting safeguards for the *Treaty* similar to those under s7 of the *Bill of Rights Act*.[69] That section requires the Attorney-General to report to Parliament on the inconsistency of Bills with the rights and freedoms contained in the *Bill of Rights Act*.[70] Additionally, Anaya's recommendations included that the Waitangi Tribunal receive sufficient funding;[71] legislation replacing the *Foreshore and Seabed Act* be consistent with the principles of the *Treaty* and international standards;[72] the *Treaty* settlement process involve all interested groups, provide adequate redress to Māori, and give greater consideration to the connection Māori have with their traditional lands and resources;[73] special attention be directed at increasing Māori participation in local governance, such as through reversing an earlier decision to reject the findings of the Royal Commission on Auckland Governance and guarantee Māori seats on the Auckland City Council;[74] and that the Government continue its work to address socio-economic disparities between Māori and non-Māori.[75]

The concerns Anaya raised in his full report received little media attention. Both his advance report and the final report's presentation to the HRC barely received a mention in the media, with the main emphasis in those sources that covered it centring on the socio-economic disadvantage Anaya found.[76] The public release of his advance report was overshadowed by the

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[68] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [72].
[69] Ibid [77].
[70] *New Zealand Bill of Rights Act 1990* (NZ), s 7.
[71] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [70].
[72] Ibid [79]. See also HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Māori People in New Zealand*, UN Doc A/HRC/18/XX/Add.Y (17 February 2011) [79] ('*Anaya Follow-up Report on New Zealand: Advance Version*'). Anaya's final report is different in some minor respects to the advance version of the report. Most notably, and as discussed in Part E of this chapter, these amendments reflect the enactment of *the Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) in March 2011, the month following public release of his advance report.
[73] Ibid [73]-[74].
[74] Ibid [68].
[75] Ibid [80]-[85].
[76] See, eg, New Zealand Press Association, 'Maori "Extremely Disadvantaged" in NZ – UN Report', *3 News* (online), 22 February 2011 <http://www.3news.co.nz/Maori-extremely-disadvantaged-in-NZ--UN-report/tabid/419/articleID/199305/Default.aspx>; New Zealand Press Association, 'Maori "Extremely Disadvantaged" – UN Report', *New Zealand Herald* (online), 22 February 2011 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10707993>; 'UN Told of Extreme Disadvantage for Maori', *Stuff* (online), 22 February 2011 <http://www.stuff.co.nz/national/4687320/UN-told-of-extreme-disadvantage-for-Maori>; 'UN Report Shouldn't be Lost in Upheaval', *Waatea603am* (online), 24 February 2011 <http://waatea.blogspot.com.au/2011/02/te-puni-kokiri-seeks-quake-role.html>.

deadly earthquake that struck New Zealand on the same day. One Māori academic reflected, '[w]e tried to set up a media interview but...nobody cared with the Christchurch earthquake.'[77] Anaya's final report was released almost a year after his visit when interest in its contents had faded. The minimal media attention attached to release of Anaya's follow-up report represented a lost opportunity to draw public attention to his criticisms of the rights situation of Māori. Anaya returned international attention to some of his criticisms during the interactive dialogue on his report before the HRC, where he reiterated that the *Treaty* settlement process 'suffers from evident shortcomings' and that Māori 'face extreme disadvantages in social and economic spheres in relation to the rest of New Zealand society'.[78] But, again, the interactive dialogue was not picked up in the New Zealand media.

(c) Low-key Communications

The special procedures experts engaged in some low-key shaming in their communications with the New Zealand Government too. Several communications have been issued by the experts to New Zealand, two of which directly concerned Māori rights. In 2007 Stavenhagen, jointly with the experts on terrorism and human rights defenders, issued a communication to the Government concerning the arrest of Māori social activists suspected of terrorism-related offenses, as part of an operation carried out in various parts of the country known domestically as Operation 8.[79] Then in 2012 Anaya acting alone sent an allegation letter to the New Zealand Government concerning the alleged exclusion of a family collective, the Mangakahia Whānau, from the *Treaty* settlement process as a product of the Government's policy of negotiating *Treaty* settlements with large Māori groupings.[80] Neither letter had a heavy emphasis on shaming the Government, although Anaya's observations on the Government's response to the Mangakahia Whānau communication contained some direct remarks on the actions he expected the Government to take to address his concerns.[81] The communication regarding Operation 8 was unusual in that it was publicised through the media prior to its publication in the experts' annual reports.[82] A positive by-product of this focus was that it

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[77] Interview 4 (Wellington, 4 May 2011).

[78] James Anaya speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* (20 September 2011) James Anaya <http://unsr.jamesanaya.org/videos/webcast-18th-session-of-the-human-rights-council-statement-of-special-rapporteur-and-interactive-dialogue>.

[79] *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [339]-[357]. For background on Operation 8 see Danny Keenan (ed), *Terror in Our Midst? Searching for Terror in Aotearoa New Zealand* (Huia Publishers, 2008).

[80] *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [121]-[124]; *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78.

[81] *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [123]-[124]. In contrast, Stavenhagen's one sentence long observation regarding the Operation 8 communication thanked the Government for its detailed response and noted that he would 'continue to monitor developments related to the matter', although there is no evidence that he nor the other experts that joined in the communication did. *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [357].

[82] 'UN to Investigate Tuhoe's Anti-Terror Raids', *3 News* (online), 16 January 2008 <http://www.3news.co.nz/UN-to-investigate-Tuhoes-anti-terror-raids/tabid/209/articleID/43607/Default.aspx>; Te Ururoa Flavell, Māori Party MP,

brought additional international media attention to Stavenhagen's country report.[83] Anaya's communication received no media attention, reflecting another missed opportunity to draw attention to Anaya's rights concerns.

2 *Dialogue-building as Postscript*

Efforts at dialogue-building were a supplemental feature of the experts' country missions – mainly Anaya's – and, to a lesser extent, the communications as well. The experts' assessment of the human rights situation of Māori witnesses the rights violations outlined. Anaya made an effort to praise what he perceived as positive efforts by the New Zealand Government in his follow-up report. He commented that '[e]specially in recent years, New Zealand has made significant strides to advance the rights of Māori people and to address concerns raised by the former Special Rapporteur',[84] going on to cite several examples.[85] For instance, he observed that 'the Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples'.[86] Elsewhere in the report he also, inter alia, 'welcomes New Zealand's efforts to secure Maori political participation at the national level';[87] 'applauds the availability of Maori language instruction';[88] and identifies the Government's *Whānau Ora* programme, a cross-agency culturally anchored social programme for reducing inequalities experienced by Māori and others, as 'a positive initiative for Maori development'.[89] The NZHRC remarked on Anaya's 'astute acknowledgement of the progress being made'.[90] Praise was also a feature of Anaya's press release at the conclusion of his visit and his preliminary note, which echoed the praise of the final report.[91] In contrast, Stavenhagen's country report on New Zealand offered little praise – he only went so far as to be 'encouraged' at the Government's commitment to reduce Māori inequality and see Māori share in development,[92] and acknowledge the shift from an 'assimilationist model' of ethnic relations

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'Government's Human Rights Humiliation' (Press Release, 17 January 2008) <http://www.scoop.co.nz/stories/PA0801/S00129.htm>; New Zealand Press Association, 'UN Sends 'Please Explain' Letter over Terror Raids', *Converge* (online), 17 January 2008 <http://www.converge.org.nz/pma/tr170108.htm>.

[83] See, eg, Jon Henley, 'The Maori Resistance', *The Guardian* (online), 6 November 2007 <http://www.guardian.co.uk/theguardian/2007/nov/06/features11.g2>.

[84] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [66].

[85] Ibid [66]-[67].

[86] Ibid [67].

[87] Ibid [68].

[88] Ibid [80].

[89] Ibid [84].

[90] NZHRC commissioner, Rosslyn Noonan, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.

[91] James Anaya, 'New Zealand: More to be Done to Improve Indigenous People's Rights, Says UN Expert', above n 40; *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9, [3]-[5], [8], [10].

[92] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, 2. Stavenhagen also identified 'progress' in the reduction of inequalities between Māori and *Pākehā*: at [70].

to one of biculturalism.[93] However, in his annual thematic reports Stavenhagen has frequently held Indigenous rights developments in New Zealand out as positive.[94] Further, the Special Rapporteur's country reports and dialogues with state and other actors sought to improve knowledge within New Zealand concerning the content of international Indigenous rights norms and their specific application to Māori. Anaya, for example, expressly referred to the provisions of the *UNDRIP* in assessing the Bill designed to repeal and replace the *Foreshore and Seabed Act*.[95] And Stavenhagen, in his Study on Best Practices, stated that his New Zealand 'visit was reportedly seen as a basic point of reference by indigenous organizations'.[96]

D *Astringent to Amiable: The Government's Official Response*

1 *Stavenhagen in the Firing Line*

The New Zealand Government's official response to the special procedures' consideration of the human rights situation of Māori varied markedly. Despite its reported strong objection to the creation of the mandate of the Special Rapporteur on Indigenous peoples,[97] it permitted each country visit by the mandate and it formally cooperated with the special procedures' communications regarding the rights of Māori, responding promptly and substantively to each of them, although it largely dismissed the concerns.[98] The latter fact is significant in light of the high number of governments that do not respond either at all or substantively to the experts' communications, as discussed in the previous chapter.[99] But the Government's attitude towards Stavenhagen's visit and report was particularly negative. Stavenhagen expressed 'his gratitude to the people and Government of New Zealand for their hospitality and cooperation' in his country report.[100] Yet, during his visit Stavenhagen received minimal cooperation from the Government such that Preston et al use New Zealand as an example of governments that 'show little interest' in the Special Rapporteur on Indigenous

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[93] Ibid [77].
[94] See, eg, *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [60]; *Stavenhagen Annual Report 2003,* UN Doc E/CN.4/2003/90, [30]; *Stavenhagen Annual Report 2004,* UN Doc E/CN.4/2004/80, [64], [75]-[76]; *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [66], [74].
[95] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [56]. See also *Anaya Follow-up Report on New Zealand: Advance Version,* UN Doc A/HRC/18/XX/Add.Y, [56].
[96] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [15].
[97] Victoria Tauli-Corpuz and Erlyn Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and Challenges* (Tebtebba Foundation, 2004) 6.
[98] *Anaya Communications Report 2008,* UN Doc A/HRC/9/9/Add.1, [349]-[356]; Letter from Brian Wilson to James Anaya, 18 October 2012, and Letter from Brian Wilson to James Anaya, 6 November 2012, accessible through *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78.
[99] At the time of New Zealand's response regarding the Operation 8 communication New Zealand was bidding for a place on the HRC, a bid it ultimately lost. This may have also influenced the tenor of its response to that communication, which was notably more positive than its response to Stavenhagen's country mission only two years earlier. New Zealand's bid for a non-permanent seat on the UN Security Council in 2015-2016 may have affected the tone of its responses to the later communication.
[100] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, 2.

peoples' visits and 'are not collaborative'.[101] The Prime Minister did not meet with him.[102] Even before Stavenhagen set foot in New Zealand some Māori perceived that the Government went to work to 'minimise both his role and the importance of his visit', supported by sectors of the media who expressed 'outrage that the country should be even hosting such a visit and casting doubts on the Special Rapporteur's competence and impartiality'.[103]

The Labour-led New Zealand Government's response to Stavenhagen's country report was vitriolic. Privately, the Government proposed extensive corrections to Stavenhagen's draft report. Revealing of the depths of its unhappiness, it even explored the possibility of delivering its comments on the report not only to the OHCHR, as is standard practice, but also to Stavenhagen personally in Mexico.[104] The only positive aspect of this hyper-critical response is that the Government took the time and care to respond, in detail, to the report. Publically, the Prime Minister claimed the report was 'unbalanced'.[105] In a lengthy press release the Deputy Prime Minister called it 'selective', 'disappointing' and 'narrow', as well as claiming that it was full of errors of fact and interpretation.[106] He commented that '[h]is raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves.'[107] The press release criticised the short period of time Stavenhagen had spent in New Zealand arguing that he had 'failed to grasp the importance of the special mechanisms we have in place to deal with Māori grievances and the progress successive governments have made'.[108] It criticised several of the specific concerns raised in Stavenhagen's report, including regarding the *Treaty* settlement process, Māori political representation and the protection of Māori cultural heritage. For example, the Government expressed indignant surprise that Stavenhagen's comments on the Waitangi Tribunal and *Treaty* settlement process were generally negative when it asserted that other UN bodies had praised it. But its most extensive criticisms were directed at Stavenhagen's conclusions and recommendations regarding Māori rights over the foreshore and seabed, which are considered in the next part of this chapter.[109] Elsewhere the Government ridiculed Stavenhagen for allegedly being surprised at the high proportion of urban-based Māori,[110] a further tactic to undermine Stavenhagen's intellectual authority. As Tom Bennion and Darrin Cassidy point out, domestically '[t]he

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[101] Preston et al, above n 25, 35.
[102] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [3].
[103] Moana Jackson, 'The United Nations and the Foreshore' (2006) 68 *Mana*, 18, 18.
[104] Internal briefing to New Zealand's Minister of Foreign Affairs and Trade, 'Special Rapporteur's Draft Report on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples in New Zealand', 3 February 2006, obtained under *OIA* request from MFAT, 4.
[105] 'UN Report Critical of Foreshore Act', *Television New Zealand* (online), 4 April 2006 <http://tvnz.co.nz/politics-news/un-report-critical-foreshore-act-695153>.
[106] Michael Cullen, Deputy Prime Minister, 'Response to UN Special Rapporteur Report' (Press Release, 4 April 2006) <http://www.beehive.govt.nz/release/response-un-special-rapporteur-report>.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] New Zealand Press Association, 'Urban Maori? UN Envoy was "Stunned"', above n 61.

impression given was of an error-ridden report worthy of dismissal'.[111] The Government stated that it would make 'a brief and carefully worded formal response to the UN but will not act on its recommendations'.[112] Its statement to the UN HRC was polite, but largely ignored the report's contents, instead emphasising New Zealand's capacity to address its issues itself and professing its progress in Indigenous rights recognition.[113] The response was part of a strategy privately described by the Government as one that 'deliberately avoids engaging on the Special Rapporteur's unacceptable recommendations', such as regarding the foreshore and seabed,[114] presumably to discourage further public attention to his criticisms.

The response is even more striking given that immediately prior to Stavenhagen's visit the Government had heaped praise on the special procedures as a human rights mechanism. Less than a month before the visit it observed that many special procedures experts 'prepare excellent reports that are currently largely ignored by delegates rehashing old debates in their resolutions'.[115] It went on, '[f]or the most part, the Special Procedures have been instrumental in highlighting issues that need to be discussed, and providing expert and independent contributions to the debate.'[116] When a special procedures expert was critical of New Zealand's own human rights situation this positive sentiment was quickly forgotten.

The Labour-led Government was not the only political party to respond bitterly to Stavenhagen's criticisms. The Māori Affairs Spokesman for the National Party, which was then in Opposition, rejected the initial conclusions Stavenhagen shared at the close of his visit. He stated 'New Zealanders don't need to be told by the UN what it means to be a Kiwi. Fair-minded Kiwis will reject these statements outright, because they know them to be untrue'.[117] He too criticised the short period of time Stavenhagen spent in the country and described Stavenhagen's statement as 'full of unsubstantiated assertions and loaded language'.[118] He also intimated that Stavenhagen was advocating for 'two standards of citizenship' in New Zealand.[119] He advised the Government that 'they should do themselves and race relations in New Zealand a favour' and tell Stavenhagen 'not to bother' writing his final report.[120]

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[111] Tom Bennion and Darrin Cassidy, 'Special Rapporteur's Report Taken for a Spin' (2006) 70 *Mana* 40, 41.
[112] Television New Zealand, 'No Consensus Over UN Report', above n 61.
[113] Don Mackay, New Zealand Permanent Representative, 'Human Rights Council: Presentation of Report by Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples' (Statement to the HRC, Geneva, 19 September 2006) <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-19-September-2006.php>.
[114] Internal briefing to New Zealand's Minister of Foreign Affairs and Trade, 'International Indigenous Issues', 6 April 2006, obtained under *OIA* request from MFAT.
[115] Rosemary Banks, Permanent Representative of New Zealand, on behalf of Canada, Australia and New Zealand, 'Informal Consultations of the Plenary on the Human Rights Council, Second Meeting: Mandates and Functions' (Statement delivered to the GA, New York, 18 October 2005) <http://www.humanrightsvoices.org/assets/attachments/documents/new_zealand_second_10-18-05.pdf> 4.
[116] Ibid.
[117] Gerry Brownlee, National Party Maori Affairs Spokesman, 'UN Assumptions Biased Presumptions' (Press Release, 25 November 2005) <http://www.scoop.co.nz/stories/PA0511/S00387.htm>.
[118] Ibid.
[119] Ibid.
[120] Ibid.

Stavenhagen's report did contain some minor errors and ambiguities that the Government leveraged in its critique. Bennion and Cassidy note that several recommendations 'reflect the time pressures Special Rapporteurs work under'.[121] For example, Stavenhagen recommended that New Zealand's Mixed-Member Proportional electoral system be entrenched.[122] The system is entrenched, and was at the time of Stavenhagen's visit, although the position is complicated by the fact that the provision entrenching that system is not itself entrenched.[123] But on the whole Stavenhagen's report was a good reflection of the central Indigenous rights concerns in New Zealand. In the words of one domestic observer, he 'got to the heart of issues'.[124] The Government's dismissal of the entire report on the basis of a small number of errors and ambiguities underscores the importance of the experts being diligent in their fact checking and clear in the communication of their concerns and recommendations. States will be quick to seize on any opportunities to delegitimise the reports. Piccone picks up on this, arguing that such errors are used not only to undermine the special procedures' work but the work of other UN actors too.[125]

2 *Whitewashing Anaya's Report*

Five years later, Anaya's visit and report on New Zealand received a warmer welcome from the Government. Still, as one Māori academic reflected, 'the Crown didn't exactly jump up and down with enthusiasm' at having him in New Zealand.[126] The Prime Minister met with Anaya, although the Prime Minister primed the public to ignore his report if it was too critical: following his meeting with Anaya, the Prime Minister described New Zealand as a 'leader' 'when it comes to dealing with indigenous rights' and indicated that he placed more value on New Zealanders' views of the country's race relations than the views of the UN.[127] Internal Government documents describe Anaya as 'informed and engaged', that he had 'a sophisticated appreciation of how to engage with governments and ways of progressing issues for indigenous peoples', and that 'his programme was a good news story for New Zealand'.[128] When Anaya's advance report was released the Government issued no public criticism of the report. In fact, it made no public comment all; in part because of the earthquake mentioned above. Privately, the Government described Anaya's advance report as 'a substantial and carefully considered piece

[121] Tom Bennion and Darrin Cassidy identify Stavenhagen's recommendation regarding environmental concerns at Maketu as one example. Bennion and Cassidy, above n 111.
[122] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [86].
[123] *Electoral Act 1993* (NZ), s 268.
[124] Interview 3 (Wellington, 3 May 2011). Bennion and Cassidy reach the same conclusion. Bennion and Cassidy, above n 111, 41.
[125] Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 216.
[126] Interview 4 (Wellington, 4 May 2011).
[127] Bennett, above n 65.
[128] Internal briefing from the New Zealand Ministry of Foreign Affairs and Trade in Wellington to Geneva and New York, 'Visit to New Zealand of Professor James Anaya, United Nations Special Rapporteur on Indigenous Peoples', 13 August 2010, obtained under *OIA* request from MFAT, 1-2.

of work'.[129] The Government's concerns regarding the report centred on how it represented the treaty settlement process.[130] But it also expressed an interest in hearing more about one of Anaya's recommendations (that alternative dispute resolution options be pursued in the *Treaty* settlements process), suggesting it was open to at least one of Anaya's proposals.[131]

The New Zealand Government's main public statements on the full report were made before international fora, where Anaya's criticisms were largely whitewashed. In a formal statement on the final report to the HRC the Government expressed appreciation for the report and Anaya's 'identification of progress made as well as significant problems still to be addressed'.[132] It did acknowledge several of the concerns Anaya raised. But at the same time it toned down Anaya's criticisms, for example the 'extreme' socio-economic disadvantage that Anaya identified was reduced to the 'generally…lower socio economic status' experienced by Māori in the Government's statement.[133] The Government's moves to play down Anaya's criticisms were evident in later references to the report too. For example, in its periodic report submitted to the CERD Committee in 2012 the Government included a statement on Anaya's report. But it focused on Anaya's praise, only mentioning Anaya's concerns regarding socio-economic development, ignoring the remainder of his criticisms.[134] Before the HRC the Government also tied its recognition of 'the significant challenges that still remain regarding the situation of Māori in New Zealand' to commentary on the overrepresentation of Māori in the prison system and socio-economic concerns, rather than to political or land rights issues.[135] The Government took the opportunity to promote what it presented as developments in accordance with Anaya's recommendations in front of the HRC, including regarding the constitutional review process, its historical *Treaty* settlements, the foreshore and seabed, Māori participation in decision-making, efforts to reduce Māori recidivism, and its *Whānau Ora* social programme. In fact, the Government asserted that it was 'already acting on many of Anaya's recommendations and will continue to draw on the report over time'.[136] A similar statement was made before the GA, where it described the special procedures as the HRC's 'eyes and ears'.[137] At the prompting of the NZHRC, the Government also expressed an intention to establish a

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[129] Internal briefing from the New Zealand Ministry of Foreign Affairs and Trade in Wellington to Geneva, 'Preliminary Report: Visit to New Zealand of James Anaya, Special Rapporteur on the Rights of Indigenous Peoples', 7 February 2011, obtained under *OIA* request from MFAT, 2.
[130] Ibid 1-4.
[131] Ibid 4.
[132] Dell Higgie, New Zealand Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.
[133] Ibid.
[134] CERD Committee, *Reports Submitted by States Parties under Article 9 of the Convention: Eighteenth to Twentieth Periodic Reports of States Parties Due in 2011: New Zealand*, UN Doc CERD/C/NZL/18-20 (14 June 2012) [10] ('*New Zealand Report to CERD Committee 2012*').
[135] Dell Higgie, New Zealand Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.
[136] Ibid.
[137] Jim McLay, New Zealand Ambassador and Permanent Representative, 'UN General Assembly - Report of the United Nations Human Rights' (Statement delivered to the GA, New York, 2 November 2011) <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2011/0-2-November-2011.php>.

monitoring function across multiple ministries to track implementation of Anaya's recommendations, but this has not materialised.[138]

Again, the positive tone of the Government's public statements was a deliberate strategy. An internal Government document reveals an agreement that the tone of the statement 'needs to be positive and upbeat' and 'should draw on two or three positive developments since Anaya's visit, such as the passing of the Marine and Coastal Areas Bill', the new foreshore and seabed legislation. The internal document explicitly comments that '[t]he statement should not be a detailed response to Anaya's report' as this 'could create unnecessary tension in the Government's relationship with Professor Anaya, which to date has been open, collaborative with reasonable [sic] positive and constructive results'.[139] While the Government's reaction is more positive than it was with Stavenhagen, the documentation indicates little attention being paid to the actual implementation of his recommendations, the focus instead being on how to manage the reputational impacts of, and potential publicity surrounding, his report.

The Government had moved from rejection of the Special Rapporteur on Indigenous peoples' country assessment of the human rights situation of Māori, under Stavenhagen, to a degree of outward commitment to the follow-up assessment by Anaya five years later. The concern here is to what extent this rejection and then apparent commitment to the Special Rapporteur's country assessments translated into action to implement the Special Rapporteur's recommendations.

E *Ritualism Revealed: The Government's Actions*

1 *Partial Implementation as Diversion*

The New Zealand Government has actioned few of the Special Rapporteur's recommendations in their totality. The fact that many of Anaya's outstanding Indigenous rights concerns echoed those made by Stavenhagen is itself indication of the small number of matters on which the Government took action in the time between the reports. The Government has conformed to some recommendations. The recommendations that have been implemented are recommendations that simply require endorsement of an international instrument – the *UNDRIP*[140] – or the continuation of existing Government action, such as support for New

[138] Interview 1 (Wellington, 5 May 2011); Interview 3 (Wellington, 3 May 2011).
[139] Internal New Zealand Ministry of Foreign Affairs and Trade email from Hine-Wai Loose to Lucy Te Moana, John Whaanga, Stuart Beresford, David Crooke, Lois Searle and Ben Keith, 30 March 2011, obtained under *OIA* request from MFAT.
[140] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [102]. The Government announced its support for the *UNDRIP* during the PFII in 2010, see Pita Sharples, Minister of Maori Affairs, 'Statement delivered to the Permanent Forum on Indigenous Issues' (New York, 19 April 2010) <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php>.

Zealand's Māori Television station,[141] and the Government's *Whānau Ora* social programme.[142] But even these moves have been problematic. To take endorsement of the *UNDRIP* as an example, Stavenhagen's recommendation was that '[t]he Government of New Zealand should continue to support efforts to achieve a United Nations declaration on the rights of indigenous peoples by consensus, including the right to self-determination.'[143] The Government initially did the opposite. Soon after the conclusion of Stavenhagen's visit the New Zealand Government moved from a moderate stance in relation to negotiations on the then draft *UNDRIP* to an oppositional one,[144] eventually voting against its adoption before the GA in 2007 alongside the United States, Canada and Australia.[145] It was only in 2010 that New Zealand changed its position and endorsed the *UNDRIP*.[146] When it did so, its endorsement was qualified. In the Government's statement endorsing the *UNDRIP* it repeatedly emphasised the aspirational nature of elements of the *UNDRIP* and implied that no changes to bring its domestic practices, policies and legislation into line with the rights affirmed in the *UNDRIP* were necessary.[147] The Prime Minister later confirmed this in the House of Representatives when, during question time, he reassured members that '[i]t is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework'.[148] Nor is there credible evidence to suggest that these moves were made in response to the Special Rapporteur's recommendations. For instance, the Government's endorsement of the *UNDRIP* is most persuasively attributable to domestic lobbying efforts, in particular by the Māori Party.[149] The shift also took place in the context of moves by the other states who were originally also in opposition to the *UNDRIP* publically reversing, or indicating their intention to reverse, their

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[141] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [81]. For evidence of continued funding for Māori Television see, eg, The Treasury, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2014* (2013) 174-75, 177.

[142] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [84]. For evidence of continued funding for the *Whānau Ora* programme see, eg, The Treasury, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2014* (2013) 174-76.

[143] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [102].

[144] Compare, eg, CHR, *Draft Declaration on the Rights of Indigenous Peoples Amended Text: Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland* UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004) with Working Group on the Draft Declaration on the Rights of Indigenous Peoples, *Self-Determination Proposal of Australia, New Zealand and the United States of America: Explanatory Note* <http://www.unpo.org/article/3367>. See generally Claire Charters, *The Legitimacy of Indigenous Peoples' Norms Under International Law* (PhD Thesis, University of Cambridge, 2011) 215-19.

[145] Rosemary Banks, New Zealand Permanent Representative to the UN, 'Declaration on the Rights of Indigenous Peoples: Explanation of Vote' (Statement delivered to the GA, New York, 13 September 2007) <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php>.

[146] Sharples, above n 140.

[147] Ibid. See generally Kiri Rangi Toki, 'Ko Ngā Take Tare Māori: What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples' (2010) 16 *Auckland University Law Review* 243, 259-60.

[148] New Zealand, *Parliamentary Debates*, House of Representatives, 20 April 2010, vol 662, 10238 (John Key, Prime Minister). See generally Jacinta Ruru, 'Finding Support for a Changed Property Discourse for Aotearoa New Zealand in the United Nations Declaration on the Rights of Indigenous Peoples' (2011) 15 *Lewis & Clark Law Review* 951, 971.

[149] As one Māori academic observed, the Māori Party put a lot of work into getting New Zealand to shift. … That came about through *really* hard lobbying.' Interview 4 (Wellington, 4 May 2011).

position.[150] New Zealand's international human rights reputation would be negatively impacted were it to stand alone in defiance of the instrument.

The Government has outright resisted – in Mertonian terms, engaged in retreatism from – some recommendations. The Government has indicated that it has no plans to action Stavenhagen's recommendation that the Waitangi Tribunal be granted binding powers of adjudication.[151] It has stated that it will not ratify *ILO Convention 169*.[152] Nor has it followed Anaya's recommendation to reconsider its earlier decision to reject guaranteed Māori seats on the Auckland City Council.[153] Yet, conformity and resistance only explain the Government's response to a small number of the recommendations.

Ritualism has been the Government's dominant behavioural response. Ritualism is evident in the partial implementation of the bulk of the Special Rapporteur's recommendations. Some will paint the fractional implementation of these recommendations as a success story for the Special Rapporteur. Certainly, any moves in line with the experts' recommendations, however small, are deserving of celebration. Yet, a deeper reading reveals that this pattern of partial implementation is a deflection technique. The Government deflects attention from its failure to substantively implement the Special Rapporteur's recommendations by taking some shallow steps consistent with those recommendations. To understand the nature of this ritualised approach to implementation it is necessary to examine the Government's behaviour in some depth. The Government's approach is illustrated here using three of the Special Rapporteur's recommendations concerning constitutional protection, land rights and education.

2 *Improbable Constitutional Protection*

(a) Domestic Insecurity

The New Zealand Government's response to the special procedures' recommendations regarding the constitutional protection of Māori rights is an apt example of the Government's ritualistic behaviour. Māori rights as Indigenous peoples are subject to a high degree of insecurity in New Zealand's domestic legal system. New Zealand's constitution is unusual in that it is drawn from a variety of sources, including statutes, common law and convention. Beyond provisions regarding the term of Parliament and the functioning of New Zealand's electoral system, New Zealand statutes are capable of amendment by a simple Parliamentary

[150] Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement to Parliament House, Canberra, 3 April 2009); Michaëlle Jean, Governor General of Canada, 'Speech from the Throne' (Speech to Canada's 40th Parliament, Ottawa, 3 March 2010).

[151] The Government did not expressly reject Stavenhagen's recommendation but in 2007 the CERD Committee made the same recommendation, which the Government rejected. NZHRC, *Tūi Tūi Tuituiā: Race Relations in 2010* (2011) 8.

[152] Ibid 9.

[153] NZHRC, *Race Relations 2012*, above n 32, 61.

majority.[154] While, since the late 1980s, the *Treaty* has often been cited as New Zealand's founding constitutional document,[155] the orthodox legal position is that the *Treaty* requires incorporation into domestic statute in order to be legally enforceable; it is not a source of enforceable rights in itself.[156] For a short period from the mid-1980s the Government moved to incorporate references to the principles of the *Treaty* in various statutes, securing some significant gains for Māori.[157] But in the last decade this practice has abated.[158] There is no reference to Māori or the *Treaty* in New Zealand's relatively emasculated *Bill of Rights Act* or the *Constitution Act 1986* (NZ). The *Bill of Rights Act* is not supreme law: no legislation can be struck down because it violates rights affirmed in the Act;[159] although, as noted above, the Attorney-General assesses Bills for consistency with the rights it affirms.[160] The Act also provides that where a *Bill of Rights Act*-consistent interpretation 'can be given' it should be preferred.[161]

Both Stavenhagen and Anaya identified the domestic insecurity of Māori rights as a concern. Stavenhagen found that 'New Zealand's human rights legislation does not provide sufficient protection mechanisms regarding the collective rights of Maori that emanate from article 2 of the Treaty of Waitangi (their *tino rangatiratanga*).'[162] He recommended that a 'convention should be convened to design a constitutional reform' to regulate the Government-Māori relationship 'on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination.'[163] He went on to recommend, inter alia, that the *Treaty* and the *Bill of Rights Act* be entrenched.[164] Five years later, Anaya raised the issue of the domestic legal insecurity of Māori rights under the *Treaty* and international human rights in his report.[165] He recommended that '[t]he principles enshrined in the Treaty of Waitangi and related internationally-protected human rights should be provided security within the domestic legal

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[154] *Electoral Act 1993* (NZ), s 268.
[155] See, eg, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 655, 664 per Cooke P; Sir Robin Cooke, 'Fundamentals' (1988) *New Zealand Law Journal* 158, 159-60. See generally Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008).
[156] *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).
[157] Statutory references to the principles of the Treaty of Waitangi are contained in, for example, the *State-Owned Enterprises Act 1986* (NZ), s 9; *Conservation Act 1987* (NZ), s 4; *Resource Management Act 1991* (NZ), s 8. Case law on such references includes *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA). For discussion of the gains secured by Māori see Paul Rishworth, 'Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights' (Paper presented to International Center for Law and Religion Studies Australia Conference, Canberra, 2009); Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 17–8.
[158] However, after extensive lobbying by Māori, a reference to the principles of the Treaty of Waitangi was included, in 2012, in the *Public Finance (Mixed Ownership Model) Amendment Act 2012* (NZ), s 45Q.
[159] *New Zealand Bill of Rights Act 1990* (NZ), s 4.
[160] Ibid s 7.
[161] Ibid s 6. See generally Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, 2005) 3.
[162] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [13].
[163] Ibid [84].
[164] Ibid [85], [91].
[165] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [46]-[51], [77].

system of New Zealand so that these rights are not vulnerable to political discretion'.[166] 'At a minimum' he proposed 'the development of safeguards similar to those under the Bill of Rights Act' for the Treaty, referring to the section 7 vet of Bills under that Act.[167]

(b) From Resistance to 'Conversation'

The Government initially rejected the Special Rapporteur's recommendations, but ultimately it took some steps in apparent accordance with them. Privately, the Government identified Stavenhagen's position regarding New Zealand's constitutional structure as one of three key concerns in his draft report observing that '[e]ntrenchment can be seen to disregard the essential character of the New Zealand constitution'.[168] Before the HRC it dismissed the need for constitutional change, stating:

> the report raises questions concerning possible constitutional change. There is a diverse range of opinion about this subject in New Zealand and at this stage there is no consensus for constitutional change. However, any agreed change will be brought about through the free and full exercise of democratic prerogatives by Māori and non-Māori alike.[169]

Consistent with this position, for several years there was no movement on this recommendation. But late in 2008 the National Party, taking power, signed a confidence and supply agreement with the Māori Party, which committed to establishing no later than early 2010 'a group to consider constitutional issues including Māori representation'.[170] Soon after Anaya's mission ended the Government announced the terms of reference for the review. It included consideration of Māori representation – including the Māori electoral option, Māori electoral participation, and Māori seats in Parliament and local government – as well as the role of Māori customs and the *Treaty* in New Zealand's constitutional arrangements.[171] It also included consideration of the size and term of Parliament, *Bill of Rights Act* issues and whether New Zealand should have a consolidated constitution. A Constitutional Advisory Panel was appointed in 2011. The public were given an opportunity to provide submissions to the Constitutional Advisory Panel, which will report its advice to the Government by the end of

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[166] Ibid at [77].
[167] Ibid at [77].
[168] Internal briefing to New Zealand's Minister of Foreign Affairs and Trade, 'Special Rapporteur's Draft Report on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples in New Zealand', 3 February 2006, obtained under *OIA* request from MFAT, annex: Special Rapporteur's Report: Additional Commentary on Specific Paragraphs, 2.
[169] Mackay, above n 113.
[170] National Party and Māori Party, *Relationship and Confidence and Supply Agreement* (16 November 2008) <http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf> 2 ('*Relationship Agreement 2008*').
[171] New Zealand Ministry of Justice, *Terms of Reference – Consideration of Constitutional Issues* (2010) <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/terms-of-reference-constitutional-advisory-panel>.

2013, with the Government providing its response by mid-2014.[172] Anaya's report, which was released after the terms of reference were announced, identified the constitutional review process as one of the 'significant strides' taken by the Government 'to advance the rights of Maori people and to address concerns raised by the former Special Rapporteur'.[173]

The constitutional review process only goes a small way towards giving effect to either Special Rapporteur's recommendations to provide security for Māori rights, however. The Government has committed to a conversation only. No specific action is required following the review. Majority interests, in Parliament and amongst the public, will hold sway regardless of the legitimacy of Māori claims for constitutional recognition of their rights as Indigenous peoples: the Government has advised that any significant proposals that come out of the review will need either to pass a referendum or receive broad cross-party support to be implemented.[174] As a result, the likelihood of moves to centre the *Treaty* in New Zealand's constitutional arrangements, or to give effect to the right of Māori to be self-determining, is slim, for example. As noted in Part B, Māori form a minority in the population and in Parliament and domestic rhetoric around perceived Māori privileges remains strong. Further, the terms of reference make no mention of Indigenous peoples' right to self-determination or international Indigenous rights norms. Some have also argued that the *Treaty* is marginalised because the review is concerned with how the *Treaty* fits into the constitution rather than how the constitution is drawn out of the *Treaty*.[175] Concerns about the focus of the Government's Constitutional Advisory Panel prompted the creation of a parallel *iwi*-led constitutional working group: Aotearoa Matike Mai. It has engaged with Māori to develop a model constitution based on Māori *kawa* (protocol) and *tikanga* (custom), the *Treaty* and the 1835 *Declaration of Independence*.[176]

(c) Limited Role

The role of the Special Rapporteur on Indigenous peoples in bringing about the Government's flawed constitutional review was minimal. The confidence and supply agreement with the Māori Party was the prime driver for its institution, in turn reflecting decades long debate among Māori regarding New Zealand's constitutional arrangements. As Risse and Ropp explain, changes in domestic politics – such as the move here from a Labour to a National-led coalition Government with the support of the Māori Party – can often act as a forerunner to

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[172] Bill English, Deputy Prime Minister, and Pita Sharples, Māori Affairs Minister, 'Constitutional Advisory Panel Named' (Press Release, 4 August 2011) <http://www.beehive.govt.nz/release/constitutional-advisory-panel-named>.
[173] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [66].
[174] English and Sharples, above n 172.
[175] Interview 3 (Wellington, 3 May 2011); Peace Movement Aotearoa, *NGO Information for the 82nd Session of the Committee on the Elimination of Racial Discrimination* (2013) Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PeaceMovementAotearoa_NewZealand_CERD82.pdf> [21] ('*NGO Information to CERD 2013*').
[176] Converge, *Independent Iwi Constitutional Working Group: Aotearoa Matike Mai* <http://www.converge.org.nz/pma/iwi.htm>.

improved domestic approaches to human rights.[177] The work of the Māori Party, rather than any particular commitment to Indigenous rights by the National Party, was central to the change.[178] Other domestic actors, such as the NZHRC, have made domestic legal security for the principles of the *Treaty* and international human rights a priority for action too.[179] Further, international actors additional to the Special Rapporteur have raised similar concerns over the years, including the CERD Committee and states during New Zealand's first UPR before the HRC.[180] But Stavenhagen's recommendation provided an additional leverage point for the Māori Party's advocacy for a review.[181] And, the New Zealand Government has projected the impression that it has taken on board and acted upon Anaya's recommendations on this issue: before the HRC in 2011 it highlighted the steps it had taken in conformity to Anaya's recommendations on domestic protection for Māori rights.[182] Anaya's report also provided a platform for domestic actors to critique the Government on this matter on the world stage – before the PFII in 2012 the Māori caucus stated that the Government 'must fully implement' the Special Rapporteur on Indigenous peoples' recommendations during discussion on the constitutional review.[183]

In this constitutional protection example the New Zealand Government moved from resistance to some apparent commitment. But the 'commitment' was ritualistic. The Government initiated a constitutional dialogue but Indigenous peoples' rights under the *Treaty* and international law, including to self-determination, are marginalised and majoritarian interests will reign. Through its constitutional conversation the Government has been able to tick off its obligations under the 2008 confidence and supply agreement with the Māori Party, and claim progress towards recommendations from Stavenhagen, Anaya, and other international bodies. In effect, the Government's moves have enabled international calls for domestic security for Māori rights to be neutralised, at least for the time being.

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[177] Thomas Risse and Stephen C Ropp, 'Conclusions' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 234, 241.

[178] Interview 4 (Wellington, 4 May 2011); Interview 2 (Wellington, 5 May 2011).

[179] See, eg, NZHRC commissioner, Rosslyn Noonan, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.

[180] See, eg, CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand,* UN Doc CERD/C/NZL/CO/17 (15 August 2007) [13] ('*CERD Committee on New Zealand 2007*'); *HRC UPR New Zealand,* UN Doc A/HRC/12/8, [81](21).

[181] Interview 2 (Wellington, 5 May 2011).

[182] Dell Higgie, New Zealand Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.

[183] Māori Indigenous Caucus cited in doCip *Update No 104* (2013) (January/April) <http://www.docip.org/All-Issues.121.0.html> 18.

3 *Continuing Foreshore and Seabed Discrimination*

(a) Appropriation of Māori Property Rights

Ritualism is further evident in the New Zealand Government's response to the special procedures' recommendations regarding the right of Māori to their lands. Indigenous peoples' rights to their lands and natural resources are a central issue in New Zealand, as elsewhere. In the last decade a prime controversy has centred on the Government's appropriation of extant Māori property rights to New Zealand's foreshore and seabed through the *Foreshore and Seabed Act* and later replacement legislation.[184] The *Foreshore and Seabed Act* was enacted following a decision of New Zealand's Court of Appeal that opened the way for the potential recognition of Māori freehold property interests in the foreshore and seabed.[185] The Government reacted by passing legislation under urgency without adequate consultation with Māori to override the decision: the *Foreshore and Seabed Act*. The Act vested those areas of the foreshore and seabed where Māori might have an interest in the Crown, but excluded existing freehold titles from the vesting; extinguished the ability to recognise any freehold title for Māori; and instituted onerous tests for Māori to prove new legislatively constrained customary rights.[186] The Government's response to the Court decision prompted protest in New Zealand on a scale not witnessed since the 1970s, including a 50,000 people strong *hīkoi* (march) on Parliament;[187] which the Prime Minister dismissed as led by 'haters and wreckers'.[188] The Government's approach was the subject of a scathing Waitangi Tribunal report, which found that:

> The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination.[189]

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[184] For discussion of the foreshore and seabed legislation in relation to the *New Zealand Bill of Rights Act 1990* (NZ) see Fleur Adcock, 'Maori and the Bill of Rights Act: A Case of Missed Opportunities?' (2013) forthcoming *New Zealand Journal of Public and International Law*.

[185] *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

[186] See generally Claire Charters and Andrew Erueti, 'Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004' (2005) 36 *Victoria University of Wellington Law Review* 257; Claire Charters and Andrew Erueti (eds), *Maori Property Rights in the Foreshore and Seabed: The Last Frontier* (Victoria University Press, 2007).

[187] 'Timeline: Foreshore and Seabed Act', *Television New Zealand* (online), 1 July 2009 <http://tvnz.co.nz/politics-news/timeline-foreshore-and-seabed-act-2821 13>.

[188] 'Maori March to Defend Beaches', *BBC News* (online), 5 May 2004 <http://news.bbc.co.uk/2/hi/asia-pacific/3684953.stm>.

[189] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004) xiv.

The CERD Committee also invoked its early warning and urgent action procedure to review the Act while in Bill form, finding that it discriminated against Māori.[190] Despite this, the Government pushed the legislation through Parliament in substantially the same form as the much criticised policy. It asserted that the Act did not infringe the human rights of Māori.[191] In support, it had the Attorney-General's suspect vet of the legislation under section 7 of the *Bill of Rights Act*, which found that the prima facie discriminatory treatment of Māori rights was justified as a 'reasonable limit' and there was no prima facie breach of the right of minorities to enjoy their culture under the Act.[192] The Attorney-General's support for the legislation underscores the insecurity of Māori rights under New Zealand law.

Stavenhagen and Anaya each offered recommendations on the foreshore and seabed issue in their reports on New Zealand. Stavenhagen's recommendations were made in relation to the *Foreshore and Seabed Act*, which was enacted the year before his mission. Stavenhagen found that the Act 'extinguished all Maori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures.'[193] He recommended that the *Foreshore and Seabed Act* 'be repealed or amended' and that the Government and Māori negotiate a *Treaty* settlement that recognises 'the inherent rights of Maori in the foreshore and seabed' and that establishes 'regulatory mechanisms' that allow for the general public's 'free and full access' to New Zealand's beaches and coastal areas without discrimination.[194]

(b) Defiance to Camouflage

Again, the Government resisted Stavenhagen's recommendations in strong terms but eventually took some steps in accordance with them. Privately, the Government identified Stavenhagen's position regarding Māori interests in the foreshore and seabed as one of its key concerns with his draft report.[195] Publically, the Deputy Prime Minister erroneously claimed that Stavenhagen had misstated the effect of the legal decision that had led to enactment of the

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[190] CERD Committee, *Decision 1(66): New Zealand Foreshore and Seabed Act 2004*, UN Doc CERD/C/66/NZL/Dec.1 (11 March 2005) [6]. See generally Charters and Erueti, 'Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004', above n 186.

[191] Michael Cullen, Deputy Prime Minister, 'Waitangi Tribunal Report Disappointing' (Press Release, 8 March 2004) <http://www.beehive.govt.nz/node/19091>. See generally Catherine Iorns Magallanes, 'The Foreshore and Seabed Legislation: Resource- and Marine-Management Issues' in Charters and Erueti, above n 186, 119, 131.

[192] Margaret Wilson, Attorney-General, 'Foreshore and Seabed Bill' (Attorney-General Compatibility Report) *Ministry of Justice* 6 May 2004 <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/foreshore-and-seabed-bill> [36], [102]-[103].

[193] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [79]. In his 2006 annual report Stavenhagen described the Act as 'curtailing' Māori rights, also identifying the CERD Committee's criticism of it. *Stavenhagen Annual Report 2006*, UN Doc E/CN.4/2006/78, [22], [52].

[194] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [92].

[195] Communication from MFAT to the UN Human Rights and Commonwealth Division, 'Special Rapporteur's Report on Indigenous Rights and Freedoms in New Zealand', 17 February 2006, obtained under *OIA* request from MFAT, 2.

Foreshore and Seabed Act and the legal position prior to that decision; failed to recognise the changes made to the Act while it was in Bill form as a result of the Waitangi Tribunal report and public submissions; and, misstated the effects of excluding freehold interests from the Crown vesting.[196] But four years later, in September 2010, the Government introduced legislation to repeal and replace the Act into the House of Representatives as Stavenhagen had recommended: the *Marine and Coastal Area (Takutai Moana) Bill*.[197] The Attorney-General assessed that the discrimination under the new Bill was again reasonably justified under the *Bill of Rights Act*; the Attorney-General did not consider whether there was a potential breach of the right of minorities to enjoy their culture under that Act.[198]

Contrary to Stavenhagen's recommendations, the *Marine and Coastal Area (Takutai Moana) Bill* only proposed to slightly improve the position under the *Foreshore and Seabed Act*. As with the *Foreshore and Seabed Act*, the Bill intended to extinguish Māori interests in the foreshore and seabed. But instead of transferring them to the Crown as the original Act did it would transfer them to a new construct called a 'common space', over which the Crown exercised control. As with the Act, the replacement Bill also discriminated against Māori. In effect, it would only apply to areas where Māori may have an interest, excluding the bulk of foreshore privately held by others from its scope. It did differ from the original Act in that it restored to Māori their right of access to the Courts – Māori would have six years to lodge a claim to have their 'customary title' in the 'common space' recognised. But the 'customary title' would be a new form of subordinate title less than the freehold title potentially available prior to enactment of the *Foreshore and Seabed Act*. In order to establish title Māori would also have to prove exclusive use and occupation of the relevant area without substantial interruption since 1840, a difficult task for most, especially given the Government's history of confiscations of Māori land.[199] Peace Movement Aotearoa, a New Zealand NGO, concluded in a submission to the CERD Committee that '[t]he replacement legislation retains most of the discriminatory aspects of the Foreshore and Seabed Act 2004 as it treats Māori property differently from that of others, and limits Māori control and authority over their foreshore and seabed areas'.[200]

The recommendations in Anaya's advance report concerned the *Marine and Coastal Area (Takutai Moana) Bill*, as his mission had taken place just prior to its introduction into Parliament. By the time Anaya had finalised his report for presentation to the HRC the Bill had

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[196] Cullen, 'Response to UN Special Rapporteur Report', above n 106.
[197] The *Marine and Coastal Area (Takutai Moana) Bill* is available from the New Zealand Parliament website <http://www.parliament.nz>.
[198] Simon Power, Acting Attorney-General, 'Marine and Coastal Area (Takutai Moana) Bill' (Attorney-General Compatibility Report) *Ministry of Justice* 2 September 2010 <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/marine-and-coastal-area-takutai-moana-bill> [34]-[35]. For criticism of the Attorney-General's assessment see, eg, Treaty Tribes Coalition, *Submission on the Marine and Coastal Area (Takutai Moana) Bill to the Māori Affairs Select Committee* (16 November 2010) Converge <http://www.converge.org.nz/pma/fsttc10.pdf> [17]-[28].
[199] Moana Jackson, *A Further Primer on the Foreshore and Seabed: The Marine and Coastal Area (Takutai Moana) Bill* (8 September 2010) <http://www.converge.org.nz/pma/mj080910.htm>.
[200] Peace Movement Aotearoa, *NGO Information to CERD 2013*, above n 175, [32].

been enacted. In his advance report Anaya commented that the Bill 'represents a notable effort to reverse some of the principal areas of concern of the 2004 Foreshore and Seabed Act'.[201] But he noted 'that the bill still allows for certain past acts of extinguishment of Māori rights to have effect'.[202] This prompted him to remind 'the Government that the extinguishment of indigenous rights by unilateral, uncompensated acts is inconsistent with the Declaration on the Rights of Indigenous Peoples.'[203] In addition, Anaya noted concerns that the Bill only required the Government to 'acknowledge' rather than 'give effect' to the *Treaty* and that there was a six year limitation to lodge claims for customary interests.[204] Anaya recommended that the Government consult widely with Māori on the contents of the Bill 'in order to address any concerns they might still have'.[205] He further recommended that special attention be directed to the Bill's sections on 'customary rights, natural resource management, protection of cultural objects and practices, and access to judicial or other remedies for any actions that affect their customary rights' so as 'to ensure that those provisions are consistent with the principles of the Treaty of Waitangi and international standards.'[206] The final report mirrored these findings and recommendations, with some minor refinements to reflect the enactment of the Bill the month following public release of Anaya's advance report.[207] Notably, in the final report Anaya moved to recommend that the provisions of the Act 'are *implemented* in a way that is consistent with the principles of the Treaty of Waitangi and international standards.'[208]

The Government outwardly vocalised commitment to Anaya's recommendations on the legislation but did not action them. The Bill was enacted without substantive amendment as the *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) (*Marine and Coastal Area Act*). The Act did not address Māori concerns or conform to the principles of the *Treaty* and international standards, as Anaya recommended. Jacinta Ruru concludes, '[t]he 2011 Act is comparatively a little better on the property question, but not much.'[209] In fact, in 2013 the CERD Committee expressed concern that the Act 'contains provisions that, in their operation, may restrict the full enjoyment by Maori communities of their rights under the Treaty of Waitangi, such as the provision requiring proof of exclusive use and occupation of marine and coastal areas without interruption since 1840'.[210] Yet, during the second reading of the Bill the Attorney-General claimed that he had 'looked at international developments – as I was urged to do by the UN

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[201] *Anaya Follow-up Report on New Zealand: Advance Version*, UN Doc A/HRC/18/XX/Add.Y, [78].
[202] Ibid [56].
[203] Ibid.
[204] Ibid.
[205] Ibid [79].
[206] Ibid.
[207] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [56], [78]-[79].
[208] Ibid [79] (emphasis added).
[209] Ruru, above n 148, 974.
[210] CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand*, UN Doc CERD/C/NZL/CO/18-20 (1 March 2013) [13] ('*CERD Committee on New Zealand 2013*').

special rapporteur, James Anaya' in developing the tests for 'customary title' in the Bill.[211] The Government also misrepresented Anaya's report: during the same reading another member of the governing National Party erroneously asserted that 'nowhere in the report does it say that there is anything wrong with this bill'.[212] During its final reading the Attorney-General drew attention to Anaya's praise for the Bill too, neglecting to mention any of his concerns.[213] Additionally, during the 2011 interactive dialogue on Anaya's report before the HRC, New Zealand stated that it had 'taken note of the Special Rapporteur's concerns about customary rights over the marine and coastal area'.[214] It asserted that '[t]he new Act follows extensive consultations with all New Zealanders, including Māori' and 'also reflects express consideration of international human rights standards relevant to such customary claims'.[215] The Government may have 'considered' international human rights standards but those standards are not reflected in the Act. For example, it continues to unilaterally extinguish Māori rights without guaranteeing compensation. Nor was the Bill enacted following adequate consultation with Māori. The Parliamentary Select Committee considering the Bill received approximately 6000 submissions on the Bill.[216] All bar one of the submissions from *marae* (Māori meeting places), *hapū*, *iwi*, Māori land owners, Māori organisations, and Māori collectives opposed passage of the Bill as it was drafted.[217] Yet, the Select Committee issued a brief report in response recommending that the Bill be passed without amendment.[218] The flaws in the Act are such that its provisions cannot be '*implemented* in a way that is consistent with the principles of the Treaty of Waitangi and international standards', as Anaya recommended in his final report.[219]

(c) Minor Hand

Again, the Special Rapporteur's role in helping to bring about the largely superficial changes in the foreshore and seabed legislation was small. The Government did profess to have taken on board Anaya's concerns. Attention on the issue from Stavenhagen and Anaya also

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[211] New Zealand, *Parliamentary Debates*, House of Representatives, 8 March 2011, vol 670, 16976 (Christopher Finlayson, Attorney-General).
[212] New Zealand, *Parliamentary Debates*, House of Representatives, 8 March 2011, vol 670, 16976 (Tau Henare, National Party MP).
[213] Christopher Finlayson, 'Marine and Coastal Area (Takutai Moana) Bill Third Reading Speech' (Speech to the House of Representatives, Wellington, 24 March 2011) <http://www.beehive.govt.nz/speech/marine-and-coastal-area-takutai-moana-bill-third-reading-speech>.
[214] Dell Higgie, New Zealand Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.
[215] Ibid.
[216] *New Zealand Report to CERD Committee 2012,* UN Doc CERD/C/NZL/18-20, [42].
[217] Kaitiaki o te Takutai, *Summary of Māori Submissions on the Marine and Coastal (Takutai Moana) Bill 2010* (22 February 2011) <http://www.converge.org.nz/pma/fs220211.pdf> 1; Peace Movement Aotearoa, *NGO Information to CERD 2013*, above n 175, [33].
[218] Māori Affairs Committee, New Zealand House of Representatives, *Marine and Coastal Area (Takutai Moana) Bill: Report of the Māori Affairs Committee* (2011) <http://www.parliament.nz/resource/0000158312> 2. For criticisms of the Select Committee process see Carwyn Jones, *Māori Affairs Select Committee Report on Marine and Coastal Area Bill* (18 February 2011) Ahi-kā-roa <http://ahi-ka-roa.blogspot.com/2011/02/maori-affairs-select-committee-report.html>.
[219] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [79] (emphasis added).

bolstered domestic opposition to the legislation.[220] And it meant that the Government was repeatedly being asked to explain its approach on the international stage.[221] But Stavenhagen and Anaya were not the only international actors expressing concern at the legislation. Actors including the CERD Committee,[222] states participating in New Zealand's first UPR,[223] and the UN Human Rights Committee,[224] issued recommendations or raised questions on it. However, domestic factors again had the most sway. In the same 2008 confidence and supply agreement between the National and Māori Parties that provided for a constitutional review, the parties agreed to 'initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua'.[225] '*Mana whenua*' is the exercise of authority over an area. A Government appointed Ministerial panel was established to fulfil this task. In its 2009 report the Ministerial panel determined that the Act, amongst other things, discriminated against Māori and recommended that it be repealed, with a more appropriate balance being struck between Māori property rights and public rights and expectations.[226] The replacement Act was a product of this determination.

The role of the Māori Party was again pivotal. The Government itself publically acknowledged that the review of the legislation was a product of its agreement with the Māori Party.[227] Key domestic actors, such as member of the NZHRC, underscored the important role of the Māori Party's relationship with the National Party in the 'significant developments for Maori' that occurred between Stavenhagen's and Anaya's visits.[228] And, the Māori Party viewed its own role as decisive, with one of its members stating of the replacement legislation 'I don't think it's [happened] because of the Declaration on the Rights of Indigenous People or James Anaya coming. I think it's because of being in the arrangement we're in [with the National Party]'.[229] In turn, the Māori Party had been formed and entered Parliament on the back of the groundswell of mass Māori opposition to the *Foreshore and Seabed Act*. This is testament to the force the Māori mass public can wield in New Zealand. But the Māori Party did leverage Stavenhagen's criticisms of the legislation while it was in Opposition.[230] It also leveraged Anaya's comments on the replacement legislation when it was in a relationship with

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[220] Interview 2 (Wellington, 5 May 2011); Interview 4 (Wellington, 4 May 2011); Interview 5 (Christchurch, 6 May 2011); Interview 6 (Panama City, 3 June 2011).
[221] See, eg, *HRC UPR New Zealand,* UN Doc A/HRC/12/8, [36], [40], [81](58).
[222] *CERD Committee on New Zealand 2007,* UN Doc CERD/C/NZL/CO/17, [19].
[223] See, eg, *HRC UPR New Zealand,* UN Doc A/HRC/12/8, [61].
[224] Human Rights Committee, *List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of New Zealand (CCPR/C/NZL/5)*, UN Doc CCPR/C/NZL/Q/5 (24 August 2009) [9].
[225] National Party and Māori Party, *Relationship Agreement 2008*, above n 170, 2.
[226] New Zealand Ministry of Justice, *Pākia ki Uta, Pākia ki Tai: Report of the Ministerial Review Panel - Ministerial Review of the Foreshore and Seabed Act 2004* (2009) 12-3.
[227] See, eg, Simon Power, 'Response to Questions 1 to 16: Minister Simon Power' (Statement delivered to the Human Rights Committee, New York, 15 March 2010) <http://www.beehive.govt.nz/speech/response-questions-1-16-minister-simon-power>.
[228] NZHRC commissioner, Rosslyn Noonan, cited in Bennett, above n 65.
[229] Interview 2 (Wellington, 5 May 2011).
[230] '[W]e were in Opposition at the time and we were keen to hang it out there as a statement that had come from an independent international expert'. Ibid.

the Government. The Māori Party used Anaya's positive comments on the replacement legislation to justify its compromise position in the face of continued opposition to the *Marine and Coastal Area Act* from its Māori constituents: 'we probably used it politically to…justify the position that we took because we said "if the international Rapporteur came to New Zealand and said that we're doing alright [we must be]"'.[231] The Māori Party's approach reveals that even Indigenous-focused political parties will selectively edit the special procedures' reports to support perceptions of human rights improvements if it could reflect positively on the party.

In this example we see another illustration of the New Zealand Government's resistance to the special procedures' recommendations that transforms into ritualised 'commitment'. While the Government, including the Māori Party, has painted the *Marine and Coastal Area Act* as a positive development, significant issues with its content remain. It replaces the former Act with an equally discriminatory regime that continues to marginalise Māori rights to the foreshore and seabed. But having enacted new, difficult to demystify, legislation the Government can deflect (in some measure) international and domestic criticism of its approach to Māori rights to the foreshore and seabed.

4 *Modest Moves for Māori Education*

(a) A System Failing Māori

The New Zealand Government further deflects attention from its ritualistic behaviour towards these hard rights to self-government and land through its partial commitment to soft rights, such as the right of Māori to an education tailored to their cultural needs. Māori educational outcomes and access to a quality education in *te reo* Māori remain a concern in New Zealand. For much of the nineteenth and twentieth centuries New Zealand adopted an assimilationist education model, with the use of *te reo* Māori in schools actively discouraged and high levels of discrimination against Māori within educational institutions and curricula. As a result, by the latter half of the twentieth century *te reo* Māori was on the verge of being lost and Māori educational outcomes were poor. Māori-led efforts resulted in the creation of *kōhanga reo* (*te reo* Māori immersion preschools in the 1980s); the recognition of *te reo* Māori as an official language in the *Maori Language Act 1987* (NZ); the development of a *Māori Language Strategy* in 2003; and, the creation of *wānanga* or Māori tertiary education providers. Due to these and other initiatives, immediately prior to Stavenhagen's mission there were 61 *te reo* Māori immersion schools; 83 bilingual schools, as well as others with some immersion and bilingual classes; and, Māori participation in tertiary education had grown rapidly. But there

[231] Ibid.

remained a shortage of professionally trained *te reo* Māori teachers and Māori educational outcomes continued to be low when compared with those of non-Māori.[232]

Both Stavenhagen and Anaya issued recommendations to address concerns regarding Māori educational outcomes and teaching in *te reo* Māori in their reports. Stavenhagen found that '[d]espite progress thus far, the schooling system has been performing on average less well for Maori than for non-Maori students, a problem which points to as yet unresolved issues concerning culturally appropriate educational methodologies.'[233] He recommended that '[m]ore resources should be put at the disposal of Maori education at all levels, including teacher training programmes and the development of culturally appropriate teaching materials.'[234] Relatedly, he recommended that revival of the Māori language continue to be recognised and respected through appropriate educational channels.[235] Five years later Anaya identified 'many key improvements in Maori education since the 2006 report of the previous Special Rapporteur.'[236] This drew some criticism from Māori educationalists – he was accused of painting an overly positive picture of the state of Māori education 'only because we seem to be doing better than other Indigenous peoples', when the appropriate comparator group is non-Māori New Zealanders.[237] But Anaya similarly concluded that 'the education achievement of Maori children still lags behind that of other New Zealanders, particularly in early childhood education and in secondary school retention.'[238] In his recommendations Anaya urged 'the Government to work to overcome the shortage of teachers fluent in the Maori language and to continue to develop Maori language programmes.'[239]

(b) Narrow Commitment

The Government's actions reveal a degree of commitment to improve Māori educational outcomes and teaching in *te reo* Māori in line with the Special Rapporteur's recommendations. The Government did not publically criticise either expert's recommendations on these issues. Nor did it do so in internal documents concerning the visits and reports. Instead, it has publically reiterated its commitment to *te reo* Māori and improved educational outcomes

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[232] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [59]-[64]. See generally, New Zealand Ministry of Māori Development, *He Rautaki Reo Māori– The Māori Language Strategy* (2003); *New Zealand Report to CERD Committee 2012,* UN Doc CERD/C/NZL/18-20, [139]-[141]; Walker, above n 10, 146-48, 203, 208, 238-43; Wally Penetito, *What's Māori About Māori Education?* (Victoria University Press, 2010).
[233] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [64].
[234] Ibid [97].
[235] Ibid [100]. Stavenhagen also recommended that '[s]tudent fees should be lowered and allowances increased so as to stimulate the passage of more Maori students from certificate and diploma to degree level programmes in tertiary education': at [98].
[236] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [59].
[237] Interview 3 (Wellington, 3 May 2011).
[238] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [59].
[239] Ibid [80].

for Māori.[240] More resources have been devoted to Māori education, although not at all levels. For example, the Government's 2013 budget allocates NZ$8 million over a four year period to a new Māori Language Research and Development Fund administered by Te Taura Whiri i te Reo Māori, the Māori Language Commission, 'to strengthen the evidence base for effective Māori language policies and programmes'.[241] It also devotes funds to a package of scholarships for students training to become teachers in Māori-medium education and high-school level *te reo* Māori.[242] There have been some positive moves in the development of teacher training programmes and culturally appropriate teaching materials. *The New Zealand Curriculum*, the revised curriculum for both primary and secondary schools, was released in 2007. It includes references to the *Treaty*, acknowledges that *te reo* Māori is an official language for delivery of the curriculum, and recognises the importance of a curriculum that reflects and values *te ao* Māori, the Māori world.[243] *Te Marautanga o Aotearoa* was introduced into schools in 2011. It is a companion document built upon the values of *kōhanga reo* and *kura kaupapa* (Māori medium primary schools) that sets out the curriculum for schools teaching in *te reo* Māori.[244] It was the first New Zealand educational curriculum to be developed and written in *te reo* Māori. Further, *Ka Hikitia - Managing for Success: The Māori Education Strategy 2008-2012* was released in 2006 with a focus on 'increasing the learning and capacity of teachers, placing resourcing and priorities in Maori language in education, and increasing whanau [extended family] and iwi authority and involvement in education'.[245] *Ka Hikitia – Accelerating Success 2013-2017*, the revised Māori education strategy, was released in mid-2013.[246] *Tau Mai Te Reo*, the Ministry of Education's Māori language in education strategy for 2013 to 2017, was released at the same time.[247] A new Māori Language Strategy will also be released in late 2013.[248] Additional strategies have been designed to improve Māori students' educational success, including *Tū Māia e te Ākonga 2013–2016* and *Te Rautaki Māori 2012–17*.[249] These are just some of a

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[240] See, eg, Parekura Horomia, Minister of Māori Affairs and Associate Education Minister, 'Transforming Education to Deliver For Maori' (Press Release, 15 April 2008) <http://www.beehive.govt.nz/release/transforming-education-deliver-maori>; Pita Sharples, Māori Affairs Minister, 'Review Aims to Benefit Maori Language' (Press Release, 1 September 2010) <http://www.beehive.govt.nz/release/review-aims-benefit-maori-language>.

[241] Pita Sharples, Māori Affairs Minister and Associate Education Minister, 'Increased Investment in Māori Language' (Press Release, 16 May 2013) <http://www.beehive.govt.nz/release/increased-investment-m%C4%81ori-language>.

[242] Ibid.

[243] New Zealand Ministry of Education, *The New Zealand Curriculum* (2007).

[244] New Zealand Ministry of Education, *Te Marautanga o Aotearoa* (2008).

[245] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [58]. New Zealand Ministry of Education, *Ka Hikitia - Managing for Success: The Māori Education Strategy 2008 – 2012* (2008).

[246] New Zealand Ministry of Education, *Ka Hikitia - Accelerating Success 2013-2017: The Māori Education Strategy* (2013).

[247] New Zealand Ministry of Education, *Tau Mai Te Reo: The Māori Language in Education Strategy 2013-2017* (2013).

[248] Sharples, 'Increased Investment in Māori Language', above n 241.

[249] NZHRC, *Race Relations 2012*, above n 32, 81.

constellation of initiatives directed at improving Māori educational outcomes and the health of *te reo* Māori.[250]

Issues remain, however. In 2012 the New Zealand Government acknowledged the existence of 'significant challenges' in relation to Māori education, including regarding improving 'effective teaching and learning for Māori students, especially in relation to cultural responsiveness', increasing 'the resources and support available for teachers in Māori medium/settings', increasing 'the supply of teachers proficient in te reo Māori', and ensuring that 'secondary schools enable Māori students to gain worthwhile qualifications and make subject choices that open up future opportunities'.[251] Māori educational achievement continues to lag behind that of non-Māori. For example, half of Māori leave school without upper secondary school qualifications, twice the number of *Pākehā*.[252] There are concerns that teachers are not being supported in the implementation of the *Treaty* dimension of *The New Zealand Curriculum*, affecting the quality with which it is taught.[253] *Ka Hikitia* has been criticised for failing to make provision for a *kaupapa* Māori (an ideologically Māori) approach to learning within mainstream educational institutions.[254] Two Waitangi Tribunal reports have further highlighted concerns. In 2011 the Tribunal found that the Crown had failed in its duty to protect *te reo* Māori under the *Treaty*, describing the health of the language as 'fragile at best' and recommending urgent action.[255] In 2013 the Tribunal found that the Government had failed to adequately sustain *kōhanga reo* as an environment for language transmission, in breach of the *Treaty* and recommending, inter alia, that the Government develop a policy and funding regime tailored to *kōhanga reo*.[256] Further, in 2013 the Government announced that it would cease funding Te Kotahitanga, a highly successful education programme that enhances Māori student achievement by developing culturally responsive pedagogies, which had been in operation since 2004.[257]

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[250] See generally *New Zealand Report to CERD Committee 2012,* UN Doc CERD/C/NZL/18-20, [133], [137], [141], [203].
[251] See, eg, ibid [142].
[252] Ibid [132].
[253] Interview 3 (Wellington, 3 May 2011).
[254] Wally Penetito, 'Keynote: Kaupapa Māori Education: Research as the Exposed Edge' in Te Wāhanga, *Kei Tua o te Pae Hui Proceedings: The Challenges of Kaupapa Māori Research in the 21st Century* (New Zealand Council for Educational Research, 2011) 38, 41.
[255] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity - Te Taumata Tuarua/Volume 2* (2011) 441.
[256] Waitangi Tribunal, *Matua Rautia - Report on the Kōhanga Reo Claim* (Wellington, 2013) chapter 11.
[257] John Banks, Associate Minister of Education, 'Greens Mislead Public About Partnership School Funding' (Press Release, 24 April 2013) <http://www.beehive.govt.nz/release/greens-mislead-public-about-partnership-school-funding>. Regarding assessments of the programme's success, see, eg, Anne Tolley, Education Minister, and Pita Sharples, Associate Education Minister, 'Positive Evaluation for Te Kotahitanga' (Press Release, 28 October 2010) <http://www.beehive.govt.nz/release/positive-evaluation-te-kotahitanga>.

(c) Slight Part

The role of the Special Rapporteur on the rights of Indigenous peoples in contributing to the modest positive steps to improve Māori educational outcomes and the teaching of *te reo* Māori is difficult to assess. There is no evidence that either expert influenced the Government's moves. The Government has not publically tied its steps to either Special Rapporteur's recommendations, as it did with Anaya's recommendations under the *Marine and Coastal Area Act*, for example. Nor do the timing of the moves hint at a focal role for the visits or recommendations. Other international actors have also expressed concern at the educational achievement of Māori students and at the state of the Māori language.[258] But the primary driver for these developments is again the lobbying of domestic actors. This includes the actions of claimants before the Waitangi Tribunal, such as the Kōhanga Reo National Trust. It also includes the work of the NZHRC, which made New Zealand's status as a well-established bilingual nation a priority in its 2005 to 2010 action plan for human rights, for example.[259] The Māori Party features heavily again too. Its confidence and supply agreements with the National Party saw the then co-leader of the Māori Party appointed as Associate Minister of Education following the national elections in both 2008 and 2011.[260] Further, in the 2011 confidence and supply agreement the National Party agreed to advance Māori Party policies providing for increases in Māori participation in early childhood education; improved Māori achievement in primary, secondary and tertiary education; and, to consider recognising the unique status of Māori medium education providers through their own statutory legislation.[261] But the Special Rapporteur's recommendations bolstered the lobbying efforts of these domestic actors.[262] For example, the NZHRC seized upon Anaya's recommendations on education and language before the HRC in 2011.[263]

The Government's response to Māori rights to education differs from the previous two examples in that at least aspects of the conforming steps are not ritualistic. In the former examples the Government resists conformity to the Special Rapporteur's recommendations regarding the constitutional protection of Māori rights and Māori rights to the foreshore and seabed, but disguises this resistance with ceremonial moves in apparent conformity with the recommendations: the Government engages in a constitutional review process unlikely to result

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[258] See, eg, *CERD Committee on New Zealand 2013,* UN Doc CERD/C/NZL/CO/18-20, [15], [17]; *CERD Committee on New Zealand 2007,* UN Doc CERD/C/NZL/CO/17, [20].

[259] NZHRC, *Mana ki Te Tangata/The New Zealand Action Plan for Human Rights: Priorities for Action 2005-2010* (2005) [4.4]. In addition, in 2007 and 2010 the NZHRC 'called for a national languages policy and specific strategies for te reo Māori', see Karen Johansen, NZHRC, 'Language and Culture' (Statement to EMRIP, Geneva, 2012) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASHedfc/f9445574.dir/EM12karen065.pdf> 3.

[260] National Party and Māori Party, *Relationship Agreement 2008*, above n 170, 3; National Party and Māori Party, *Relationship Accord and Confidence and Supply Agreement with the Māori Party* (11 December 2011) <http://www.parliament.nz/resource/0001759095> 5 ('*Relationship Agreement 2011*').

[261] National Party and Māori Party, *Relationship Agreement 2011*, above n 260, 3.

[262] Interview 3 (Wellington, 3 May 2011).

[263] See, eg, NZHRC commissioner, Rosslyn Noonan, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 78.

in improved protection for Māori rights and enacts legislation that effectively perpetuates the discrimination it purports to remedy. In contrast, in the current example the Government has taken more substantive steps to conform to aspects of the Special Rapporteur's recommendations. These steps reflect a partial commitment to the Indigenous education and language norms underlying the Special Rapporteur's recommendations. They are not simply a commitment to the institutionalised means for achieving those goals, such as conducting a review or developing a policy that exists on paper only. Yet, deflection is occurring in this example too.

5 *A Strategy of Deflection*

The New Zealand Government ritualises its conformity to the Special Rapporteur's recommendations regarding hard rights in order to deflect attention from its underlying resistance to those rights. It leverages its partial conformity to the Special Rapporteur's recommendations regarding soft rights for the same purpose. As identified in Chapter I, I characterise constitutional protection of Māori rights and Māori rights to the foreshore and seabed as hard rights because they correlate to Indigenous peoples' rights to self-determination and to their lands, both of which entail power and wealth sharing on the part of the state. In contrast, the right of Māori to an education tailored to their cultural needs is a soft right because it is a cultural right and generally does not challenge existing state power and wealth structures to the same extent.

Sheryl Lightfoot recognises the same resistance to hard rights and, what she views as, an 'over-compliance' with soft rights in New Zealand. Lightfoot argues that New Zealand emphasises 'individual rights and soft collective rights (language, culture, education, etc), while simultaneously resisting the hard rights of land and self-determination'.[264] She posits that it is reflective of a state-centric model of reconciliation that continues to rely on the doctrine of discovery to avoid or deflect conversations on hard rights.[265] This idea forms part of a larger argument she constructs concerning Indigenous rights 'over-compliance'. According to Lightfoot, 'over-compliance' occurs where a state 'paradoxically takes constitutional, legal and/or policy actions which recognize specific rights or a category of rights that go beyond that state's international human rights treaty obligations or its normative international commitments.'[266] In her view, over-compliant states like New Zealand focus on, and excel in,

[264] Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada' (2010) 62(1) *Political Science* 84, 96.
[265] Ibid 104.
[266] Ibid 87.

complying with soft rights while simultaneously resisting hard rights.[267] However, 'over-compliance' is a problematic term. It suggests that New Zealand is more than compliant with the soft international Indigenous rights norms to which it has committed, which it is not. Lightfoot's argument predates New Zealand's endorsement of the *UNDRIP*. Now that New Zealand has endorsed that instrument it cannot be said that New Zealand is domestically recognising soft rights that go beyond its normative international commitments. In fact, this was the case even before that endorsement given the strong Indigenous rights jurisprudence of the bodies monitoring compliance with the international human rights treaties to which New Zealand is party. I do not embrace the idea that New Zealand is 'over-compliant'. But I do see the New Zealand Government as using its semi-compliance with soft rights to deflect from its resistance to hard rights.

The New Zealand Government has much to gain from this approach. It affords the Government the appearance of rights conformity, while it avoids commitment to the substance or goals of hard Indigenous peoples' rights. By deflecting attention from its ritualised behaviour New Zealand avoids outright confrontation with the Special Rapporteur on the rights of Indigenous peoples, as occurred with Stavenhagen. It avoids the negative press associated with such an approach. As identified above, the Government's rejection of Stavenhagen's report was the subject of significant domestic media attention, whereas Anaya's report and the Government's benign response largely flew under the media's radar. It also avoids strong critique from the Special Rapporteur: by eventually moving to ritualise its conformity to Stavenhagen's recommendations the Government was praised for its perceived progress in Anaya's 2011 follow-up report and received more muted criticisms from Anaya for ongoing concerns. Because the Government does not outright reject the norms the subject of the Special Rapporteur's recommendations its resistance is more understated and, thus, more difficult to identify. This carries implications for how the human rights situation of Māori is viewed both domestically and on the world stage. In particular, it enables New Zealand's self-propagated image as a world leader in Indigenous rights recognition to go largely unquestioned. It feeds into what Moana Jackson has called 'a powerful new myth: that New Zealand leads the world not only in the benevolence of its actual colonization, but also in the way it now seeks to redress the wrongs of its past'.[268] The analysis offered here indicates that New Zealand's approach to Indigenous rights recognition is in fact more complex, favouring recognition of soft rights over hard rights. And, even then, its recognition is partial.

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[267] Ibid 104. Moana Jackson similarly argues that '[t]he only reality Maori are permitted to define and inhabit is a "cultural" construct of language, music, art and custom.' Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 107.

[268] Jackson, 'Colonization as Myth-Making: A Case Study in Aotearoa', above n 8, 106.

F *Conclusion: Maintaining the Myth of Rights Leadership*

This case study reveals that being a stable liberal democracy with a reputation as a world leader in Indigenous rights recognition is no guarantee of conformity to special procedures mandate-holders' recommendations concerning Indigenous peoples' rights. The Government has implemented some of the Special Rapporteur on Indigenous peoples' recommendations, it has rejected others. But ritualism, dressed up as partial implementation, has been the Government's most prominent behavioural response. The Government initially rejected the Special Rapporteur's recommendations concerning the protection of Māori rights in New Zealand's constitutional arrangements and in the foreshore and seabed, only to later take steps that give the appearance of a commitment to those recommendations. But the commitment is not to the goals of the Special Rapporteur's recommendations, namely: domestic legal security for Māori rights under the *Treaty* and international human rights law, including in respect of the foreshore and seabed. Rather, it is to the institutionalised means for achieving those goals: a constitutional conversation and new (equally discriminatory) foreshore and seabed legislation. The Government has demonstrated a degree of commitment to the Special Rapporteur's recommendations regarding improved educational outcomes for Māori and Māori access to an education in *te reo* Māori. But it leverages its limited conformity to this soft cultural right to education to deflect attention from its underlying resistance to the hard rights regarding self-determination and land. When Charlesworth raised the idea that states engage in rights ritualism in the context of discussing Cambodia's behaviour towards international human rights regulation she commented that such behaviour was 'not confined to developing countries', observing that Australia engaged in ritualism too.[269] This chapter confirms that countries from the global North also engage in ritualism in response to international human rights regulation.

The role of the Special Rapporteur on Indigenous peoples in bringing about the small, mostly ceremonial, gains in line with the country recommendations is slight but tangible. The experts have afforded legitimacy to domestic lobbying efforts for improved rights recognition, and have been leveraged by domestic actors for that purpose. Notably, the Government professed to have taken on board Anaya's recommendations in refining the replacement foreshore and seabed legislation. But the Special Rapporteur's Indigenous rights praise, as tendered by Anaya, has also been used by the New Zealand Government to legitimise ritualistic rights moves. Domestic actors, such as the Māori Party, have been the major drivers behind the developments consistent with the Special Rapporteur's recommendations. Overall, New Zealand has inwardly committed to few of the Special Rapporteur's recommendations. The analysis indicates that human rights investigators must be vigilant to the possibility that states

[269] Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 13.

Government's initial reaction, has been largely positive; examines the Government's ritualised implementation of the recommendations, again, using three exemplar recommendations regarding the soft cultural right to an intercultural bilingual education, as well as the hard rights of Indigenous participation in decision-making and Indigenous peoples' rights to their lands; and closes with observations on the Government's approach of providing soft commitments and hard resistance to the experts' recommendations.

B *Background*

1 *Contemporary Rights Crisis*

Guatemala possesses all the trappings of a democracy but is facing a serious human rights crisis. The most populous Central American country,[2] it has an estimated population of 15.1 million,[3] the majority of which are Indigenous. Maya are the main Indigenous peoples, comprising almost 60 per cent of the total population and accounting for 22 of the 24 different Indigenous languages spoken within its borders.[4] Two other Indigenous peoples are recognised by the Government – the Xinka and Garífuna – who together make up around 2.5 per cent of the total population.[5] The Xinka are a distinct Indigenous people from Eastern Guatemala.[6] The Garífuna are of Carib, Arawak and West African descent and reportedly arrived in Guatemala early in the 1800s.[7] But I follow the state and Stavenhagen's lead in treating them as 'Indigenous peoples' for the purposes of this discussion.[8] The remainder of the population are *mestizo* (of Spanish and Indigenous descent) and European. Despite being a numerical minority,

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[2] Eduardo Jiménez Mayo, 'The Violence after "La Violencia": The Guatemalan Maya and the United Nations-Brokered Peace Accords of 1996' (2011) 7(3) *AlterNative* 207, 215.
[3] UNDP, *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World* (2013) 196.
[4] Regarding the estimated size of Guatemala's Indigenous peoples population, see HRC, *Annual Report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala*, UN Doc A/HRC/19/21/Add.1 (30 January 2012) [52] ('*HCHR Report on Guatemala 2012*'). Twenty-two different Maya languages are recognised in the decree creating the Academy of Mayan Languages, see *Ley de la Academia de Lenguas Mayas de Guatemala*, Government Decree No 65-90 (Guatemala) art 7. Regarding the total number of Indigenous languages spoken in Guatemala, see Luis Enrique López, *Reaching the Unreached: Indigenous Intercultural Bilingual Education in Latin America - Background Paper Prepared for the Education for All Global Monitoring Report 2010, Reaching the Marginalized,* UN Doc 2010/ED/EFA/MRT/PI/29 (2009) 3 ('*Reaching the Unreached*').
[5] Government of the Republic of Guatemala, Unidad Revolucionaria Nacional Guatemalteca and United Nations, *Agreement on Identity and Rights of Indigenous Peoples* (United Nations, 31 March 1995) ('*Agreement on Identity and Rights of Indigenous Peoples 1995*'). Regarding estimates of the population size of the Xinka and Garífuna peoples see, eg, Instrumentos Internacionales de Derechos Humanos, *Documento Básico que Forma Parte Integrante de los Informes de los Estados Partes: Guatemala*, UN Doc HRI/CORE/GTM/2012 (9 October 2012) [14] ('*Guatemala Background Document 2012*').
[6] Roddy Brett, 'Confronting Racism from within the Guatemalan State: The Challenges Faced by the Defender of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office' (2011) 39(2) *Oxford Development Studies* 205, 224 n 1.
[7] CHR, *Report by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc E/CN.4/2005/18/Add.2 (11 March 2005) [40] ('*Expert on Racism Guatemala 2005*').
[8] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [10].

VI SOFT COMMITMENT, HARD RESISTANCE: GUATEMALA'S RESPONSE

A *Introduction*

One case study provides limited guidance on the influence of the special procedures mechanism on states' behaviour towards Indigenous peoples. Accordingly, in this chapter I analyse the influence of the special procedures mechanism on state behaviour towards Indigenous peoples in a second, markedly different, state: Guatemala. Guatemala is an ideal counter-point to New Zealand in an assessment of the special procedures' influence on states' behaviour towards Indigenous peoples. Apart from its dramatically different history and contemporary reality, it is one of the states most studied by the special procedures and, superficially, it is an example of a state where the special procedures have had a discernibly positive influence on state behaviour towards Indigenous peoples; sources including Stavenhagen, Preston et al, Piccone, and Bray have identified it as such.[1] Certainly, in contrast to New Zealand where none of the examples of moves towards implementation of the special procedures' recommendations were attributable to the mechanism in anything other than a peripheral way, there are two noteworthy examples of the mechanism having a direct influence in Guatemala. However, a closer reading reveals that the Guatemalan Government engages in Indigenous rights ritualism as much as the New Zealand Government. Ritualism – the Government's foremost behavioural response – is again apparent in the Government's implementation of aspects of the soft rights the subject of the special procedures' recommendations. This ritualistic behaviour operates to deflect attention from the Government's failure both to more fully implement those soft rights as well as to implement the hard rights reflected in the experts' proposals for action. It is also evident in the Government's deflection tactic of publically committing to recommendations concerning hard rights, only to resist those rights in more sophisticated ways. This chapter introduces Guatemala's Indigenous rights situation; analyses the way in which each of the special procedures' dialogic mechanisms of shaming, dialogue-building and capacity-building have been leveraged in the state; identifies the Government's official response to these efforts, which, in contrast to the New Zealand

[1] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [58]-[64]; Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007), 35, 39; Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010) appendix E 66; David Barton Bray, 'Rodolfo Stavenhagen: The UN Special Rapporteur on Indigenous Peoples' (2011) 113(3) *American Anthropologist* 502, 503. The impact of special procedures experts in Guatemala beyond the Indigenous rights sphere has also been identified. See, eg, Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299, 311; Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1995-1996) 28 *Journal of International Law and Politics* 785, 805.

Government's initial reaction, has been largely positive; examines the Government's ritualised implementation of the recommendations, again, using three exemplar recommendations regarding the soft cultural right to an intercultural bilingual education, as well as the hard rights of Indigenous participation in decision-making and Indigenous peoples' rights to their lands; and closes with observations on the Government's approach of providing soft commitments and hard resistance to the experts' recommendations.

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[2] Eduardo Jiménez Mayo, 'The Violence after "La Violencia": The Guatemalan Maya and the United Nations-Brokered Peace Accords of 1996' (2011) 7(3) *AlterNative* 207, 215.
[3] UNDP, *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World* (2013) 196.
[4] Regarding the estimated size of Guatemala's Indigenous peoples population, see HRC, *Annual Report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala*, UN Doc A/HRC/19/21/Add.1 (30 January 2012) [52] ('*HCHR Report on Guatemala 2012*'). Twenty-two different Maya languages are recognised in the decree creating the Academy of Mayan Languages, see *Ley de la Academia de Lenguas Mayas de Guatemala*, Government Decree No 65-90 (Guatemala) art 7. Regarding the total number of Indigenous languages spoken in Guatemala, see Luis Enrique López, *Reaching the Unreached: Indigenous Intercultural Bilingual Education in Latin America - Background Paper Prepared for the Education for All Global Monitoring Report 2010, Reaching the Marginalized,* UN Doc 2010/ED/EFA/MRT/PI/29 (2009) 3 ('*Reaching the Unreached*').
[5] Government of the Republic of Guatemala, Unidad Revolucionaria Nacional Guatemalteca and United Nations, *Agreement on Identity and Rights of Indigenous Peoples* (United Nations, 31 March 1995) ('*Agreement on Identity and Rights of Indigenous Peoples 1995*'). Regarding estimates of the population size of the Xinka and Garífuna peoples see, eg, Instrumentos Internacionales de Derechos Humanos, *Documento Básico que Forma Parte Integrante de los Informes de los Estados Partes: Guatemala*, UN Doc HRI/CORE/GTM/2012 (9 October 2012) [14] ('*Guatemala Background Document 2012*').
[6] Roddy Brett, 'Confronting Racism from within the Guatemalan State: The Challenges Faced by the Defender of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office' (2011) 39(2) *Oxford Development Studies* 205, 224 n 1.
[7] CHR, *Report by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc E/CN.4/2005/18/Add.2 (11 March 2005) [40] ('*Expert on Racism Guatemala 2005*').
[8] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [10].

this latter group is dominant within the state.[9]

Guatemala is officially a constitutional republic. Its state structure is based on a civil law system, drawn from its Spanish colonisers. It has an executive headed by the President, a unicameral Congress elected through a party list proportional representation system and a judiciary, of which the Constitutional Court is the highest body. Although formally a democracy, Ivan Briscoe identifies the state as in 'a stalled or incomplete process of democratic transition'.[10] A small number of economic elite exercise de facto power over much of the organs of state, sometimes in concert with the international drug cartels that use the country as a transit point between Latin America and the United States.[11] Its fragile state institutions are financially emaciated creating limited bureaucratic capabilities,[12] a product of the country having one of the lowest tax burdens in Latin America and Caribbean.[13] There is widespread impunity for the extreme violence that punctuates the state;[14] in 2013 Guatemala ranked 109th most peaceful country out of 162 countries, in stark contrast to New Zealand's third place.[15] The military is influential.[16] Under the 2012 President-elect Otto Pérez-Molina, a former military general, it is increasingly so.[17]

Guatemala is a lower middle income country and an 'emerging and developing economy',[18] but it is dramatically unequal. Seventy per cent of the country's fertile land is

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[9] See, eg, *HCHR Report on Guatemala 2012*, UN Doc A/HRC/19/21/Add.1, [52].

[10] Ivan Briscoe, *The Proliferation of the "Parallel State"* (Fundacion para las Relaciones Internacionales y el Dialogo Exterior, 2008) 13.

[11] Procurador de los Derechos Humanos de la República de Guatemala, *Contribución del Procurador de los Derechos Humanos de la República de Guatemala Examen Periódico Universal al Estado de Guatemala Segundo Ciclo 14ª Sesión* (2012) <http://lib.ohchr.org/HRBodies/UPR/Documents/Session14/GT/PDH_UPR_GTM_S14_2012_ProcuraduriaDerechoHumano_S.pdf> 3. See generally Ivan Briscoe and Martin Rodriguez Pellecer, *A State Under Seige: Elites, Criminal Networks and Institutional Reform in Guatemala* (Netherlands Institute of International Relations, 2010).

[12] Kevin Casas-Zamora, *The Travails of Development and Democratic Governance in Central America* (Brookings Institution, 2011) 3. See generally HRC, *Report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala*, UN Doc A/HRC/16/20/Add.1 (26 January 2011) [8] ('*HCHR Report on Guatemala 2011*').

[13] Center for Economic and Social Rights and Instituto Centroamericano de Estudios Fiscales, *Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala: Executive Summary* (2009) 17. See generally HRC, *Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Guatemala*, UN Doc A/HRC/WG.6/14/GTM/2 (13 August 2012) [7] ('*OHCHR Compilation on Guatemala 2012*'); *HCHR Report on Guatemala 2011,* UN Doc A/HRC/16/20/Add.1, [12], [66]; HRC, *Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala*, UN Doc A/HRC/13/26/Add.1 (3 March 2010) [10] ('*HCHR Report on Guatemala 2010*').

[14] See, eg, Human Rights Watch, *World Report 2012* (2012) 247-52; Mayo, above n 2, 207; Timothy J Smith and Thomas A Offit, 'Confronting Violence in Postwar Guatemala: An Introduction' (2010) 15(1) *Journal of Latin American and Caribbean Anthropology* 1, 1-3; Megan K Donovan, 'The International Commission Against Impunity in Guatemala: Will Accountability Prevail?' (2008) 25(3) *Arizona Journal of International and Comparative Law* 779, 784-85. Special procedures experts are not immune from attack. In August 2013 the Guatemalan office of the expert on freedom of opinion was broken into with computers and documents seized, see Chaloka Beyani, 'Guatemala: UN Expert Alarmed by Break-In of Special Rapporteur on Freedom of Expression's Office' (Media Statement, 2 August 2013) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13605&LangID=E>.

[15] Institute for Economics and Peace, *Global Peace Index 2013: Measuring the State of Global Peace* (2013) 5.

[16] See, eg, Mayo, above n 2, 211-12.

[17] See, eg, The Guatemala Human Rights Commission/USA, *Recent Attacks on Land Rights Activists Raise Alarm* (14 May 2013) <http://www.ghrc-usa.org/our-work/current-cases/recent-attacks-on-land-rights-activists-raise-alarm/>.

[18] Economy Watch, *Emerging Markets* <http://www.economywatch.com/world_economy/emerging-markets/>.

controlled by two per cent of landowners.[19] Ten per cent of the population receives nearly half of all the country's income.[20] More than fifty per cent of the population lives in poverty, and almost one in seven in extreme poverty.[21] The country has a GDP per capita approximately half of the average for Latin America and the Caribbean,[22] and one of the lowest rates of expenditure on social policies in the region.[23] The UNDP's Human Development Report 2013 ranks Guatemala 133rd out of 187 countries, below Iraq and only one place above Timor-Leste.[24]

Since the 1990s Guatemala has positioned itself as a leading advocate of Indigenous peoples' rights on the international stage. It has demonstrated keen support for international instruments that elaborate international Indigenous rights norms. In contrast to New Zealand, Guatemala was a key advocate of including strong rights protections in the *UNDRIP* and voted in favour of its adoption in 2007.[25] In 1996 it ratified the binding *ILO Convention 169*, which New Zealand refuses to ratify; it never ratified *ILO Convention 107*. Guatemala has also ratified the core UN human rights treaties whose provisions elaborate international Indigenous rights norms, including the *CERD*, *ICCPR*, *ICESCR*, *CEDAW*, *CRC*, *CAT* and *CRPD*.[26] Regionally, Guatemala is a member of the OAS and is a party to its central human rights instrument, the *American Convention on Human Rights*.[27] It has also recognised the jurisdiction of the Inter-American Court; the body, along with the Inter-American Commission, responsible for overseeing adherence to that Convention.[28] In addition, Guatemala has been active in the negotiation of the OAS' draft American *Declaration on the Rights of Indigenous Peoples*.[29] As identified in Chapter I, Guatemala has historically cosponsored the resolutions on Indigenous rights and activities within the UN's main human rights bodies.[30] It has repeatedly taken the

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[19] *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [66].
[20] Mayo, above n 2, 216.
[21] *HCHR Report on Guatemala 2012*, UN Doc A/HRC/19/21/Add.1 [9]; Jonathon Menkos, Ignacio Saiz and María José Eva, *Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala: Executive Summary* (Central American Institute for Fiscal Studies and Center for Economic and Social Rights, 2009) 7.
[22] Central Intelligence Agency, *The World Factbook: Guatemala* <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html>.
[23] See, eg, *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [10]; *OHCHR Compilation on Guatemala 2012,* UN Doc A/HRC/WG.6/14/GTM/2, [58]; Economic Commission for Latin America and the Caribbean, *Social Panorama of Latin America: Briefing Paper* (2010) 33-4.
[24] UNDP, *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World*, above n 3, 143.
[25] GA, *107th Plenary Meeting: Official Records*, UN Doc A/61/PV.107 (13 September 2007) 19; Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 458 n 88; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, appendix [65].
[26] *OHCHR Compilation on Guatemala 2012,* UN Doc A/HRC/WG.6/14/GTM/2, 2.
[27] *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978); Organization of American States, *American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32): Signatories and Ratifications* <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>.
[28] Ibid.
[29] See, eg, Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System* (IWGIA, 2002) 103, 106, 108-09, 111, 115.
[30] See, eg, Luis Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 314, 315; OHCHR, 'Council Extends

international stage to praise the Indigenous-exclusive international mechanisms and to encourage other states to respect Indigenous peoples' rights.[31] As a consequence, it has been praised for 'its leadership in indigenous peoples' rights.'[32] But the persistence of Indigenous rights concerns in Guatemala will surprise no one familiar with its troubled history.

2 *Bleak Historical Record*

Spain asserted colonial authority over Guatemala, and its Maya and Xinka peoples, in the 1500s. As in New Zealand, Guatemala's Indigenous peoples actively resisted their colonisers. Unlike in New Zealand, there was no treaty with the Maya and Xinka. Instead Spain claimed sovereignty over Guatemala by conquest, engaging in explicit policies of extermination and extreme labour exploitation. The Spanish colonisers implemented a series of systems from the late 1500s, which awarded, initially the Spanish *conquistadores* or conquerors and later others, grants of land that were worked by Guatemala's Indigenous peoples as indentured servants through to the early 1800s. When Guatemala gained independence from Spain in 1821 Mayan and Xinka autonomy was not restored, instead control of the state was placed in the hands of an elite descended from the former Spanish colonial rulers.[33] These elite capitalised on the racial divisions rife in the country. They embraced the international market system, dismantling Mayan highland communal village lands to establish an extensive system of coffee plantations that operated into the 1960s using the exploited labour of Indigenous and other peasant farmers.[34] Then, in 1954, with United States corporate interests in the country threatened by a package of progressive social welfare and land reforms, the United States backed a coup that overthrew the elected Government and replaced it with successive repressive military dictatorships.[35] When dissidents responded with violent resistance in 1960, Guatemala's 36 year internal conflict began.[36]

Mandates on Slavery, Peaceful Assembly, Health, Arbitrary Detention, Indigenous Peoples and Mercenaries' (Media Release, 26 September 2013) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13790&LangID=E>; doCip, *Human Rights Council* <http://www.docip.org/Human-Rights-Council.64.0.html>.

[31] See, eg, Guatemalan Government, 'Intervención de Guatemala en el Marco del Sexto Período de Sesiones Mecanismo de Expertos sobre los Derechos de los Pueblos Indígenas' (Geneva, July 2013) <http://www.docip.org/Online-Documentation.32.0.html> 3; HRC, *Report of the Working Group on the Universal Periodic Review*, UN Doc A/HRC/17/10 (24 March 2011) [86.107].

[32] Paraguay cited in HRC, *Report of the Working Group on the Universal Periodic Review: Guatemala*, UN Doc A/HRC/22/8 (31 December 2012) [78] ('*Guatemala UPR 2012*').

[33] See generally W George Lovell, 'Surviving Conquest: The Maya of Guatemala in Historical Perspective' (1988) 23(2) *Latin American Research Review* 25, 28-37.

[34] Stephen C Ropp and Kathryn Sikkink, 'International Norms and Domestic Politics in Chile and Guatemala' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 172, 177; Richard Ashby Wilson, 'Is the Legalization of Human Rights Really the Problem? Genocide in the Guatemalan Historical Clarification Commission' in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2006) 81, 90; Lovell, above n 33, 38-42.

[35] Ropp and Sikkink, above n 34, 177-78; Donovan, above n 14, 782.

[36] Donovan, above n 14, 782.

Guatemala's internal conflict was not directly in response to the repression of Guatemala's Indigenous peoples. However, after bearing the brunt of the violence many Indigenous peoples joined the guerrilla movement.[37] The conflict reached its height between 1981 and 1983 when the military conducted a scorched-earth counterinsurgency campaign in Guatemala's Mayan populated highlands. A UN-backed truth commission (headed by a former special procedures country mandate-holder) would later describe military massacres of four Mayan communities during this period as genocide.[38] Overall, the commission estimated that more than 200,000 people were killed or disappeared during the conflict, with over 100,000 fleeing the country and between 500,000 and a million and a half people displaced. The commission attributed 93 per cent of the atrocities committed to the military. Eighty-three per cent of the victims of arbitrary execution and forced disappearance identified by the commission were Mayan.[39] President Molina is himself accused of having supervised acts of genocide during the conflict, prompting an allegation letter by the experts on torture and extrajudicial executions in 2011.[40]

Moves towards democratic government, peace, and recognition of Indigenous peoples' rights occurred during the later years of the conflict. The military, financially starved and internally divided, surrendered formal control of the state through a new constitution, agreed in 1985. The *Constitution of the Republic of Guatemala 1985* (*Constitution*) includes some reference to Indigenous peoples, recognising their status as Indigenous peoples, their right to their cultural identity, and outlining some general land protections.[41] However, in contrast to other constitutions in Latin America, the *Constitution* is silent regarding Indigenous peoples'

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[37] Evelyn Gere and Tim MacNeill, 'Radical Indigenous Subjectivity: Maya Resurgence In Guatemala' (2008) 8(2) *The International Journal of Diversity in Organisations, Communities and Nations* 97, 99; Rosemary Thorp, Corinne Caumartin and George Gray-Molina, 'Inequality, Ethnicity, Political Mobilisation and Political Violence in Latin America: The Cases of Bolivia, Guatemala and Peru' (2006) 25(4) *Bulletin of Latin American Research* 453, 455-56.

[38] Commission for Historical Clarification, *Guatemala Memory of Silence: Tz'inil Na'tab'al: Report of the Commission for Historical Clarification: Conclusions and Recommendations* (1999) [122] ('*Conclusions and Recommendations*'). The Commission for Historical Clarification (*Comisión para el Esclarecimiento Histórico* or CEH) was presided over by Christian Tomuschat. The CEH's full report is available in Spanish only, see Comisión de Esclarecimiento Histórico, *Guatemala: Memoria del Silencio: Informe de la Comisión para el Esclarecimiento Histórico* (1999). Another investigation into the conflict was carried out by the Catholic Church: the Recovery of Historical Memory (*Recuperation de la Memoria Historica* or REMHI), see Oficina de Derechos Humanos del Arzobispado de Guatemala, *Guatemala: Nunca Más - Informe del Proyecto Interdiocesano Recuperación De La Memoria Histórica* (1998). An abridged version is available in English, see Human Rights Office Archdiocese of Guatemala, *Guatemala, Never Again! REMHI, Recovery of Historical Memory Project: The Official Report of the Human Rights Office, Archdiocese of Guatemala* (1999).

[39] CEH, *Conclusions and Recommendations*, above n 38, [1]-[2], [15], [66].

[40] HRC, *Communications Report of Special Procedures*, UN Doc A/HRC/19/44 (23 February 2012) ('*Joint Communications Report February 2012*') 62. Molina is not named in the communication but reference is made to video footage of him and the pseudonym he assumed in the footage. A copy of the information transmitted to the expert on torture, which prompted the communication, is available at Rights Action, *No More 'Politics & Business As Usual' with War Criminals in Guatemala* (2011) <http://www.rightsaction.org/articles/peres_molina_letter_080611.html>.

[41] *Constitution of the Republic of Guatemala 1985* (Guatemala), arts 58, 66-8 and 76. See, eg, Rachel Sieder, "'Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala" (2011) 40 *Economy and Society* 239, 253; Rachel Sieder, 'The Judiciary and Indigenous Rights in Guatemala' (2007) 5(2) *International Journal of Constitutional Law* 211, 237-38. See generally Roddy Brett, *Social Movements, Indigenous Politics and Democratisation in Guatemala, 1985-1996* (Brill Academic Publishers, 2008).

rights to self-determination, political participation, legal pluralism and natural resources.[42] The most important domestic instrument concerning Indigenous peoples is the 1995 *Agreement on Identity and Rights of Indigenous Peoples* (*Indigenous Agreement*), part of the package of UN-mediated *Peace Accords* signed in December 1996 bringing an end to the conflict. The *Indigenous Agreement* committed the Guatemalan Government to implement constitutional reforms to recognise Indigenous peoples and their rights, including to their languages, bilingual education, spirituality, cultural heritage sites, laws, authorities and lands.[43] The constitutional reforms failed at a referendum in 1999, with only 18 per cent of voter participation.[44] But the *Peace Accords* were subsequently given effect in ordinary statute instead in 2005.[45] Various state institutions to advance Indigenous rights were created from the 1990s, including a special Indigenous women's defence office (DEMI);[46] the defender of the rights of Indigenous peoples' unit,[47] within the country's NHRI (PDH);[48] the Presidential Commission for Coordination on Human Rights (COPREDEH);[49] and the Presidential Commission against Discrimination and Racism towards Indigenous Peoples of Guatemala (CODISRA).[50] However, with resistance from the economic elite, a lack of institutional support, and starved of funding, substantive implementation of the *Peace Accords*, in particular of the *Indigenous Agreement*, has been thwarted.[51]

3 *Indigenous Rights Urgency*

The Indigenous rights situation remains grave. Few of the architects of the worst abuses against Indigenous peoples during the conflict have been tried.[52] The autonomy of Indigenous

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[42] Gonzalo Aguilar et al, 'South/North Exchange of 2009 - The Constitutional Recognition of Indigenous Peoples in Latin America' (2010) 2(2) *Pace International Law Review Online Companion* 44, 99-100.
[43] *Agreement on Identity and Rights of Indigenous Peoples 1995*, Preamble, Part I, Part II, Part III, Part IV, Part V. See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 252.
[44] Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 41, 218-19. See generally Kay B Warren, 'Voting Against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum' in Kay B Warren and Jean E Jackson (eds), *Indigenous Movements, Self-Representation, and the State in Latin America* (University of Texas Press, 2002) 149.
[45] *Ley Marco de los Acuerdos de Paz*, Government Decree No 52-2005 (Guatemala).
[46] *Defensoría de la Mujer Indígena*, Government Agreement No 525-99 (Guatemala).
[47] Defensoría de los Derechos de los Pueblos Indígenas, created in 1998. See generally Brett, 'Confronting Racism from within the Guatemalan State: The Challenges Faced by the Defender of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office', above n 6, 205.
[48] Procurador de los Derechos Humanos, created by *Constitution of the Republic of Guatemala 1985* (Guatemala) art 274.
[49] Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos, created in 1992. See generally *Guatemala Background Document 2012,* UN Doc HRI/CORE/GTM/2012, [164].
[50] *Comisión Presidencial contra la Discriminación y el Racismo contra los Pueblos Indígenas en Guatemala*, Government Agreement No 390-2002 (Guatemala).
[51] See, eg, UNDP Evaluation Office, *Assessment of Development Results, Evaluation of UNDP Contribution: Guatemala* (United Nations Development Programme, 2009) xii, 48; Brett, 'Confronting Racism from within the Guatemalan State: The Challenges Faced by the Defender of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office', above n 6, 206-08.
[52] See, eg, Donovan, above n 14, 780. For comment on some belated positive steps to prosecute key actors see, eg, HRC, *Annual Report of the United Nations High Commissioner for Human Rights: Report of the United Nations*

authorities is severely circumscribed and the courts have not revealed a coherent policy for recognising Indigenous legal systems.[53] Indigenous peoples are chronically underrepresented in Guatemalan political institutions. Following the elections in late 2011 and early 2012 Indigenous candidates secured only 19 out of the 158 congressional seats, with just three of those for Indigenous women.[54] The inequitable distribution of land significantly impacts upon Indigenous peoples (particularly Indigenous women), who for the most part lack security of title over their territories.[55] Indigenous peoples' territories are threatened by the extractive industries, energy development projects and agribusinesses funded by foreign investors, which now form the focus of Guatemala's development strategy.[56] Racial discrimination against Indigenous peoples is pervasive; in 2012 the HCHR observed that '[t]he situation of indigenous peoples epitomizes the structural patterns of racism and discrimination that persist in Guatemala, to a degree that could amount to segregation.'[57] Attacks and threats against Indigenous peoples who defend their rights are common, as is the criminalisation of their protests.[58]

Socio-economic statistics that are alarming on a national level are catastrophic when disaggregated by ethnicity. More than 70 per cent of Indigenous peoples live in poverty;[59] the same percentage of Indigenous children suffer from chronic malnutrition;[60] the maternal mortality rate, already high, is three times higher for Indigenous women than non-Indigenous women;[61] and over 47 per cent of Indigenous peoples 15 years old and above are illiterate, compared with just under 24 per cent of the non-Indigenous population.[62] Indigenous peoples' difficulties accessing basic social services are intensified by their location: around 65 per cent of the country's Indigenous peoples live in poorly serviced rural areas.[63] As a result, the Indigenous rights situation in Guatemala has been the subject of extensive international concern,

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High Commissioner for Human Rights on the Activities of Her Office in Guatemala, UN Doc A/HRC/22/17/Add.1 (7 January 2013) [37] ('*HCHR Report on Guatemala 2013*').

[53] Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 41, 219-23.

[54] Programa de las Naciones Unidas para el Desarrollo, *Ciudadanía Intercultural: Aportes desde la Participación Política de los Pueblos Indígenas de Latinoamérica* (2013) 53. Note that the HCHR identifies that Indigenous peoples secured 22 congressional seats. *HCHR Report on Guatemala 2013*, UN Doc A/HRC/22/17/Add.1 [62]. The Guatemalan Government has identified the figure as 19 so that is the figure I use. Guatemalan Government representative, Connie Taracena Secaira, cited in *GA 3rd Committee Press Release 2011,* UN Doc GA/SHC/4013.

[55] See, eg, UNDP Evaluation Office, above n 51, viii, 31. See generally Michael Holley, 'Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala' (1997) 15 *Berkeley Journal of International Law* 119.

[56] See, eg, Alberto Alonso-Fradejas, 'Land Control-Grabbing in Guatemala: The Political Economy of Contemporary Agrarian Change' (2012) 33(4) *Canadian Journal of Development Studies* 509; Amanda M Fulmer, Angelina Snodgrass Godoy and Philip Neff, 'Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine' (2008) 50(4) *Latin American Politics and Society* 91; Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41.

[57] *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [12].

[58] See, eg, Simona V Yagenova and Rocío Garcia, 'Indigenous People's Struggles Against Transnational Mining Companies in Guatemala: The Sipakapa People vs GoldCorp Mining Company' (2009) 23(3) *Socialism and Democracy* 157, 158-59, 161, 165; *HCHR Report on Guatemala 2013*, UN Doc A/HRC/22/17/Add.1 [11], [15], [47]-[53].

[59] *Guatemala Background Document 2012,* UN Doc HRI/CORE/GTM/2012, [26].

[60] Ibid [40].

[61] *OHCHR Compilation on Guatemala 2012,* UN Doc A/HRC/WG.6/14/GTM/2, [71].

[62] López, *Reaching the Unreached,* above n 4, 6.

[63] *Guatemala Background Document 2012,* UN Doc HRI/CORE/GTM/2012, [14].

including from the Inter-American Commission and Inter-American Court,[64] the ILO,[65] the UNDP,[66] and the HCHR;[67] with the OHCHR maintaining an office in Guatemala that gives 'special emphasis' to the rights of Indigenous peoples since 2005 (OHCHR-Guatemala).[68] It is to this crowd of international actors that the special procedures mandate-holders have added their voices.

C *Engaging on Maya, Xinka and Garífuna Rights*

1 *Shaming at the Helm*

In the last three decades the special procedures have devoted sustained attention to the human rights situation of Indigenous peoples in Guatemala, flexing each of the mechanism's dialogic regulatory tools. The experts have leveraged the regulatory power of shaming through numerous country visits and reports, a special country visit and report on a specific case, communications, and media releases. These attentions have translated into many hundreds of pages of observations, conclusions and recommendations, a number of which criticise the state of the dire human rights situation of Maya, Xinka and Garífuna. Altogether, in the course of three decades of attention, special procedures experts have issued some 200 recommendations to address the situation of Guatemala's Indigenous peoples spanning a spectrum of Indigenous rights norms.[69]

(a) Belated Country Consideration

Copious country reports on Guatemala have been prepared by country and thematic mandate-holders, which endeavour to shame the Guatemalan Government by drawing attention to core Indigenous rights concerns within the state. From 1983-1997 Guatemala was the subject of successive special procedures country mandates under Mark Colville the Viscount of Culross,[70] Hector Gros Espiell,[71] Christian Tomuschat,[72] and Mónica Pinto.[73] The country

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[64] See, eg, *Case of the Rio Negro Massacres vs Guatemala (Preliminary Objections, Merits, Reparations, and Costs)* IACHR Series C No 250, 4 September 2012; Inter-American Commission, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala,* OEA/Ser.L/V/II.118 Doc 5 rev 1 (29 December 2003) [210]-[267], [434].
[65] See, eg, ILO, *Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions: A Compilation of ILO Supervisory Bodies' Comments 2009-2010'* (2010) 69-75.
[66] See, eg, UNDP Evaluation Office, above n 51.
[67] See, eg, HRC, *Annual Report of the United Nations High Commissioner for Human Rights,* UN Doc A/HRC/22/17 (13 December 2012).
[68] Oficina del Alto Comisionado para los Derechos Humanos En Guatemala <http://www.ohchr.org.gt/acerca_oacnudh.asp>. The OHCHR-Guatemala's mandate was extended for a further 3 years in September 2011, see *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [1].
[69] This figure is based on separating out individual recommendations even where they are contained in the same paragraph.
[70] Mark Colville the Viscount of Culross held the role from 1983 to 1987. The mandate was established by CHR Res 1982/31 (11 March 1982). Note that the mandate's title shifted from being 'Special Rapporteur' to 'Special Representative' to 'Independent Expert' over the years. See generally Manfred Nowak, 'Country-Oriented Human

mandates were only brought to a close following the signing of the *Peace Accords* in 1996.[74] The early country mandate-holders paid scant attention to Indigenous peoples in their reports, but this improved over time. For example, Viscount Colville offered a small number of recommendations of a socio-economic flavour regarding Guatemala's 'country people' with the intimation they were Indigenous at a time when gross human rights violations were being committed against Indigenous peoples by the military.[75] In contrast, Pinto devoted significant attention to what she expressly identified as Indigenous rights concerns in her reports, including regarding Indigenous political participation, non-discrimination, ratification of *ILO Convention 169*, healthcare, bilingual education and cultural heritage.[76]

(b) Extensive Thematic Shaming

Guatemala has also been the subject of extensive country reports by various thematic mandate-holders that leverage the technique of shaming by highlighting persisting Indigenous rights concerns. As identified in Chapter I, by late 2013 Guatemala had received 21 visits from 13 different thematic mandates. Two further country missions from thematic special procedures were planned for the end of 2013, including from the expert on peaceful assembly, a mandate that has not visited Guatemala before.[77] This will bring the figure to 23 visits from 14 different thematic mandates. The expert on truth and justice, another mandate that has not previously

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Rights Protection by the UN Commission on Human Rights and its Sub-Commission' (1991) 22 *Netherlands Yearbook of International Law* 39, 62-5; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994) 133-35.

[71] Hector Gros Espiell held the role from 1987-1990. He was first appointed under the authority of CHR Res 1987/53 (28 May 1987).

[72] Christian Tomuschat held the role from 1990 to 1993. He was first appointed under the authority of CHR Res 1990/80 (7 March 1990).

[73] Monica Pinto held the role from 1993 to 1997. She was first appointed under the authority of CHR Res 1993/88 (10 March 1993).

[74] An advisory services mission was established in 1997 under the authority of CHR Res 1997/51 (15 April 1997). In 1998 the CHR concluded its consideration of the human rights situation in Guatemala, see CHR Res 1998/22 (14 April 1998) paras 1, 15.

[75] CHR, *Report on the Situation of Human Rights in Guatemala Prepared by the Special Rapporteur, Viscount Colville of Culross Pursuant to Paragraph 9 of Commission on Human Rights Resolution 1983/57 of 8 March 1983,* UN Doc E/CN.4/1984/30 (8 February 1984) [8.3] recommendation 2; CHR, *Report on the Situation of Human Rights in Guatemala Prepared by the Special Rapporteur, Viscount Colville of Culross, in Accordance with Paragraph 14 of Commission on Human Rights Resolution 1984/53 of 14 March 1984,* UN Doc E/CN.4/1985/19 (8 February 1985) [256](g). For criticism of his 1984 report see, eg, Philip Alston, 'The Commission on Human Rights' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992) 126, 168.

[76] CHR, *Report of the Independent Expert, Mrs Mónica Pinto, on the Situation of Human Rights in Guatemala, Prepared in Accordance with Commission Resolution 1993/88*, UN Doc E/CN.4/1994/10 (20 January 1994) [152], [170], [177], [179], [182]-[184]; CHR, *Report by the Independent Expert, Mrs Mónica Pinto, on the Situation of Human Rights in Guatemala, Prepared in Accordance with Commission Resolution 1994/58*, UN Doc E/CN.4/1995/15 (20 December 1994) [183], [201]; CHR, *Report by the Independent Expert, Mrs Mónica Pinto, on the Situation of Human Rights in Guatemala, Submitted in Accordance with Commission Resolution 1995/51*, UN Doc E/CN.4/1996/15 (5 December 1995) [137], [138] ('*Pinto Report 1996*'); CHR, *Report by the Independent Expert, Mrs Mónica Pinto, on the Situation of Human Rights in Guatemala, Submitted in Accordance with Commission Resolution 1996/59 and Economic and Social Council Decision 1996/270*, UN Doc E/CN.4/1997/90 (22 January 1997) [99], [104], [107]-[109].

[77] HRC, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, UN Doc A/HRC/23/39 (24 April 2013) [5]; HRC, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez*, UN Doc A/HRC/22/53 (1 February 2013) [3].

conducted a mission to the country, also intended to visit Guatemala in 2013. But, in a rare move by the Guatemalan Government, 'was informed that the Government was unable to accommodate a visit this year.'[78] The Guatemalan Government has attempted to portray the frequency of thematic special procedures' visits to the country as a reflection of its progressive approach to human rights, not its violations of those rights. Before the HRC in 2006 the Guatemalan Government representative remarked:

> I would also like to point out that the constant visits by Rapporteurs to Guatemala are not related in any way to constant problems or violations of human rights, quite the opposite, they have to do with the interest that our country has shown in having appropriate expertise provided to us by Rapporteurs and also to provide internal reporting on our work and coming up with recommendations to improve our true role as guarantors of human rights.[79]

Guatemala may be unique in attempting to paint sustained international attention to its human rights situation as reflective of its respect for human rights. Thematic attention began with the Working Group on enforced disappearances in 1987 and spans the themes of Indigenous peoples, torture, sale of children, violence against women, racism, extrajudicial executions, human rights defenders, migrants, education, food and health.[80] The degree and depth of thematic mandate-holders attention to the human rights situation of Guatemala's Indigenous peoples is attributable in large part to the theme of the mandate, as well as the expertise and interests of the appointed expert.

The Special Rapporteur on Indigenous peoples has naturally devoted its attention to pressing Indigenous rights concerns, in particular relating to land, in its country reports on Guatemala. Guatemala is one of few states to have received three country missions from the mandate. Stavenhagen visited in 2002, his first country mission in the role.[81] His report on the mission is highly critical of the human rights situation of Guatemala's Indigenous peoples, identifying the situation as 'extremely difficult' and finding that Indigenous peoples had 'been

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[78] HRC, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff*, UN Doc A/HRC/24/42 (28 August 2013) [4].
[79] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Second Session: Interactive Dialogue on Report of the Special Rapporteur on the Right to Food, Mr Jean Ziegler* (22 September 2006) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=060922>.
[80] Since 1987 country missions have been carried out by the experts on Indigenous peoples in 2002, 2006 and 2010; health in 2010; food in 2009 and 2005; the independence of judges in 2009, 2001 and 1999; education in 2008; migrants in 2008; human rights defenders in 2008 and 2002; enforced disappearances in 2006 and 1987; extrajudicial executions in 2006; racism in 2004; violence against women in 2004; the sale of children in 1999 and 2012; and torture in 1989. To access all of the associated country reports since 1998 see OHCHR, *Country Visits by Special Procedures Mandate Holders Since 1998 A - E* <http://www2.ohchr.org/english/bodies/chr/special/countryvisitsa-e.htm>. At least two mandates have produced follow-up reports on Guatemala without conducting a follow-up country visit: the mandates on enforced disappearances in 2011 and extrajudicial executions in 2009. HRC, *Informe del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias: Informe de Seguimiento a las Recomendaciones Hechas por el Grupo de Trabajo sobre las Misiones a Guatemala y Honduras*, UN Doc A/HRC/16/48/Add.2 (17 February 2011); HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Follow-up to Country Recommendations - Guatemala*, UN Doc A/HRC/11/2/Add.7 (4 May 2009) ('*Expert on Extrajudicial Executions Guatemala 2009*').
[81] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [3].

subjected to political exclusion, cultural discrimination and economic marginalization from society'.[82] Stavenhagen identified land rights as core to Indigenous peoples' concerns in the state,[83] a point he reiterated when he presented his report to the CHR.[84] Stavenhagen's numerous and sweeping recommendations to the Guatemalan Government included that the Government return land illegally taken during the conflict, establish a land register identifying Indigenous communal land and support Indigenous agriculture; fully implement the *Peace Accords* before the end of the then administration; redouble efforts to ensure the full the participation of Indigenous peoples in public affairs; ensure Indigenous peoples' access to justice; and extend bilingual education throughout the country.[85] In 2006 Stavenhagen returned to Guatemala to follow-up implementation of his earlier recommendations.[86] He reported some advances in line with his recommendations, including increasing awareness among state representatives of the need to prioritise Indigenous rights concerns, a public event acknowledging military responsibility for a 1982 massacre, establishment of CODISRA, an intention to launch a national anti-racism campaign and some developments in the recognition of language and bilingual intercultural education.[87] But he concluded that '[d]espite these positive examples, and all the efforts deployed, the Special Rapporteur's second visit to Guatemala gave him the opportunity to ascertain that the levels of racism and discrimination against indigenous peoples are still worryingly high' and he found the position of Indigenous women and children in need of urgent attention.[88]

Anaya was critical of the Indigenous rights situation in Guatemala following his 2010 special country mission. Anaya visited Guatemala to investigate the alleged lack of consultation with Indigenous peoples over the approval of natural resource extractive projects on or near Indigenous territories, both generally and in relation to the Marlin mine. I examine his recommendations regarding the Marlin mine in detail in Part E below, but introduce them now. Anaya concluded that Guatemala was experiencing 'a highly unstable atmosphere of social conflict' as a result of the mine and other projects, 'which is having a serious impact on the rights of the indigenous people and threatening the country's governance and economic development.'[89] He expressed 'grave concern at this situation' and called on 'the Government and other interested parties, including businesses, to take urgent measures to guarantee the rights of the indigenous people concerned.'[90] His general recommendations to the Guatemalan Government concerned provisions for consultation with Indigenous peoples, a review of the

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[82] Ibid 2.
[83] Ibid 2.
[84] *Press Release CHR 2003,* UN Doc HR/CN/1028.
[85] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [71]-[82]. Stavenhagen also directed recommendations to the international community, Indigenous peoples, civil society, the mass media and the academic community: at [83]-[94].
[86] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [24].
[87] Ibid [58]-[63].
[88] Ibid [64].
[89] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, 1.
[90] Ibid 2.

legislation governing extractive industries and Indigenous peoples' rights to their lands, improvements to environmental laws, mitigation of the negative impacts of extractive projects on Indigenous peoples, and protections for Indigenous peoples participating in social protests.[91] His recommendations regarding the Marlin mine included that the Government comply with precautionary measures issued by the Inter-American Commission concerning the mine, which notably called on the Government to suspend the mining operations pending a full review of the situation by the Commission; conduct independent studies into the health, environmental, social and cultural impacts of the mine; obtain the affected Indigenous peoples' consent to any future operations at the mine; create spaces for dialogue in which the affected Indigenous peoples are fully informed regarding all aspects of the mining project; investigate the processes surrounding the sale of land for the mine; and take decisive steps to reduce social conflict, such as pardoning those serving criminal sentences connected to their protests against the mine.[92]

Anaya took several additional steps to draw international attention to, and publically shame the Guatemalan Government for, the negative impact of extractive projects on Guatemala's Indigenous peoples during 2011. He shared his report through a video conference with representatives of Indigenous peoples in Guatemala, the Guatemalan Government and the international community.[93] When Anaya presented his report to the HRC he emphasised the 'urgent' need 'to carry out an independent evaluation of the social, environmental and health impacts of' the Marlin mine 'as well as beginning a process of consultation with the affected communities'.[94] He also referred to the negative impact of mining projects in Guatemala when presenting his annual report to the GA, before the EMRIP, and in a speech to an Aboriginal land council in Australia.[95]

Other thematic special procedures experts have also devoted attention to persisting Indigenous rights concerns in their reports on their country missions. Guatemala's Indigenous rights situation is a notable focus of the reports of the experts on racism,[96] health,[97] food,[98]

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[91] Ibid [78]-[85]. He also addressed recommendations to Indigenous peoples, civil society and the business sector: at [86]-[93].
[92] Ibid appendix [66]-[74].
[93] *Anaya Communications Report 2011,* UN Doc A/HRC/18/35/Add.1, annex V [2].
[94] James Anaya speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* (20 September 2011) James Anaya <http://unsr.jamesanaya.org/videos/webcast-18th-session-of-the-human-rights-council-statement-of-special-rapporteur-and-interactive-dialogue>.
[95] James Anaya, 'Statement to the United Nations General Assembly' (New York, 17 October 2011) <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2011>; James Anaya, 'Statement to the Expert Mechanism on the Rights of Indigenous Peoples' (Geneva, 13 July 2011) <http://unsr.jamesanaya.org/statements/statement-on-the-rapporteurs-activitiesemrip-fourth-session-2011>; James Anaya, 'Keynote Speech at the 2011 New South Wales Aboriginal Land Council Conference' (Media Release, 5 April 2011) <http://unsr.jamesanaya.org/statements/keynote-speech-at-the-2011-new-south-wales-aboriginal-land-council-conference>.
[96] *Expert on Racism Guatemala 2005,* UN Doc E/CN.4/2005/18/Add.2 [29]-[49].
[97] HRC, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover,* UN Doc A/HRC/17/25/Add.2 (16 March 2011) [30]-[51], [88](a)-(f), [89](a)-(f) ('*Expert on Health Guatemala 2011*').
[98] HRC, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Mission to Guatemala,* UN Doc A/HRC/13/33/Add.4 (26 January 2010) [11], [21], [31], [41], [48], [79]-[81], [86]-[87] ('*Expert on Food Guatemala*

education,[99] human rights defenders,[100] and violence against women.[101] Each of the experts' reports criticise the human rights position of Guatemala's Indigenous peoples. Their recommendations include steps to recognise and protect Indigenous peoples' lands;[102] measures to target discrimination and affirmative action programmes;[103] implementation of the *Indigenous Agreement*;[104] improved access to intercultural bilingual education;[105] greater access for Indigenous peoples to healthcare;[106] Indigenous involvement in the operation of *Mi Familia Progresa*, a social welfare cash transfer programme;[107] an end to attacks on Indigenous leaders and Indigenous rights defenders;[108] a halt to violence against Indigenous women;[109] and better funding for the state institutions promoting Indigenous rights.[110] It is noteworthy that the expert on food paid material attention to Indigenous peoples' land rights in the mandate's reports on Guatemala.[111] The experts on the independence of judges and sale of children also offer recommendations to address Indigenous rights issues.[112] The remainder of the experts generally make only passing reference to Indigenous peoples.[113] However, given the interdependency of

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2010'); HRC, *Report of the Special Rapporteur on the right to food, Jean Ziegler: Mission to Guatemala*, UN Doc E/CN.4/2006/44/Add.1 (18 January 2006) [4]-[6], [8]-[9], [11], [15]-[20], [23]-[24], [27]-[28], [30], [37], [39], [42], [43], [49], [51], [53]-[55], [57]-[58] ('*Expert on Food Guatemala 2006*').

[99] HRC, *Informe del Relator Especial sobre el Derecho a la Educación, Sr Vernor Muñoz: Misión a Guatemala*, UN Doc A/HRC/11/8/Add.3 (28 April 2009) [6], [9], [20], [28]-[31], [47], [49]-[63], [67], [80], [81], [84] ('*Expert on Education Guatemala 2009*').

[100] CHR, *Report by Ms Hina Jilani, Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Submitted Pursuant to Commission on Human Rights Resolution 2000/61: Mission to Guatemala*, UN Doc E/CN.4/2003/104/Add.2 (6 December 2002) [6], [15], [24], [27], [32], [55], [69]; HRC, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Hina Jilani: Mission to Guatemala*, UN Doc A/HRC/10/12/Add.3 (16 February 2009) [20], [24], [25], [34]-[36] ('*Expert on Human Rights Defenders Guatemala 2009*').

[101] CHR, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk: Mission to Guatemala*, UN Doc E/CN.4/2005/72/Add.3 (10 February 2005) [4], [11]-[12], [15]-[20], [25], [35], [43], [67], [72] ('*Expert on Violence Against Women Guatemala 2005*').

[102] See, eg, *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [58](b), (d), (e), (f); *Expert on Food Guatemala 2010,* UN Doc A/HRC/13/33/Add.4, [87](a).

[103] See, eg, *Expert on Racism Guatemala 2005,* UN Doc E/CN.4/2005/18/Add.2, [47](c),(e); *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [58](c)-(e).

[104] See, eg, *Expert on Racism Guatemala 2005,* UN Doc E/CN.4/2005/18/Add.2, [47](b),(d).

[105] See, eg, *Expert on Education Guatemala 2009,* UN Doc A/HRC/11/8/Add.3, [84](i), (l), (m), (p), (t),(u).

[106] See, eg, *Expert on Health Guatemala 2011,* UN Doc A/HRC/17/25/Add.2, [88](a)-(d), (f), [89](a)-(d).

[107] See, eg, *Expert on Food Guatemala 2010,* UN Doc A/HRC/13/33/Add.4, [87](b).

[108] See, eg, *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [58](b); *Expert on Human Rights Defenders Guatemala 2009,* UN Doc A/HRC/10/12/Add.3, [89]-[97]. Note that the expert on human rights defenders does not expressly mention Indigenous peoples in her recommendations but elsewhere in the report she identifies the prevalence of attacks on Indigenous rights defenders: see, eg, at [25].

[109] See, eg, *Expert on Violence Against Women Guatemala 2005,* UN Doc E/CN.4/2005/72/Add.3, [72](2), (4), (5).

[110] See, eg, *Expert on Racism Guatemala 2005,* UN Doc E/CN.4/2005/18/Add.2, [47](h).

[111] *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [9], [11], [16], [23]-[24], [28], [37], [39], [43], [49], [51], [53]-[54], [58](b), (d), (e), (f); *Expert on Food Guatemala 2010,* UN Doc A/HRC/13/33/Add.4, [31], [48], [79]-[81], [87](a).

[112] HRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: Mission to Guatemala*, UN Doc A/HRC/11/41/Add.3 (1 October 2009) [123]; CHR, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2001/39: Report on Mission to Guatemala*, UN Doc E/CN.4/2002/72/Add.2 (21 December 2001) [92](d)(iii), [92](e); CHR, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Param Coomaraswamy, Submitted in Accordance with Commission Resolution 1999/31: Report on Mission to Guatemala*, UN Doc E/CN.4/2000/61/Add.1 (6 January 2000) [169](d)(xii), [169](h); CHR, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ms Ofelia Calcetas-Santos: Report on the Mission to Guatemala*, UN Doc E/CN.4.2000/73/Add.2 (27 January 2000) [112](j).

[113] HRC, *Informe del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias: Informe de Seguimiento a las Recomendaciones Hechas por el Grupo de Trabajo sobre las Misiones a Guatemala y Honduras*, UN Doc

rights, the general recommendations of all mandate-holders are of at least tangential relevance to the rights situation of Guatemala's Indigenous peoples.

(c) Frequent Communication of Concerns

In addition to these country visits and reports, Guatemala has been the subject of a considerable quantity of communications from special procedures experts that highlight alleged Indigenous rights violations within the state. The total number of communications issued in respect of Guatemala is in the high hundreds: between 2004 and 2008 alone Guatemala was the subject of 161 communications.[114] A number of these communications have concerned Indigenous peoples. For example, by late 2013 Guatemala had been the subject of more than twenty reported communications from the Special Rapporteur on Indigenous peoples (jointly and alone), making it the fifth highest recipient of communications from that mandate.[115] By comparison, recall that New Zealand had been the subject of only two special procedures experts' communications directly concerning Indigenous rights. The communications primarily concerned threats and attacks against Indigenous leaders and Indigenous rights defenders.[116] Accordingly, they have frequently been sent jointly with the expert on human rights defenders, although the Special Rapporteur on Indigenous peoples has joined with other experts too. The communications also include concerns regarding the destruction of an archaeological site;[117] criminalisation and closure of Indigenous community radio stations;[118] eviction of Indigenous peoples from their homes;[119] and the impact of development projects, such as the Marlin mine,

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A/HRC/16/48/Add.2 (17 February 2011) 23; HRC, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Guatem*ala, UN Doc A/HRC/4/41/Add.1 (20 February 2007) [9], [12], [23]; CHR, *Report of the Working Group on Enforced or Involuntary Disappearances: Report on a Visit to Guatemala by Two Members of the Working Group on Enforced or Involuntary Disappearances (5-9 October 1987)*, UN Doc E/CN.4/1988/19/Add.1 (21 December 1987) [18]; *Expert on Extrajudicial Executions Guatemala 2009,* UN Doc A/HRC/11/2/Add.7, 5 n 3; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Mission to Guatemala*, UN Doc A/HRC/4/20/Add.2 (19 February 2007) [2], [4], [28]-[30], [35] ('*Expert on Extrajudicial Executions Guatemala 2007*'); HRC, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to Guatemala*, UN Doc A/HRC/11/7/Add.3 (18 March 2009) [15], [104]; CHR, *Report of the Special Rapporteur, Mr Pi Kooijmans, Pursuant to Commission on Human Rights Resolution 1989/33*, UN Doc E/CN.4/1990/17 (18 December 1989) [174].

[114] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 1, 21.

[115] Only Mexico, Colombia, Chile and India have received a greater number of communications from the mandate. This is the author's own assessment based on the communications reported in the Special Rapporteur on Indigenous peoples' communications reports each year.

[116] See, eg, *Stavenhagen Communications Report 2004,* UN Doc E/CN.4/2004/80/Add.1, [35]-[42]; *Stavenhagen Communications Report 2005,* UN Doc E/CN.4/2005/88/Add.1, [48]; *Stavenhagen Communications Report 2006,* UN Doc E/CN.4/2006/78/Add.1, [42]; *Stavenhagen Communications Report 2007,* UN Doc A/HRC/4/32/Add.1, [209]-[212], [214]-[217]; *Anaya Communications Report 2009,* UN Doc A/HRC/12/34/Add.1, [123]-[132]; *Anaya Communications Report 2010,* UN Doc A/HRC/15/37/Add.1, [187]-[191], [192]-[197]; *Joint Communications Report September 2011,* UN Doc A/HRC/18/51, 67, 144; HRC, *Communications Report of Special Procedures*, UN Doc A/HRC/23/51 (22 May 2013) 94 ('*Joint Communications Report May 2013*').

[117] *Stavenhagen Communications Report 2007,* UN Doc A/HRC/4/32/Add.1, [193]-[195].

[118] *Stavenhagen Communications Report 2007,* UN Doc A/HRC/4/32/Add.1, [196]-[197]; *Joint Communications Report May 2013,* UN Doc A/HRC/23/51, 14.

[119] *Stavenhagen Communications Report 2007,* UN Doc A/HRC/4/32/Add.1, [205]-[207]; *Communications Report 2011,* UN Doc A/HRC/18/51, 69.

the San Juan Sacatepequez cement factory, and the Chixoy dam.[120] The quality of the experts' observations on the communication exchange varies. Stavenhagen's observations on the communications were often brief and perfunctory.[121] Anaya's observations offered more analysis and more overtly sought to shame the Government for rights concerns. He frequently reminded the Government of the need to address the underlying issues, such as the failure to consult affected Indigenous peoples on development projects, and the disproportionate use of force against Indigenous peoples' legitimate social protests.[122]

(d) Persistent Media Statements

Special procedures experts have also set out to shame the Guatemalan Government through a string of media statements on Indigenous rights concerns in the state. To take a small selection of examples from the sizeable collection, country mandate-holder Pinto's alarm at 'the marginalization of the indigenous majority' was reported in the media as one of her chief concerns following her 1994 country mission.[123] In 2002 the following grim warning from Stavenhagen was reported in international media: '[a]ccess to land is the fundamental theme affecting the rights of Indian populations...and if these problems are allowed to continue as they have been, with no one working toward solutions, the possibility of social conflicts will increase'.[124] The expert on education drew attention to 'centuries of discrimination and racism against indigenous people' and concerns regarding bilingual intercultural education in his press release at the close of his 2008 mission to the country.[125] In 2012 Anaya identified mining in Guatemala as an example of 'how projects have progressed without consultation with indigenous peoples and much unrest' to Spanish press, reiterating his recommendation to the Guatemalan Government that, if contested mining operations cannot be suspended, measures should be taken to protect Indigenous peoples' rights and new projects should not be

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[120] *Anaya Communications Report 2010,* UN Doc A/HRC/15/37/Add.1, [185]-[186]; *Joint Communications Report September 2011,* UN Doc A/HRC/18/51, 125; *Anaya Communications Report 2011,* UN Doc A/HRC/18/35/Add.1, annex V; *Joint Communications Report February 2012,* UN Doc A/HRC/19/44, 95; *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 11; *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [92]-[95].

[121] See, eg, *Stavenhagen Communications Report 2004,* UN Doc E/CN.4/2004/80/Add.1, [35]-[42]; *Stavenhagen Communications Report 2005,* UN Doc E/CN.4/2005/88/Add.1, [48]; *Stavenhagen Communications Report 2006,* UN Doc E/CN.4/2006/78/Add.1, [42]-[43]; *Stavenhagen Communications Report 2007,* UN Doc A/HRC/4/32/Add.1, [193]-[217].

[122] *Anaya Communications Report 2013,* UN Doc A/HRC/24/41/Add.4, [87]-[91]; *Anaya Communications Report 2010,* UN Doc A/HRC/15/37/Add.1, [187]-[197]; *Anaya Communications Report 2009,* UN Doc A/HRC/12/34/Add.1, [123]-[132].

[123] Centro de Reportes Informativos sobre Guatemala, 'Monica Pinto Has Harsh Words for Guatemalan Government' *CERIGUA Weekly Briefs* 44 (29 November 1994) <http://www.tulane.edu/~libweb/RESTRICTED/CERIGUA/1994_1129.txt>.

[124] 'Guatemala Mayans Still "Wronged"', *BBC News* (online), 12 September 2002 <http://news.bbc.co.uk/2/hi/americas/2253273.stm>.

[125] OHCHR, 'Special Rapporteur on the Right to Education Ends his Visit to Guatemala' (Press Release, 28 July 2008) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8393&LangID=E>.

progressed.[126] In the same year, the expert on freedom of opinion (himself Guatemalan) revealed his 'deepest concern' regarding 'the prosecution and continuing raids against unauthorized indigenous community radio in Guatemala.'[127]

2 *Dialogue-building's Support Function*

The special procedures experts have engaged in dialogue-building on Indigenous rights with the Guatemalan Government too. As in New Zealand, this tool plays more of a supporting function to the expert's leading narrative of shame. But, given the greater interaction between the special procedures mechanism and the Guatemalan Government, there are more examples of this technique being deployed in Guatemala. The experts' commentaries in their country reports, Anaya's special report, the communications, and the media releases act as a witness to the rights violations they are concerned with. A member of CODISRA described the special procedures' role as important because they focus their work on the 'topics that not everybody is willing to talk about'.[128] Some of the experts have offered praise to the Guatemalan Government to encourage it to continually improve its protection of Indigenous rights. As identified above, in his follow-up report Stavenhagen praised the Government for what he considered to be positive steps it had taken to implement some of the recommendations in his first report on the state. In his special report Anaya identified that, despite the shortcomings he had identified, Guatemala had 'demonstrated its international commitment to the promotion and protection of indigenous rights', for example, through its role in the development and approval of the *UNDRIP*.[129] And, in her 2012 annual report, the expert on cultural rights commended Guatemala, along with other Latin American states, for having 'taken measures to give legal protection to the rights of indigenous peoples and local communities to their accumulated scientific knowledge.'[130] The experts' country and special reports have endeavoured to improve knowledge within the state regarding the content of international Indigenous rights norms and their specific application in Guatemala; Anaya's report stands out in this regard. Likewise, the mandate-holders' dialogues with Guatemalan state representatives, Indigenous peoples, and other actors during their country missions have striven to build rights knowledge. For example, Anaya's special country mission included visits to Indigenous peoples' communities, where his public meetings on Indigenous rights concerns attracted unprecedented crowds – tens of thousands in some places.[131] Additionally, Anaya returned to Guatemala in December 2012 to participate in a preparatory meeting for the 2014 World Conference on Indigenous Peoples. During the visit he took the opportunity to participate in a national forum on Indigenous peoples and natural resources, as

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[126] Anaya quoted in Efe Agency, 'Relator de la ONU Aboga por Derechos de los Pueblos Indígenas', *Prensa Libre* (online), 9 April 2012 <http://www.prensalibre.com/economia/Relator-ONU-empresas-promover-derechos-pueblos-indigenas_0_679132237.html>.

[127] Frank La Rue, 'Radios Allanadas', *Prensa Libre* (online), 24 May 2012 <http://www.prensalibre.com/opinion/Radios-allanadas_0_706129402.html>.

well as informal meetings with representatives of Indigenous peoples and the private sector, building knowledge on Indigenous rights issues regarding development and extractive projects.[132]

3 *Capacity-building's Debut*

An effort at Indigenous rights capacity-building has also been made by the mechanism in Guatemala, a regulatory tool not leveraged in New Zealand. In 2011 Anaya provided technical advisory assistance to the Guatemalan Government on a draft legal instrument regulating consultation with Indigenous peoples on matters affecting them, which is explored in Part E below.[133] He is the only special procedures mandate-holder to undertake dedicated Indigenous rights capacity-building with the state.

D *Projecting Positivity: The Government's Official Response*

Guatemala's official stance towards the special procedures' consideration of its Indigenous rights situation has been notably positive, especially compared with New Zealand's early response to attentions regarding its own context. As with other countries the subject of a special procedures country mandate, Guatemala displayed behaviour that suggested its resistance to the existence of a country mandate.[134] But, with few exceptions, the Government has maintained an open door for visits by special procedures experts; only one request for a country mission remains unanswered (from the expert on foreign debt made in 2008),[135] one mission has been postponed since 2006 (by the expert on freedom of opinion),[136] and, as noted above, the expert on truth and justice was not able to undertake a visit in 2013. Guatemala was one of the earlier states to issue a standing invitation to thematic special procedures to visit the

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[128] Interview 11 (Guatemala City, 1 June 2011).
[129] *Anaya Special Report on Guatemala 2011,* UN Doc A/HRC/18/35/Add.3, appendix [65].
[130] HRC, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: The Right to Enjoy the Benefits of Scientific Progress and its Applications,* UN Doc A/HRC/20/26 (14 May 2012) [64].
[131] Interview 12 (Telephone Interview, 23 June 2011). Anaya refers to the 'mass attendance at the meetings by the authorities and members of indigenous communities' in his preliminary note on the visit. HRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Preliminary Note on the Application of the Principle of Consultation with Indigenous Peoples in Guatemala and the Case of the Marlin Mine*, UN Doc A/HRC/15/37/Add.8 (8 July 2010) [3] ('*Anaya Preliminary Note on Guatemala 2010*'). The large number of Indigenous attendees at Anaya's meetings was confirmed by NGOs. See, eg, Brigadas Internacionales De Paz - Proyecto Guatemala, *PIM – Paquete de Información Mensual sobre Guatemala* (2010) <http://www.pbi-guatemala.org/fileadmin/user_files/projects/guatemala/files/spanish/PIM_No._81.pdf> 2.
[132] James Anaya, 'Role of Three UN Mechanisms in World Conference 2014 Discussed at Preparation Meeting in Guatemala' (Media Release, 26 December 2012) <http://unsr.jamesanaya.org/notes/role-of-three-un-mechanisms-in-world-conference-2014-discussed-at-preparation-meeting-in-guatemala>.
[133] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [8]-[10].
[134] See, eg, Nowak, above n 70, 62-3.
[135] *OHCHR Compilation on Guatemala 2012,* UN Doc A/HRC/WG.6/14/GTM/2, 5.
[136] HRC, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Ambeyi Ligabo*, UN Doc A/HRC/4/27 (2 January 2007) [21].

country – in 2001 – years before New Zealand.[137] High-level state officials have, by and large, formally cooperated with the huge number of country visits of thematic and country mandate-holders. Pockets of criticism of, and non-cooperation with, the mechanism by state representatives have occurred but they are the exception to the rule.[138] Guatemala has vocalised its approval of the special procedures mechanism. For example, in its pledge in support of its candidacy for membership to the HRC in 2006 Guatemala stated that it held the special procedures as 'of the utmost importance', cooperated 'fully' and responded 'positively to all their requests and urgent appeals' (as the response rate below reveals, this is not the case), and undertook 'to continue cooperating and to guard the effectiveness of the Special Mechanisms in the Council'.[139] In its 2010 pledges and commitments for the same purpose it similarly undertook to '[s]upport the strengthening of the human rights special procedures system.'[140] The Guatemalan Government has praised the visits and reports of special procedures experts on Guatemala, including those that have paid especial attention to Indigenous peoples.[141] Comments to the effect that the Government intends to give serious consideration to implementation of the special procedures' recommendations are frequent.[142] It also opposed adoption of the Code of Conduct for the special procedures on the grounds that it was unnecessary.[143] Further, steps have purportedly been taken towards monitoring fulfilment of the special procedures experts' recommendations regarding Indigenous peoples. COPREDEH has prepared a database of all of the recommendations on human rights addressed to Guatemala since 2008, including from the special procedures, with the stated intention of tracking their implementation.[144]

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[137] OHCHR, *Standing Invitations* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx>.
[138] Interview 18 (Quetzaltenango, 31 May 2011).
[139] Guatemalan Permanent Mission to the United Nations, *Promesas y Compromisos Voluntarios de Guatemala para la Promoción y Protección de los Derechos Humanos* (1 May 2006) <http://www.un.org/ga/60/elect/hrc/guatemala.pdf> 7.
[140] GA, Letter dated 19 March 2010 from the Permanent Representative of Guatemala to the President of the GA, UN Doc A/64/730 (29 March 2010) [30] ('*Guatemala Human Rights Pledges 2010*').
[141] See, eg, Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in the following HRC sessions: HRC, *Webcast Human Rights Council Seventeenth Session: Interactive Dialogue with the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mr Anand Grover* (1 June 2011) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=110601>; HRC, *Webcast Human Rights Council Thirteenth Session: Interactive Dialogue with the Special Rapporteur on the Right to Food, Mr Olivier De Schutter* (5 March 2010) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=100305>; HRC, *Webcast Human Rights Council Second Session: Interactive Dialogue on Report of the Special Rapporteur on the Right to Food, Mr Jean Ziegler*, above n 79.
[142] See, eg, Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Thirteenth Session: Interactive Dialogue with the Special Rapporteur on the Right to Food, Mr Olivier De Schutter*, above n 141.
[143] Meghna Abraham, *Building the New Human Rights Council: Outcome and Analysis of the Institution-Building Year* (Friedrich-Ebert-Stiftung, 2007) 29 n 90.
[144] HRC, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Guatemala*, UN Doc A/HRC/WG.6/14/GTM/1 (7 August 2012) [7] ('*Guatemala Report to HRC 2nd UPR 2012*'); OHCHR, *Universal Periodic Review Second Cycle - Guatemala: Written Replies to Advance Questions* (2012) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GTSession14.aspx> 26-8; *Guatemala Human Rights Pledges 2010,* UN Doc A/64/730, [10].

Guatemala has demonstrated pronounced support for the current and former Special Rapporteurs on Indigenous peoples' work on Guatemala. As identified in Chapter III, it was pivotal in the creation of the mandate of the Special Rapporteur on Indigenous peoples, and in the 2010 amendment of the mandate's title to refer to 'peoples' rather than 'people'. It cooperated with both Stavenhagen and Anaya's country missions to the state.[145] It was approving of each of Stavenhagen and Anaya's reports on Guatemala.[146] For example, it described Stavenhagen's 2002 visit as 'fruitful' and it recognised that it should continue to prioritise policies on the issues identified in Stavenhagen's report, including regarding land tenure, access to justice, and intercultural bilingual education.[147] When Anaya's report was presented to the HRC in 2011 it expressed its thanks for the visit, its 'support for the report', and its 'full support for the mandate of the Special Rapporteur on the rights of indigenous peoples and his work'.[148] Before the GA in 2011, the Government welcomed Anaya's recommendations on Guatemala and backed his decision to focus on Indigenous rights concerns relating to extractive industries in his future reports.[149] The Government cooperated with the OHCHR project that ran between 2004 and 2007 advising on, and monitoring the implementation of, the Special Rapporteur on Indigenous peoples' recommendations regarding Guatemala.[150] It fed information concerning the measures it had taken to implement Stavenhagen's country recommendations into Stavenhagen's Study on Best Practices.[151] The Government's response to the mandate's communications is patchier. At times it has not responded,[152] and at others it has offered a detailed and substantive response.[153] The Guatemalan Government has praised the mandate's work more generally in international fora too, including

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[145] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [2]; *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [24]; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [4].

[146] See, eg, Guatemalan Government representatives, Carlos Ramiro Martínez Alvarado and Luisa Bonilla De Galvão De Queiroz, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94. Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Fourth Session: Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen* (20 March 2007) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=070320>.

[147] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in Human Rights Council, *Webcast Human Rights Council Fourth Session: Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen,* above n 146. See also *Press Release CHR 2003,* UN Doc HR/CN/1028.

[148] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.

[149] Guatemalan Government representative, Connie Taracena Secaira cited in *GA 3rd Committee Press Release 2011,* UN Doc GA/SHC/4013.

[150] The project title was OHCHR Promotion and Protection of Human Rights of Indigenous Peoples in Central America, with Special Focus on Guatemala and Mexico. See generally *Stavenhagen Communications Report 2005,* UN Doc E/CN.4/2005/88/Add.1, [91]; *Progress Report on Study on Best Practices,* UN Doc E/CN.4/2006/78/Add.4, [115]; *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [21]-[26]; Luis Rodriguez-Piñero Royo, 'Los Procedimientos Especiales y Los Derechos Indigenas: El Papel del Relator Especial' in Mikel Berraondo et al (eds), *Los Derechos de los Pueblos Indígenas en el Sistma Internacional de Naciones Unidas* (Instituto Promocion Esudios Sociales, 2010) 109, 122; Interview 9 (Telephone Interview, 6 September 2010).

[151] *Progress Report on Study on Best Practices,* UN Doc E/CN.4/2006/78/Add.4, [97].

[152] See, eg, *Stavenhagen Communications Report 2006,* UN Doc E/CN.4/2006/78/Add.1, [43].

[153] See, eg, *Joint Communications Report February 2012,* UN Doc A/HRC/19/44, 95. In the period between Guatemala's first and second UPR it replied to just over half of all of the special procedures communications it received. *OHCHR Compilation on Guatemala 2012,* UN Doc A/HRC/WG.6/14/GTM/2, 5.

before the PFII, the EMRIP and the HRC.[154] In the latter forum it commented that '[t]his special procedure has proved, in its infancy, an innovation and, over time, has become indispensable to the human rights system, whether of the United Nations or regionally, for governments, academia, civil society and indigenous peoples themselves'.[155] Guatemala has even defended the Special Rapporteur on Indigenous peoples' mandate in the face of attack from other states in the CHR.[156]

Like New Zealand, the Guatemalan Government has repeatedly professed its progress on the special procedures' Indigenous-focused recommendations in international fora. When Stavenhagen presented his 2003 country report to the CHR, the Guatemalan Government asserted that it 'had positively dealt with the historical structural problem[s] affecting the majority of [the] indigenous people of Guatemala' and claimed progress in 'the recognition of the identities and rights of indigenous people', 'legislative matters', and education.[157] During the interactive dialogue following the presentation of Anaya's special report, the Guatemalan Government outlined the steps it was taking to enable Indigenous peoples to participate in decisions affecting them, address poverty, tackle Indigenous peoples' experiences of exclusion, and deal with concerns regarding development projects. The representative stated, 'the Government of Guatemala continues to make substantive progress aimed at the effective and integral exercise of human rights for the entire society'.[158] Before the GA in the same year it acknowledged domestic issues regarding consultation with Indigenous peoples. But it focused on positive developments including efforts to develop a regulation on consultation, the state's celebration of the International Day of the World's Indigenous Peoples, the convening of meetings that included the participation Indigenous peoples to address climate change, and the fact that in the national elections 19 Indigenous peoples had been elected to Congress.[159] A similar approach was taken in the dialogue with Anaya during the PFII's 2012 session.[160] Yet, this professed progress has not translated into comprehensive implementation of the special procedures' recommendations.

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[154] See, eg, Connie Taracena Guatemalan Government, 'Intervention: Permanent Forum on Indigenous Issues, Ninth Session, Implementation of the United Nations Declaration on the Rights of Indigenous Peoples' (New York, 2010) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH6aa6/e938aabb.dir/PF10connie127sp.PDF>; Guatemalan Government, 'Intervention: Expert Mechanism on the Rights of Indigenous Peoples, Third Session, Study on Indigenous Peoples and the Right to Participate in Decision-Making' (Geneva, 12 July 2010) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASHc646/95d07963.dir/EM10guatemala010.pdf>; Guatemalan Government, 'Intervention: Human Rights Council, Fifteenth Session, Interactive Dialogue with the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People'(Geneva, 2010) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASHc23c/58e8d15a.dir/Item3_IDGuatemala.pdf>.

[155] Guatemalan Government, 'Intervention: Human Rights Council, Fifteenth Session, Interactive Dialogue with the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People', above n 154.

[156] See, eg, Guatemalan Government representative, Ricardo Alvarado Ortigoza, cited in *Press Release CHR 2003,* UN Doc HR/CN/1028.

[157] *Press Release CHR 2003,* UN Doc HR/CN/1028.

[158] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.

[159] Guatemalan Government representative, Connie Taracena Secaira, cited in *GA 3rd Committee Press Release 2011,* UN Doc GA/SHC/4013.

[160] doCip, *Update No 104* (2013) (January/April) <http://www.docip.org/All-Issues.121.0.html> 17.

E *Rooted in Ritualism: The Government's Actions*

1 *Deflection through Deficiency*

As with New Zealand, ritualism is the Guatemalan Government's most prevalent behavioural response to the special procedures' attentions. Like in New Zealand, in Guatemala full implementation of the special procedures' recommendations regarding Indigenous peoples is uncommon. The Guatemalan Government is good at conforming to recommendations that require the ratification of an international instrument or enactment of domestic legislation. But rarely does it follow this action through with implementation. A member of the OHCHR-Guatemala reflected, 'they ratify a treaty, that's not a problem. The problem is the huge gap…[in] implementation of what they have signed.'[161] For example, Guatemala ratified *ILO Convention 169* as Pinto recommended;[162] a step that required minimal effort and resources. But it has not taken substantive steps to give domestic effect to the Convention's provisions.[163] Stavenhagen's 2002 visit also reportedly pre-emptively spurred the Government to speed up amendment of its Penal Code in order to make discrimination, including on the basis of ethnicity, an offence.[164] However, Stavenhagen criticised that legislation for not going far enough and enforcement of the Code's provisions as lacking.[165] Guatemala infrequently outwardly resists special procedures experts' recommendations regarding Indigenous peoples. Below I consider an example of Guatemala's resistance to one of Anaya's recommendation regarding the Marlin mine, although for reasons I examine I ultimately characterise the Government's response as ritualistic. Instead, following a similar pattern to New Zealand, Guatemala favours the incomplete fulfilment of recommendations regarding soft rights, such as to an intercultural bilingual education, which help it to deflect scrutiny from its fuller realisation of those rights. It also leverages these limited moves to divert attention from its inward resistance to hard rights, including regarding the participation of Indigenous peoples in decision-making and Indigenous peoples' rights to their lands and territories. Guatemala covers up its inward resistance to these hard rights with some outward expressions of commitment.

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[161] Interview 12 (Telephone Interview, 23 June 2011).
[162] *Pinto Report 1994,* UN Doc E/CN.4/1994/10, [152], [182]; *Pinto Report 1996,* UN Doc E/CN.4/1996/15, [138]. Guatemala ratified *ILO Convention 169* in June 1996. ILO, *Ratifications for Guatemala* <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102667>.
[163] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 253-57; HRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: Mission to Guatemala*, UN Doc A/HRC/11/41/Add.3 (1 October 2009) [98].
[164] Interview 16 (Guatemala City, 26 May 2011). Stavenhagen identified that the amendment occurred '[d]uring the Special Rapporteur's visit to the country'. *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [15].
[165] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [15].

(a) Educational Exclusion

The literature's best example of Guatemala's commitment to the special procedures' Indigenous-focused recommendations concerns intercultural bilingual education and illuminates the Government's ritualised response. Educational exclusion is a feature of Guatemala's history, not just for Indigenous peoples. Around the time that the first Guatemalan country mandate was created, 85 per cent of the population were living in poverty and more than half in extreme poverty, none of whom were able to satisfy their basic education needs.[166] The average illiteracy rate was over 40 per cent of the population, soaring to nearly 60 per cent amongst rural (and, mostly, Indigenous) women.[167] On one estimate, in 1990 almost 60 per cent of Indigenous children were not enrolled in schooling.[168] This was attributable in part to a chronic lack of schools and teachers: in 1987 the state had well under half of the primary school teachers required to support the population.[169] It was also attributable to cultural and language barriers. Indigenous languages are widely spoken by Guatemala's Indigenous peoples making it difficult for them to participate in the mainly Spanish-medium and monocultural education system.[170]

Some efforts to promote bilingual education had been made at the time of the special procedures' early attentions on Guatemala. Guatemala's 1985 *Constitution* provides that 'in schools established in regions with a predominantly indigenous population, education shall be conducted preferably in bilingual form.'[171] Further, in the *Indigenous Agreement* the Government committed to '[p]romote the use of all indigenous languages in the educational system' and 'to protect bilingual and intercultural education and institutions'.[172] To these ends, the Government had established a *National Bilingual Education Programme* in 1984 but it enjoyed limited reach: providing bilingual education from early childhood to the fourth grade for only around 20 per cent of Indigenous school age children, and operating in only the four main Indigenous languages.[173] The Government set up the Guatemala Academy of Mayan Languages in 1991 to promote Mayan languages and culture,[174] although the Academy has faced mandate, organisational, and personnel problems.[175] The General Directorate of Bilingual

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[166] *Tomuschat Report 1991,* UN Doc E/CN.4/1991/5, [60].
[167] Ibid [68].
[168] Ibid [69].
[169] Ibid [68].
[170] See, eg, López, *Reaching the Unreached,* above n 4, 4.
[171] *Constitution of the Republic of Guatemala 1985* (Guatemala), art 76.
[172] *Agreement on Identity and Rights of Indigenous Peoples 1995,* Part III, A, 2(b). It also committed to '[r]ecruit and train indigenous bilingual teachers': at Part III, G, 2(g).
[173] Programa Nacional de Educación Bilingüe Bicultural, Government Agreement No 1093-84 (Guatemala); *Tomuschat Report 1991,* UN Doc E/CN.4/1991/5, [69]; Interview 11 (Guatemala City, 1 June 2011).
[174] *Ley de la Academia de Lenguas Mayas de Guatemala*, Government Decree No 65-90 (Guatemala).
[175] See, eg, Nora C England, 'Mayan Efforts Towards Language Preservation' in Lenore A Grenoble and Lindsay J Whaley (eds), *Endangered Languages: Current Issues and Future Prospects* (Cambridge University Press, 1998) 99, 107-09.

and Intercultural Education (DIGEBI) was also instituted in 1995 as part of the Ministry of Education to advance the bilingual education commitments in the *Indigenous Agreement*.[176] However, it has been underfunded.[177]

Recommendations regarding Indigenous language rights and intercultural bilingual education have been a popular focus of special procedures experts' reports on Guatemala. Many experts have issued recommendations on the topic, including country mandate-holders Tomuschat and Pinto, as well as Stavenhagen and the thematic experts on education and the sale of children.[178] It is Stavenhagen's 2003 recommendations that have been celebrated in the literature as an example of the positive influence of the work of special procedures experts' country missions in Guatemala.[179] Stavenhagen was critical of the state of bilingual education in his 2003 report. He found that, despite support for intercultural bilingual education in Guatemala's *Constitution*, the *Indigenous Agreement*, and within the Government, there remained insufficient trained bilingual teachers and educational resources, and a curriculum unresponsive to the language, needs, values and systems of Indigenous peoples. This resulted in particularly negative education statistics in rural and urban Indigenous-dominated areas: half a million Indigenous children remained outside of the school system, with more than 40 per cent of education services concentrated in Guatemala City, compared with around 7 or 8 per cent directed to areas with higher numbers of Indigenous peoples.[180] In response to this situation Stavenhagen recommended:

> 77. Education should be strengthened as a national priority. Bilingual education should be extended to all areas of the country and appropriate bilingual and intercultural teaching materials should be prepared; more teacher training colleges should also be established in order to train bilingual teachers. The Special Rapporteur recommends that the Government should draw up a realistic timetable, which must be respected, to extend educational services to all the indigenous communities, and develop affirmative educational programmes for indigenous adults.[181]

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[176] *La Dirección General de Educación Bilingüe Intercultural*, Government Agreement No 726-95 (Guatemala).
[177] See, eg, Kay Warren, 'The Dynamic and Multifaceted Character of Pan-Mayanism in Guatemala' in Henry Minde (ed), *Indigenous Peoples: Self-Determination, Knoweldge, Identity* (Eburon Academic Publishers, 2008) 107, 127; Interview 11 (Guatemala City, 1 June 2011).
[178] *Tomuschat Report 1991,* UN Doc E/CN.4/1991/5, [155]; CHR, *Report by the Independent Expert, Mr Christian Tomuschat, on the Situation of Human Rights in Guatemala, Prepared in Accordance with Paragraph 11 of Commission Resolution 1991/51*, UN Doc E/CN.4/1992/5 (21 January 1992) [198]; *Pinto Report 1994,* UN Doc E/CN.4/1994/10, [183]; *Pinto Report 1996,* UN Doc E/CN.4/1996/15, [138]; CHR, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ms Ofelia Calcetas-Santos: Report on the Mission to Guatemala*, UN Doc E/CN.4/2000/73/Add.2 (27 January 2000) [112](j); *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [77]; *Expert on Education Guatemala 2009,* UN Doc A/HRC/11/8/Add.3, [84](i), (l), (m), (p), (t), (u).
[179] *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [63]; Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 1, appendix E 66.
[180] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [52], [54]-[55].
[181] Ibid [77].

The recommendation itself is not forceful. It recommends extension of intercultural bilingual education throughout the country and then suggests that 'drawing up a realistic timetable, which must be respected' is sufficient, without providing any guidance on timelines. In addition, it recommends 'more' teacher training colleges should be established and 'appropriate' teaching materials prepared, yet no indication of what this would look like in practical terms is given. But we can see its core thrust: as a matter of national priority intercultural bilingual education should be extended throughout Guatemala.

(b) Commitment on Display

The Guatemalan Government displayed a degree of commitment to Stavenhagen's recommendation. When Stavenhagen's report was presented to the CHR, the Guatemalan Government stated that '[t]he educational system had been reformed through the establishment of a commission' tasked with analysing and debating 'the educational problems of indigenous people'.[182] Guatemala further 'recognized that it should continue giving priority to public policies on... access to multicultural and bilingual education', amongst other areas.[183] Consistent with these encouraging statements, Piccone, in his Brookings Institute study, and Stavenhagen, in his report on his 2007 follow-up mission to Guatemala, identify several positive steps to implement this recommendation: the Guatemalan Government's creation in 2003 of the Vice-Ministry of Bilingual Intercultural Education; its enactment, in the same year, of the *National Languages Act 2003*, which officially recognises the Mayan, Garífuna and Xinka languages and promotes their preservation and use; and, the adoption in 2004 of a Government Order that established the DIGEBI's national policy on bilingualism and interculturalism.[184] Other subsequent developments include a 2005 Ministerial Agreement, which created a new national curriculum for primary education with a focus on bilingual, multilingual and intercultural education.[185] These are positive steps. But they have been inadequate to secure intercultural bilingual education throughout the country, as Stavenhagen recommended.

While intercultural bilingual educational initiatives have received legislative and policy support in Guatemala they are starved of the institutional and financial resources necessary to

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[182] *Press Release CHR 2003,* UN Doc HR/CN/1028.
[183] Ibid.
[184] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights,* above n 1, appendix E 66; *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [63]. See *Ley de Idiomas Nacionales*, Government Decree 19-2003; *Viceministerio de Educación Bilingüe e Intercultural*, Government Agreement 526-2003; *Generalización de la Educación Bilingüe Multi e Intercultural en el Sistema Educativo Nacional*, Government Agreement No 22-2004.
[185] Ministerial Agreement 35-2005. See, eg, CERD Committee, *Informes Presentados por los Estados Partes de Conformidad con el Artículo 9 de la Convenció, 12° y 13° Informes Periódicos que los Estados Partes Debían Presentar en 2008: Guatemala*, UN Doc CERD/C/GTM/12-13 (17 September 2009) [61]-[62] ('*Guatemala Report to CERD Committee 2009*'). See generally Luis Enrique López, 'Cultural Diversity, Multilingualism and Indigenous Education in Latin America' in Ofelia García, Tove Skutnabb-Kangas and María E Torres-Guzmán (eds), *Imagining Multilingual Schools: Language in Education and Globalization - Linguistic Diversity and Language Rights* (Multilingual Matters, 2006) 238, 243-46.

bring them to fruition. Despite budgetary increases, some Government actors have recognised that funding of intercultural bilingual education is deficient and not a governmental priority.[186] A member of DEMI observed '[w]e indigenous organisations within the Government...don't have the budget to do our work properly'.[187] As a result, bilingual education is offered in a small number of schools, and only during the first three years of primary school.[188] One Government actor estimated that just a third of Indigenous children registered in the system receive a bilingual education.[189] There has been limited progress in the training and hiring of bilingual teachers: in 2010 only 12 of the 82 teacher training colleges offered bilingual and intercultural teacher-training.[190] Teaching materials also lack an intercultural focus.[191] In a 2010 report to the UN Human Rights Committee the Guatemalan Government acknowledged that 'one of the major difficulties hindering bilingual education in Guatemala' is that 'generally speaking national curricula and even bilingual school textbooks continue to take Western culture as the reference.'[192] Nor is bilingual education available in all of Guatemala's Indigenous languages.[193] The quality of education provided is also problematic, with the HCHR noting in 2011 that educational quality in Guatemala is of particular concern in 'rural and indigenous schools, especially those with bilingual and inter-cultural programmes.'[194] All this is on top of the access, institutional, and funding issues that apply across Guatemala's education system more generally.[195] Not to mention the absence of a substantive intercultural focus in the general

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[186] See, eg, *CERD Committee, Reports Submitted by States Parties under Article 9 of the Convention, Eleventh Periodic Report of States Parties Due in 2004: Guatemala*, UN Doc CERD/C/469/Add.1 (6 May 2005) [76] ('*Guatemala Report to CERD Committee 2005*'); Mario Ellington Lambe, CODISRA, 'Intervention: Permanent Forum on Indigenous Issues, Fifth Session, Goal 2 of the Millennium Development Goals' (New York, 19 May 2005) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH7a38/abdb6dbe.dir/pfii4_102.pdf>; Marco Antonio Curuchich, CODISRA, 'Intervention: Expert Mechanism on the Rights of Indigenous Peoples, Second Session, Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education' (Geneva, 2009) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH017b/65f389ce.dir/EM09marcoantonio005.pdf>; Interview 11 (Guatemala City, 1 June 2011); Interview 10 (Guatemala City, 27 May 2011). Compare OHCHR, *Universal Periodic Review Second Cycle - Guatemala: Written Replies to Advance Questions* (2012) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GTSession14.aspx> 18-20.

[187] Interview 11 (Guatemala City, 1 June 2011).

[188] See, eg, Menkos, Saiz and José Eva, above n 21, 16; López, *Reaching the Unreached,* above n 4, 21; *Guatemala Report to CERD Committee 2005,* UN Doc CERD/C/469/Add.1, [77].

[189] Interview 11 (Guatemala City, 1 June 2011).

[190] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant - Third Periodic Report: Guatemala*, UN Doc CCPR/C/GTM/3 (31 March 2010) [564] ('*Guatemala Report to Human Rights Committee 2010*'); Interview 11 (Guatemala City, 1 June 2011).

[191] Menkos, Saiz and José Eva, above n 21, 16; Interview 10 (Guatemala City, 27 May 2011).

[192] *Guatemala Report to Human Rights Committee 2010,* UN Doc CCPR/C/GTM/3, [569].

[193] Ibid [557]; López, 'Cultural Diversity, Multilingualism and Indigenous Education in Latin America', above n 185, 243.

[194] *HCHR Report on Guatemala 2011,* UN Doc A/HRC/16/20/Add.1, [73].

[195] See, eg, Menkos, Saiz and José Eva, above n 21, 15-7; Interview 18 (Quetzaltenango, 31 May 2011). In 2010 the CRC Committee expressed concern at issues relating to access to education, see CRC Committee, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Guatemala*, UN Doc CRC/C/GTM/CO/3-4 (25 October 2010) [80] ('*CRC Committee on Guatemala 2010*').

national curriculum.[196] In response, there have been continuing international calls for improved bilingual educational services, including from the expert on education in 2009.[197]

(c) Uncertain Influence

It is not possible to conclusively establish that Stavenhagen, or other special procedures experts, played a role in those small positive developments that did occur. Piccone bases his assessment of Stavenhagen's influence on Stavenhagen's 2007 follow-up report on Guatemala; that report does not outline the causal link between the recommendation and the Government's legislative and policy actions. Further, Stavenhagen's recommendation did not specify the enactment of a law, creation of an office, or adoption of a Government Order so there is no textual connection between his recommendation and the moves. Nor was he the only actor urging improvements to bilingual education in Guatemala at that time.[198] Bilingual education is an area where NGOs have been working hard in Guatemala, often with the support of international actors, as Stavenhagen himself points out.[199] But there are a few factors that point to his impact too: the small positive developments highlighted above occurred soon after his visit; the Guatemalan Government hinted at Stavenhagen's influence in its response to his 2003 report; and domestic actors, including a representative of DEMI, see international pressure as having an important role in the positive bilingual education gains made. In the representative's words, the 'administration…created a Vice-Ministry of Bilingual Education so we could keep our languages and strengthen DEMI's work. However, it only happens when international pressure makes an influence…not by their own initiative.'[200] The OHCHR's technical cooperation project, which promoted implementation of Stavenhagen's recommendations on Guatemala, also helped to keep pressure on the Government to act on his recommendations. Its activities included disseminating Stavenhagen's reports, organising meetings to evaluate implementation of his recommendations and helping to develop indicators to monitor that

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[196] There have been some initiatives to this end, such as Ministry of Education's General Directorate for Quality Management in Education's programme 'Education for peace and a full life'. *Guatemala Report to HRC 2nd UPR 2012,* UN Doc A/HRC/WG.6/14/GTM/1, [48].

[197] See, eg, *Expert on Education Guatemala 2009,* UN Doc A/HRC/11/8/Add.3, [84](i), (l), (m), (p), (t),(u); CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc CERD/C/GTM/CO/12-13 (19 May 2010) [15] ('*CERD Committee on Guatemala 2010*'); *CRC Committee on Guatemala 2010,* UN Doc CRC/C/GTM/CO/3-4, [101], [102](a); Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Guatemala*, UN Doc CEDAW/C/GUA/CO/7 (10 February 2009) [28] ('*CEDAW Committee on Guatemala 2009*').

[198] See, eg, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guatemala*, UN Doc E/C.12/1/Add.93 (12 December 2003) [45].

[199] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [53]; *Stavenhagen Annual Report 2005,* UN Doc E/CN.4/2005/88, [78]; López, *Reaching the Unreached,* above n 4, 20.

[200] Interview 10 (Guatemala City, 27 May 2011).

implementation.[201] At best, Stavenhagen played a contributory catalytic role in fostering the Government's efforts to advance intercultural bilingual education.

The problem is that the Guatemalan Government's response to Stavenhagen's recommendation regarding intercultural bilingual education has ritualistic overtones. While constructive, the efforts have largely been confined to paper only: enacting a law, creating an office and adopting a Government Order. The institutional and financial resources required to effectively implement these laws and policies are withheld. The Government's approach reveals inward resistance even to the implementation of soft Indigenous peoples' rights. It deflects attention from this failure by its paper efforts. It further relies on these thin efforts – celebrated by Stavenhagen and Piccone – to deflect attention to its resistance to hard rights, including to participation in decision-making.

3 *No Consultation Instrument*

(a) Legislative Lacuna

The Guatemalan Government's response to the special procedures' recommendations concerning the hard right to consultation reveals in stark form the depths of its Indigenous rights ritualism. Consultation with Indigenous peoples is a vexed issue in Guatemala, especially in relation to natural resource exploitation projects on or near Indigenous peoples' traditional territories.[202] Under the *Indigenous Agreement* the Government had undertaken to '[s]ecure the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities.'[203] But there is broad agreement that this has not occurred.[204] In part, this is because domestic instruments concerning consultation for Indigenous peoples are piecemeal and do not accord with international standards.[205] Further, debate continues over whether *ILO Convention 169* requires incorporation into domestic legislation in order to render it legally binding, despite article 46 of Guatemala's *Constitution*, which establishes '[t]he general

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[201] *Stavenhagen Communications Report 2005,* UN Doc E/CN.4/2005/88/Add.1, [91]; *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [21]-[26]; Preston et al, above n 1, 21; Interview 9 (Telephone Interview, 6 September 2010).

[202] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41; Fulmer, Snodgrass Godoy and Neff, above n 56; Amnesty International, *Annual Report 2013: State of the World's Human Rights - Guatemala* (2013) <http://www.amnesty.org/en/region/guatemala/report-2013>.

[203] *Agreement on Identity and Rights of Indigenous Peoples 1995,* Part IV, F, 6(c).

[204] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 254- 57; *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [59]-[61]. The Guatemalan Government has recognised that consultation has not always occurred with Indigenous peoples. See, eg, *Guatemala Report to CERD Committee 2005,* UN Doc CERD/C/469/Add.1, [31]-[32].

[205] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 249, 256-57; Fulmer, Snodgrass Godoy and Neff, above n 56, 98-101; ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)* (2012). 947; Interview 16 (Guatemala City, 26 May 2011).

principle…that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law.'[206] *ILO Convention 169* contains several pertinent provisions concerning Indigenous consultation and participation, including requiring that governments 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'.[207] Indigenous communities have responded to the domestic legislative vacuum by conducting 'community consultations', a customary form of Mayan decision-making that is provided for, inter alia, under Guatemala's *Municipal Code*.[208] But the Government has ignored these consultations, bolstered by a 2007 decision of Guatemala's Constitutional Court that ruled that the community consultation process is not legally binding in respect of natural resource projects.[209]

The consultation issue has garnered the attention of several special procedures experts. Stavenhagen and Anaya, as well as the expert on food, have issued recommendations regarding consultation with Indigenous peoples in Guatemala. In 2006 the expert on food recommended that Guatemala's mining legislation 'be amended to ensure protection of the rights of indigenous people over their natural resources, as provided by ILO Convention No 169', which, as identified above, contains provisions regarding Indigenous consultation that the expert referenced in his report.[210] In 2003 Stavenhagen drew attention to the lack of consultation with Indigenous peoples in relation to developments affecting their lands and other matters.[211] He recommended the adoption of a legal instrument formally regulating the Government's duty to consult with Indigenous peoples, with Anaya repeating the recommendation in 2011 and specifying that the instrument should accord with international standards.[212] Stavenhagen, Anaya and other commentators view domestic legislation as necessary to provide certainty in the face of widespread misunderstanding about the scope and content of the duty to consult with Indigenous peoples, and to counter the view amongst some state actors that the lack of a domestic instrument implies the absence of an obligation to consult.[213]

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[206] *Constitution of the Republic of Guatemala 1985* (Guatemala) art 46. See generally Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 41, 221.
[207] *ILO Convention 169*, art 6(1)(a).
[208] *Código Municipal*, Government Decree 12-2002 (Guatemala), arts 65-6; *Ley de Consejos de Desarrollo Urbano y Rural*, Government Agreement No 461-2002 (Guatemala), art 15; Interview 14 (May 2011). See generally Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 256; *Guatemala Report to CERD Committee 2009,* UN Doc CERD/C/GTM/12-13, [275]-[276].
[209] La Corte de Constitucionalidad de la República de Guatemala, Expediente No 1779-2005, 8 May 2007. See generally *Guatemala Report to CERD Committee 2009,* UN Doc CERD/C/GTM/12-13, [278]; Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 257.
[210] *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [23], [28], [58](f).
[211] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [27], [47].
[212] Ibid [82]; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [78].
[213] See, eg, *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, 2, [37]; ILO, above n 205, 947; Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 257.

(b) *Hollow Commitment and Expert Assistance*

The Guatemalan Government displayed outward commitment to the experts' recommendations. Over the years the Guatemalan Government put forward multiple proposals for instruments to regulate consultations with Indigenous peoples, none of which were enacted.[214] Early in 2011, several months after Anaya's special mission to Guatemala, the Guatemalan President presented a bill that had the stated purpose of implementing the provisions on consultation with Indigenous peoples in *ILO Convention 169*.[215] It is unclear whether Anaya played a role in the Government's decision to present a new bill: a host of international and domestic actors, including the ILO and Guatemala's Constitutional Court, also recommended adoption of a domestic instrument.[216] But during the interactive dialogue following the presentation of Anaya's report to the HRC the Guatemalan Government implied that it was informed by Anaya's views:

> We always would recall what had been set forth by the Special Rapporteur in his report where he indicates that, though the consultation is applicable even in the absence of a domestic legislation framework, it should also coincide with other bodies and international mechanisms on human rights…[and] should take place with all haste in order to ensure that these processes have legal security and certainty.[217]

And, before the PFII earlier that year, the Guatemalan Government stated that Anaya's 2010 visit had prompted a national dialogue on the 'pressing need' to consult Indigenous peoples regarding development projects in their territories.[218]

Regardless of his influence on the presentation of the new instrument, Anaya had a direct influence on the content of the instrument through his capacity-building efforts. At the Government's invitation, Anaya provided comments to the Government on initial iterations of

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[214] See, eg, ILO, above n 205, 947; *Guatemala Report to CERD Committee 2009,* UN Doc CERD/C/GTM/12-13, [166]-[167], [278]. See also *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [25].
[215] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [26].
[216] ILO, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC)* (4 June 2007) [60](g); La Corte de Constitucionalidad de la República de Guatemala, Expediente No 1779-2005, 8 May 2007; La Corte de Constitucionalidad de la República de Guatemala, Expediente No 3878-2007, 21 December 2009. See also, eg, HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the Work of its Office in Guatemala*, UN Doc A/HRC/7/38/Add.1 (29 January 2008) [52], [91], [97]; HRC, *Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala in 2008*, UN Doc A/HRC/10/31/Add.1 (28 February 2009) [105](d); *HCHR Report on Guatemala 2011,* UN Doc A/HRC/16/20/Add.1, [63]; *CERD Committee on Guatemala 2010,* UN Doc CERD/C/GTM/CO/12-13, [11](a)-(c); CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc CERD/C/GTM/CO/11 (15 May 2006) [19]. Anaya acknowledges that other actors have recognised the legal vacuum regarding Indigenous peoples' consultation rights in Guatemala. *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [21].
[217] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.
[218] Guatemalan Government representative, Francisco Cali, cited in Economic and Social Council, 'Global Consensus on Indigenous Rights Declaration should be Celebrated, but Strong Effort Needed to Make Principles Alive "On the Ground", Permanent Forum Told', (Press Release, UN Doc HR/5057, 19 May 2011).

the draft instrument prior to its public release for discussion.[219] In his comments on the penultimate draft of the instrument, Anaya described it as 'an important step' towards a domestic law regulating consultation. But he also stated that in his view there were 'serious limitations and gaps' in the instrument regarding the content of the state's duty to consult with Indigenous peoples in accordance with international standards.[220] Anaya offered comments and recommendations on the draft to bring it into line with international standards. For example, he criticised the draft instrument's statement that Indigenous peoples only have to be consulted on those measures that 'directly, exclusively and solely' affect them;[221] its 'shallow' provisions on the consultation process itself;[222] and its silence on Indigenous peoples' sharing of the benefits of natural resource exploitation projects in their traditional territories.[223] He also emphasised the need to open up the instrument for dialogue and consultation with Indigenous peoples.[224] Only some of Anaya's proposed amendments were incorporated into the final draft that was released for public comment shortly after.[225]

Notably, the Government ignored Anaya's advice to open up the instrument for dialogue and consultation with Indigenous peoples. The extent of the Government's 'consultation' with Indigenous peoples was to permit comments to be made on the draft by the general public within 30 working days of its release, although this period was eventually extended for a short time.[226] The notice of consultation and a copy of the draft instrument were publicised in Spanish on the Internet,[227] excluding a large proportion of Guatemala's Indigenous peoples who do not read Spanish and lack access to the Internet;[228] the UNDP estimated that in

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[219] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [8]-[10]; *Anaya Report to GA 2011,* UN Doc A/66/288, [22].

[220] Letter from James Anaya to Sr Ricardo Cajas Mejía, Director Ejecutivo Consejo de Organizaciones Mayas de Guatemala, 1 March 2011, annex ('*Comentarios del Relator Especial sobre los Derechos de los Pueblos Indígenas en Relación con el Borrador Preliminar de Reglamento para el Proceso de Consulta del Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes (Guatemala) - 7 de Febrero de 2011*') <http://www.dialogo.gob.gt/nuevo/sites/default/files/anexos_pueblos_indigenas.pdf> [3] ('*Letter from Anaya to Cajas Mejía 2011*'). The annex contained a copy of Anaya's comments to the Guatemalan Government on the third draft of the instrument.

[221] Ibid annex [15]-[16].

[222] Ibid annex [25].

[223] Ibid annex [42].

[224] Ibid annex [9], [44].

[225] Ministerio de Trabajo y Previsión Social, *Reglamento para el Proceso de Consulta del Convenio 169 de la OIT Sobre Pueblos Indígenas y Tribales en Países Independientes* (23 February 2011) <http://www.politicaspublicas.net/panel/attachments/article/732/2011-guatemala-proyecto-reglamento-consulta.pdf>; *Letter from Anaya to Cajas Mejía 2011*, above n 220, 2; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [10], [27].

[226] Human Rights Committee, *Replies from the Government of Guatemala to the List of Issues (CCPR/C/GTM/Q/3) to be Taken Up in Connection with the Consideration of the Second Periodic Report of Guatemala (CCPR/C/GTM/3)*, UN Doc CCPR/C/GTM/Q/3/Add.1 (29 September 2011) [196]-[197]; Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.

[227] Ministerio de Trabajo y Previsión Social, above n 225.

[228] Interview 16 (Guatemala City, 26 May 2011). For criticisms of the 'consultation' process see, eg, Irmalicia Velásquez Nimatuj, 'Reglamento Consulta C169 (III): Es Burlarse de ellos y Violar sus Derechos', *El Periódico* (online), 2011 <http://www.elperiodico.com.gt/es/20110314/opinion/192378/>.

2010 only 10.5 per cent of Guatemala's total population used the Internet.[229] As a result of the Government's failure to appropriately consult with Indigenous peoples on the instrument, and the instrument's contents, the draft was widely rejected by Indigenous peoples, including prompting Indigenous-led highway road blocks and public burnings of the regulations.[230] Domestic IPOs were vocal in their criticisms of the content of the draft instrument. For example, the Western Peoples Council (Consejo de Pueblos de Occidente or CPO), stated that the instrument 'diminishes, restricts and distorts the real spirit of the Right to Consultation', ignoring the rights affirmed in *ILO Convention 169*, the *UNDRIP* and other international instruments.[231] It filed a legal claim before Guatemala's Constitutional Court seeking a halt to consultations on the instrument.[232]

Anaya came under fire from Indigenous peoples for his involvement in the drafting of the instrument. In some quarters Anaya's comments in favour of the Government adopting *an* instrument were misconstrued as dictating that *the* instrument proposed by the President had to be approved.[233] This view was not helped by the Government putting forward the impression that Anaya supported the draft instrument in its publically released form. A representative of the PDH commented 'the government says…James Anaya has provided us with advice, the High Commissioner [for Human Rights] also has knowledge and is aware of what we're doing, the OIT [ILO] has presented its opinion on our project and we've incorporated its observations; that's what the Government says.'[234] Anaya was accused of taking a pro-development stance and he was requested by a collective of Guatemalan IPOs to share his comments on the instrument, which he did.[235] IPOs also criticised Anaya and the ILO for putting pressure on Indigenous peoples to respond to the instrument;[236] some viewed the community consultations as sufficient avenue for expressing their disapproval of development projects in their territories.[237]

Anaya took steps to clarify his position. When it became apparent that there was misunderstanding amongst Indigenous peoples regarding his stance on the instrument,

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[229] UNDP, *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World*, above n 3, 188.
[230] Interview 16 (Guatemala City, 26 May 2011); 'Indígenas Protestan en Quiché Contra Reglamento de Consultas', *Prensa Libre* (online), 5 April 2011 <http://www.prensalibre.com/noticias/reglamento-consultas-protesta-quiche_0_457154415.html>.
[231] Consejo de Pueblos de Occidente (CPO), *Presentación del Amparo en Contra del Reglamento de Consulta - 23 de Marzo de 2011 en la Corte de Constitucionalidad* (2011) <http://consejodepueblosdeoccidente.blogspot.com.au/2011/06/el-consejo-de-pueblos-maya-de-occidente.html#!/2011/03/consejo-de-los-pueblos-maya-de.html>.
[232] CPO, *Acción de Amparo en Contra del Reglamento de Consulta* (2011) <http://consejodepueblosdeoccidente.blogspot.com.au/2011/03/resolucion-del-amparo-en-contra-del.html#!/2011/03/resolucion-del-amparo-en-contra-del.html>.
[233] Interview 10 (Guatemala City, 27 May 2011).
[234] Interview 16 (Guatemala City, 26 May 2011).
[235] Ibid; *Letter from Anaya to Cajas Mejía 2011*, above n 220.
[236] See, eg, Velásquez Nimatuj, above n 228.
[237] See, eg, CPO, *Corte de Constitucionalidad Dictamina* (14 December 2011) <http://consejodepueblosdeoccidente.blogspot.com.au/2011/12/corte-de-constitucionalidad-dictamina.html#!/2011/12/corte-de-constitucionalidad-dictamina.html>.

representatives from Anaya's support team reportedly travelled to Guatemala to clarify his views.[238] During the interactive dialogue on his 2011 report Anaya was careful to spell out his perspective on the Government's draft instrument after the Government representative identified in that forum that Guatemala had prepared the draft instrument 'enriched by the contributions of the ILO and Anaya'.[239] Anaya responded:

> I would like to make reference to the Guatemalan Government's statement that I contributed with comments to that effort and that my comments were taken into account in the drafting of that regulation. I would simply like to clarify that in my comments I noted that in many respects the regulation draft developed by Guatemala fell short of international standards, although at the same time I applauded, and continue to applaud, efforts by Guatemala to move forward in this regard and urge Guatemala to continue such efforts in full collaboration and cooperation with Indigenous peoples.[240]

Despite this, some Indigenous peoples remained unsure of Anaya's intentions in Guatemala, with one Mayan woman commenting 'his credibility is questionable. We do not really know if his first or primary intention was to say the regulations had to be approved as the Government had written them.'[241] It is an example of the vulnerability Merry associates with those actors who perform the role of translators. She argues that translators 'are powerful in that they have mastered both of the discourses of the interchange, but they are vulnerable to charges of disloyalty or double-dealing.'[242] The Government's act of implying Anaya's support for the instrument also backs Piccone's argument that '[i]n intensely polarised situations, opposing sides will seek to manipulate a rapporteur's visit and report to their own advantage, hindering impact.'[243] The lesson in this for special procedures experts is to be very careful and clear in the comments they make in the course of their work and to monitor how those comments are presented by other actors, particularly governments.

At the same time, Anaya's contribution was praised as positive by other domestic actors close to the issues. A representative of the OHCHR-Guatemala celebrated Anaya's visit for raising the profile of the right to be consulted, which the representative identified as one of Guatemala's most pressing issues given its importance to land rights concerns.[244] The

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[238] Interview 10 (Guatemala City, 27 May 2011).
[239] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.
[240] James Anaya, final remarks, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Part II, Clustered Interactive Dialogue on Indigenous Peoples, 19th Plenary Meeting* (21 September 2011) United Nations <http://www.unmultimedia.org/tv/webcast/2011/09/part-ii-clustered-interactive-dialogue-on-indigenous-peoples-19th-plenary-meeting.html>.
[241] Interview 10 (Guatemala City, 27 May 2011).
[242] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38, 40.
[243] Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 216.
[244] Interview 12 (Telephone Interview, 23 June 2011).

representative identified that Anaya's comments were 'essential' to IPOs' mobilisation of a response to the Government on the instrument. For example, his advice was 'really key' in the development of the CPO's legal claim before the Constitutional Court seeking a halt to consultations on the instrument.[245] The CPO's writ makes express reference to comments by Anaya on the content of the right to consultation.[246]

(c) Direct Impact

This is an example of the special procedures' work having a tangible influence on government behaviour. The Guatemalan Government specifically incorporated aspects of Anaya's advice into its draft instrument to regulate consultation with Indigenous peoples. Yet, Anaya's influence did not translate into Guatemala's actual conformity to the hard right to consultation the subject of his recommendation. The draft instrument fell short of international standards, contrary to Anaya's recommendation. And, as it transpired, the CPO's claim to halt the regulation was successful. Late in 2011 Guatemala's Constitutional Court definitively suspended consultation on the instrument on the basis that the draft regulation did not accord with *ILO Convention 169*.[247] Anaya's advice assisted the CPO in achieving its favoured domestic ruling. But Anaya may not view the ruling so positively. He encouraged Guatemala's Indigenous peoples to objectively consider the draft instrument and to enter into dialogue with the Government over any proposed alternatives to the instrument or its content, a reflection of his desire for an instrument to be agreed.[248] Thus, Anaya was influential, but not in securing adoption of a domestic instrument regulating consultation, as he recommended. Nor was he successful in securing the Government's greater conformity to international norms regarding Indigenous consultation, the status quo is retained.

The story is further complicated by the Government's attribution of blame for the instrument's failure. Before international fora the Guatemalan Government has acknowledged that an instrument regulating consultation with Indigenous peoples is needed.[249] But it has attributed its inability to agree an instrument to the actions of Indigenous peoples themselves, rather than its own acute failure to give effect to the very right the subject of the regulation: the right to be consulted. When Anaya presented his annual report to the GA in 2011 the Guatemalan representative is reported as stating:

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[245] Ibid.
[246] CPO, *Acción de Amparo en Contra del Reglamento de Consulta,* above n 232, 12-3, 19.
[247] La Corte de Constitucionalidad de la República de Guatemala, Expediente No 1072-2011, 24 November 2011. See generally *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [61].
[248] *Letter from Anaya to Cajas Mejía 2011*, above n 220, 2-3.
[249] For example, Guatemala accepted a collection of recommendations directed to it during its second UPR concerning the development of an instrument on consultation with Indigenous peoples. HRC, *Report of the Working Group on the Universal Periodic Review: Guatemala - Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UN Doc A/HRC/22/8/Add.1 (23 January 2013) [4], [15].

> It was clear that there was inadequate participation by indigenous peoples in both designing and benefiting from a host of projects, including those by extractive industries. The Government wanted to move forward as quickly as possible to regulate the consultations with indigenous peoples, with a view towards introducing a sense of certainty regarding such discussions. A proposal to that end was put forward to indigenous groups in Guatemala, but some groups had opposed that proposal and sought legal remedies to prevent the establishment of such regulations. Consequently, all Government efforts to comply with ILO Convention No 169 through such regulations had been suspended.[250]

By attributing the stalling of the draft instrument to political dynamics within Indigenous communities the Government shifts perceptions of blame for its non-implementation away from itself. This constitutes another form of Indigenous rights ritualism: the Government maintains an aura of 'progress' by the release of a draft instrument on consultation but the instrument languishes because the Government undermines the right to consultation in the process. In mid-2012 the Government began drafting yet another instrument to regulate consultation with Indigenous peoples in Guatemala, the fate of this instrument remains to be seen.[251]

4 *Mining despite Opposition*

(a) Operating without Consent

A final example, intimately tied to the issue of consultation, further illustrates Guatemala's Indigenous rights ritualism. It concerns Indigenous peoples' rights to their lands and resources. Indigenous peoples' land rights are an intractable issue in Guatemala. Like many Indigenous peoples of the Americas and elsewhere, Guatemala's Indigenous peoples are experiencing extreme pressures on their lands and natural resources from transnational companies seeking to undertake large-scale development projects on them.[252] The Marlin mine is an emblematic example of how fraught such projects are, although it is only one of many such examples in Guatemala.[253]

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[250] Guatemalan Government representative, Connie Taracena Secaira, cited in *GA 3rd Committee Press Release 2011,* UN Doc GA/SHC/4013. A similar statement was made before the HRC. Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.

[251] OHCHR, *Universal Periodic Review Second Cycle - Guatemala: Written Replies to Advance Questions* (2012) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GTSession14.aspx> 26; *Guatemala UPR 2012,* UN Doc A/HRC/22/8, [98](a).

[252] See generally Shin Imai, Ladan Mehranvar and Jennifer Sander, 'Breaching Indigenous Law: Canadian Mining in Guatemala' (2007) 6 *Indigenous Law Journal* 101; Leire Urkidi, 'The Defence of Community in the Anti-Mining Movement of Guatemala' (2011) 11(4) *Journal of Agrarian Change* 556; Joris van de Sandt, *Mining Conflicts and Indigenous Peoples in Guatemala* (Cordaid, 2009).

[253] See, eg, Fulmer, Snodgrass Godoy and Neff, above n 56, 92.

The Marlin mine is an open pit gold and silver mine owned by the Canadian company Goldcorp Inc and operating through the subsidiary Montana Exploradora de Guatemala SA. It was the first mining project approved in Guatemala under a new 1997 Mining Code.[254] It operates in San Marcos, in the predominantly Mayan municipalities of Sipakapa and San Miguel Ixtahuacán, home to the Sipakepense and Mam peoples. It started commercial operations in late 2005, following the grant of a 25 year operating licence by the Government and the injection of US$45 million in loans and equity from the International Finance Corporation.[255] The mine has generated millions of dollars in levies and taxes for the cash-starved Guatemalan Government and the company has implemented several social projects.[256] However, concerns were expressed about the mine from its earliest days. In June 2005 the Sipakepense peoples held community consultations over whether the mine should proceed. The vast majority of participants voted against the mine, triggering the wave of Indigenous community consultations noted above.[257] Beyond the affected communities, the mine has attracted considerable criticism from other IPOs, human rights and environmental NGOs and church groups throughout Guatemala, even some state institutions;[258] transnational NGOs, including Oxfam;[259] scholars;[260] and international bodies.[261]

The main criticism expressed regarding the mine is that the affected Indigenous communities were not adequately consulted prior to its commencement. But significant concerns have also been raised regarding its negative health, environmental, property and social impacts; the lack of sufficient provision for the affected communities to share in the benefits of the mine, including through permanent skilled jobs and an appropriate share of royalties; attacks and threats against those protesting against the mine and the criminalisation of their protest; its conflict with the emphasis in the Mayan 'cosmovision' on harmony with nature; and, the questionable manner in which the land for the mine was acquired by the company.[262]

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[254] Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 255.
[255] Ibid 255; On Common Ground Consultants Inc, *Human Rights Assesment of Goldcorp's Marlin Mine: Commissioned on Behalf of Goldcorp by the Steering Committee for the Human Rights Impact Assessment of the Marlin Mine* (2010) appendix A 3.
[256] See, eg, Fulmer, Snodgrass Godoy and Neff, above n 56, 93; ILO, above n 205, 948.
[257] See, eg, Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 41, 234-36. See generally Yagenova and García, above n 58.
[258] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 255; Fulmer, Snodgrass Godoy and Neff, above n 56, 94. The mine has been the subject of litigation by the Guatemalan Minister of the Environment and Natural Resources. See, eg, On Common Ground Consultants Inc, above n 255, appendix F 3.
[259] See, eg, Oxfam America, *Marlin Mine: Violence and Pollution Lead to Call for Suspension* (18 October 2011) <http://www.oxfamamerica.org/articles/marlin-mine-violence-and-pollution-lead-to-call-for-suspension>; Amnesty International, *Guatemala: Carmen Mejía* (3 January 2013) <http://www.amnesty.ca/get-involved/take-action-now/guatemala-carmen-mej%C3%ADa>.
[260] See, eg, Imai, Mehranvar and Sander, above n 252; Fulmer, Snodgrass Godoy and Neff, above n 56.
[261] See, eg, ILO, above n 205, 948-49; Compliance Advisor Ombudsman, *Assessment of a Complaint Submitted to CAO in Relation to the Marlin Mining Project in Guatemala* (Office of the Compliance Advisor Ombudsman, International Finance Corporation, Multilateral Investment Guarantee Agency, 7 September 2005) 37-9.
[262] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 255; Fulmer, Snodgrass Godoy and Neff, above n 56, 93-4; Imai, Mehranvar and Sander,

The impact of the mine on the Sipakepense and Mam peoples has been the subject of several special procedures experts' reports. The mine first attracted concerned comment from the expert on food in 2006, with the expert relaying Indigenous peoples' concerns that they had not been adequately consulted over the project and highlighting the violent repression of Indigenous peoples' protests against the mine.[263] A year later Stavenhagen referred to gold mining in San Miguel Ixtahuacán and Sipakapa when commenting on the devastating impact of extractive industries on Indigenous peoples in his annual thematic report.[264] But it is Anaya who has directed the most significant attention to the project. Anaya sent an allegation letter to the Guatemalan Government regarding the mine late in 2009 in which he raised concerns regarding its alleged social and environmental impacts.[265] He eventually conducted a special mission to the state in June the following year to investigate the consultation procedures in relation to the project. He found that the Marlin mine was not the subject of consultation with the affected Indigenous peoples in accordance with international standards.[266] In a good example of the 'close cooperation and coordination with…regional human rights organizations' that the Special Rapporteur on Indigenous peoples is requested to exercise in its mandate,[267] one of Anaya's resulting recommendations was that the Government comply with the Inter-American Commission's 2010 precautionary measures concerning the mine.[268]

The Inter-American Commission is one of the principal human rights organs of the OAS. On 20 May 2010, less than a month before Anaya's mission to Guatemala, the Inter-American Commission had taken the significant step of requesting that the Government comply with a suite of precautionary measures regarding the mine. Precautionary measures are issued only in the most serious and urgent cases, where life or other fundamental rights are threatened.[269] Notably, the measures issued by the Inter-American Commission included that the Government should suspend the mine's operations within 20 days.[270] The measures were issued pending the Inter-American Commission's decision on the merits of a petition brought by members of the affected communities, which alleged that the Government had failed to obtain their free, prior and informed consent to the mine. Early in June 2010, shortly before Anaya's special mission, the then President Álvaro Colom publically stated that there was 'no basis' for

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above n 252, 110-15, 124; Interview 13 (Telephone Interview, 27 May 2011); Interview 10 (Guatemala City, 27 May 2011); Interview 16 (Guatemala City, 26 May 2011); Interview 18 (Quetzaltenango, 31 May 2011).

[263] *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [51].

[264] *Stavenhagen Annual Report 2007,* UN Doc A/HRC/4/32, [52].

[265] *Anaya Communications Report 2010,* UN Doc A/HRC/15/37/Add.1, [185]-[186].

[266] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, appendix [68].

[267] *HRC Res 15/14,* UN Doc A/HRC/RES/15/14, para d.

[268] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, appendix [66].

[269] Inter-American Commission on Human Rights, *Rules of Procedure of the Inter-American Commission on Human Rights* <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> art 25(1). See generally Diego Rodríguez-Pinzón, 'Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance' (2013) 20(2) *Human Rights Brief* 13.

[270] Inter-American Commission on Human Rights, *Comunidades del Pueblo Maya (Sipakepense y Mam) de los Municipios de Sipacapa y San Miguel Ixtahuacán en el Departamento de San Marcos, Guatemala*, MC 260-07 (20 May 2010) <http://www.oas.org/es/cidh/decisiones/cautelares.asp>.

ordering the suspension of the mine's operations.[271] During the visit, and in his preliminary and final reports, Anaya urged the Government to suspend the mine on the basis that the Inter-American Commission's request was a response to reasonable concern regarding the rights of Indigenous peoples, particularly in relation to their health and the environment.[272] It is Anaya's influence regarding suspension of the mine on which I focus here.

(b) From 'Commitment' to Rejection

Anaya was influential – fleetingly – in the Government's response to the Inter-American Commission's request to suspend the mine. Five days after the end of Anaya's visit President Colom changed his position. On 23 June 2010 the Government advised the Inter-American Commission that it would abide by the Inter-American Commission's precautionary measures in order 'to comply with its international commitments in the area of human rights',[273] although the Government also asserted that none of the analyses conducted by the Government had identified conclusive evidence of health or environmental concerns arising from the mine's activities.[274] On the last day of his visit Anaya had given a press conference at which he had urged the Government to comply with the measures;[275] presumably a sentiment he also communicated during his meetings with high-level Government officials, including the President, while in Guatemala. A Government announcement regarding compliance with the Inter-American Commission's precautionary measures was imminent around the time of Anaya's visit.[276] But the turnaround in the Government's position suggests that Anaya's recommendation at the press conference, and discussions with Government officials while in the country, were influential in the decision. Scholars writing on the mine, following the Government's announcement that it would suspend its operations, are silent on Anaya's role in the change in position.[277] Nor was Anaya or the Inter-American Commission the only actor putting pressure on the Government to suspend the mine,[278] as the affected communities'

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[271] See, eg, President Álvaro Colom quoted in Àngels Masó and Alberto Ramírez, 'Ecologistas Critican Respaldo a Minería', *Prensa Libre* (online), 3 June 2010 <http://www.prensalibre.com/noticias/Ecologistas-critican-respaldo-mineria_0_273572681.html>; Interview 12 (Telephone Interview, 23 June 2011).

[272] 'Relator Pide a Gobierno Acatar Medidas de CIDH', *Prensa Libre* (online), 19 June 2010 <http://www.prensalibre.com/noticias/politica/Relator-Gobierno-acatar-medidas-CIDH_0_283171690.html>; *Anaya Preliminary Note on Guatemala 2010,* UN Doc A/HRC/15/37/Add.8, [27]; *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, appendix [61], [64], [66].

[273] Comisión Presidencial Coordinadora de la Política Ejecutivo en materia de Derechos Humanos, *Ref P- 1018 - 2010/RDVC/HEMJ/ad* (23 June 2010) <http://168.234.200.197/docs/informe-mirna.pdf> 1.

[274] Ibid. 1-2.

[275] Prensa Libre, 'Relator Pide a Gobierno Acatar Medidas de CIDH', above n 272.

[276] The Government had reportedly secured an extension until 25 June 2010 to respond to the Inter-American Commission on Human Rights regarding its compliance with the measures. Alberto Ramírez, 'CIDH da Prórroga de 15 Días al Gobierno', *Prensa Libre* (online), 11 June 2010 <http://www.prensalibre.com/noticias/CIDH-da-prorroga-dias-Gobierno_0_278372187.html>.

[277] See, eg, Michael L Dougherty, 'The Global Gold Mining Industry, Junior Firms, and Civil Society Resistance in Guatemala' (2011) 30(4) *Bulletin of Latin American Research* 403.

[278] See, eg, ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)* (2010) 770; Oxfam America, *Oxfam Calls for Suspension of Guatemala Mine* (19 May 2011)

sustained protests testify.[279] However, a representative of the OHCHR-Guatemala credited Anaya's visit as instrumental in the Government's announcement to suspend the mine, through raising the profile of the right of Indigenous peoples to be consulted and in mobilising IPOs and NGOs on the issue.[280] Other observers have drawn a connection between Anaya's visit and the Government's announcement too.[281]

The cause for celebration was short-lived. The Government publically announced that it intended to begin the 'administrative process' to suspend the mine, without providing a timeline for that process.[282] It maintained expectations that the mine would be suspended over the course of a year, with the mine in operation all the while. But, eventually, in July 2011 it announced that it would not comply with the Inter-American Commission's order to suspend the mine because, through its own investigations, it had found that there was no evidence of environmental contamination or a probability of any damage if operations at the mine continued.[283] Concerns have been expressed at the shallow nature of the Government's investigations on the mine,[284] a product of the state's limited resources and its interest in retaining the mine as a revenue source. When Anaya's report on the Marlin mine was presented to the HRC a few months later the Guatemalan Government downplayed the issue. It pointed to the Constitutional Court's decision that the community consultations regarding the mine were not legally binding and asserted, in relation to any potential environmental damage, that its Ministries of Environment and Natural Resources, as well as Energy and Mines, were 'carrying out constant monitoring of the situation in Guatemala'.[285]

<http://www.oxfamamerica.org/press/pressreleases/oxfam-calls-for-suspension-of-guatemala-mine>; Agenzia Fides, *America/Guatemala - Rigoberta Menchú and the Bishop of San Marcos Call on President Colom to Guarantee Security for the People and Respect for the Environment* (17 June 2010) <http://www.fides.org/en/news/26899?idnews=26899&lan=eng>; Rights Action, *US Members of Congress Letter to Guatemalan President Colom Calling for Suspension of Goldcorp's 'Marlin' Mine in Guatemala* (7 April 2011) <http://www.rightsaction.org/articles/Congressional_letter_on_Marlin_mine_040711.html>; Interview 14 (Guatemala City, 1 June 2011); Interview 16 (Guatemala City, 26 May 2011); Interview 12 (Telephone Interview, 23 June 2011).

[279] See, eg, Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 41, 255-57; Imai, Mehranvar and Sander, above n 252, 109-15, 124.

[280] Interview 12 (Telephone Interview, 23 June 2011).

[281] See, eg, Tracy L Barnett, 'Goldcorp's Marlin Mine: "Development for Death"', *The Huffington Post* (online), 1 July 2010 <http://www.huffingtonpost.com/tracy-l-barnett/goldcorps-marlin-mine-dev_b_629452.html>.

[282] Óscar Ismatul and Geovanni Contreras, 'El Gobierno Cumplirá Orden de Cerrar Mina', *Prensa Libre* (online), 24 June 2010 <http://www.prensalibre.com/noticias/comunitario/Gobierno-cumplira-orden-cerrar-mina_0_286171419.html>.

[283] Ministerio de Energía y Minas Resolución No 0104 (8 July 2011); 'MEM Desiste de Suspender Operaciones en Mina Marlin', *La Hora* (online), 20 July 2011 <http://www.lahora.com.gt/index.php/nacional/guatemala/actualidad/3935-mem-desiste-de-suspender-operaciones-en-mina-marlin>.

[284] See, eg, MiningWatch Canada and Center for International Environmental Law, 'Guatemala Defies Human Rights Body, Refuses to Suspend Marlin Mine' (Press Release, 4 August 2011) <http://www.miningwatch.ca/news/guatemala-defies-human-rights-body-refuses-suspend-marlin-mine>; Center for International Environmental Law and MiningWatch Canada, 'Human Rights Commission's Climbdown a Wake-up Call for Human Rights Defenders in the Americas, Not Indicator of Goldcorp's Performance' (Press Release, 5 January 2012) <http://www.miningwatch.ca/news/wake-call-human-rights-defenders-americas-not-indicator-goldcorp-s-performance>.

[285] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 94.

The Government's resistance to Anaya's recommendation then took an interesting form. It not only outwardly resisted suspension of the mine it went a step further and sought to reject the basis for Anaya's recommendation: it petitioned the Inter-American Commission to have the precautionary measure regarding suspension of the Marlin mine withdrawn.[286] This suggests the Guatemalan Government is acutely concerned with its regional and international Indigenous rights reputation. In a surprise move, the Inter-American Commission acceded in December 2011, modifying the precautionary measures by removing the request that mining operations be suspended.[287] NGOs expressed concern over the removal, pointing out that it was the second time in less than a year that the Inter-American Commission had succumbed to government pressure to modify an order regarding a mining project on Indigenous territories.[288] Indicative of the Government's push to continue operations at the mine, soon after the Inter-American Commission modified its measures Goldcorp voluntarily agreed to increase its royalty rate to the Guatemalan Government for the mine from one to four per cent of gross revenue.[289] Anaya has not publically commented on whether the withdrawal of the order to suspend the mine changes his view that operations at the Marlin mine should be suspended.[290] But Indigenous opposition to the mine remains strong: in mid-2012 in San Miguel Ixtahuacán the affected communities conducted a symbolic people's trial against Goldcorp regarding its operations in Guatemala, Honduras and Mexico. The Tribunal's judgment included that Goldcorp suspend all of its operations in Mesoamerica, including the Marlin mine.[291]

The Guatemalan Government's combination of outward commitment and inward resistance is ritualistic. Guatemala deflected attention from its resistance to the Inter-American Commission's precautionary measure and Anaya's associated recommendation by professing a commitment to suspend operations at the mine for a year. When it eventually revealed that it would not implement the order it worked hard to remove the basis for the order itself, ultimately successfully. While Anaya had an observable influence on the Government's initial announcement that it would suspend operations at the Marlin mine, again this influence did not translate into Guatemala's actual conformity to the hard land rights norms the subject of the

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[286] See, eg, MiningWatch Canada and Center for International Environmental Law, 'Guatemala Defies Human Rights Body, Refuses to Suspend Marlin Mine', above n 284.

[287] Inter-American Commission on Human Rights, *Comunidades del Pueblo Maya (Sipakepense y Mam) de los municipios de Sipacapa y San Miguel Ixtahuacán en el Departamento de San Marcos, Guatemala*, MC 260-07 (20 May 2010, modified 7 December 2011) <http://www.oas.org/es/cidh/decisiones/cautelares.asp>.

[288] See, eg, Center for International Environmental Law and MiningWatch Canada, 'Human Rights Commission's Climbdown a Wake-up Call for Human Rights Defenders in the Americas, Not Indicator of Goldcorp's Performance', above n 284; Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012: Events of 2011* (2012) 109.

[289] Goldcorp Inc, 'New Voluntary Royalty Agreement to Benefit Stakeholders of Goldcorp's Marlin Mine' (Press Release, 27 January 2012) <http://www.goldcorp.com/Investor-Resources/News/News-Details/2012/New-Voluntary-Royalty-Agreement-to-Benefit-Stakeholders-of-Goldcorps-Marlin-Mine1128070/default.aspx>.

[290] However, as identified above, in April 2012 Anaya stated of mining projects generally in Guatemala, '[i]n the case of Guatemala, my recommendation has been that if you cannot suspend existing projects, take clear measures to protect the rights, life and health of indigenous peoples. And no progress at all on new projects.' Anaya quoted in Efe Agency, above n 126.

[291] Tribunal Popular Internacional de Salud, *Veredicto de Culpabilidad de Goldcorp se Entrega a las Autoridades de Guatemala y Canada* <http://tribunaldesalud.org/>.

recommendation. The mine continues to operate without the consent of the affected Indigenous peoples.

5 *Ritualism as Soft Committing and Hard Resisting*

Indigenous rights ritualism is the Guatemalan Government's prevalent response to the special procedures' attentions. Here, even the soft cultural right to an intercultural bilingual education struggles to gain recognition. But aspects of this right are recognised, which is worthy of praise in a state with a history as harrowing as Guatemala's. As in New Zealand, Guatemala uses its limited moves towards implementation of the special procedures experts' recommendations regarding the right to an intercultural bilingual education as a cover for its failure to more substantively implement both those soft rights recommendations and recommendations regarding hard rights. It further deflects attention from its inward resistance to hard rights to land and participation in decision-making with outward acceptance of the recommendations concerning those rights; at least for periods. The Government's tendency to resist recognition of hard Indigenous peoples' rights to land and participation in decision-making is harder to ignore than in New Zealand. The failing has been recognised to some degree by observers of Guatemala's Indigenous rights situation. For example, Charles Hale argues of Guatemala's steps to recognise Indigenous peoples' rights that 'neoliberalism's cultural project entails pro-active recognition of a minimal package of cultural rights, and an equally vigorous rejection of the rest', such as rights to self-determination and land.[292] Even if Guatemala's Indigenous rights failings are more easily detected than New Zealand's, the Guatemalan Government's ritualistic behaviour still carries political perks.

The advantages of the Guatemalan Government's Indigenous rights ritualism are multiple. It does not allow it to avoid international scrutiny, if the number of special procedures experts and other international bodies' missions to the country are any indication. Nor does it prevent domestic lobbying for rights recognition. But welcoming the multiple visits of special procedures experts and others allows Guatemala to assert its status as an open liberal democracy.[293] Partially implementing some of the recommendations allows it to maintain the façade, helping it to hold onto its seat on UN rights bodies such as the HRC, for example. Ritualising its Indigenous rights implementation enables the state to avoid outright confrontation with the special procedures and other actors regulating those norms, generally blunting their criticism. Not since the former expert on extrajudicial executions' biting 2006 critique that '[t]he question today is less what should be done than whether Guatemala has the

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[292] Charles Hale, 'Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala' (2002) 34 *Journal of Latin American Studies* 485, 485.

[293] See, eg, Jorge Skinner-Klee, Guatemalan Government representative, 'Intervention: Permanent Forum on Indigenous Issues, Fifth Session, Human Rights' (New York, 22 May 2006) <http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASHeb7e/627cc9c7.dir/pfii5_156.pdf>.

will to do so' has Guatemala been vigorously critically dressed down by a special procedures mandate-holder.[294] Even the HCHR, whose mandate emphasises cooperation with states,[295] has delivered more critical assessments of the Government's commitment to Indigenous peoples' rights than the special procedures.[296] Ritualism also provides a defence to accusations of lack of headway – the Government always has an 'achievement' up its sleeve to present in its favour. These largely ceremonial achievements stunt the potential for substantive rights recognition under the guise of rights improvements. With the pretence of rights progress the Government continues to access international donor funding and maintain a degree of political power.[297] Moreover, Guatemala's Indigenous rights ritualism acts as a domestic pressure valve for Indigenous rights concerns: were the depths of its non-conformity to Indigenous peoples' rights revealed the Indigenous-majority population could be prompted to mobilise on mass, as has occurred in neighbouring countries.

F *Conclusion: Possibilities beyond the Ritual*

The lesson from Guatemala is that being an international advocate of Indigenous peoples' rights and the international mechanisms that promote them – including the mandate of the Special Rapporteur on Indigenous peoples – does not necessarily translate into domestic implementation of special procedures experts' recommendations regarding Indigenous peoples. The Government has displayed a degree of commitment to aspects of the special procedures experts' recommendations. This is evident in the Government's act of preparing a draft regulation regarding consultation and in some of the steps taken to promote intercultural bilingual education across the country, for example. The Government has resisted aspects of the experts' recommendations too, a behaviour apparent in the state's eventual public revelation that it would not suspend operations at the Marlin mine and in its lobbying of the Inter-American Commission to have the precautionary measure regarding suspension of the Marlin mine withdrawn. However, ultimately I characterise these behavioural responses as ritualistic: the Government's tactic is to publically commit to norms concerning hard rights, only to resist those norms in more subtle ways. It further deflects attention from its resistant behaviour through a degree of 'paper' conformity to soft cultural rights.

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[294] *Expert on Extrajudicial Executions Guatemala 2007,* UN Doc A/HRC/4/20/Add.2, [63].
[295] *High Commissioner for the Promotion and Protection of All Human Rights*, GA Res 48/141, UN Doc A/RES/48/141 (20 December 1993) para 4(g).
[296] See, eg, OHCHR, 'A Critical Period in Guatemala's history - Navi Pillay Press Conference by UN High Commissioner for Human Rights Navi Pillay in Guatemala City, Guatemala' (Press Statement, 15 March 2012) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11967&LangID=E>; *HCHR Report on Guatemala 2011,* UN Doc A/HRC/16/20/Add.1, [10].
[297] Charlesworth makes a similar point regarding the tangible rewards Cambodia receives as a product of its rights ritualism. Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 14.

Although, as in New Zealand, ritualism is Guatemala's paramount behavioural response to the special procedures' recommendations regarding Indigenous peoples, the special procedures have exerted greater influence in this state. Anaya had a direct and observable influence on the Guatemalan Government's draft instrument regulating consultation with Maya, Xinka and Garfiuna and on the Government's announcement that it would suspend operations at the Marlin mine. Stavenhagen at most played a contributory role in expediting the adoption of legislative and policy measures regarding intercultural bilingual education for Indigenous peoples in the state. However, as in New Zealand, the special procedures' influence on the Guatemalan Government's actual conformity to international Indigenous rights norms has been slight. None of the examples of Anaya's direct influence translated into Guatemala's actual conformity to the Special Rapporteur's recommendations. Yet, these examples offer some insights into the mechanism's *potential* to influence state behaviour: they underscore the importance of the proactive capacity-building work of the special procedures and the catalytic force of country missions. The next chapter appraises the factors that explain the special procedures' regulatory impact in both Guatemala and New Zealand. It does so with a view to understanding whether the special procedures mechanism may be better harnessed to secure improved domestic implementation of international Indigenous peoples' rights norms.

VII UNRAVELLING THE WEBS: UNPACKING THE EXPERTS' INFLUENCE

A *Introduction*

The two case studies tell a story of an international mechanism that regulates state behaviour towards Indigenous peoples imperfectly but appreciably. There are instances where New Zealand and Guatemala have acted upon the special procedures' recommendations regarding Indigenous peoples. However, for the most part, this has not translated into the states' conformity to the international Indigenous rights norms the subject of the special procedures' recommendations. Ritualism was the defining behavioural response of both states to the special procedures' work. In this chapter I explore the factors that explain the special procedures' influence in New Zealand and Guatemala. I undertake a 'webs of influence' analysis to unravel the regulatory webs operating in both states. My analysis is based upon my theoretical understanding of the mechanics of regulation, outlined in Chapter II. That understanding draws significantly on the theorising of Braithwaite and Drahos and posits that regulation occurs through contests of principles between different actors leveraging many mechanisms. In this chapter I analyse the key actors, principles and mechanisms that have a bearing on the special procedures' impact on state behaviour towards Indigenous peoples in New Zealand and Guatemala. I argue that an intricate mosaic of factors affects the experts' influence. Pivotal actors are not enrolled, the fundamental principles pushed by both governments are not countered, and material mechanisms are not worked to their complete capacity. As I undertake this analysis I put forward proposals for enhancing the regulatory clout of the experts that are of application beyond New Zealand and Guatemala. I argue for improved strategies of actor engagement by the special procedures; a more explicit and careful contestation of the principles undergirding state reactions to the special procedures' reports and the rights underpinning the recommendations they make; and identify ways that several regulatory mechanisms, including modelling and capacity-building, can be better exploited. The key actors, principles and mechanisms, and associated proposals for improving the special procedures' impact, are analysed in turn.

B *Actors*

1 *States' Lack Political Will*

Multiple key actors have a bearing on the special procedures' influence on states' behaviour towards Indigenous peoples. States themselves are pivotal. The literature identifies states' lack of political will to cooperate with the special procedures and to implement their recommendations as a central constraint on their efficacy.[1] Lack of institutional or resource capacity are additional complicating considerations that frequently crop up.[2] The case studies in Chapters V and VI bear out the effect of these constraints. The case studies reveal the slight influence the mechanism has had across two markedly different states. As Chapter VI showed, Guatemala is a fragile, post-conflict, developing, incompletely transitioned democracy, with a low GDP for the region, and organs of state starved of funds and captive to powerful economic elite. The state's frailty, particularly the entrenched corruption and impunity, inhibits implementation of those special procedures experts (and other actors') recommendations regarding Indigenous peoples and their rights that are perceived to run counter to the economic elite's interests. But advances in Indigenous rights recognition are not thwarted solely by institutional and other barriers beyond the control of reigning administrations: there is little political will to pursue an Indigenous rights or human rights agenda, as the state behaviour explored in Chapter VI demonstrated. Thus, in Guatemala it is necessary to manufacture the political will to substantively commit to Indigenous peoples' rights. It is also necessary to strengthen the institutions of state, by dismantling the elite's underlying power structures, so that the state has improved capacity to implement the reforms required.[3]

In New Zealand the dynamic is different. The lack of state action on special procedures experts' recommendations cannot be attributed to instability, a lack of available funds or non-

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[1] See, eg, Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206, 206, 210; Theodore J Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 91; Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 224; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 148; Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 419, 440-45; Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007) 39, 44, 51-54; Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia, 2006) 350.

[2] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 206, 210; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 1, 217-18; Michael O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3(1) *Human Rights Law Review* 53, 69; Miko Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Abo Akademi University, 2001) 165-78; Gutter, above n 1, 350; Jennifer Preston et al, above n 1, 44, 53.

[3] Risse and Ropp make the argument of human rights campaigns generally that they 'should be about transforming the state, not weakening or even abolishing it.' Thomas Risse and Stephen C Ropp, 'Conclusions' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 234, 277.

functioning state institutions. As Chapter V showed, New Zealand is a stable, developed, democracy with a high GDP per capita and it is celebrated for having a generally strong human rights record. Instead, the inaction can be attributed in a large part to a lack of political will for Indigenous rights recognition on the part of successive administrations, as evidenced in the chapter on the country; even if the outward response to the special procedures' recommendations improved over time. The impression is that the special procedures' recommendations are read in advance of their release in order to help manage New Zealand's domestic and international reputation as a rights respecting state. They are then ignored again until such time as international attention is redirected at them, such as during the interactive dialogue with the expert, presence before a UN treaty body, or during the UPR. At this point, the Government returns to them again to see whether any domestic actions have, coincidentally, furthered the recommendations in the reports and so can be profiled publically as steps to implement the recommendations.

The findings are counter-intuitive in a key respect. As many of the recommendations require the expenditure of financial and political resources the expectation was that Guatemala, as the developing country, would fare worse than New Zealand in implementation. But this did not prove to be the case. The mechanism has had more influence in Guatemala than New Zealand even though this has not translated into greater substantive rights conformity in that state. This lends support to Beth Simmons' argument that international human rights law has a greater potential impact in states where political institutions have been unstable and are in a state of transition.[4] Perhaps New Zealand was an unusual comparator, given its especially stubborn resistance to international oversight of its Indigenous rights situation. But it is not alone in this stance.[5] New Zealand's initial extreme resistance to negative international comment on its Indigenous rights situation, and its later indifference to Anaya's report, indicates that in New Zealand domestic actors wield the most clout in the promotion of Indigenous rights recognition. In contrast, in Guatemala the Government listens more to international actors advocating Indigenous rights recognition: they can make life difficult by lobbying for the withdrawal of foreign aid and business investment or for other forms of international ostracism. Regardless, Williams identifies that most states, whether from the global North or global South, endeavour to avoid the political isolation that can result from international attention to domestic

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[4] Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) 15-7. See also Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 216. Regarding Indigenous peoples, Irène Bellier and Martin Préaud identify the paradox that 'where states are dependent on international cooperation and monitoring, indigenous peoples' can be 'in a somewhat better position to see their rights protected and respected than those living in the first world', where states control development programmes, lands and resources. Irène Bellier and Martin Préaud, 'Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples' (2011) 16(3) *The International Journal of Human Rights* 474, 482.

[5] See, eg, Philippine Government representative, Denis Yap Lepatan, cited in *Press Release CHR 2003,* UN Doc HR/CN/1028.

rights abuses.[6] And, if there is one positive thing that New Zealand and Guatemala's rights ritualism reveals it is that both states are concerned to have a positive international Indigenous rights reputation; otherwise they would outwardly resist or disengage from the special procedures' work on Indigenous peoples.

Other states have played a minimal role in promoting implementation of the special procedures' recommendations in both countries. Neither New Zealand nor Guatemala is a big player on the international stage potentially making them more susceptible to the influence of other, more powerful, states. Concerned states could appeal to New Zealand and Guatemala to implement the recommendations, backing the appeals with threats to reduce trade or aid or other alliances, such as military cooperation.[7] However, relying on such threats to advance Indigenous peoples' rights carries its own concerns, including that it is often those whose rights are being violated that bear the brunt of the penalty not the state.[8] This is the case where programmes that Indigenous peoples are reliant on have aid funding withdrawn, for example. The efficacy of trade sanctions and other forms of economic coercion in improving human rights recognition has also been called into question.[9] Nevertheless scholars, including Simmons, have acknowledged that aid could be used by donor countries to incentivise human rights conformity.[10] In Guatemala donor states such as Norway, Germany and the Netherlands could be pivotal because of the financial resources for Indigenous programmes and projects they already provide.[11] But to date they have not prefaced their financial support on the implementation of special procedures experts' recommendations. Major powers, such as the United States and United Kingdom, that have shown an interest in Guatemala or New Zealand's Indigenous rights situation could be targeted to place diplomatic pressure on the governments to

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[6] Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660, 669.

[7] Regarding the use of such tactics to secure the realisation of human rights, see, eg, Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998) 129; Simmons, above n 4, 374-75; Emilie M Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) *International Organization* 593, 623-24.

[8] For support for this proposition regarding human rights generally see, eg, Simmons, above n 4, 374; Elvira Domínguez Redondo, 'The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review* 673, 693.

[9] See, eg, Simmons, above n 4, 374-75; Dursun Peksen, 'Better or Worse? The Effect of Economic Sanctions on Human Rights' (2009) 46(1) *Journal of Peace Research* 59; Cristiane Careniero and Dominique Elden, 'Economic Sanctions, Leadership Survival and Human Rights' (2009) 30(3) *University of Pennsylvania Journal of International Law* 969; Elvira Domínguez Redondo, above n 8, 693-94; Risse and Ropp, above n 3, 277-78. More generally, regarding the negative consequences of foreign aid on building the rule of law in developing states, see Katherine Erbeznik, 'Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries' (2011) 18(2) *Indiana Journal of Global Legal Studies* 873.

[10] Simmons, above n 4, 375. However, Simmons also notes that '[m]ost of the evidence suggests that unless the aid is targeted to specific purposes associated with improving rights practices, it has little positive impact.' Piccone identifies a potential role for bilateral donors in incentivising the implementation of the special procedures' recommendations specifically and gives some examples of where this has already occurred. Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 86, 98.

[11] For examples of the support these states provide see, eg, *HCHR Report on Guatemala 2013,* UN Doc A/HRC/22/17/Add.1, [94]; *HCHR Report on Guatemala 2010,* UN Doc A/HRC/13/26/Add.1, [75], [77]; Ministerio de Relaciones Exteriores de Guatemala, *Presentan Libro 'Indicadores para los Pueblos Indígenas'* (7 October 2010) <http://www.minex.gob.gt/Noticias/Noticia.aspx?ID=531&Busqueda=indígena>.

comply with the special procedures experts' recommendations.[12] In respect of Guatemala, the five states designated as 'friends' of its peace process could be lobbied to support the state to implement its international Indigenous rights obligations;[13] as could its regional neighbours who have a direct interest in the state's stability. States with high-level government members who are Indigenous, such as Bolivia, or perceived 'global good Samaritans',[14] such as Sweden, could also be encouraged to take a lead in shaming recalcitrant states internationally. Diplomatic pressure could be of particular impact where Guatemala or New Zealand seeks membership to the HRC or as non-permanent member of the UN Security Council; New Zealand is seeking a non-permanent seat on the Security-Council for 2015-2016.[15] The home states of transnational corporations, such as Canada in the case of Goldcorp, could also be targeted to encourage corporate compliance with the special procedures experts' recommendations.[16] But, given the associated diplomatic costs, scholars have identified that a general reluctance persists to bilaterally advocate the realisation of human rights norms.[17]

2 *UN Institutional Constraints*

(a) Creating Enforcement Capability

The heavy institutional constraints, highlighted in Chapter IV, that weigh upon the special procedures are relevant factors in understanding their influence. As that chapter identified, like other UN human rights mechanisms, the special procedures do not possess the power to institutionally enforce their recommendations. There is a lack of institutional follow-up of actions taken to implement special procedures experts' recommendations by the HRC or OHCHR. And the economic and personnel resourcing constraints that mute the impact of the special procedures – and the UN human rights system more generally – have been well

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[12] For examples of the interest such states have shown in the Indigenous rights situation in New Zealand and Guatemala, see, eg, *Guatemala UPR 2012,* UN Doc A/HRC/22/8, [100.27]; OHCHR, *Universal Periodic Review Second Cycle - Guatemala: Questions Submitted in Advance, Addendum 1* (2012) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GTSession14.aspx> 2; *HRC UPR New Zealand,* UN Doc A/HRC/12/8 [49], [81](32).

[13] The five states are Norway, the United States, Mexico, Venezuela, and Colombia.

[14] The term comes from Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (Oxford University Press, 2009).

[15] New Zealand Ministry of Foreign Affairs and Trade, *New Zealand UN Security Council Candidate 2015-16*, New Zealand Embassy <http://www.nzembassy.com/united-nations/news/new-zealand-un-security-council-candidate-2015-16>. Guatemala assumed a non-permanent seat on the Security-Council for 2012-2013.

[16] For example, during the EMRIP in 2012 the Canadian Government representative responded to criticisms raised regarding Goldcorp's operations at the Marlin mine. Fleur Adcock 'Meeting Notes: Expert Mechanism on the Rights of Indigenous Peoples: Fifth Session' (July 2012). Notably, in 2012 the CERD Committee recommended that Canada 'take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.' CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc CERD/C/CAN/CO/19-20 (9 March 2012) [14].

[17] See, eg, Simmons, above n 4, 113-14. For comment on the diplomatic costs associated with threatening economic sanctions see, eg, John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 537.

documented. Giving international human rights mechanisms enforcement powers is an approach advocated by some special procedures experts and Indigenous peoples.[18] But addressing the latter two concerns – follow-up and resourcing – dominates existing suggestions in the literature for improving the impact of the mechanism.[19] There is merit in each. Making special procedures experts' recommendations binding determinations and granting the UN the ability to enforce their implementation may improve their implementation rate but raises further issues, including the identity of the enforcement body, the nature of the penalty and the mode of enforcement. Such a move is unrealistic at present; states are likely to resist mandate-holders making enforceable findings.[20] As Chapter II revealed, such a move may also negatively impact the implementation of mandate-holders' findings as states find ways to resist coercion. It may render states even less likely to grant access to, and cooperate with, mandate-holders in their work. Further, it may be opposed by some Indigenous peoples out of concern that the experts do not always get their recommendations right, an idea explored further below.

(b) Institutionalising Follow-up

There is a stronger case for institutional follow-up of the implementation of special procedures experts' recommendations, which can be understood as a form of enforcement. UN follow-up of implementation of the special procedures' recommendations was Stavenhagen's

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[18] Interview 13 (Telephone Interview, 27 May 2011); Interview 16 (Guatemala City, 26 May 2011); Interview 14 (Guatemala City, 1 June 2011); Interview 18 (Quetzaltenango, 31 May 2011); Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 1, 227. See generally Manfred Nowak, 'It's Time for a World Court of Human Rights' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 17.

[19] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 226; Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010) 40-1; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 47-52, 99, 123-26; Lempinen, above n 2, 27-9, 165-180; Bertrand G Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff Publishers, 2009) 176; Surya P Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' (2011) 15(2) *The International Journal of Human Rights* 249, 261-62; Surya P Subedi et al, 'The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 155, 160; Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act' (2011) 15(2) *The International Journal of Human Rights* 162, 169-70; Baldwin-Pask and Scannella, above n 1, 446-52, 470-78; Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1995-1996) 28 *Journal of International Law and Politics* 785, 822; Jennifer Preston et al, above n 1, 45-6; 51, 53-6; Victoria Tauli-Corpuz and Erlyn Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and Challenges* (Tebtebba Foundation, 2004) 34-5; O'Flaherty, above n 2, 75-6; Sir Nigel S Rodley, 'United Nations Action Procedures Against "Disappearances," Summary or Arbitrary Executions, and Torture' (1986) 8 *Human Rights Quarterly* 700, 730; Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185, 219; Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299, 309; Jared M Genser and Margaret K Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice' (2008) 39 *Columbia Human Rights Law Review* 687, 740-44, 749-50; *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [88]-[89], [91]-[93], [95], [97], [101]; CHR, *Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights: Report of the Open-Ended Seminar on this Subject Convened Pursuant to Commission on Human Rights Decision 2005/113*, UN Doc E/CN.4/2006/116 (12 December 2005) [44]-[55].

[20] See, eg, Nifosi, above n 1, 146.

central suggestion for addressing their efficacy. He described the absence of UN follow-up as 'one of the weakest aspects' of the mechanism.[21] In support, the literature on responsive regulation dictates that as well as agreeing regulatory outcomes agreement is also required on how to monitor their achievement.[22] UN actors have taken some ad hoc steps to monitor implementation in both states. In both case study states the Special Rapporteur on Indigenous peoples has conducted follow-up missions. In Guatemala multiple other special procedures mandate-holders have also carried out follow-up missions looking at rights concerns that include violations of Indigenous peoples' rights. The OHCHR has taken several steps to follow-up implementation of special procedures experts' recommendations regarding Indigenous peoples in Guatemala. For example, there was the OHCHR project that had as one of its key objectives providing support to Guatemala in implementing Stavenhagen's recommendations on the country.[23] The OHCHR-Guatemala played a lead role in coordinating a workshop to strategise implementation of Anaya's 2010 report,[24] as well as disseminating special procedures experts' reports that examined Indigenous peoples' rights.[25] Domestic institutions have also played a role in the two states. As identified in the previous chapter, in Guatemala COPREDEH manages a database of special procedures experts' recommendations. But implementation of the recommendations in the database is not systematically monitored so the database acts more as a repository for the largely forgotten recommendations.[26] The NZHRC has expressed an intention to coordinate monitoring of implementation of Anaya's recommendations on New Zealand from 2012, although this is yet to happen.[27] Despite these efforts, implementation rates in both states have been low. This suggests a greater role for the special procedures' parent body, the HRC, is necessary.

The HRC's potential roles are varied. It could include requiring states to identify whether they accept or reject each of the special procedures' country recommendations when the report is presented; periodic requests for states, IPOs and civil society to provide updates on

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[21] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

[22] See, eg, John Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475, 476, 496.

[23] See, eg, *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [21]-[22], [24]-[26]. Note that the special procedures' Manual of Operations identifies a role for UN country teams in follow-up. Special Procedures, *Manual of Operations of the Special Procedures of the Human Rights Council* (Office of the High Commissioner for Human Rights, 2008) [104]-[105], [126] ('*Manual of Operations*').

[24] Interview 12 (Telephone Interview, 23 June 2011).

[25] See, eg, Oficina del Alto Comisionado para los Derechos Humanos: Guatemala, 'Relator Especial para los Derechos Humanos de los Pueblos Indígenas, Realiza Visita de Seguimiento a Guatemala' (Press Release, 12 May 2006) <http://www.oacnudh.org.gt/documentos/comunicados/20065291539350.Visita%20Stavenhagen,%20mayo%202006.pdf>; Oficina del Alto Comisionado para los Derechos Humanos: Guatemala, 'Relator Especial de la ONU Presenta Informe Sobre Proyectos de Minería que Afectan a Pueblos Indígenas en Guatemala' (Press Release, 4 March 2011) <http://www.oacnudh.org.gt/documentos/comunicados/Comunicado_Informe_Relator_PueblosIndígenas(4mar11).pdf>; Jennifer Preston et al, above n 1, 37.

[26] *HCHR Report on Guatemala 2011,* UN Doc A/HRC/16/20/Add.1, [102]; Interview 12 (Telephone Interview, 23 June 2011).

[27] Interview 3 (Wellington, 3 May 2011); Interview 1 (Wellington, 5 May 2011); NZHRC commissioner, Rosslyn Noonan, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* (20 September 2011) James Anaya <http://unsr.jamesanaya.org/videos/webcast-18th-session-of-the-human-rights-council-statement-of-special-rapporteur-and-interactive-dialogue>.

implementation; independent research on implementation by an arm of the OHCHR, the results of which are revealed during HRC sessions; a greater role for special procedures experts in the UPR process;[28] separate dialogues on each country report;[29] and dedicated questioning on implementation of recommendations during the interactive and UPR dialogues by the Chair of the session. The HRC should take a stance on non-implementation. State cooperation with the special procedures and implementation of their recommendations needs to actually be taken into account when electing members to the HRC.[30] Consistent failure to implement recommendations should be recorded in a resolution of the HRC. James Lebovic and Erik Voeten have argued on the basis of statistical data that '[t]he adoption of a UNCHR resolution condemning a country's human rights record produced a sizeable reduction in multilateral, and especially World Bank, aid'.[31] A condemnatory resolution could thus incentivise implementation, especially in Guatemala. However, as a state-based body past practice suggests that the HRC is likely to be unwilling to comment on states' rights violations except in the most extreme or politically charged cases.[32] Such institutional follow-up would encourage implementation by demonstrating concern at the highest levels of the UN human rights system for compliance with special procedures experts' recommendations. The absence of an institutional follow-up procedure currently signals the reverse. It should also be made easier for Indigenous peoples to participate in the interactive dialogues during which the special procedures present their reports to the HRC, presently they must do so under the umbrella of an NGO with consultative status with ECOSOC.[33]

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[28] Alston, above n 19, 222; Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country', above n 19, 262; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 132-33; HRC, *Report of the Twentieth Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council (Vienna, 24-28 June 2013)*, UN Doc A/HRC/24/55 (22 July 2013) [27] ('*Report of the Special Procedures' 20th Meeting*').

[29] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 19, 40.

[30] See, eg, ibid 39; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 127. Subedi goes further suggesting that '[e]very state wishing to be elected to the Human Rights Council should be expected to accept the possible appointment of a country mandate holder for that country if need be.' Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 1, 228.

[31] James H Lebovic and Erik Voeten, 'The Cost of Shame: International Organizations and Foreign Aid on the Punishing of Human Rights Violators' (2009) 46(1) *Journal of Peace Research* 79, 79. They also found that it 'had no effect on the country's aggregate bilateral aid receipts.'

[32] See, eg, Lempinen, above n 1, 105-09; Nifosi, above n 1, 134-35; Menno T Kamminga, 'The Thematic Procedures of the UN Commission on Human Rights' (1987) 34 *Netherlands International Law Review* 299, 317; Pinheiro, above n 19, 169-70; Matthew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 *Alternatives: Global, Local, Political* 449, 453; Katarina Tomaševski, 'Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004' (2005) 5(2) *Human Rights Law Review* 205, 213.

[33] Improved Indigenous peoples' participation during the interactive dialogue has been facilitated by the expansion of the mandate of the Voluntary Fund on Indigenous Populations to support Indigenous peoples' participation in sessions of the HRC. HRC, *Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples*, UN Doc A/HRC/21/23 (25 June 2012) [35].

(c) Increasing Funding

Increasing the financial support available to the special procedures may improve the impact of the mechanism. Anaya has invited the HRC to increase the support provided to the Special Rapporteur for Indigenous peoples.[34] It could come from other UN agencies, such as those that work on Indigenous rights concerns, or outside of the UN.[35] Increased funding could allow for further follow-up missions by mandate-holders to states, which would assist in keeping the rights concerns raised in the reports on the government and public agenda. Few mandate-holders have the time or resources to conduct follow-up missions to gauge the extent of implementation of their recommendations and none have the capability to carry out sustained follow-up.[36] It would allow for more country visits generally. It could improve the quality of the reports by allowing for a greater number of research assistants and thus more in-depth research on the state. It would allow special procedures mandate-holders to spend a longer period of time in the country with the increased domestic media attention that entails. It could allow for mandate-holders to action more communications it receives, to conduct more research regarding those complaints, and to set up a system for responding to complainants to advise them of any action taken regarding the complaint. The structure of the system could be rethought too: mandate-holders could become full-time paid employees of the UN.[37] In the context of a global economic recession the likelihood of securing increased funding for the mechanism or enabling the payment of salaries to mandate-holders is remote. Yet, the Special Rapporteur on Indigenous peoples is one of the mandates that has been particularly successful in securing additional private funding for its work, allowing it to conduct follow-up missions in both states and to undertake an increased number of state visits generally, suggesting that increased funding alone is not the answer.

These factors – a lack of coercive enforceability, institutional follow-up and funding – are difficult for non-state actors to address. However, even accounting for these limitations, the low influence of the special procedures in New Zealand and Guatemala is in part attributable to factors over which the special procedures mandate-holders, Indigenous peoples and Indigenous rights advocates have control.

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[34] *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [89].

[35] See, eg, Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 19, 41, 43. Piccone argues that the Assistant Secretary-General for Human Rights, who is based in New York, should take a lead role in securing increased funding for the experts from within the UN system. Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 133.

[36] See, eg, Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 217-18.

[37] Interview 9 (Telephone Interview, 6 September 2010); Oliver Hoehne, 'Special Procedures and the New Human Rights Council - A Need for Strategic Positioning' (2007) 4(1) *Essex Human Rights Review* 48, 62; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 51.

For a start, the influence of the mechanism is hindered by the special procedures' lack of a coherent vision of Indigenous rights conformity and of strategies to implement that vision. Determining both is made complex where the special procedures are concerned because the mandate-holders function both as independent experts, acting in their personal capacity with their own expertise and interests, and as part of the special procedures system. Each expert commenting on the human rights situation of Indigenous peoples presumably has a vision of a world in which the rights of Indigenous peoples are better respected. But what precisely this means is open to interpretation as is the best route for getting there. Hinting at this incoherence, were Anaya to offer advice to the next Special Rapporteur on Indigenous peoples, it would be 'to really think hard about the modalities of the policy and engagement.'[38] He has also identified the 'need to devote greater efforts to…develop strategies to use the recommendations…to effect change.'[39]

The absence of strategy is evident in both states. It is evident in the high frequency of visits made to Guatemala, which are in addition to the multiple country visits undertaken by other international mechanisms such as the ILO and Inter-American Commission. It is questionable how much impact a mandate-holder will have when it is the third to have undertaken a mission to a state in one year.[40] The visits themselves can then become ritualised, a form of the 'regulatory ritualism' described in Chapter II. It is also discernible in the large volume of recommendations that the special procedures produce. It is stark in Guatemala where there are approximately 200 recommendations regarding Indigenous peoples. New Zealand has received only two visits from special procedures experts and so has not accumulated the same size collection of recommendations but the number is still approaching 40. The recommendations are often variations on the same theme but working through them and understanding their nuances takes time. Nor do these figures include the copious country-specific recommendations directed at advancing Indigenous rights issued by other international, regional and domestic mechanisms. The magnitude of special procedures experts' recommendations regarding Guatemala was a concern of a member of the OHCHR-Guatemala 'definitely too many recommendations doesn't help. After a while it's just more recommendations: one more, one more.'[41] Where there is a large pool of recommendations with no identifier of priority it is self-defeating. The state may not know where to start with

[38] Interview with James Anaya (Telephone Interview, 24 January 2011, updated by email 5 July 2013). Beyond the Indigenous rights context, Hoehne has argued that the special procedures system should develop 'a mission statement and an overall strategy on their desired identity and the steps to achieve it.' Hoehne, above n 37, 64. Regarding the need for the experts to be strategic in their country missions see Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 82, 84-6.
[39] *Anaya Report to GA 2013,* UN Doc A/68/317, [25].
[40] See, eg, Baldwin-Pask and Scannella, above n 1, 448; Interview 12 (Telephone Interview, 23 June 2011).
[41] Interview 12 (Telephone Interview, 23 June 2011).

implementation. Nor may other actors know where to begin with monitoring implementation of them. It is especially problematic for states, such as Guatemala, with limited resources. It enables the 'pick and choose' approach to implementation visible in both states.[42] And it increases the chance of inconsistency between recommendations.[43]

There are several options for tackling this issue. These include creating 'theme-specific *ad hoc* working groups' of mandate-holders (and even others) to address cross-cutting Indigenous rights concerns, streamlining visits and recommendations;[44] improving coordination between the experts and other international and regional institutions concerned with Indigenous rights, such as the UN human rights treaty bodies, the ILO and the Inter-American Commission;[45] special procedures experts moving to offer just five key recommendations, identifying them in order of priority for implementation,[46] which would help prevent states from hiding behind implementation of the softest recommendations; mandate-holders recommending the implementation of existing recommendations from special procedures experts or other mechanisms, rather than adding more;[47] and returning to the provision of centralised thematic support for the special procedures dealing with Indigenous rights issues through the OHCHR's Indigenous Peoples and Minorities Section, which would assist in rationalising the experts' attentions on Indigenous rights concerns.[48]

A lack of a coherent plan of action is evident in ill-formulated recommendations that make it difficult for Indigenous rights advocates to promote and monitor their implementation. A member of the OHCHR-Guatemala remarked, 'you have some recommendations that are so general, so ambiguous [such as] "Indigenous peoples need to have their right to health respected"' that it is unclear what to do with them.[49] Framing recommendations in broad or vague terms exposes them to restrictive interpretation by states, as the New Zealand and Guatemalan case studies demonstrate. Similarly, some recommendations simply ask states 'to consider taking a course of action', which is satisfied where consideration is purported to have been given to the action (even where action is required but not taken). Some have called for

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[42] See generally Alston, above n 19, 221.
[43] For example, whereas Stavenhagen and the HRC's UPR recommended that New Zealand ratify *ILO Convention 169*, Anaya did not. *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3 [103]; *HRC UPR New Zealand,* UN Doc A/HRC/12/8, [81](7). Note that Anaya has recommended that other states ratify *ILO Convention 169*, see, eg, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*: *The Situation of Indigenous Peoples in Namibia*, UN Doc A/HRC/24/41/Add.1 (25 June 2013) [76].
[44] On the creation of theme specific working groups of special procedures experts generally see, eg, Hoehne, above n 37, 63 (emphasis in original); Baldwin-Pask and Scannella, above n 1, 451-52.
[45] Human rights treaty bodies have occasionally encouraged New Zealand and Guatemala to implement special procedures experts' recommendations, including regarding Indigenous rights concerns. See, eg, *CERD Committee on New Zealand 2013,* UN Doc CERD/C/NZL/CO/18-20, [7]; *CRC Committee on Guatemala 2010,* UN Doc CRC/C/GTM/CO/3-4, [78].
[46] Alston, above n 19, 221.
[47] Interview 12 (Telephone Interview, 23 June 2011). See, eg, *Expert on Extrajudicial Executions Guatemala 2007,* UN Doc A/HRC/4/20/Add.2, [63].
[48] Interview 9 (Telephone Interview, 6 September 2010).
[49] Interview 12 (Telephone Interview, 23 June 2011).

recommendations that are more practical and specific.[50] At the same time, recommendations that are too specific may foreclose better alternative routes of achieving the same objective, which in-country actors may be better able to design.[51] Further, in their reports on New Zealand and Guatemala, mandate-holders have favoured recommendations that focus on the satisfaction of what quantitative researchers label 'structural indicators' and 'process indicators' rather than requiring changes in actual outcomes in Indigenous rights recognition. Structural indicators include whether an international instrument has been ratified, a domestic law enacted or a rights institution established. Process indicators include whether the state has taken some identifiable action to fulfil the relevant right, such as through running human rights training sessions.[52] The reliance on structural and process indicators means that New Zealand and Guatemala are in at least partial compliance with a number of special procedures experts' recommendations despite an absence of notable positive change in Indigenous rights outcomes in either state.[53] To help to address this, mandate-holders could recommend a broad outcome and then identify the minimum more specific structural and process actions they expect to see.

Lack of goal-oriented planning is further evident in the special procedures' approach to follow-up of implementation of their recommendations. The Special Rapporteur on Indigenous peoples conducted follow-up missions in each state but did not provide a systematic assessment of implementation of each of the mandate's earlier recommendations, choosing instead to comment on some positive developments and continuing areas of concern. A methodical appraisal setting out what, if any, specific progress has been made and the basis for assessing that the recommendation has, or has not, been implemented would make progress clearer.[54] Beyond the OHCHR-led implementation planning meetings that followed Anaya's 2010 visit in Guatemala, there has rarely been a plan of action as to how special procedures experts' reports will be used when they are released in either state.[55] Special procedures mandate-holders also need to actively challenge the state to show that they are compliant with the experts' recommendations. During the interactive dialogues at which the reports are presented, mandate-holders are primarily reactive, responding to states' questions about their work, rather than proactively questioning states about implementation of their recommendations. As these

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[50] See, eg, Alston, above n 19, 221; Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 216, 226; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 76; Interview 12 (Telephone Interview, 23 June 2011).

[51] Interview 1 (Wellington, 5 May 2011); NZHRC, 'Commissions Role to Build Discussion and Dialogue' (Media Release, 13 April 2006) <http://www.hrc.co.nz/news-and-issues/maori/commissions-role-to-build-discussion-and-dialogue/>.

[52] See, eg, Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights,* UN Doc E/2011/90 (26 April 2011) [12].

[53] They reflect what David Kennedy has described as the human rights movement's 'strong attachment…to the legal formalization of rights and the establishment of legal machinery for their implementation', which has made 'the achievement of these forms an end in itself'. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) 12.

[54] Across the two case study states, Alston's follow-up assessment reflects the closest approximation to such a methodical approach, although it did not concern Indigenous peoples' rights. *Expert on Extrajudicial Executions Guatemala 2009,* UN Doc A/HRC/11/2/Add.7, appendix.

[55] Interview 9 (Telephone Interview, 6 September 2010); Interview 12 (Telephone Interview, 23 June 2011).

dialogues are now webcast, it is a prime opportunity to expose resistant states. The interactive dialogue could also provide an opportunity for reflection and adjustment where mandate-holders revise and improve recommendations to capture changes and developments.

4 *Non-state Actors' Unenthusiastic Embrace*

(a) Greater Use in Guatemala

In addition, there has been low take-up of the special procedures' recommendations by the actors best placed to move them forward. The importance of securing the buy-in of actors well positioned to leverage the special procedures' work, particularly local actors, is a thesis supported in the existing literature and by the mandate-holders themselves.[56] In the Indigenous rights domain these actors include Indigenous peoples and Indigenous rights advocates, human rights NGOs, NHRIs,[57] epistemic communities of academics and lawyers, business actors and the media. Indigenous peoples and Indigenous rights advocates, including NHRIs, in New Zealand and Guatemala have engaged with the special procedures mechanism: providing information to special procedures experts requesting them to take action, such as through the communications procedure or calling on them to undertake country missions;[58] responding to the special procedures' information gathering questionnaires;[59] meeting with special procedures experts during their country missions;[60] and praising their reports.[61] The issue is leverage of the experts' findings and recommendations by a large base of actors.

The special procedures' findings and recommendations have had more extensive use in Guatemala than New Zealand. In Guatemala domestic IPOs have referenced the special procedures' work in their domestic legal submissions and in submissions to the international

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[56] See, eg, Golay, Mahon and Cismas, above n 19, 310; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 105, 114; Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011); Interview 9 (Telephone Interview, 6 September 2010).

[57] For comment on the important, but uneven, role NHRI's have played in relation to the special procedures' work generally see Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 117-21.

[58] Interview 1 (Wellington, 5 May 2011); Interview 3 (Wellington, 3 May 2011); Interview 4 (Wellington, 4 May 2011); Interview 6 (Panama City, 3 June 2011); Interview 13 (Telephone Interview, 27 May 2011); Interview 14 (Guatemala City, 1 June 2011); Interview 16 (Guatemala City, 26 May 2011).

[59] See, eg, Letter from CPO to James Anaya, 1 May 2011 <http://consejodepueblosdeoccidente.blogspot.com.au/2011_05_01_archive.html#!/2011/05/respuestas-del-cuestionario-de-james.html>.

[60] See, eg, *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [3]-[5]; *Anaya Special Report on Guatemala 2011,* UN Doc A/HRC/18/35/Add.3, [6].

[61] See, eg, Moana Jackson, *The United Nations on the Foreshore: A Summary of the Report of the Special Rapporteur* (2006) Converge <http://www.converge.org.nz/pma/mj050406.htm>; Interview 5 (Christchurch, 6 May 2011); Interview 6 (Panama City, 3 June 2011); 'UN Report Shouldn't be Lost in Upheaval', *Waatea603am* (online), 24 February 2011 <http://waatea.blogspot.com.au/2011/02/te-puni-kokiri-seeks-quake-role.html>; Tracey Castro Whare, trustee of Aotearoa Indigenous Rights Trust (under the banner of Incomindios), speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 27.

system on Indigenous rights concerns.[62] Notably, as identified in the previous chapter, Anaya's advice on the draft consultation instrument was used to prepare a challenge to that instrument before Guatemala's Constitutional Court.[63] The difference in leverage of the reports by Guatemala's Indigenous peoples and Māori may be attributable to the fact that in Guatemala there are less functioning domestic avenues for exposing the state's rights violations and because a far greater number of special procedures experts have reported on their situation, providing a rich resource for supporting argument. But, even in Guatemala, IPOs have not made a sustained push for implementation of the special procedures' recommendations post-visit or harnessed their reports or advice on a large scale. Nor have other actors. Guatemala's PDH, although expressing an intention to institutionalise a process for promoting implementation of the recommendations, has not done so.[64] And international NGOs, scholars, and the domestic media have devoted only modest attention to the special procedures' visits and reports regarding Guatemala's Indigenous peoples.[65]

In New Zealand there has been minimal use of the Special Rapporteur on Indigenous peoples' reports by Māori and even less use of them by other actors. The Special Rapporteur's reports have been used most on the international stage, such as by an IPO and other domestic human rights NGOs to inform their shadow reports to UN human rights treaty bodies and in interventions before the EMRIP.[66] However, as one Māori human rights lawyer identified, it is domestic leverage of the reports that is central and more local actors, particularly Māori

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[62] See, eg, El Movimiento de Mujeres Indígenas Tz'ununija', *Informe Alternativo Sobre la Situación de Mujeres Indígenas en Guatemala, Presentado al Consejo de Derechos Humanos de Naciones Unidas, Segundo Examen Periodico Universal al Estado de Guatemala* (2012) Office of High Commissioner for Human Rights <http://lib.ohchr.org/HRBodies/UPR/Documents/Session14/GT/JS14_UPR_GTM_S14_2012_JointSubmission14_S.pdf> 1; Interview 14 (Guatemala City, 1 June 2011).

[63] CPO, *Acción de Amparo en Contra del Reglamento de Consulta* (2011) <http://consejodepueblosdeoccidente.blogspot.com.au/2011/03/resolucion-del-amparo-en-contra-del.html#!/2011/03/resolucion-del-amparo-en-contra-del.html> 12-3, 19; Interview 12 (Telephone Interview, 23 June 2011).

[64] Interview 16 (Guatemala City, 26 May 2011).

[65] See, eg, Amnesty International, *Guatemala: Lives and Livelihoods at Stake in Mining Conflict* (21 June 2012) <http://www.amnesty.org/en/news/guatemala-lives-and-livelihoods-stake-mining-conflict-2012-06-21>; Rachel Sieder, 'The Judiciary and Indigenous Rights in Guatemala' (2007) 5(2) *International Journal of Constitutional Law* 211, 216 n 16; Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 81; Efe Agency, 'Relator de ONU Verificará Daños Causados por la Minería en Guatemala', *Terra* (online), 13 June 2010 <http://noticias.terra.com/noticias/relator_de_onu_verificara_danos_causados_por_la_mineria_en_guatemala/act2374051>; Efe Agency, 'El Relator de la ONU sobre el Derecho a la Salud hará una Visita Oficial a Guatemala', *Noticias de Guatemala* (online), 12 May 2010 <http://noticias.com.gt/nacionales/20100512-el-relator-de-la-onu-sobre-el-derecho-a-la-salud-hara-una-visita-oficial-a-guatemala.html>. However, note that in 2005 the expert on violence against women stated that she was 'impressed with the media interest in and coverage of my visit.' *Expert on Violence Against Women Guatemala 2005,* UN Doc E/CN.4/2005/72/Add.3, [70].

[66] See, eg, Jennifer Preston et al, above n 1, 36, 40; Peace Movement Aotearoa, *NGO Information for the 48th session of the Committee on Economic, Social and Cultural Rights* (2012) Converge <http://www.converge.org.nz/pma/CESCR48-PMA.pdf> [43], [49]; Aotearoa Indigenous Rights Trust and others, *Joint submission to the Universal Periodic Review of New Zealand* (2009) Converge <http://www.converge.org.nz/pma/towupr09.pdf> [12], [13], 3 n 6, [35], 8 n 17, [47]-[49]; Peace Movement Aotearoa, *NGO Report to the Committee on the Elimination of Racial Discrimination* (2007) Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/pma.pdf> [18]-[20], [38]; Interview 6 (Panama City, 3 June 2011).

lawyers, need to use the reports.[67] While in opposition the Māori Party referenced Stavenhagen's report in Parliament and in media releases on several occasions.[68] But this practice subsided when the Party entered into its formal relationship with the National Party in late 2008.[69] The NZHRC has referenced the Special Rapporteur's recommendations in its domestic race relations reports,[70] as well as using them 'to drive the issue' of Māori representation in local government domestically.[71] But a public appraisal of the Government's implementation of Anaya's recommendations has not materialised. And a member of the NZHRC reflected that it had found the experts' reports 'difficult to mobilise…through New Zealand.'[72] Neither Anaya nor Stavenhagen's report on New Zealand is cited in reported New Zealand case law. Only a handful of academics make minimal reference to the mandate.[73] The absence of high profile Māori rights advocates pushing for action on the reports, bar some public statements by leading Māori lawyer Moana Jackson regarding Stavenhagen's report, is striking.[74] Several factors contribute to the low up-take of the reports by domestic actors in both states.

(b) Fledgling Indigenous Rights Cultures

There is a fledgling Indigenous rights culture in the two countries. In Guatemala Indigenous peoples and their IPOs (and civil society more generally) remain fragmented and weakened by the internal conflict and the continuing overt repression of human rights defenders

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[67] Interview 6 (Panama City, 3 June 2011).

[68] See, eg, Te Ururoa Flavell, Māori Party MP, 'Local Government Law Reform Bill - Te Ururoa Flavell' (Speech to the House of Representatives, Wellington, 4 April 2006) <http://www.waiariki.maori.nz/index.php?pag=nw&id=213&p=local-government-law-reform-bill.html>; Māori Party, 'Too Slow Too Furious' (Press Release, 1 June 2006) <http://www.scoop.co.nz/stories/PA0606/S00004.htm>; Māori Party, 'Maori Party Welcomes New UN Special Rapporteur' (Press Release, 1 April 2008) <http://www.scoop.co.nz/stories/PA0804/S00002/maori-party-welcomes-new-un-special-rapporteur.htm>.

[69] The practice did not completely disappear. See, eg, Hone Harawira, Māori Party, 'Treaty Settlements and Appropriations - Hone Harawira' (Speech to the House of Representatives, Wellington, 3 August 2010) <http://www.maoriparty.org/index.php?pag=nw&id=1196&p=speech-treaty-settlements-and-appropriations-hone-harawira.html>; Interview 2 (Wellington, 5 May 2011).

[70] See, eg, NZHRC, *Tūi Tūi Tuituiā: Race Relations in 2012* (2013) 100; NZHRC, *Tūi Tūi Tuituiā: Race Relations in 2011* (2012) 34-7; NZHRC, *Tūi Tūi Tuituiā: Race Relations in 2006* 15.

[71] Interview 1 (Wellington, 5 May 2011)

[72] Interview 3 (Wellington, 3 May 2011).

[73] See, eg, Jacinta Ruru, 'Finding Support for a Changed Property Discourse for Aotearoa New Zealand in the United Nations Declaration on the Rights of Indigenous Peoples' (2011) 15 *Lewis & Clark Law Review* 951, 973-74; Roderic Pitty, 'The Unfinished Business of Indigenous Citizenship in Australia and New Zealand' in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU E Press, 2009) 25, 38-9; Fleur Adcock, 'Indigenous Peoples Rights Under International Law: The Year in Review' (2011) 9 *New Zealand Yearbook of International Law* 296, 296-99; Fleur Adcock and Claire Charters, 'Indigenous Peoples' Rights Under International Law: The Year in Review' (2010) 8 *New Zealand Yearbook of International Law* 203, 206-07. Non-academic texts have also referred to the experts' reports, see, eg Robert Kirkness, 'A Proud Democratic Tradition?', *New Zealand Lawyer* (online), 17 August 2007 <http://www.nzlawyermagazine.co.nz/Archives/Issue71/F4/tabid/422/Default.aspx>; Fleur Adcock, 'Aotearoa (New Zealand)' in Cæcilie Mikkelsen (ed), *The Indigenous World 2012* (IWGIA, 2012) 224, 229-30. As noted in Chapter I, a journal article based on Chapter V of this dissertation is forthcoming with the *New Zealand Yearbook of International Law*.

[74] See, eg, Jackson, *The United Nations on the Foreshore: A Summary of the Report of the Special Rapporteur*, above n 61. Māori academic Rawiri Taonui urged that attention be given to Anaya's report. Rawiri Taonui cited in 'UN Report Shouldn't be Lost in Upheaval', above n 61.

and social movements.[75] This hinders their ability to push for implementation of the special procedures' recommendations on a significant national scale. There are also internal divisions within the Indigenous movement, in particular between rural Indigenous communities and the 'Indigenous elites working the international system',[76] as well as those Indigenous peoples who pursue a primarily class based rather than cultural agenda.[77] Given Indigenous peoples comprise a numerical majority within Guatemala their joint mobilisation would offer a real opportunity for political influence. On a practical level, the lack of widespread access to community radio and the Internet in rural areas, IPOs' significant resourcing constraints, and linguistic and cultural differences between Indigenous peoples makes large-scale mobilisation difficult.[78] Sympathetic institutions, such as the PDH, are also restrained by resourcing issues.[79] In New Zealand the same practical issues are not present, but the human rights movement is also in its early stages. Māori claims have been high on the public agenda since the 1970s but are usually advanced on a *hapū* or *iwi* basis rather than on a pan-Māori basis. Further, Māori claims tend to centre on the commitments contained in the *Treaty* rather than human rights instruments.[80] A general domestic distrust and apathy towards human rights persists even though Māori have been active participants in the international Indigenous peoples' rights sphere for decades.[81]

(c) Mechanism Little-known

Further, the special procedures mechanism is not well known beyond UN-savvy IPOs, NGOs and select international lawyers. This has been long acknowledged by mandate-holders and scholars.[82] For the reports to be used actors must first be aware of their contents. There are

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[75] See generally Rosemary Thorp, Corinne Caumartin and George Gray-Molina, 'Inequality, Ethnicity, Political Mobilisation and Political Violence in Latin America: The Cases of Bolivia, Guatemala and Peru' (2006) 25(4) *Bulletin of Latin American Research* 453, 462-65; Stephen C Ropp and Kathryn Sikkink, 'International Norms and Domestic Politics in Chile and Guatemala' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 172, 178, 197-98; Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 65, 217-18; Rachel Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala" (2011) 40 *Economy and Society* 239, 252; Ivan Briscoe and Martin Rodriguez Pellecer, *A State Under Seige: Elites, Criminal Networks and Institutional Reform in Guatemala* (Netherlands Institute of International Relations, 2010) 30-1; Eduardo Jiménez Mayo, 'The Violence after "La Violencia": The Guatemalan Maya and the United Nations-Brokered Peace Accords of 1996' (2011) 7(3) *AlterNative* 207, 207.

[76] Interview 15 (Guatemala City and Antigua, 23 May 2011).

[77] See, eg, Thorp, Caumartin and Gray-Molina, above n 75, 464; Interview 12 (Telephone Interview, 23 June 2011). See generally Victor Montejo, *Maya Intellectual Renaissance: Identity, Representation, and Leadership* (University of Texas Press, 2005); Edward F Fischer and R McKenna Brown (eds), *Maya Cultural Activism in Guatemala* (University of Texas Press, 1996); Kay Warren, 'The Dynamic and Multifaceted Character of Pan-Mayanism in Guatemala' in Henry Minde (ed), *Indigenous Peoples: Self-Determination, Knoweldge, Identity* (Eburon Academic Publishers, 2008) 107; Evelyn Gere and Tim MacNeill, 'Radical Indigenous Subjectivity: Maya Resurgence In Guatemala' (2008) 8(2) *The International Journal of Diversity in Organisations, Communities and Nations* 97.

[78] Interview 16 (Guatemala City, 26 May 2011); Interview 17 (Quetzaltenango, 31 May 2011).

[79] Interview 16 (Guatemala City, 26 May 2011).

[80] See, eg, *Ngāi Tahu Claims Settlement Act 1998* (NZ).

[81] See, eg, Fleur Adcock, 'Maori and the Bill of Rights Act: A Case of Missed Opportunities?' (2013) forthcoming *New Zealand Journal of Public and International Law*. Regarding the absence of a human rights culture in New Zealand generally see, eg, Sian Elias, 'Limiting Rights under a Human Rights Act: A New Zealand Perspective' (Address to the Australian Bill of Rights Conference, University of Melbourne Law School, 3 October 2008) 8.

[82] See, eg, Antonio Cassese, *International Law* (Oxford University Press, 2001) 365-66; CHR, *Report of the Tenth*

pockets of high familiarity with the special procedures in the case study states; this is evident in the unusually high crowds of 10,000 to 15,000 people that showed out to hear Anaya speak in some regions of Guatemala.[83] According to a member of the OHCHR-Guatemala it was the first time 'for a long time' that such mobilisation had been seen by domestic IPOs,[84] a testament to the mobilising power of Anaya's visit. Other special procedures experts focusing on Indigenous rights concerns in Guatemala that year did not attract the same attention, supporting the impression that most Indigenous peoples are even less aware of special procedures mandates beyond the Special Rapporteur on Indigenous peoples.[85] The wider public is largely unfamiliar with the experts generally. As a result, the perception is that the reports have a relatively low readership in both states.[86] In Guatemala readership of the reports is constrained by high rates of illiteracy amongst Indigenous peoples and physical access to the reports, which are published online.[87] But sometimes UN country teams, such as the OHCHR-Guatemala, have used their own resources to print and distribute summaries of the reports or recordings of them.[88] Language barriers also prevent the reports from having a greater global readership.[89] For example, Anaya's 2011 report on Guatemala is only available in Spanish, just one of the UN's six official languages. In states such as Guatemala, where international condemnation is one of the few avenues available to capture the state's attention, international readership of the reports is particularly important.

Efforts to improve knowledge regarding the special procedures' role in realising international Indigenous rights norms as well as readership of the reports are needed. Training sessions to this end have been held during sessions of the PFII and EMRIP and guidebooks on the mechanism have been published.[90] But these efforts speak mainly to actors already loosely familiar with the international system. Steps to reach wider domestic audiences are needed. User friendly information about the mechanism needs to be shared in different formats beyond the OHCHR's website. For example, before the PFII in 2011, the Pacific Caucus recommended that the Special Rapporteur on Indigenous peoples 'develop culturally appropriate and accessible educational programs about his mandate and protocols for engagement that are easily accessible

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Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (Geneva, 23-27 June 2003), UN Doc E/CN.4/2004/4 (5 August 2003) [20], [68]; Hoehne, above n 37, 61; *Anaya Report to GA 2013,* UN Doc A/68/317, [25].

[83] Interview 12 (Telephone Interview, 23 June 2011); Brigadas Internacionales De Paz - Proyecto Guatemala, *PIM – Paquete de Información Mensual sobre Guatemala* (2010) <http://www.pbi-guatemala.org/fileadmin/user_files/projects/guatemala/files/spanish/PIM_No._81.pdf> 2.

[84] Interview 12 (Telephone Interview, 23 June 2011).

[85] For example, the expert on health also visited Guatemala in 2010 and devoted significant attention to Indigenous rights concerns but his visit did not attract the same attention from Indigenous peoples as Anaya. Interview 12 (Telephone Interview, 23 June 2011).

[86] See, eg, Interview 2 (Wellington, 5 May 2011).

[87] See generally Tauli-Corpuz and Alcantara, above n 19, 32.

[88] Interview 12 (Telephone Interview, 23 June 2011). See, eg, Jennifer Preston et al, above n 1, 37.

[89] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

[90] See, eg, Email from Nathalie Gerber McCrae to doCIP mailing list, 15 May 2013; OHCHR, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008) chapter VI.

to Indigenous peoples from developing and remote regions.'[91] To help build public 'ownership' of the special procedures' work, and counter the perception that the experts' visits and reports are for Indigenous peoples only, mandate-holders could speak at seminars geared at the general public during their country missions, as Anaya did once during his New Zealand visit.[92] Further, to capitalise on domestic media interest during the visits the experts could present substantive findings in their final media statements, which some, such as the Special Rapporteur on Indigenous peoples, already do. But while these steps may increase awareness of the mechanism and readership of the reports it ignores the more fundamental point of whether the receiving audience will like what is shared.

(d) Imaginations Not Captured

In neither case study state have the special procedures captured the imagination of those best placed to take their work forward; Indigenous peoples in particular. If the reports are to have impact it is vital that Indigenous peoples use them in their negotiations and lobbying.[93] Some prominent Indigenous peoples who are highly conversant with the UN human rights system and aware of the experts' reports elected not to read them or, having read them, did not choose to leverage them.[94] There are variant reasons for this. Some see the mechanism as toothless and leveraging the reports as futile 'perhaps there's an embarrassment at an international level but it doesn't matter to us here.'[95] Others are not moved by the report's findings and recommendations. They do not view their concerns as accurately reflected in the reports, including as identified in Chapter V because, comparative to other Indigenous peoples' situations, the expert perceived their position as less grave; or, as identified in Chapter VI, the expert was viewed as taking a pro-development stance. Indigenous women, children, the disabled and lesbian, gay, bisexual and transgender Indigenous persons may not identify with the reports, which pay little attention to their intersecting concerns. This is a fact recognised by some experts: Stavenhagen points out that each of his reports to the CHR, and later the HRC, contained a section regarding the rights of Indigenous women and children '[b]ut I, myself, was not very satisfied by the whole thing; that is, I do not think I did a satisfactory job.'[96] Or they do

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[91] Francis Lampard, 'Statement to the Permanent Forum on Indigenous Issues' (New York, 2011) <http://www.humanrights.gov.au/sites/default/files/content/social_justice/international_docs/2011/4_b_Dialogue_with_the_Special_Rapporteur_PACIFIC_FINAL.pdf> 5.

[92] Interview 4 (Wellington, 4 May 2011); 'Seminar with Professor James Anaya, UN Special Rapporteur on Indigenous Peoples' Rights 19 July 2010', *Tangatawhenua* (online), 13 July 2010 <http://news.tangatawhenua.com/archives/6159>.

[93] See, eg, Jennifer Preston et al, above n 1, 39-40, 45.

[94] Interview 10 (Guatemala City, 27 May 2011); Interview 17 (Quetzaltenango, 31 May 2011); Interview 18 (Quetzaltenango, 31 May 2011); Interview 2 (Wellington, 5 May 2011); Interview 4 (Wellington, 4 May 2011); Interview 5 (Christchurch, 6 May 2011).

[95] Interview 16 (Guatemala City, 26 May 2011).

[96] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011). Note that the expert on health devoted sizeable attention to the health concerns of Indigenous women in his 2011 report on Guatemala, see *Expert on Health Guatemala 2011,* UN Doc A/HRC/17/25/Add.2.

not view the reports as offering any penetrating insights; one Māori academic remarked of Anaya's report, 'I didn't pick it up and wave it around, "You must read this! You must read this!" I just thought it...didn't show any great insight'.[97] Still others viewed the experts as failing to understand domestic conditions when framing their recommendations, in particular the depth of state corruption and capture in Guatemala.[98] A few criticised special procedures experts' (and other UN mechanisms') reports for their moderate approach towards governments: they 'always get along with everybody',[99] and should 'be a little more frank, a little more drastic with those who are in charge of our country'.[100] Others see the complicity of the human rights system in the watered down recognition of Indigenous peoples' claims and elect not to leverage the system as a whole.[101]

On some critiques the mechanism is yet another means by which Indigenous peoples' agency and power is removed. In both states some Indigenous peoples favoured articulating their own claims to the UN directly rather than relying on the special procedures mechanism. A Mayan academic stated 'in our country I would remove the figure of interpreter. We don't need these interpreters we Maya, we need spaces to participate.'[102] Similarly, a Māori commentator reportedly remarked that Anaya's visit was an insult that suggested Māori could not deal with the issues themselves '[i]t reflects that we have the inability to articulate ourselves and deliver our own message. We can deliver our own message and we deliver it well'.[103] The low take-up of the recommendations intimates that this view has a larger Indigenous base. The Special Rapporteur on Indigenous peoples' mandate is in particular danger of being viewed by states as a one stop shop for 'the Indigenous perspective', saving them the time of engaging with the multiple and dispersed authorities and views of the Indigenous peoples within their borders. There has been a tendency to rely on the international community to play the central role in promoting Indigenous rights consciousness and compliance in Guatemala.[104] An overreliance on professional, international, human rights expertise does nothing to develop local expertise or

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[97] Interview 4 (Wellington, 4 May 2011).
[98] Interview 17 (Quetzaltenango, 31 May 2011); Interview 18 (Quetzaltenango, 31 May 2011); Interview 15 (Guatemala City and Antigua, 23 May 2011); Interview 14 (Guatemala City, 1 June 2011).
[99] Interview 14 (Guatemala City, 1 June 2011).
[100] Interview 17 (Quetzaltenango, 31 May 2011). This stance also received support in Interview 18 (Quetzaltenango, 31 May 2011); Interview 2 (Wellington, 5 May 2011).
[101] For example, Jeff Corntassel has argued that the channeling of Indigenous peoples away from grassroots mobilisation to gaining an audience before the Special Rapporteur on Indigenous peoples, and other international mechanisms, marginalises Indigenous peoples and their concerns. Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137, 140.
[102] Interview 18 (Quetzaltenango, 31 May 2011).
[103] David Rankin, of the *iwi* Ngāpuhi, quoted in 'UN Expert Reports on NZ Race Relations', *New Zealand Herald* (online), 21 July 2010 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10660311>.
[104] For example, Sieder observes that '[f]ollowing the signing of the final peace settlement, international development agencies and multilateral banks and donors took a leading role in supporting and implementing the agreements.' Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 75, 252.

local dialogue on human rights.[105] Thus, especial care needs to be taken there to ensure that IPOs and domestic human rights NGOs are buttressed rather than supplanted by the profusion of special procedures experts and other international, transnational and regional actors operating in the country.

On other critiques, not all mandate-holders are equally adept at building and sustaining the necessary relationships with Indigenous peoples and domestic rights advocates to see the reports embraced locally. The centrality of building relationships with domestic stakeholders is identified in the literature.[106] The importance of Indigenous peoples feeling 'that they were listened to' was highlighted by several interviewees as a central dimension of this relationship-building exercise.[107] It presupposes first that Indigenous peoples are met with. In New Zealand Anaya spent a lot of time with government actors, understood as a tactic by the Māori Party to get the buy-in of those actors to his visit, which impeded his exposure to an expanded Māori and general public base.[108] This was a source of tension with other Māori rights advocates and attracted criticism from Māori on the international stage. For example, before the EMRIP in 2011, a Māori delegate stated that the Special Rapporteur on Indigenous peoples needed to spend more time talking with Indigenous peoples and less time with governments.[109] The need for mandate-holders to develop a relationship of *ongoing* exchange with domestic actors was also emphasised by interviewees.[110] For the most part the conversation loop with the mandate-holders ends once the expert leaves the country. The relationship-building should begin before the expert arrives in the country and continue after, including enhancing Indigenous peoples' role in the production of the reports.[111] Indigenous peoples need to work at maintaining the relationships too.[112]

Mass publics also remain unmoved by the special procedures' formal and austere reports. The experts' reports on New Zealand and Guatemala follow closely the formal, 'objective', dispassionate, approach of Geertz's 'Complete Investigator' discussed in Chapter IV. Stavenhagen himself has reflected that he 'never felt comfortable' with the formal language demanded of the reports.[113] For the mechanism to have impact enlarged social buy-in to the

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[105] Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 11. Relatedly, Simmons argues that 'too often' transnational actors, while crucial to human rights compliance, have been 'presented as the "white knights" that make demands for those who are not often credited with the ability to speak, strategize, litigate and mobilize for themselves and their society.' Simmons, above n 4, 356.

[106] See, eg, Golay, Mahon and Cismas, above n 19, 310-11; Tauli-Corpuz and Alcantara, above n 19, 36.

[107] Interview 3 (Wellington, 3 May 2011); Interview 18 (Quetzaltenango, 31 May 2011); Interview 17 (Quetzaltenango, 31 May 2011); Interview 10 (Guatemala City, 27 May 2011).

[108] Interview 3 (Wellington, 3 May 2011).

[109] Anahera Scott cited in Fleur Adcock 'Meeting Notes: Expert Mechanism on the Rights of Indigenous Peoples: Fourth Session' (July 2011). A similar comment was made by the interviewee in Interview 6 (Panama City, 3 June 2011).

[110] Interview 3 (Wellington, 3 May 2011); Interview 12 (Telephone Interview, 23 June 2011); Interview 4 (Wellington, 4 May 2011).

[111] Interview 3 (Wellington, 3 May 2011); Interview 4 (Wellington, 4 May 2011).

[112] Interview 4 (Wellington, 4 May 2011). See generally Tauli-Corpuz and Alcantara, above n 19, 27-9.

[113] Interview with Rodolfo Stavenhagen (Skype Interview, 19 April 2011).

work of the mechanism is necessary;[114] as one Māori academic reflected, 'we can't do it alone'.[115] To resonate with a wider audience the style of the reports should shift to combine the current formal narrative with stories or testimonies from Indigenous peoples, even images. This would give a more direct voice to the Indigenous peoples the subject of the reports and lift the reports' emotional impact. As identified in Chapter IV, Anaya is one expert that has dabbled in including direct quotes from Indigenous peoples in some of his country reports; although not on either New Zealand or Guatemala. Sharing direct quotes and short testimonies in the reports is also one way of revealing divergent Indigenous perspectives on issues, without the expert having to take a side. Some innovative moves in this direction have already been taken. A half hour documentary in Spanish with English subtitles concerning Anaya's 2011 mission to Argentina was released by IWGIA and Ore Media a year after the visit. It included statements by Indigenous peoples of their rights concerns from across the state and showed extracts of the media presentation Anaya gave at the end of the mission.[116] This is an excellent and emotionally affecting way to literally give voice to Indigenous peoples and visually represent their concerns, such as showing footage of the environmental contamination perceived as caused by extractive projects. In 2013 Anaya described the video as 'a good practice that he considers could be developed further to raise awareness of the work of mandate holders.'[117] But thought needs to be given to the intended audience of such works, the timing of their release and how they are disseminated to reach their audience.

The above analysis of the key actors relevant to the work of the special procedures in New Zealand and Guatemala indicates that the mechanism's slight influence in both states is not attributable simply to an absence of political will or institutional constraints, although these are important. The approach of sympathetic states, mandate-holders themselves and those best positioned to take the recommendations forward – particularly Indigenous peoples – are also crucial. I turn now to examine the principles that underlie the rhetorical tussle that goes on between these key actors.

C *Principles*

The actors leverage different contesting principles to regulate the Indigenous rights regulatory domain. The core principles, on both sides of the contest, are all articulated within a liberal frame, reflecting liberalism's dominance of political discourse and international law.[118]

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[114] For example, Simmons argues that '[o]ne of the most important resources for a movement's success has been found to be support from actors who are not direct beneficiaries of the movement's goals.' Simmons, above n 4, 137.
[115] Interview 4 (Wellington, 4 May 2011).
[116] IWGIA, *Visit of the United Nations Special Rapporteur on the Rights of Indigenous Peoples to Argentina* (2012) <http://www.iwgia.org/publications/search-pubs?publication_id=608>.
[117] *Anaya Report to GA 2013,* UN Doc A/68/317, [18].
[118] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 5.

Although the actors and their positions are various I discuss the underlying principles with reference to two core sets of actors: states (and their allies) and special procedures mandate-holders (and their allies). The special procedures' primary arsenal is the growing body of international Indigenous peoples' rights norms, which have evolved out of a package of liberal human rights law.[119] Sometimes the total package of rights is leveraged as a general claim of rights subjecthood, while at other times particular rights are advocated. The liberal framing of the principles pushed by the mandate-holders both allows them to be heard but also constrains the types of claims that can be made: Indigenous peoples' claims largely become translated as rights to enjoy and express their culture rather than nationhood.[120] New Zealand and Guatemala push back against the mandate-holders using the principles of unitary state sovereignty, with its corollaries of territorial integrity and non-interference in domestic affairs; 'equality before the law'; and a commitment to national development through economic growth. These are all central tenets of liberal political thought.[121] What is most striking in this contest in Guatemala and New Zealand is the almost complete absence of mandate-holders' explicit advocacy of Indigenous peoples' right to self-determination.

1 *Indigenous Rights Holders versus State Sovereignty*

(a) Non-radical Contestations of Sovereignty

The core principle leveraged by special procedures mandate-holders is a conceptualisation of Indigenous peoples as rights holders. It is the prescription that Indigenous peoples are bearers of Indigenous peoples' rights (which I understand as a subset of human rights) that are enforceable against the state.[122] It subsumes and takes for granted the broader principle of indigeneity itself, which is the distinctive identity claim made by Indigenous peoples by virtue of their status as first peoples. As identified in Chapter I, as a concept 'indigeneity' suffers from several shortcomings, including its presumption of a homogenous Indigenous entity. But it has nevertheless been embraced by many collectives in order to pursue

[119] See generally Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2 ed, 2003); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002).
[120] See generally Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010) 1-4, 7. Regarding the constraining power of international legal discourse see Koskenniemi, above n 118, 12.
[121] See generally Donnelly, above n 119; Koskenniemi, above n 118.
[122] Indigenous peoples' rights are commonly conceptualised as an Indigenous specific formulation of human rights, see, eg, S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2 ed, 2004) 7. But this is debated. For example, Benedict Kingsbury examines the different conceptual approaches that underlie Indigenous peoples' rights, see Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press, 2001) 69. See also Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003) 136-41.

their struggles for justice.[123] Pushing Indigenous peoples as rights holders is a logical move given that the special procedures are a human rights mechanism. Human rights are the basis for mandate-holders' authority to investigate and report on the situation of Indigenous peoples, with international human rights instruments such as the *UNDRIP* providing the normative framework for the mandates.

Unitary state sovereignty is the core principle pushed by New Zealand and Guatemala in response. As identified in Chapter II, it is the prescription that the state is indivisible and 'should be supreme over any other source of power on matters affecting its citizens or territory.'[124] Of course, in practice, no state retains full sovereign power. It is only in rhetoric that sovereignty is absolute.[125] The principle manifests itself in several ways, including as a resistance to any actions perceived to impact the territorial integrity or political structure of the state and more generally as a resistance to outside interference in the domestic affairs of the state. The latter stance is more evident in New Zealand than Guatemala. It is apparent in the Labour-led Government's assertion that Stavenhagen's recommendations were 'an attempt to tell us how to manage our political system' when New Zealand preferred 'to debate and find solutions to these issues ourselves.'[126] It was also present in the National-led Government's response to Anaya's visit, when the Prime Minister emphasised that he placed more weight on New Zealanders' views on Indigenous rights than the UN's.[127] It is a sentiment that was shared by some unexpected non-state actors in New Zealand too, including New Zealand's then Race Relations Commissioner who, following release of Stavenhagen's report, reportedly commented that 'while some iwi may seek out international opinion the debate needs to be held at home.'[128] Yet, Chapter V demonstrates that the New Zealand Government has not outright rejected international oversight – it issued the standing invitation to thematic special procedures, it formally cooperated with Stavenhagen and Anaya's visits, and outside of the public eye it provided detailed almost paragraph by paragraph responses to Stavenhagen and Anaya's reports. The Government also publically adopted a more welcoming stance towards Anaya's visit and oversight than its stance towards Stavenhagen's, an approach largely attributable to the Māori Party's position in Government.

Part of the reason why the New Zealand Government so vividly rejects international interference in its domestic affairs regarding Māori is because it pushes the principle that it is a

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[123] See, eg, Fiona McCormack, 'Indigeneity as Process: Māori Claims and Neoliberalism' (2012) 18(4) *Social Identities: Journal for the Study of Race, Nation and Culture* 417, 430.

[124] Braithwaite and Drahos, above n 17, 25. See generally Anaya, *Indigenous Peoples in International Law*, above n 122, 21.

[125] See, eg, Keal, above n 122, 181; Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013) 9.

[126] Michael Cullen, Deputy Prime Minister, 'Response to UN Special Rapporteur Report' (Press Release, 4 April 2006) <http://www.beehive.govt.nz/release/response-un-special-rapporteur-report>.

[127] Prime Minister John Key cited in Adam Bennett, 'UN Visitor Checks NZ Race Relations', *New Zealand Herald* (online), 20 July 2010 <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10659949>.

[128] Joris de Bres, Race Relations Commissioner, cited in 'No Consensus Over UN Report', *Television New Zealand* (online), 5 April 2006 <http://tvnz.co.nz/content/695498/425825.html>. See also NZHRC, 'Commissions Role to Build Discussion and Dialogue', above n 51.

human rights and Indigenous rights leader. As a result it struggles with information – such as that set out in the mandate-holders' reports – that conflicts with or may tarnish that self-image. This was evident in the Government's response to both mandate-holders' visits. For example, when discussing Anaya's visit the Prime Minister stated 'New Zealand actually has a very well defined and established set of rules when it comes to dealing with indigenous rights and I think we're a leader in that field.'[129] In the Government's formal response to Stavenhagen's report it projected the state as an archetype of harmonious ethnic relationships, asserting that 'Māori, like all New Zealanders, live in a contemporary democracy that is, by any standards, participatory and inclusive…discrimination is an anathema to New Zealanders.'[130] The view that New Zealand is a world leader in human rights and Indigenous rights is widely embraced, domestically and internationally.[131] Comparative to other states, New Zealand's positive human rights record may be generally well deserved. But it contains many blind spots in its recognition of Indigenous peoples' (and others') claims. This self-image renders it that much harder for the state to hear criticisms of its behaviour. The myth that New Zealand is a great egalitarian land of opportunity for all also serves to place responsibility for those who are struggling back on the individuals themselves, stripping claims of their collective dimension and concealing systemic issues. Further, the social pervasiveness of this self-image makes it difficult to rally support for Indigenous claims from the larger public in New Zealand.

In contrast, the Guatemalan Government has been less precious about international comment on its Indigenous rights situation. As Chapter VI showed, it was one of the earlier states to issue a standing invitation to the thematic special procedures, formally cooperated with the experts' numerous country visits touching on Indigenous rights, and even actively sought out mandate-holders' assistance, in the form of Anaya's advice on the draft consultation instrument. Given Guatemala's track record in Indigenous rights protection this may come as a surprise – in Guatemala there are ostensibly more rights violations to hide from view. But it reflects the fact that Guatemala, after decades of international intervention, has become accustomed to international oversight, including by the special procedures. It likely sees the potential reputational (being viewed as an open democracy), and other benefits (like donor funding and trade agreements), to be gained from opening its doors to review and comment. But an outward openness toward international oversight does not translate into action on the findings made by those international actors, as Chapter VI showed. It is here that the state's resistance to interference in its domestic affairs manifests. In the words of one Mayan academic,

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[129] Prime Minister John Key quoted in Bennett, above n 127.

[130] Don Mackay, New Zealand Permanent Representative, 'Human Rights Council: Presentation of Report by Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples' (Statement to the HRC, Geneva, 19 September 2006) <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-19-September-2006.php>.

[131] See, eg, Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity - Te Taumata Tuarua, Volume 1* (2011) 98; Carlos Vázquez, the Country Rapporteur for New Zealand, closing remarks in CERD Committee, 'Committee on Elimination of Racial Discrimination Considers Report of New Zealand' (Media Release, UN Doc CRD13/010E, 22 February 2013).

once the international observers have left '[v]ery often we say, "what does the government care, what does the state care, we're autonomous. We couldn't care less what outsiders say."'[132]

Claims that threaten the territorial integrity or political structure of the state meet more strident resistance in both countries. Both states' resistance to such claims is evident in the governments' selectivity towards implementation of the special procedures' recommendations that concern land and self-government; in the very act of picking and choosing those elements of the recommendations they wish to implement the governments are asserting their sovereign power. The two governments favour implementation of aspects of recommendations that pose less of a challenge to existing state structures (such as aspects of the soft right to an education tailored to Indigenous peoples' cultural needs), while those recommendations that may require renegotiation of the states' sovereignty (such as aspects of Indigenous peoples' hard rights to self-government and to lands and natural resources) are resisted and deflected. In recognising a carefully delimited set of bicultural (New Zealand) and multicultural (Guatemala) rights the states exert control over differences 'that challenge the boundaries of the sovereign political subject'.[133] And mute Indigenous peoples' demands for more expansive recognition of their right to self-determination, such as autonomous Indigenous governments.[134] Biculturalism and multiculturalism have facilitated some favourable policies and legislation for Indigenous peoples. However, the policies are at root concerned with assimilation rather than the recognition of difference as they 'posit one dominant culture under which different subcultures must ultimately submit.'[135] Mandate-holders should expressly reject these states' tendency to respond selectively to Indigenous peoples' claims and on the assimilationist agenda of their cosmetic bicultural and multicultural policies.

In leveraging the principle of Indigenous peoples as rights holders special procedures experts do not radically contest the sovereignty of states. Special procedures experts use Indigenous peoples' rights bearing subjectivity to advocate for transparency in states' actions towards Indigenous peoples, asserting that being an international human rights monitoring mechanism it should be able to observe, examine and comment on the states' conformity to international Indigenous rights norms.[136] It is evident in the fact of the mandate-holders' country

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[132] Interview 18 (Quetzaltenango, 31 May 2011).

[133] In the context of discussion on how 'both multiculturalism and secularism are deployed as techniques to govern difference' Brenna Bhandar states that '[d]ifferences that challenge the boundaries of the sovereign political subject are perceived as a threat to be contained and managed'. Brenna Bhandar, 'The Ties that Bind: Multiculturalism and Secularism Reconsidered' (2009) 36(3) *Journal of Law and Society* 301, 304 quoted in Jonathan Goldberg-Hiller et al, 'Roundtable on Eve Darian-Smith, Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law' (2011) 19(3) *Feminist Legal Studies* 265, 281.

[134] For criticism of state techniques of accommodation of Indigenous peoples through policies of multiculturalism, see, eg, James Tully, 'The Struggles of Indigenous Peoples For and Of Freedom' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 36; Charles Hale, 'Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala' (2002) 34 *Journal of Latin American Studies* 485.

[135] Eve Darian-Smith in Goldberg-Hiller et al, above n 133, 285.

[136] As set out in Chapter II, Braithwaite and Drahos identify transparency as a recurrent principle in the regulatory domains they examine. Braithwaite and Drahos, above n 17, 25. In fact, they identify that '[o]f all the principles we have surveyed, transparency has been the one which has most consistently strengthened in importance': at 507.

visits and communications. In their dialogues and reports the special procedures experts ask states to make accommodations for Indigenous peoples in the state. But in the act of that request the experts reaffirm the legitimacy of those states' sovereignty. Mandate-holders are also constrained by the human rights instruments that frame their mandates, which, at the same time as recognising Indigenous peoples as rights-holders, also affirm state sovereignty, such as the *UNDRIP*. In centring the state as the actor both primarily responsible for human rights violations and the enforcer of those rights, human rights law reinforces the power of the state.[137]

(b) Avoiding Self-determination

The special procedures, including the former and current Special Rapporteurs on Indigenous peoples, have shied away from explicitly pushing Indigenous peoples' right to self-determination as a principle in their work on New Zealand and Guatemala. Indigenous peoples' right to self-determination in its stronger forms clashes with state assertions of unilateral and undivided sovereignty because it recognises the status of Indigenous peoples as 'peoples', with claims to prior and continuing statehood, self-government and other expressions of autonomy over their territories. In its weaker forms the right to self-determination is less threatening. It finds expression as Indigenous peoples' rights both to participate in government and to be consulted on matters affecting them.[138]

Self-determination claims were raised with the experts in both states. In New Zealand the language of self-determination, and its *te reo* Māori equivalents, was used.[139] For example, representatives of the *iwi* Ngāi Tuhoe reportedly discussed Tuhoe aspirations for *mana motuhake* or self-determination over their territories with Anaya during his visit.[140] In Guatemala it is unclear whether the precise language of self-determination was used during discussions with the experts. But expressions of its more autonomous dimensions were evident, for example, during Anaya's visit in assertions that Indigenous peoples could decide, through

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[137] See, eg, Makau wa Mutua, 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63, 67.

[138] Regarding the spectrum of Indigenous peoples' claims to 'sovereignty', see, eg, Roger Maaka and Augie Fleras, 'Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 89, 93-4. Note that Taiaiake Alfred and other Indigenous scholars critique the concept of 'sovereignty' as a political objective for Indigenous peoples, see, eg, Taiaiake Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse' (2001) 3(1) *Indigenous Affairs* 22, 27-8. See also Steven Wheatley, 'Conceptualizing the Authority of the Sovereign State over Indigenous Peoples' (2013) *Leiden Journal of International Law* 1. For comment on the idea of 'strong' and 'weak' forms of self-determination see Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, above n 120, 3; Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) *The European Journal of International Law* 141, 142 n 3.

[139] See, eg, Letter from Peace Movement Aotearoa to Rodolfo Stavenhagen, 23 November 2005 <http://www.converge.org.nz/pma/sr-pma05.pdf> 2, 10-1; Ruth Berry, 'Maori Denied Rights, UN Man Told' *New Zealand Herald* 21 November 2005 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10356212>; New Zealand Press Association, 'Tuhoe Assured UN Visitor on Apartheid – Kruger', *New Zealand Herald* (online), 30 July 2010 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10662352>.

[140] Tamati Kruger, Treaty of Waitangi settlement negotiator for the *iwi* Ngāi Tuhoe, cited in Berry, above n 139.

their customary decision-making practices, what extractive projects occurred on their traditional lands. And, at least since the time of the *Indigenous Agreement*, there have been demands for recognition of Indigenous peoples' rights to manage their internal affairs according to their own customs.[141]

Yet, the experts have rarely explicitly referenced the right to self-determination and its more autonomous forms in their reports on either country. Stavenhagen's 2006 report on New Zealand is the main exception. In that report Stavenhagen pushed the right to self-determination in his comments on *iwi* and *hapū* governance structures, self-governing social programmes, constitutional reform and the *UNDRIP*.[142] His strongest statement on the right was contained in his recommendation for constitutional reform, which was examined in Chapter V.[143] But he was silent on self-determination and other of its commonly associated stronger dimensions – autonomy and self-government – in his comments on his missions to Guatemala. Anaya has been more restrained in his references to the right in relation to both states. In respect of New Zealand, in his press statement and preliminary note he commented that '[t]he principles of the Treaty provide a foundation for Maori self-determination based on a real partnership between Maori and the New Zealand State'.[144] He also referred to the right in articulating the purpose of the *UNDRIP*.[145] However, the language of self-determination disappeared in his final report on the mission, beyond a scene-setting remark regarding the meaning of *tino rangatiratanga*.[146] It is telling that Stavenhagen's report on New Zealand found higher support amongst Māori than Anaya's: a report that does not expressly tackle Indigenous self-determination will not capture Indigenous imaginations in the same way. Similarly, in his report on Guatemala Anaya simply identified that the duty of states to consult with Indigenous peoples on decisions affecting them was a manifestation of Indigenous peoples' right to self-determination.[147] Other special procedures mandate-holders have demonstrated greater reticence to advocate the principle, avoiding referencing the term altogether in their reports on Guatemala. In both states the special procedures experts overwhelmingly represent self-determination in their reports by its weaker proxies, such as Indigenous participation in government and consultation rights.

Avoiding using the language of self-determination in the country reports may be a deliberate tactic to avoid provoking the ire of the governments and keep them at the meeting table. Recognition of the right to self-determination may be viewed as too ambitious or

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[141] See, eg, *Agreement on Identity and Rights of Indigenous Peoples 1995*, Part IV, sect E, para 3.
[142] *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [18], [42], [80], [84], [94], [102].
[143] As discussed in Chapter V, Stavenhagen called for constitutional reform that regulates the Government-Maori relationship 'on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination.' Ibid [84].
[144] James Anaya, 'New Zealand: More to be done to Improve Indigenous People's Rights, Says UN Expert' (Press Statement, 23 July 2010) <http://unsr.jamesanaya.org/statements/new-zealand-more-to-be-done-to-improve-indigenous-peoples-rights-says-un-expert>; *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9, [3].
[145] James Anaya, 'New Zealand: More to be Done to Improve Indigenous People's Rights, Says UN Expert', above n 144; *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9, [4].
[146] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [8].
[147] *Anaya Special Report on Guatemala 2011,* UN Doc A/HRC/18/35/Add.3, [38].

unrealistic.[148] Or it could be that the experts view strong autonomy claims, for example, as capable of expression using alternative concepts, such as the right to culture.[149] Both Stavenhagen and Anaya expressly emphasise the centrality of self-determination to Indigenous peoples' claims in their annual thematic reports and in speeches at workshops and seminars.[150] Their comfort with the term in this space likely stems from the fact that often specific states are not singled out; in the abstract the principle is less confronting. The Special Rapporteurs use the language of self-determination more readily in some other country reports too, but regarding countries where there is greater domestic ease with the term, such as the United States.[151] However, the pragmatism argument is more difficult to sustain in respect of Guatemala, where the Government was an outward advocate of strongly worded provisions on self-determination in the *UNDRIP*,[152] even if it inwardly resists its realisation. In contrast, New Zealand publically voiced concerns regarding the inclusion of an affirmation of self-determination in the *UNDRIP*.[153]

The tendency of the special procedures experts to avoid the language of self-determination in their reports on New Zealand and Guatemala is problematic. While the *UNDRIP* limits the recognition of Indigenous self-determination to its internal dimensions (except where the legal justifications for secession are made out) it does not preclude models at the stronger end of the spectrum that fall short of secession, such as models that provide for the exercise of significant internal autonomy over a defined territory within the state.[154] In both New Zealand and Guatemala Indigenous peoples' understandings of self-determination represent the full spectrum of its conceptualisations, although calls for external models of self-determination are not strong in either country.[155] Given the numerical majority of Indigenous

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[148] As set out in Chapter IV, the Manual of Operations calls for the experts' recommendations to be 'attainable' and 'realistic', see *Manual of Operations*, above n 23, [98]. Engle identifies that it is '[c]laims centered on the protection of culture' that 'have tended to garner success before international and regional legal bodies'. Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, above n 120, 4.

[149] Engle points out that 'relatively strong redistributive claims' are capable of being made by Indigenous peoples 'under the right to culture', in the context of an overall argument critiquing 'the cultural rights rubric for often displacing or deferring issues of structural distributional inequalities'. Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, above n 120, 3.

[150] See, eg, *Anaya Report to GA 2013,* UN Doc A/68/317, [73]-[77]; *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, 1, [29]-[33]; *Anaya Annual Report 2011,* UN Doc A/HRC/18/35, [80], [82]; *Anaya Annual Report 2009,* UN Doc A/HRC/12/34, [41]; *Anaya Annual Report 2008,* UN Doc A/HRC/9/9 [74]; *Stavenhagen Annual Report 2003,* UN Doc E/CN.4/2003/90, [12], [73]; *Stavenhagen Annual Report 2002,* UN Doc E/CN.4/2002/97, [38], [86]-[91]; James Anaya, 'International Development Cooperation Must Advance Indigenous Self-Determination' (Media Release, 30 March 2011) <http://unsr.jamesanaya.org/notes/international-development-cooperation-must-advance-indigenous-self-determination>.

[151] See, eg, *Anaya Report on US 2012,* UN Doc A/HRC/21/47/Add.1, [27], [30], [52], [59], [63], [71], [79], [82]; *Anaya Report on Sápmi Region 2011,* UN Doc A/HRC/18/35/Add.2 (6 June 2011) [12], [23], [32]-[45], [72], [74]-[78]; *Stavenhagen Report on Bolivia 2009,* UN Doc A/HRC/11/11, [16], [83].

[152] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 458 n 88.

[153] See, eg, New Zealand Government representative, Rosemary Banks, quoted in Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights', above n 138, 146 n 14.

[154] *UNDRIP* arts 3, 46(1); GA, *107th Plenary Meeting: Official Records* UN Doc A/61/PV.107 (13 September 2007).

[155] Regarding New Zealand see, eg, Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada' (2010) 62(1) *Political Science* 84, 98-9; Maaka and Fleras, above n 138, 99-100; Charles M Hawksley and Richard Howson, 'Tino Rangatiratanga and Mana Motuhake: Nation State and Self Determination in Aotearoa New Zealand' (2011) 7(3) *AlterNative: A Journal of Indigenous Peoples* 246, 250-51,

peoples in Guatemala existing democratic institutions provide an avenue for strong Indigenous political expression. But this ignores concerns over the Hispanic structure of those political institutions and the differences between and within different Indigenous and Mayan collectives that make pan-Indigenous or even pan-Maya action difficult. And yet the special procedures have shied away from advocating stronger models. Where special procedures experts exclude stronger forms of Indigenous self-determination from their dialogues with states and their country reports they are pushing those dimensions to the fringes, weakening and radicalising them. While their compromise interpretations may improve the position of Indigenous peoples in the short-term in the longer term it may make it more difficult for Indigenous peoples to successfully bring more expansive claims against the state.[156] In this way we see how the work of the special procedures both supports and constrains Indigenous peoples' claims. Part of the experts' hesitancy in advocating stronger forms of self-determination may be attributable to the diversity of opinions amongst Indigenous peoples regarding what self-determination means for them in practice. But this only underscores how problematic it is for mandate-holders to give voice to such a small selection of understandings of the concept. For frank dialogue on Indigenous peoples' claims to occur, self-determination needs to return to the forefront of discussion as an explicit counter to the Government's principle of unitary sovereignty.[157] Pushback is likely from some quarters.[158] But the special procedures' low influence to date indicates that they have little to lose by invoking the strong language of self-determination. As the case studies reveal, states will not necessarily even implement recommendations reflecting its weaker dimensions.

2 *The Equality Contest: Rights versus Privileges*

A contest of equalities plays out vividly in the principle of Indigenous privilege, the second core principle leveraged by the states. It is the prescription that where Indigenous

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253-55. Regarding Guatemala, see, eg, Demetrio Cojtí Cuxil, 'The Politics of Mayan Revindication' in Edward F Fischer and R McKenna Brown (eds), *Maya Cultural Activism in Guatemala* (University of Texas Press, 2001) 19, 27-43; Montejo, above n 77, 174; Gere and MacNeill, above n 77, 99-100, 102; Santiago Bastos, 'La (Ausencia de) Demanda Autonómica en Guatemala' in Miguel González, Araceli Burguete Cal y Mayor and Pablo Ortiz-T (eds), *La Autonomía a Debate Autogobierno Indígena y Estado Plurinacional en América Latina* (FLACSO, Sede Ecuador et al, 2010) 317.

[156] Merry, describing the work of Myra Marx Ferree, argues 'that resonant discourses are less radical than nonresonant ones, and that some movement leaders may choose the nonresonant approach to induce greater social change in the long run'. Myra Marx Ferree, 'Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany' (2003) 109(2) *American Journal of Sociology* 304, 305 cited in Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38, 41.

[157] Scholars from Koskenniemi to Ivison have underscored the need for genuine dialogue (or 'multilogue') to resolve normative problems. Koskenniemi, above n 118, 544-45; Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press, 2002) 163.

[158] For example, from those who see claims based on a human right to culture as capable of generating the same outcomes that claims based on self-determination can and those who see self-determination as having 'already failed as a strategy.' For comment see, eg, Kirsty Gover, 'Review Essay: The Elusive Promise of Indigenous Development: Rights, Culture, Strategy by Karen Engle' (2011) 12 *Melbourne Journal of International Law* 1, 5.

peoples enjoy differential recognition based on their identity they are receiving an inappropriate privilege rather than enjoying a human right. The concept of equality is leveraged by states in its formal sense to argue against 'special' recognition afforded Indigenous peoples and it is advanced by Indigenous peoples to argue for equal recognition of their difference. In New Zealand the former leader of both the National and ACT parties, Don Brash, has been a particular advocate of the principle of Indigenous privilege.[159] The support he secured as leader of the Opposition with his 'one law for all New Zealanders' stance in the mid-2000s prompted the Government of the time to review all policies and laws that made specific provision for Māori.[160] This rhetoric was at fever pitch at the time of Stavenhagen's visit. It is evident in an internal draft of the Government's formal response to Stavenhagen's report before the HRC:

> The arrangements in place for Māori take into account historical inequalities, and, where appropriate, encourage self-management. Consistent with our obligations under CERD, they are, of course, discretionary. And, the CERD also makes it clear that special measures should be temporary and should not lead to the maintenance of separate rights for different racial groups. The Special Rapporteur seems to be suggesting, however, that special measures should exist in perpetuity. Any notion of perpetual dependency is not one that is shared by Māori, or by the New Zealand government.[161]

The Government conveyed similar comments to Stavenhagen when responding privately to his draft report.[162] Its public response to the report was more toned down, although the Government advised that '[i]n our view, a delicate balance can and must be struck between measures that may be put in place specifically for indigenous peoples and the imperative to avoid creating different classes of citizenship.'[163] The language of differential citizenship recurs in Government statements on Indigenous peoples' rights.[164] But the principle of Indigenous privilege has not been expressly advocated by the Government in response to Anaya's report; although the notion resurfaced with a vengeance in the rhetoric of the ACT Party, one of the National-led Government's coalition partners, following Anaya's visit.[165] Both New Zealand's

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[159] See, eg, Don Brash, leader of the National Party, 'Nationhood' (Address to the Orewa Rotary Club, Orewa, 27 January 2004) <http://www.scoop.co.nz/stories/PA0401/S00220.htm>. See generally Pitty, above n 73, 36-9; Claire Charters, 'Do Maori Rights Discriminate Against Non-Maori?' (2009) 40 *Victoria University of Wellington Law Review* 649.

[160] Trevor Mallard, Coordinating Minister Race Relations, 'Terms of Reference: Review of Targeted Programmes' (Media Release, 25 March 2004) <http://www.beehive.govt.nz/node/19258>.

[161] Internal briefing to New Zealand's Minister of Foreign Affairs and Trade, 'New Zealand's Response to the Report of the UN Special Rapporteur for Indigenous Issues', 24 February 2006, obtained under *OIA* request from MFAT, 5.

[162] Internal briefing to New Zealand's Minister of Foreign Affairs and Trade, 'Special Rapporteur's Draft Report on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples in New Zealand', 31 January 2006, obtained under *OIA* request from MFAT, 5.

[163] Mackay, above n 130.

[164] See, eg, New Zealand Government representative, Rosemary Banks, cited in GA, *107th Plenary Meeting: Official Records*, UN Doc A/61/PV.107 (13 September 2007) 14.

[165] See, eg, ACT Party, *Fed Up with Pandering to Maori Radicals?* (Advertisement, 11 July 2011) <http://www.act.org.nz/files/MaoriRadicals.pdf>.

Court of Appeal and the Waitangi Tribunal have identified the lingering public presence of the principle in the country.[166]

The Indigenous privileges rhetoric is apparent in Guatemala too. According to a PDH representative, amongst 'the conservatives' the prevailing sentiment is that Indigenous peoples are being afforded privileges (such as through proposed laws that seek to protect Indigenous peoples' sacred sites) that will 'divide the country'.[167] A similar rhetoric was behind the failure to get the constitutional reforms giving effect to the *Indigenous Agreement* up in 1999.[168] But the principle has not played out in dialogue surrounding the special procedures experts' reports in the same way.

In New Zealand the special procedures have countered this principle by emphasising the rights basis for measures targeted at Indigenous peoples. Stavenhagen criticised the view that Māori have special privileges in several places in his 2005 report. For example, he commented:

> [S]ome New Zealanders appear to approve of the view of "One law for all" (that is, no more special laws on Māori rights, understood as meaning Government should stop the alleged "pampering" of Maori). The political media have taken up these arguments and have reflected the view of those who would like to see an end to the alleged "privileges" accorded by the Government to Maori. The Special Rapporteur was asked several times whether he agreed that Maori had received special privileges. He answered that he had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Maori people, evidence that he is concerned with in the present report.[169]

He identified the role of some politicians in pushing the idea too.[170] The privileges rhetoric was not a focus of Anaya's report, although he noted complaints regarding 'the lack of political will to implement what are perceived as "special measures" for Maori people.'[171] But in the press statement he gave on the last day of his 2010 visit, and in his preliminary note, he referenced the debate commenting that the *UNDRIP* 'far from affirming rights that place indigenous peoples in a privileged position, aims at repairing the ongoing consequences of the historical denial of the

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[166] See, eg, *Takamore v Clarke* [2011] NZCA 587 (CA), 658-59; Waitangi Tribunal, 'Time to Move beyond Grievance in Treaty Relationship, Tribunal Says' (Media Release, 2 July 2011) <http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp>. The Government's equation of Indigenous rights with privileges or special measures also prompted concerned comment from the CERD Committee in 2007. *CERD Committee 2007,* UN Doc CERD/C/NZL/CO/17, [15].

[167] Interview 16 (Guatemala City, 26 May 2011).

[168] Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 65, 219; Kay B Warren, 'Voting Against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum' in Kay B Warren and Jean E Jackson (eds), *Indigenous Movements, Self-Representation, and the State in Latin America* (University of Texas Press, 2002) 149, 172-74.

[169] *Stavenhagen Report on New Zealand,* UN Doc E/CN.4/2006/78/Add.3, [54]. See also [27], [79].

[170] *Stavenhagen Report on New Zealand,* UN Doc E/CN.4/2006/78/Add.3, [27].

[171] *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [21].

right to self-determination and other basic human rights.'[172]

In respect of Guatemala, the privileges debate is not tackled in any of the special procedures experts' country reports. But critical comment on the absence of equality for Indigenous peoples is made. For example, Stavenhagen observes that 'far from being full and equal partners with the rest of the population, indigenous people have been subjected to political exclusion, cultural discrimination and economic marginalization from society',[173] and that the country 'remains a profoundly unequal and divided society.'[174] Experts including those on food,[175] health,[176] and violence against women[177] have also underscored the inequality experienced by Indigenous peoples in Guatemala repeatedly in their country reports.

The persistence of the Indigenous privilege principle, especially in New Zealand, suggests that the mandate-holders need to devote greater attention to explaining the rights basis for recognition afforded Indigenous peoples in their general and special country reports.[178] Alternatively, at least in New Zealand where the rights counter has been more prominent, it suggests that the counter is ineffective and a new response should be found. The rights versus privileges debate could be put to bed by moving away from using rights language and instead focusing on individual and group capabilities. For example, Duncan Ivison has suggested that it may be 'more helpful to talk about the capabilities we want individuals or groups to have – as opposed to the rights they apparently already possess – and then of the mechanisms and institutions required for their effective exercise.'[179] Karen Engle has also suggested that Indigenous claims are better expressed outside of a human rights framework.[180] But as a human rights mechanism the special procedures are confined to the language of rights.[181] Moreover, rights discourse is the principal language of emancipation globally, making articulations outside of its frame more difficult to be heard.[182]

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[172] James Anaya, 'New Zealand: More to be Done to Improve Indigenous People's Rights, Says UN Expert', above n 144; *Anaya Preliminary Note on New Zealand,* UN Doc A/HRC/15/37/Add.9, [4].
[173] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, 2.
[174] Ibid [70].
[175] *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, 2, [15]-[16], [54], [58](b).
[176] *Expert on Health Guatemala 2011,* UN Doc A/HRC/17/25/Add.2, 1-2, [6]-[7], [30], [36]-[37], [39]-[41], [43], [51].
[177] *Expert on Violence Against Women Guatemala 2005,* UN Doc E/CN.4/2005/72/Add.3, 2, [4], [5], [11], [21], [67].
[178] I note that Anaya devoted especial attention to debunking the view that the *UNDRIP* affords Indigenous peoples privileges in his final report to the GA in 2013. *Anaya Report to GA 2013,* UN Doc A/68/317, [68]-[72].
[179] Ivison, above n 157, 164.
[180] Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, above n 120, 1-2, 7-8, 14, 73, 98-9, 102, 133.
[181] Merry observes that 'translators are restricted by the discursive fields within which they work.' Merry, above n 156, 48.
[182] David Kennedy points out that '[a]s a dominant and fashionable vocabulary for thinking about emancipation, human rights crowds out other ways of understanding harm and recompense.' Kennedy, above n 53, 9. See also Wendy Brown, "The Most We Can Hope For...': Human Rights and the Politics of Fatalism' (2004) 103(2-3) *South Atlantic Quarterly* 451, 461-62.

The third principle of national economic development is leveraged by both states. It is the prescription that economic growth is the priority of the state and the key to national progress. In New Zealand the principle is an implicit driving force in governmental policy.[183] For example, a cynical view would see both sets of foreshore and seabed legislation as spurred by a desire to 'resolve' Māori property rights in the foreshore and seabed in order to facilitate offshore natural resource extraction ventures.[184] In its response to Anaya's 2012 communication, the Government also emphasised the need to 'achieve better results for Māori, which will benefit New Zealand as a whole', which has a development undertone.[185] But as a developed country the principle is not at the forefront in the Indigenous rights domain in same way as it is in Guatemala, a developing country. The Guatemalan Government has not explicitly advocated this principle in response to special procedures experts' reports. In its interactive dialogues with special procedures experts and reports to UN human rights treaty monitoring bodies its language regarding development is carefully chosen, emphasising social and cultural development alongside economic development, and highlighting the important role of Indigenous peoples in its achievement.[186] But there are indicators of the Government's more general prioritisation of economic development, especially the extractive industries,[187] as its stance towards those opposing the Marlin mine reveals. Guatemala's *Constitution* even declares the exploitation of minerals a public necessity.[188] And the Government itself identifies that it has 'a big interest in developing the sector.'[189] This is problematic because Indigenous peoples' assertions of their right to oppose extractive projects on or near their territories are then framed as opposition to national development and progress. In the words of one Mayan interviewee, 'as we object to mining activity it's been projected that our objection is against development.'[190]

The special procedures have countered with the need for economic development to occur consistently with Indigenous peoples' rights. Several special procedures experts have expressed concern at the negative impact of development projects on Indigenous peoples in

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[183] See, eg, McCormack, above n 123, 421.
[184] Interview 5 (Christchurch, 6 May 2011).
[185] Letter from Brian Wilson to James Anaya, 6 November 2012, 2 available in *Joint Communications Report February 2013,* UN Doc A/HRC/22/67, 78.
[186] See, eg, Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* , above n 27; *Guatemala Report to CERD Committee 2009,* UN Doc CERD/C/GTM/12-13, [281], [294].
[187] See generally Sieder, "Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala', above n 75, 254.
[188] *Constitution of the Republic of Guatemala 1985* (Guatemala), art 125.
[189] Gobierno de Guatemala Ministerio de Economica and Invest in Guatemala, *Mining* (2013) 4.
[190] Interview 14 (Guatemala City, 1 June 2011). See also *HCHR Report on Guatemala 2012,* UN Doc A/HRC/19/21/Add.1, [55]. Regarding the prevalence of this rhetoric generally see, eg, Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate Publishing Limited, 2011) 158.

Guatemala, Anaya most extensively.[191] He attempted to paint a picture of how development could occur consistent with Indigenous rights, highlighting the importance of consultation with Indigenous peoples regarding the projects, for example. But he also called on Indigenous peoples to enter into dialogue with the Government with a view to reaching agreement on projects that respect their internationally recognised rights, contribute to their economic and social development, and enable their full participation in decision-making affecting their lives.[192] As identified in the previous chapter, some Indigenous peoples criticised the perceived pro-development sentiment in Anaya's injunction. The tension reveals something of the limits of human rights discourse as a tool for resisting dominant models of development as economic growth: the two are intertwined; the GA has described them as 'interdependent and mutually reinforcing'.[193] As a result, the human rights project has been criticised for legitimating neoliberal development models that maintain Western hegemony.[194]

Related to Guatemala's claims of the need to prioritise national economic development is the Government's claim that its developing status renders it incapable of implementing measures recommended by the special procedures. I term it the principle of 'lack of capacity'. The Guatemalan state plays on the idea that it is doing the best it can within its limited means. It has repeated its commitment, and will, to implement the international Indigenous standards articulated by the special procedures before the UN.[195] But it expressly or impliedly cites, inter alia, lack of funds, technical expertise, sufficient assistance and knowledge of solutions for its inability to give them full effect. For example, during the interactive dialogue with the expert on food in 2010 the Guatemalan delegate asserted that the situation of under-nourishment (which particularly impacts Indigenous peoples) was a priority for the Government's attention adding the proviso, 'although we do have limitations we have implemented measures to the best of our abilities'.[196] Statements in a similar vein have been made following the state's two UPRs.[197]

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[191] See, eg, *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3; *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [27]; *Expert on Food Guatemala 2006,* UN Doc E/CN.4/2006/44/Add.1, [43], [51], [58](j); *Expert on Health Guatemala 2011,* UN Doc A/HRC/17/25/Add.2, [39].

[192] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [77]-[87].

[193] *2005 World Summit Outcome,* GA Res 60/1, UN Doc A/RES/60/1 (16 September 2005) [135].

[194] For example, according to Wendy Brown, rights discourse 'converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well.' Brown, above n 182, 461. See generally Sundhya Pahuja, 'Rights as Regulation: The Integration of Development and Human Rights' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate Publishing, 2007) 167; Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) 163-232; Makau Mutua, *Human Rights: A Political & Cultural Critique* (University of Pennsylvania Press, 2002).

[195] See, eg, Guatemalan Government representatives, Carlos Ramiro Martínez Alvarado and Luisa Bonilla De Galvao De Queiroz, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 27; Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Fourth Session: Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen* (20 March 2007) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=070320>.

[196] Guatemalan Government representative, Carlos Ramiro Martínez Alvarado, speaking in HRC, *Webcast Human Rights Council Thirteenth Session: Interactive Dialogue with the Special Rapporteur on the Right to Food, Mr Olivier De Schutter* (5 March 2010) United Nations <http://www.un.org/webcast/unhrc/archive.asp?go=100305>.

[197] See, eg, HRC, *Report of the Human Rights Council on its Eighth Session*, UN Doc A/HRC/8/52 (1 September 2008) [685]; *Guatemala UPR 2012,* UN Doc A/HRC/22/8, [6].

Constraining expectations of its human rights capacity allows the Government to present itself as both needy and progressing, which assists it to deflect criticism for its failures in rights implementation and allows it to continue to secure donor funding and assistance from states and international organisations.

At times this principle has been countered by mandate-holders' affirmations that it is within the state's abilities to institute reforms to enable it to better comply with international Indigenous rights norms, it simply lacks the political will to do so. For example, both Stavenhagen and the expert on racism have identified that the *Indigenous Agreement* remains unimplemented due to a lack of political will,[198] with Stavenhagen stating that 'Guatemala has the capacity…to implement an effective human rights policy.'[199] The strongest statement of the Government's ability to address its own human rights situation has come from the expert on extrajudicial executions. In 2007 he observed that 'Guatemala is not a failed State' nor 'especially poor',[200] and that 'Guatemalans are not ignorant of the problems confronting their country and are aware of the policies that could be pursued to ameliorate those problems.'[201] Rather, he concluded that the widespread nature of the human rights violations he witnessed were the product of 'a distinct lack of political will'.[202] To an extent the Guatemalan Government is justified in bringing attention to its reduced capacity to address Indigenous rights issues within its borders, given the economic elite's stranglehold on power noted above and in Chapter VI. But this does not absolve the state's responsibility to tackle that stranglehold in order to meet its Indigenous rights, and other human rights, obligations.

In New Zealand, instead of a focus on incapacity as an excusing principle, the Government emphasises what it perceives as the comparatively impressive steps it has taken to address Indigenous claims to excuse it from criticism. As noted above, the Government pushes the idea that it is already a world leader in Indigenous rights recognition comparative to other states with the implication that it should be immune from criticism in that domain. Mandate-holders have demonstrated that while New Zealand has taken some important steps in Indigenous rights recognition significant concerns remain.[203] But the strength of this self-image prevents the New Zealand Government from taking seriously criticisms of its Indigenous rights record. Instead it blames the mandate-holder for getting it wrong, as it did with Stavenhagen, or fixates on the praise and glosses over the criticism (where it responds at all) as it did with Anaya.

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[198] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [62]; *Expert on Racism Guatemala 2005,* UN Doc E/CN.4/2005/18/Add.2, [37]. The expert on racism acknowledged that resourcing issues played a role too.
[199] *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [68]. Anaya concluded that the reforms he identified required the Government to show greater initiative but he also called on other stakeholders, including Indigenous peoples, to make greater efforts to engage in dialogue with the Government. *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [77].
[200] *Expert on Extrajudicial Executions Guatemala 2007,* UN Doc A/HRC/4/20/Add.2, 2.
[201] Ibid [63].
[202] Ibid 2.
[203] See, eg, *Anaya Follow-up Report on New Zealand,* UN Doc A/HRC/18/35/Add.4, [66]-[85]; *Stavenhagen Report on New Zealand*, UN Doc E/CN.4/2006/78/Add.3, [51], [59], [67], [77]-[82].

More traction may be gained where the principles underlying the states' responses to these Indigenous rights norms are explicitly tackled. This is because principles 'set the direction of regulatory change' by unifying thinking.[204] As identified in Chapter II, this feature makes principles the most important component of the regulatory webs. At present the principles pushed by the states are being inadequately contested and dominating the Indigenous rights domains in both states. Special procedures experts need to get inventive and develop principles to set a new direction for regulatory change. Theoretically, the possible principles are constrained only by the experts' imaginations.

Continuous improvement is one principle that may be useful as a novel counter by mandate-holders where state actors view themselves either as incapacitated (Guatemala) or as world leaders (New Zealand) in Indigenous rights recognition. As identified in Chapter II, continuous improvement is a management philosophy capturing the notion of an ongoing effort to improve or ratchet-up standards.[205] And its focus on a learning culture rather than a culture of blame has been singled out by Charlesworth as potentially useful in fostering improved human rights protection, including in the work of the special procedures.[206] Domínguez Redondo and Rodriguez-Piñero have also made a connection between the general failure of the human rights project to elicit compliance and its naming and shaming approach, although neither discuss the principle of continuous improvement specifically. Domínguez Redondo explains that 'those in charge of human rights mechanisms, scholars and practitioners tend to neglect the potential value of cooperative approaches to human rights implementation and focus instead on the confrontational approaches'.[207] And Rodriguez-Piñero observes 'that the effectiveness of "name and shame" techniques has long been superseded by crude facts',[208] underlining 'the importance of empowering rights-holders, of reinforcing duty-bearers' capacities, and of the role of technical cooperation' in heralding a more sophisticated approach to rights implementation.[209] The idea of special procedures experts putting a greater focus on the cooperative aspect of their work has received support from mandate-holders and states too.[210] For example, in his final

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[204] Braithwaite and Drahos, above n 17, 522.
[205] Ibid 25, 35, 615-16.
[206] Charlesworth, above n 105, 15.
[207] Domínguez Redondo, above n 8, 683. Note that Domínguez Redondo's focus is narrow. She is concerned with the role of the 'cooperative' mechanism of the UPR in creating international legal obligations.
[208] Luis Rodríguez-Piñero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 314, 329.
[209] Ibid 330.
[210] See, eg, *Report of the Special Procedures' 14th Meeting,* UN Doc A/HRC/7/29, [33]; *Report of the Special Procedures' 18th Meeting,* UN Doc A/HRC/18/41, [34]; Juan Jose Gomez Camacho, Permanent Representative of Mexico to the UN (Geneva), and Sihasak Phuangketkeow, President of the HRC, cited in *Improving Implementation and Follow-up: Treaty Bodies, Special Procedures, Universal Periodic Review - Report of Proceedings* (Open Society Justice Initiative, Global Observatory on Human Rights - UPR Watch and Foreign Policy at Brookings,

report to the GA in 2013 Anaya remarked that he hoped 'that future work of the mandate will be able to focus more on moving beyond reacting to denouncements of alleged human rights violations, to helping to assist indigenous peoples and States to develop concrete proposals and programmes of action for advancing the rights of indigenous peoples.'[211]

The principle of continuous improvement aligns with the diplomatic dimension of the special procedures' mandate. It is also relationship enhancing, which is important given that the special procedures are dependent on the cooperation of states, as well as Indigenous peoples and others, in their work. Chapters IV to VI revealed that the principle of continuous improvement is already engaged to a very small degree in mandate-holders' work. For example, mandate-holders typically begin their country and special reports by highlighting positive steps the state has taken towards respect for Indigenous rights and then go on to outline core Indigenous rights concerns that persist. But the principle has been under-engaged in New Zealand and Guatemala. Embracing the principle of continuous improvement would mean flipping the focus of special procedures experts' reports. The starting point would be to understand what the state is good at and then to build commitment outwards through shared projects.[212] Rather than shaming, cooperation is the hallmark of this approach. Under this approach New Zealand's self-image as an Indigenous rights leader could even be exploited to the advantage of the experts. The state's interest in maintaining that self-image could be harnessed as a tool for persuading New Zealand to become 'an innovator to lead the pack' in continuous improvement.[213] This could harbour benefits, both for New Zealand's Indigenous rights conformity and potentially that of other states, who are compelled to 'catch up with the leader'.[214]

Care must be taken to ensure that embrace of this principle is not counter-productive, however. Chapter II identified Charlesworth's caution of the 'need to guard against the process of continuous improvement itself becoming ritualised.'[215] A commitment to continuous improvement should not prevent the special procedures from being critical where necessary. If pushed too far the principle may contribute to the state's inability to see the true extent of rights violations within the country and its liability for them. In addition, the special procedures' experts will also need to take care not to alienate Indigenous peoples – the greatest potential advocates of the reports – who expect mandate-holders to communicate the gravity of their human rights situation forcefully to governments.[216] A 'delicate balance' is demanded between

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2010) 11, 27; Dell Higgie, New Zealand Government representative, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue* , above n 27.

[211] *Anaya Report to GA 2013,* UN Doc A/68/317, [5].

[212] See, eg, Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 501.

[213] Braithwaite and Drahos, above n 17, 615.

[214] Ibid.

[215] Charlesworth, above n 105, 15. See generally John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007), 207-8.

[216] For example, Tauli-Corpuz and Alcantara identify the importance of experts not offending the states that host them but praise Stavenhagen for having been 'uncompromising in pointing out the realities in a country'. Tauli-Corpuz and Alcantara, above n 19, 32.

the criticism of rights violations and the encouragement of rights promotion.[217]

D *Mechanisms*

1 *The States' Tools*

To push these principles, states and mandate-holders largely engage webs of dialogue and persuasion, dialogue being the primary regulatory mechanism available to the experts. But this does not put the actors on an equal footing. As identified in Chapter II, states' use of dialogic mechanisms carries more weight than mandate-holders' use of them because lurking behind the state's dialogue is always the spectre of enforcement through coercion and other means. Modelling, which is a dialogic mechanism, is the primary tool engaged by both states. Models of New Zealand as an Indigenous rights leader and egalitarian land of opportunity for all were promoted domestically and internationally in response to both Stavenhagen and Anaya's visits and reports, particularly following Stavenhagen's report.[218] It used the models to dismiss and gloss over the special procedures' criticisms of its Indigenous rights situation. In contrast, Guatemala modelled itself as a state committed to Indigenous rights but thwarted by domestic conditions and in need of international assistance to realise those commitments. It used this model to explain its minimal progress.

In both states the threat and use of military coercion, economic coercion and systems of reward – all tools of the powerful – are present although they have not been leveraged in response to the mandate-holders' work. Military and economic coercion are dominant motifs in states' struggles to contain Indigenous peoples' claims. Military coercion is most stark in Guatemala. It is evident in the violent repression of protests over development projects on or near Indigenous territories, the criminalisation of Indigenous peoples involved in protests, and the imposition of states of siege over Indigenous territories where development projects are opposed.[219] Even where force is not used, the threat of force remains high given the state's

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[217] Charlesworth, above n 105, 16. See also Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms', above n 1, 216; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 76, 128; Flood, above n 7, 113; Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *The International Journal of Human Rights* 232, 241.

[218] See, eg, Prime Minister John Key quoted in Bennett, above n 127; Cullen, above n 126; Parekura Horomia, Minister of Maori Affairs, 'NZ Government to Host United Nations Special Rapporteur' (Media Release, 15 November 2005) <http://www.beehive.govt.nz/release/nz-government-host-united-nations-special-rapporteur>; Dell Higgie, New Zealand Government representative, speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 27; Mackay, above n 130.

[219] See, eg, Shin Imai, Ladan Mehranvar and Jennifer Sander, 'Breaching Indigenous Law: Canadian Mining in Guatemala' (2007) 6 *Indigenous Law Journal* 101, 110-15, 124; Amanda M Fulmer, Angelina Snodgrass Godoy and Philip Neff, 'Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine' (2008) 50(4) *Latin American Politics and Society* 91, 91-2, 114; Sieder, 'The Judiciary and Indigenous Rights in Guatemala', above n 65, 216-17; Gobierno de Guatemala, 'Gobierno Levanta estado de Sitio y Declara el de Prevención en Cuatro Municipios' (Government Notice, 9 May 2013) <http://www.guatemala.gob.gt/index.php/2011-08-04-18-06-26/item/3725-gobierno-levanta-estado-de-sitio-y-declara-el-de-prevenci%C3%B3n-en-cuatro-municipios>.

brutal use of violence against Indigenous peoples during the internal conflict. The threat and use of military coercion against Māori is present in New Zealand too. It is evident in the heavy-handed police tactics during Operation 8, for example.[220] In Guatemala economic coercion is apparent through the withholding of basic state services to Indigenous communities; as Chapter VI showed public investment in Guatemala is inequitable predominantly targeting urban areas with lower populations of Indigenous peoples. It means that business interests seeking to execute development projects on Indigenous lands can 'reward' Indigenous peoples by providing improved community infrastructure (such as health centres, schools and roads), which are the responsibility of the state.[221] In New Zealand, for those Māori collectives who cooperate with the Government, there is, for example, the promise of recognition as a mandated *iwi* organisation that can receive historical *Treaty* settlement redress and other forms of Government cooperation and support.

2 *The Experts' Mechanisms*

(a) Shaming Dominates

As identified in Chapters IV to VI, like with most of the UN human rights machinery, shaming is the primary regulatory mechanism engaged by the special procedures mandate-holders, including in New Zealand and Guatemala. For shaming to be an effective persuasive tool the state must care about its Indigenous rights reputation. Where states predominantly engage in Indigenous rights ritualism, as New Zealand and Guatemala do, it indicates that the states care about whether they appear to be complying with at least some Indigenous rights norms. This concern may be explained in varying ways. As Chapter IV pointed out, states may covet a reputation as an Indigenous rights respecter to secure continued investment and donor funding, maintain domestic stability, or to enjoy status as a good global actor. This care for appearances provides a foothold for mandate-holders: by naming states' behaviour as Indigenous rights ritualism the mandate-holders can help to deconstruct the false image of the state as respecting the relevant right and reveal the true areas in which the state is, and is not, committed. This information can then be leveraged by Indigenous rights advocates in their interactions with state actors, the media and others. Shaming has not been leveraged to its full capacity in either state. For example, neither state has been pulled up by the special procedures experts on its tactic of avoiding recognition of hard Indigenous peoples' rights.[222] But, where it

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[220] See, eg, Moana Jackson, 'Preface' in Danny Keenan (ed), *Terror in Our Midst? Searching for Terror in Aotearoa New Zealand* (Huia Publishers, 2008) 1, 1-2.
[221] See, eg, *Anaya Annual Report 2013,* UN Doc A/HRC/24/41, [24].
[222] Stavenhagen, in his Study on Best Practices, identified the general tendency amongst states to implement recommendations regarding social policy and development and avoid implementing recommendations regarding constitutional reform and land. *Study on Best Practices*, UN Doc A/HRC/4/32/Add.4, [83].

has been leveraged, shaming has not proved very effective as the primary tool in the special procedures' tool belt. This has been the case even in Guatemala, despite the fact that Downs and Jones argue that reputational consequences for rights violations appear to be higher for developing states.[223] In part this is attributable to the way the experts have approached the technique of shaming. Braithwaite, Makkai and Braithwaite identify that strong regulators 'do mobilize shame, but in a reintegrative way', rather than in a stigmatising way, when norms are not met.[224] It is a stretch to characterise the technique as being used in a reintegrative way in both states.

(b) Modelling not Prominent

There are a host of other regulatory mechanisms that have not been widely engaged by the special procedures, which could also be useful. Modelling is one such mechanism. Modelling has been underutilised by the special procedures experts in both states. Yet, Braithwaite and Drahos identify it as 'the most consistently important mechanism of globalization'.[225] As Chapter II established, it is especially useful for actors with little resources. This is because whether a model is effective depends more on the power of the model than of the resources and capacities of the actor promoting it;[226] although Braithwaite and Drahos' findings still suggest that powerful actors will generally prevail over less powerful actors.[227] Special procedures experts do engage the mechanism of modelling to a small degree. In a sense, every recommendation issued by the mandate-holders can be understood as a model: each is a conception of action to be taken. But Braithwaite and Drahos point to Oran Young and Gail Osherenko's finding regarding international environmental regimes that 'models must be simple.'[228] Braithwaite and Drahos add that those models that have impact 'are uncomplicated formulae that advocates and journalists can encapsulate for political and public consumption.'[229] Recommendations vary in form but rarely do they meet these criteria such that they spur the mass action envisaged by those authors. In fact, the case studies do not reveal any successful examples of the mandate-holders exploiting the micro-macro theory of the processes of globalisation put forward by Braithwaite and Drahos in which modelling is central, which is outlined in Chapter II.

Models can also be understood as transferable examples of behaviour from other countries. This taps into the responsive approach to regulation's idea that regulatory culture

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[223] George W Downs and Michael A Jones, 'Reputation, Compliance, and International Law' (2002) 31 *Journal of Legal Studies* S95, S113-S114.
[224] Braithwaite, Makkai and Braithwaite, above n 215, 302.
[225] Braithwaite and Drahos, above n 17, 34.
[226] Ibid 595.
[227] See, eg, ibid 475, 551.
[228] Ibid 291 referring to Oran R Young and Gail Osherenko (eds), *Polar Politics: Creating International Environmental Regimes* (Cornell University Press, 1993).
[229] Braithwaite and Drahos, above n 17, 291.

should be conceived 'not as a rulebook but as a storybook' through which 'instructive stories' are shared.[230] Subedi observes that some of the special procedures experts' country visits 'may constitute a learning process of best practice in operation in countries with a better record of the human rights situation. These may then be passed on to other countries.'[231] Special procedures experts have sometimes promoted models of successful rights recognition from other countries in the case study states. For example, in his 2011 report on Guatemala the expert on health described effective interventions by women's groups in rural Nepal to address perinatal problems, which 'could readily be adapted to the most remote villages in Guatemala'.[232] But references like this are infrequent. Given that mandate-holders are exposed to positive measures taken by states and other actors to respect Indigenous rights across the globe, it is surprising that these examples are not drawn on more. The practice is largely restricted to occasional statements in the experts' thematic reports.[233]

Guatemala could learn both from (apparent) world leaders in the protection of Indigenous rights, such as Norway, and from similarly placed countries, such as Nepal, who are also struggling to address serious Indigenous rights challenges. Admittedly, contextual considerations mean that few models will be wholly transferable. Speaking of human rights generally, Ife cautions that care must be taken to avoid making over-simplifications and assuming 'some commonality across different communities, which does not reflect the reality of practice.'[234] But the models may still provide inspiration. Special procedures experts could also draw on positive models from similarly placed states in Latin America, such as Bolivia, Venezuela and Mexico.[235] For example, Simmons advocates comparisons of rights practices '*within* cultures and *within* development levels' as a way of helping to 'undercut the perception that rights are a game of the West against the rest.'[236] Both Bolivia and Mexico have received a country mission from the Special Rapporteur on Indigenous peoples and so are known to the mandate. Models of how Guatemala could use its meagre public resources more equitably and efficiently would be particularly useful. Guatemala is an especially good candidate for models from other countries as it has demonstrated a desire to learn from other states how they are tackling Indigenous rights challenges. Guatemalan representatives met with state representatives of Nepal, Norway and Peru during 2010 and 2011 to discuss strategies for implementation of *ILO Convention 169*, Indigenous rights challenges, and drafting a law regarding Indigenous

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[230] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 520. Braithwaite relies on Clifford Shearing and Richard Ericson in making this point. Clifford D Shearing and Richard V Ericson, 'Culture as Figurative Action' (1991) 42(4) *The British Journal of Sociology* 481, 489. See also Braithwaite, Makkai and Braithwaite, above n 215, 299.

[231] Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 1, 223.

[232] *Expert on Health Guatemala 2011,* UN Doc A/HRC/17/25/Add.2, [59].

[233] See, eg, *Anaya Annual Report 2012,* UN Doc A/HRC/21/47, [13].

[234] Jim Ife, *Human Rights From Below: Achieving Rights Through Community Development* (Cambridge University Press, 2010) 211.

[235] Two Guatemalan interviewees identified these three states as potential sources of inspiration for Indigenous rights recognition. Interview 15 (Guatemala City and Antigua, 23 May 2011); Interview 16 (Guatemala City, 26 May 2011).

[236] Simmons, above n 4, 377 (emphasis in original).

peoples' right to be consulted, respectively.[237] Other states, including the Philippines, have expressed a desire to learn from 'Guatemala's vast experience in international cooperation on human rights issues' too,[238] underscoring the fact that in some respects Guatemala itself may provide positive rights lessons for other countries.

Neither Stavenhagen nor Anaya drew on overseas models for Indigenous rights protection in their reports on New Zealand. In contrast to Guatemala, in New Zealand there is less interest in what is happening overseas in the recognition of Indigenous claims, a reflection of New Zealand's self-image as a world leader in Indigenous rights protection. But New Zealand has acted quickly when it has perceived itself to be lagging behind those states on which it does model itself more generally, such as Australia, the United States and Canada. For example, as identified in Chapter V, New Zealand's move to endorse the *UNDRIP* seems to have been motivated at least in part by a desire not to be left behind when Australia and Canada expressed support for it.

A key advantage of the mechanism of modelling is that it can be used to harness the identitive power of mass publics, which could be of particular use in New Zealand. Recall, as set out in Chapter II, that Braithwaite and Drahos argue that actors can use modelling to draw out 'contradictions in the identities propagated by dominant models' that confer privilege on dominant groups.[239] Mandate-holders themselves do not necessarily have to develop the models that invert hegemonic status systems. There are several potential roles for special procedures experts in the modelling process that Braithwaite and Drahos describe, which I identify in Chapter II. In brief, they can operate as model missionaries to popularise oppositional models; model mercenaries to turn the toeholds created by model missionaries into footholds; or model mongers to experimentally float different oppositional models.[240] For example, the special procedures experts could harness the mechanism to draw out contradictions between the human rights situation of Māori and New Zealand's dominant national identity that values equality of opportunity. Projections of this self-image abound on the international stage, including in New Zealand's response to the Special Rapporteur on Indigenous peoples' reports, where references

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[237] Ministerio de Relaciones Exteriores de Guatemala, 'Comunicado 061-2010: Funcionarios de Nepal Visitan Guatemala para Conocer Experiencias Relacionadas con el Avance del Convenio 169 de la OIT' (Government Notice, 19 March 2010) <http://www.minex.gob.gt/Noticias/Noticia.aspx?ID=216&Busqueda=indígena>; Ministerio de Relaciones Exteriores de Guatemala, 'Comunicado 152-2010: Realizan Seminario para Intercambiar Experiencias de los Pueblos Indígenas de Noruega y Guatemala' (Government Notice, 16 June 2010) <http://www.minex.gob.gt/Noticias/Noticia.aspx?ID=281&Busqueda=indígena>; *Guatemala UPR 2012,* UN Doc A/HRC/22/8, [98](a).

[238] HRC, *Report of the Working Group on the Universal Periodic Review: Guatemala,* UN Doc A/HRC/8/38 (29 May 2008) [66]. In a meeting in Nepal in 2007, Stavenhagen reportedly identified Guatemala as 'one example that can be studied carefully' in efforts to address issues facing Nepal. NGO-Federation of Nepalese Indigenous Nationalities, *Interaction Meeting with Special Rapporteur: Record of Meeting* (2007) 5-6.

[239] Braithwaite and Drahos, above n 17, 579. See also Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101(7) *Harvard Law Review* 1331, 1367.

[240] Braithwaite and Drahos, above n 17, 579-80.

to 'equal treatment', 'fairness' and 'equality' recur.[241] The media and Internet have an important function in encapsulating models for public consumption. But this is hampered in both states by the prevalence of discriminatory stereotypes of Indigenous peoples in the mainstream media and, in Guatemala, by access issues.[242]

(c) Capacity-building Underexploited

The mechanism of capacity-building has also been underexploited by mandate-holders. Anaya's advice on Guatemala's draft consultation instrument is the only example of a special procedures expert providing technical advisory assistance regarding Indigenous rights in either state. Capacity-building could be further leveraged by the special procedures experts, especially in Guatemala where more of an emphasis on developing the expertise of local actors and building the capacity of local institutions to address Indigenous rights challenges is needed. This would assist in addressing concerns that Indigenous agency is negatively affected by deferring to outside international experts, including mandate-holders. Capacity-building has an empowering educative dimension, which is positive. It is also relationship enhancing (like a focus on continuous improvement), helping to build trust between the collaborating actors.[243] And it is proactive rather than simply reactive, developing capacity to avoid further rights violations rather than only responding to immediate violations.

As identified above, mandate-holders and states have recognised the value of embracing a focus on cooperative capacity-building for the realisation of human rights. Subedi cites the argument of some developing states that the move to a more constructive approach, which focuses on 'guiding and offering concrete advice towards improving a situation' rather than naming and shaming, would help to dispel 'the perception of "us" *versus* "them"'.[244] And Pinheiro quotes the words of former HCHR, Sergio Vieira de Mello, in reflecting on his own work as a mandate-holder: '[i]t is not enough to blame. It is also necessary to help governments

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[241] See, eg, Mackay, above n 130; Dell Higgie, New Zealand Government representative speaking in HRC, *Webcast Human Rights Council Eighteenth Session: Statement of Special Rapporteur and Interactive Dialogue*, above n 27. For further examples beyond the state's response to the special procedures see, eg, *New Zealand Report to CERD Committee 2012,* UN Doc CERD/C/NZL/18-20, [3]; NZHRC, *A Fair Go for All?* <http://www.hrc.co.nz/key-projects/a-fair-go-for-all>. See generally David Hackett Fischer, *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States* (Oxford University Press, 2012) 6-9.

[242] See generally Raymond Nairn et al, 'Media, Racism and Public Health Psychology' (2006) 11 *Journal of Health Psychology* 183; Ajb'ee Jiménez, 'Representación de las Luchas Mayas en los Medios de Comunicación escrita en Guatemala' in Roddy Brett and Marta Casaús Arzú (eds), *Racism and Ethnic Discrimination in Guatemala: Historical Tendencies and Actual Debates* (Institute of Latin American Studies, Stockholm University, 2010) 77.

[243] Capacity-building has been successfully engaged by other human rights actors, such as the OHCHR's country offices, 'to build trust and relationships' with state actors with whom relationships can otherwise be strained. Christian Salazar Volkmann, 'Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia' (2012) 4(3) *Journal of Human Rights Practice* 396, 427, 429, 446. Admittedly in a markedly different regulatory context, and as identified in Chapter II, Heimer and Gazley have also argued that more cooperative interactions between regulators and regulatees provide an opportunity for transcending ritualism. Carol A Heimer and J Lynn Gazley, 'Performing Regulation: Transcending Regulatory Ritualism in HIV Clinics' (2012) 46(4) *Law & Society Review* 853, 853.

[244] Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 1, 228.

or regimes to emerge from their own mistakes or their own contradictions.'[245] Notably, a shift to focus on capacity-building is supported by Anaya in the Indigenous rights domain. In 2013, when reflecting on the lessons he had learned during his two terms in the role, he stated that '[t]he promotion of good practices and providing technical assistance are key areas in which the Special Rapporteur has seen his work have a positive effect, with many of his recommendations being taken up in legal and policy reforms made at the international and national levels.'[246] Going forward, he called for additional attention to be devoted to furnishing capacity-building assistance directly to Indigenous peoples (not just states) to support them in their own initiatives to realise their rights,[247] a welcome suggestion.

A capacity-building approach also carries attendant risks. States may cite cooperation with special procedures experts as evidence of their proactive efforts on human rights even where those efforts are lacking, reluctant or ritualistic, as Guatemala did. Time and resources, both of which are precious given their limited supply, are then expended on states that lack a genuine commitment to the project. There is also the dilemma whether the experts should cooperate with states that are known to commit grave Indigenous rights violations.[248] But states with positive track records of cooperation with the experts can be favoured for technical assistance.[249] And reintegrative shaming theory suggests that a strategy of principled engagement with states, which dictates 'respectful engagement with the state and its people while firmly disapproving' of the rights violation, will yield more influence than stigmatising the state and treating it as a pariah.[250]

(d) Low Adjustment and Coordination

Examples of the experts employing the mechanisms of reciprocal adjustment and non-reciprocal coordination regarding Indigenous peoples' rights are scarce. Non-reciprocal coordination is evident in a recommendation by Anaya that Goldcorp's Guatemalan subsidiary consider withdrawing its complaints against Indigenous protestors pending before the courts (not a move obviously in the company's interests) in order to generate trust with Indigenous communities (easing tensions and facilitating dialogue with the communities, which may ultimately allow smoother business operations).[251] It is a dialogic tool more suited to a meeting room than a UN report and so there are likely more examples of this technique than apparent

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[245] Sergio Vieira de Mello in Jean-Claude Buhrer and Claude B Levenson, *Sergio Vieira de Mello, un Espoir Foudroyé* (Mille et une nuits, 2004) 84-5 quoted in Pinheiro, above n 19, 167.
[246] *Anaya Report to GA 2013,* UN Doc A/68/317, [16].
[247] Ibid.
[248] Volkmann notes this tension in the context of the OHCHR's work on extrajudicial executions in Colombia. Salazar Volkmann, above n 243, 447.
[249] Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights*, above n 19, 39; Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* above n 1, 99-100.
[250] John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU EPress, 2012) 32.

from the reports. Both mechanisms require reciprocity: an exchange with others for mutual benefit. Thus, they depend on a willing other party (for example, the state or business actors) with which to exchange. Special procedures experts could try and facilitate Indigenous peoples' engagement in strategies of reciprocal adjustment with governments. But the special procedures need to be careful that concessions are not made in the form of 'adjustments' regarding Indigenous peoples' rights without a clear mandate from the affected Indigenous peoples.

(e) Faint Webs of Reward and Coercion

Webs of reward and coercion – which operate through the mechanisms of economic coercion, military coercion, and reward – are only capable of being woven by the special procedures experts when they enrol the power of other actors who possess these capabilities (or who are good at enrolling others who do). Mechanisms of reward and coercion have not been well harnessed by the experts in either case study state. The special procedures have at times directed recommendations to the UN system in their country reports on Guatemala, but not New Zealand.[252] However, they have not formally requested the HRC or CHR to take specific action to address Indigenous rights violations. Special procedures experts could push for the removal of states from sitting on the HRC or the issue of a HRC recommendation condemning a state's actions where they are in serious breach of their Indigenous rights obligations. Lebovic and Voeten's research, noted above, identifies the impact a CHR resolution condemning a state's human rights record can have on the multilateral aid a state receives.[253] Infrequently have mandate-holders sought to enrol the power of actors with significant resources and authority, such as multilateral finance institutions, sympathetic states (or minority factions within states) and companies;[254] Anaya's overtures to Goldcorp's Guatemalan subsidiary being the central exception.[255] In support, in 2013 Anaya observed that 'more engagement with business enterprises is needed' on the part of the mandate and he expressed the hope 'that greater emphasis will be placed on this in the future.'[256] As identified above, multilateral lending institutions and foreign donors could be targeted to financially incentivise Guatemala's compliance with the special procedures' recommendations. Special procedures experts could target sympathetic shareholders in corporations such as Goldcorp to help exert pressure within

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[251] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [74].
[252] See, eg, *Stavenhagen Report on Guatemala,* UN Doc E/CN.4/2003/90/Add.2, [83]-[87].
[253] Lebovic and Voeten, above n 31, 79.
[254] For comment on the absence of this approach by the UN generally regarding human rights see Flood, above n 7, 130.
[255] *Anaya Special Report on Guatemala*, UN Doc A/HRC/18/35/Add.3, [66], [74]; Interview 12 (Telephone Interview, 23 June 2011).
[256] *Anaya Report to GA 2013,* UN Doc A/68/317, [34].

the organisations for respect for Indigenous rights.[257] Military coercion is not a tool available to, or used, by the special procedures acting alone. But special procedures experts could foreseeably play a role in bringing grave Indigenous rights violations to the attention of the UN Security Council, which has the power to authorise the use of force;[258] although using force, especially to advance a human rights agenda, is problematic.[259] The special procedures are well placed to enrol these actors given their time spent at the UN headquarters in Geneva and New York, sites at which the heads of many powerful actors come together.[260]

3 *Dual Regulatory Pyramids*

I gather these strands together to conceive of mandate-holders' regulatory powers as two linked and complementary regulatory pyramids: one strengths-based and another focused on enforcement. The idea of regulatory pyramids was introduced in Chapter II. The strengths-based pyramid is designed to expand strengths to take regulatory domains up through ceilings and is backed by rewards.[261] It preferences active rather than passive responsibility 'challenging actors to take responsibility for making things right into the future' rather than 'holding actors responsible for wrongs they have done in the past.'[262] This is a markedly different conceptualisation from current rhetoric around Indigenous rights, which tends to be grievance based. My strengths-based pyramid for the special procedures starts at its base with education and persuasion regarding strengths; it focuses on identifying what the state is good at, assisting states to 'find their own motivation to improve'.[263] Under this pyramid, states are praised where they demonstrate commitment, in order to nurture their motivation to continuously improve.[264] Praise has a role only where human rights performance is reliably shown to have improved, however.[265] Thus, attention must be paid to ritualistic behaviour where, as in the case studies, steps are taken to deflect attention from a failure to implement Indigenous rights norms. The pyramid then moves to providing 'prizes', perhaps in the form of a public award from the chair

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[257] The Network in Solidarity with the People of Guatemala, an NGO, has taken steps in this direction. See, eg, Network in Solidarity with the People of Guatemala, *Mobilizing for Goldcorp's 2012 Meeting of Shareholders* (20 June 2012) <http://nisgua.blogspot.com.au/2012/06/mobilizing-for-goldcorps-2012-meeting.html>.

[258] For an argument that the UN Security Council should play a greater role in the protection of human rights see Claire Breen, 'Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security' (2008) 12 *Max Planck Yearbook of United Nations Law* 177.

[259] See, eg, Simmons, above n 4, 373-74.

[260] Braithwaite and Drahos, above n 17, 560.

[261] Braithwaite, Makkai and Braithwaite, above n 215, 318, 330.

[262] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 510. Braithwaite draws on Mark Bovens in making this distinction. Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998).

[263] The quoted text is from Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 476. Braithwaite speaks of regulators generally, not the special procedures. I share Braithwaite's view that to do this regulators (that is, the special procedures) need to become adept 'at what the counselling literature conceives as Rogerian reflective listening: listening that reflects back commitment to achieve outcomes grounded in motivations chosen by the speaker': at 499-500.

[264] Ibid 476.

[265] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 202.

of the special procedures' Coordination Committee or the President of the HRC, where Indigenous rights recognition is greatest. It provides capacity-building in the form of offers of assistance where Indigenous rights performance is poor and need is greatest, privileging states or other actors that have demonstrated a genuine commitment to the realisation of Indigenous peoples' rights. These prizes and assistance are enhanced as the pyramid is climbed. The experts will celebrate the innovation of actors whose strengths are expanding by publicising it in their reports, before the HRC, and in the media, as well as supporting the extension of these strengths with further prizes and grants of capacity-building assistance. Mandate-holders can enrol the power of others, including IPOs, NGOs, the UN, other states and businesses, to reward states for improvements, rendering it 'a pyramid of progressively more expanded networking of capacity-building.'[266] For example, at the peak of the pyramid the HRC could issue a resolution praising states for good Indigenous rights performance.[267] IPOs and NGOs could also acknowledge positive steps in media campaigns and donor states could inject further funding into states showing continuous improvement in Indigenous rights recognition.[268] Yet, some states will abuse mandate-holders' offers of cooperation, which is why the strengths-based pyramid needs to be backed up by enforcement capability.[269]

The enforcement pyramid is designed to use networked escalation (from deterrent to incapacitative sanctions) to identify and solve problems. The enforcement pyramid's strategy is one of principled engagement.[270] It begins with soft and weak dialogic webs of regulation at its base, such as the persuasive techniques of disapproval and shaming. The formal and informal meetings between mandate-holders and key state actors in Geneva, New York and domestically are good places for respectful pressure to be applied, alongside offers of assistance.[271] Where a state is failing to implement recommendations made by a mandate-holder or to respond substantively to a communication, the mandate-holder could first contact the state's permanent mission in Geneva or high-level state officials in the relevant country to privately express concern at the failure. As Chapter II identified, presuming that dialogic forms of social control will be tried first lends legitimacy to the more coercive forms of control when they are engaged and improves the likelihood of compliance. Mandate-holders should signal, but not threaten, the

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[266] Braithwaite, Makkai and Braithwaite, above n 215, 315, 317.

[267] Human Rights Watch has suggested that decisions of the HRC 'could include positive measures designed to reinforce and encourage good practices, as well as criticisms'. Human Rights Watch, *Curing the Selectivity Syndrome: The 2011 Review of the Human Rights Council* (2010) 11.

[268] It is already common practice for large NGOs, such as Amnesty International, to draw attention to 'successes' in human rights campaigns. See, eg, Amnesty International Australia, *Success Stories* <http://www.amnesty.org.au/success/>. In support, at their twentieth meeting the experts 'suggested that positive examples of the impact of special procedures should be brought to the attention of member States and donors.' *Report of the Special Procedures' 20th Meeting,* UN Doc A/HRC/24/55, [31].

[269] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 488.

[270] See generally Braithwaite, Charlesworth and Soares, above n 250, 37-8.

[271] Regarding using informal meetings at sites, such as Geneva, to apply pressure on states for human rights violations, alongside offers of assistance, see Braithwaite, *Restorative Justice and Responsive Regulation*, above n 265, 202.

sanctions to which they can escalate.[272] Although special procedures mandate-holders do not have coercive powers, they can temper this handicap by progressively enrolling the capabilities of others as they move up the pyramid.[273] The steps continuing up the pyramid could include: sending an official letter to the relevant head of state to express concern (further up the pyramid the President of the HRC could also do so); conducting a country visit or repeat country visit; issuing a press release and meeting with local media to draw attention to the lack of implementation; naming non-cooperating states in mandate-holders' reports; shaming the state during the interactive dialogue before the HRC or in presenting its report to the GA; relevant mandate-holders grouping together to consider the rights issue and publicising their observations; holding a special session of the HRC on the issue; requesting the HRC to issue a resolution condemning the rights violation; calling on donor states and multilateral finance organisations not to provide aid or finance to the country in question; appealing to sympathetic states to impose economic sanctions on the violating state; and, in particularly grave circumstances, asking the UN Security Council to intervene in the violations. Where efforts at 'reform and repair' are shown then the expert can de-escalate down the pyramid or,[274] when the problem is solved, 'switch off'.[275] Recall too Braithwaite's observation that '[t]he paradox of responsive regulation is that by having a capability to escalate to tough enforcement, most regulation can be about collaborative capacity building.'[276] If the experts have the ability to move up to sanctions at the top of the pyramid, and this is known to states, the need to engage these tougher sanctions should be small.

Context is crucial when engaging the dual regulatory pyramids. Mandate-holders must remain attentive to the particular contextual factors of each state and rights challenge they consider and be flexible in the sanction or reward engaged, or even in applying the pyramid at all.[277] Circumstances may justify circumventing the order of the pyramid or that a different regulatory pyramid is used. Mandate-holders should also not be afraid to use praise and shame simultaneously. Braithwaite argues that '[w]hen an organization has been so irresponsible that a regulator is punishing it at the peak of its regulatory pyramid for a particular form of conduct, there is no inconsistency in lauding the same organization by moving it to the top of the pyramid of supports on some other issue.'[278] In fact, he argues that praise in one domain can build the actor's confidence to address concerns in another domain.[279] Braithwaite acknowledges regulators' concerns about sending the public mixed messages about how an

[272] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 476. For comment on the reasons why threats should exist in the background rather than the foreground see: at 489.
[273] Braithwaite, Makkai and Braithwaite, above n 215, 315; Braithwaite, Charlesworth and Soares, above n 250, 38.
[274] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 483-84.
[275] Braithwaite, Makkai and Braithwaite, above n 215, 322.
[276] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 475.
[277] Ibid 490, 492-93. Regarding the special procedures specifically, Flood has argued that '[h]ow well a rapporteur tailors strategy and tactics to the specific features of the target state will help significantly in determining how successful he or she will be in achieving the goals set forth in the mandate.' Flood, above n 7, 112.
[278] Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', above n 22, 504.
[279] Ibid.

actor should be viewed but cautions that 'we should not want the public to stigmatize or essentialize a whole organization, or worse, a whole country (such as Iraq), because one part of it has done something terrible.'[280] He argues that the best way to transcend this is to assist responsible actors within the organisation to get an upper hand.[281] This is a pertinent caution in the regulatory domain of Indigenous rights where states, such as New Zealand and Guatemala, demonstrate behaviour that is both deserving of praise and shame. The focus must be on supporting and cultivating Indigenous rights allies within the organs of government.

E *Conclusion: Engage Actors, Contest Principles, Exploit Mechanisms*

A knotty collection of elements elucidate the minimal impact of the special procedures on New Zealand and Guatemala's behaviour towards Indigenous peoples. The analysis reveals several of the decisive factors, including both states' lack of political will; the institutional constraints acting on the mechanism; the special procedures' lack of a coherent vision and strategy; the special procedures' failure to capture the imagination of the actors best placed to take their work forward; the uncontested nature of the state's ruling principles of unitary state sovereignty, formal equality and national economic development; and, the suite of under-utilised regulatory mechanisms available to mandate-holders, especially modelling and capacity-building. If the special procedures are to have a greater impact on state behaviour towards Indigenous peoples these factors must be addressed. Indigenous peoples and other advocates of Indigenous rights must be inspired to leverage the reports, the special procedures experts must expressly and rigorously counter the principles pushed by states, and all regulatory mechanisms must be used. An option presented here is for special procedures mandate-holders to engage dual regulatory pyramids, one focused on building strengths and the other on enforcement, in order to promote compliance. The dual pyramids neatly illustrate the need for the special procedures experts to balance robust criticism of state behaviour in violation of Indigenous peoples' rights with empowering praise for efforts to realise them. For many lawyers, governed by the myopia of seeing punishment as *the* response to rights violations, this approach will require a leap of faith. Braithwaite argues that '[r]esponsive regulation for continuous improvement in human rights performance is not the way that human rights lawyers tend to think. It is a paradigm shift worthy of their consideration, however.'[282] I agree. As someone steeped in the same disciplinary biases, I do not advocate it lightly. I do not seek to downplay the gravity of the many Indigenous rights violations that occur on a daily basis or to deny the role, explicit and tacit, that states often play in the commission of those wrongs. Rather, out of fidelity to the goal of advancing the realisation of international Indigenous

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[280] Ibid.
[281] Ibid.
[282] Braithwaite, *Restorative Justice and Responsive Regulation*, above n 265, 201.

peoples' rights norms, I am concerned with identifying approaches that actually work and there are indications that a dual enforcement and strengths-based approach could.

VIII CONCLUSION

This research set out to understand the role that the international human rights system could play in tackling the gap between states' commitment to international Indigenous rights norms and their domestic implementation of them. To do so it examined how the special procedures, a unique and under-researched mechanism within the UN human rights system, regulate state behaviour towards Indigenous peoples. It found that the special procedures regulate state behaviour towards Indigenous peoples unevenly but observably. There are instances where states have acted upon the special procedures' recommendations. Yet, in most instances this has not translated into the states' conformity to the international Indigenous rights norms the subject of the special procedures' recommendations. This is because states deflect deep scrutiny of their Indigenous rights records by predominantly engaging in ritualism: outwardly agreeing with the special procedures' recommendations, while inwardly developing techniques to avoid them. It also determined that the full influential potential of the mechanism is untapped; identifying strategies for improving the special procedures' regulatory impact and, accordingly, enhancing its role in narrowing the Indigenous rights commitment-implementation divide.

The fact that the special procedures regulate state behaviour at all will challenge rationalist theorists. As Chapter III revealed, this independent human rights mechanism enjoys a broad mandate to advance the realisation of international Indigenous rights norms, in particular through the work of the Special Rapporteur on Indigenous peoples, but also through the 50 additional thematic and country-focused mandates. However, Chapter IV showed that the core tools at the mechanism's disposal to carry out this task are dialogic. The experts have no mandated power to coerce state cooperation with their work or state implementation of their recommendations. As a result, the experts principally deploy shaming techniques, especially through their country and special reports, communications and the media. In addition, they seek to build dialogue around Indigenous rights norms through the techniques of witnessing, praise and knowledge-building. Some, like Anaya, also undertake capacity-building work, supporting states to conform to Indigenous rights norms through their technical advisory assistance. They conduct this massive task with inadequate UN support: without a salary, with limited funds and with varying levels and quality of OHCHR personnel assistance; although a few mandates have astutely enrolled assistance from beyond the UN.

Nor do the experts' recommendations appeal to rationalists' understandings of states' self-interest. The experts ask states to relinquish some of their power rather than increasing it, including seeking recognition of Indigenous peoples' right to self-determination (albeit primarily through its less challenging proxies of self-government and the right to participate in

decision-making), to their lands and resources, and to an education tailored to their cultural needs, including one that is in their language. Yet, some states act on these recommendations.

Chapters V and VI demonstrated the influence the special procedures have had on the New Zealand and Guatemalan governments' behaviour towards Indigenous peoples. These two vastly different states both expressed partial commitment to the special procedures' recommendations concerning Indigenous peoples' soft cultural right to education. Outward displays of commitment were also made regarding aspects of the special procedures' recommendations regarding the hard rights to self-determination and to land. What is more, the case studies showed that, in some cases, the states were influenced in their actions by the experts.

In New Zealand the role of the Special Rapporteur on Indigenous peoples in bringing about the moves in line with the mandate's country recommendations was faint but identifiable. The experts bolstered domestic lobbying efforts for Māori constitutional recognition and protection of Māori rights over the foreshore and seabed and, to a lesser extent, for improved Māori educational outcomes and access to an education in *te reo* Māori. Moreover, the New Zealand Government claimed to have taken on board Anaya's recommendations in refining the replacement foreshore and seabed legislation.

In Guatemala the special procedures' influence was more pronounced. Anaya had a direct influence on the Guatemalan Government's draft instrument regulating consultation with Maya, Xinka, and Garífuna through his capacity-building work and, following his special country mission, on the Government's announcement that it would suspend operations at the Marlin mine. Although the literature has celebrated Stavenhagen's influence on the Government's adoption of legislative and policy measures regarding an intercultural bilingual education for the state's Indigenous peoples, he at most played a contributory role in these developments.

The fact that the special procedures' influence is more evident in Guatemala than in New Zealand will surprise those who expected a developed liberal democracy to be more responsive to international human rights regulation than a post-conflict developing state in democratic transition. But it reflects the differing contexts of the two states: in New Zealand domestic actors, especially the Māori Party, wield more influence over the government, whereas in Guatemala international actors do. It also reflects the different regulatory mechanisms deployed in the two states. In Guatemala Anaya engaged in capacity-building and embraced a more cooperative working style, which seemingly fostered Guatemala's rights commitments. However, a deeper reading of New Zealand and Guatemala's public exhibitions of commitment to the special procedures experts' recommendations, including Anaya's, revealed that they were often ritualised.

In both New Zealand and Guatemala, ritualism was the governments' dominant response to the special procedures' efforts to advance the realisation of international Indigenous rights norms. The pervasiveness of this behavioural response paints a bleaker picture of the special procedures' regulatory impact. It lends support to Charlesworth's argument that ritualism is rife in the field of human rights.[1] New Zealand disguised its inward resistance to the special procedures experts' recommendations regarding hard rights to constitutional protection and land with a degree of outward acceptance of those recommendations. It leveraged its partial commitment to the experts' recommendations concerning the soft cultural right of Māori to an education tailored to their cultural needs, including one in *te reo* Māori, to deflect attention both from its fuller implementation of those soft rights and its resistance to the hard rights. The same pattern of behaviour was discernible in Guatemala in relation to the Government's resistance to the hard rights to Indigenous peoples' participation in decision-making and land, and its limited commitment to Indigenous peoples' soft right to a bilingual intercultural education. It indicates that these states' anxieties regarding Indigenous peoples' hard rights to self-determination (even its weak proxies) and to their lands and resources persist, despite their endorsement of the *UNDRIP*. While these two states are less resistant to soft cultural rights, the case studies demonstrated that even here their level of commitment is unsteady.

States can successfully maintain the façade of Indigenous rights commitment, even in this hyper information age, given the lack of institutionalised follow-up of implementation of the special procedures experts' recommendations. In the longer term states may be caught out where it becomes apparent that the rights issue remains unaddressed. Yet, ritualism buys states time. At the point at which the shallow nature of the Indigenous rights commitment is revealed, a future government administration will likely have to deal with it. Worse, the ritualised commitment may keep the continuing violation permanently hidden from the view of all but those who bear its brunt, erecting thick communication barriers between Indigenous peoples and their potential allies.

States' Indigenous rights ritualism gives us something to work with, however. The fact that both New Zealand and Guatemala engage in Indigenous rights ritualism reveals both states' concern to have favourable international Indigenous rights reputations. In the act of pretending to comply with the international Indigenous rights norms that underpin the special procedures experts' recommendations, there may actually be some compliance by the states: constructivist approaches to state conformity to international norms posit that states may become so enmeshed in their own rights rhetoric that it leads to improved rights conformity over time; although the time horizons for such change may be lengthy.[2] The states' rights ritualism also signals that the

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[1] Hilary Charlesworth, 'Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (2010) 29 *The Australian Year Book of International Law* 1, 12.

[2] See, eg, Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 17, 27; Ryan Goodman

states view the special procedures as an authority that has some legitimacy; otherwise they would outwardly reject the mechanism and its work.

The discernible, albeit far from perfect, regulatory impact of the special procedures in New Zealand and Guatemala is important. It shows that comparatively weak actors like the special procedures can influence powerful actors, such as states. It offers some empirical backing to the existing literature's largely anecdotal reflections on the special procedures' ability to influence states' human rights behaviour. In doing so it suggests that this instrument of the international human rights system retains some of the emancipatory promise of human rights, even if the claims that can be made using it are constrained by the mechanism's liberal foundations: the master's tools can contribute to dismantling the master's house.[3] But other devices are needed too

In understanding the special procedures as a mechanism with influential power it is necessary to remain alive to the possible negative consequences of the experts' exercise of that power. David Kennedy has termed such consequences the 'dark sides of virtue'.[4] As Chapter V to VII showed, these can include the experts' positions on rights concerns undercutting Indigenous peoples' more challenging claims, such as to stronger forms of self-determination; some Indigenous peoples' voices being excluded; and the misuse and misrepresentation of the experts' findings by states and others. Much will depend on the individual mandate-holders, given the significant autonomy they enjoy, as to whether the mechanism is an instrument of progress in advancing the realisation of Indigenous peoples' rights.

While the special procedures' impact in the two states studied here is slight, the mechanism has great potential. Chapter II argued that the special procedures have the ability to weave webs of influence that conduce state conformity to the international Indigenous rights norms they push. Understanding regulation as a product of 'webs of influence' – actors pushing contesting principles using different regulatory mechanisms – opens up a host of regulatory strategies to the special procedures. Special procedures experts can weave dialogic webs, which are often more influential and common than the webs of reward and coercion open to powerful actors like states. They can be proactive in micro-macro processes of globalisation as individual entrepreneurs, enrolling organisational power and promoting models that highlight contradictions in majoritarian identities. They can leverage the principle of continuous improvement to build on states' latent strengths. In other contexts, seemingly powerless actors

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and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *The European Journal of International Law* 725, 738-41. Even Anaya observes that in in being '[m]otivated to *appear* in compliance with their international obligations when under the scrutiny of international bodies, states are more likely *to actually be* in compliance.' S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2 ed, 2004) 219 (emphasis in original).

[3] Audre Lorde, *Sister Outsider* (The Crossing Press Feminist Series, 1984) 112.

[4] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004).

have mobilised such dialogic networks to significant effect.[5]

Multiplex forces constrain the realisation of the mechanism's full influential capabilities in the two case study states. These were examined in Chapter VII, where the threads of the webs of influence operating in the Indigenous rights domains in New Zealand and Guatemala were unravelled. The analysis enabled a move away from the standard assessment that it is the unenforceability of the experts' recommendations, resource issues and a lack of will on the part of states that thwarts the special procedures' influence. These factors matter. But they do not capture the whole narrative where Indigenous peoples' rights are concerned. Beyond states and institutional actors, other salient actors were not wholly enrolled. The special procedures themselves did not display a cohesive vision on Indigenous rights conformity and on ways to implement that objective. Further, in the two case study states there was a low take-up of the special procedures experts' recommendations by the actors that are best placed to give them life. In part this was because of the weak rights cultures in both states and the lack of knowledge regarding the mechanism. But it was also because the experts had failed to capture (or, in some cases, sustain) the imagination of pivotal stakeholders, especially Indigenous peoples. In addition, the core principles of unitary state sovereignty, formal equality and national economic development leveraged by the states were not sufficiently challenged. Nor were all available mechanisms applied with their full might, especially modelling and capacity-building.

Informed by an understanding of these factors, the research offers insights into how the special procedures' efficacy in realising international Indigenous rights norms could be enhanced, insights that can inform practical strategies to help close the Indigenous rights implementation gap. To elevate the special procedures' influence there is a need for the experts to refine their plans of action for actor engagement; more frankly and attentively assail the principles at the base of states' behavioural responses to their recommendations and the rights they promote; and to take advantage of all available regulatory mechanisms. I draw these ideas together to propose that the special procedures experts engage dual regulatory pyramids, one designed to expand strengths and backed by rewards, and the other focused on enforcement in order to 'solve a problem'.[6] While no one mechanism is the panacea to the human rights situation of Indigenous peoples, by engaging these strategies the special procedures can be a compelling tool in the armoury for change.

The analysis advocates viewing the international human rights system as a potentially powerful source of influence regarding Indigenous peoples' rights; the dialogic 'webs of influence' that human rights actors weave can impact state behaviour. But it also exposes one of the tactics states engage in to deflect attention from their resistance to international Indigenous rights norms: ritualism. The depth of the gap between the international commitment to

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[5] See, eg, John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU EPress, 2012).
[6] John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007) 320, 322.

Indigenous rights norms and their domestic implementation suggests that ritualism is practised by states beyond New Zealand and Guatemala and that it is also engaged in response to international human rights mechanisms other than the special procedures. Indigenous rights ritualism is an unexplored concept in scholarship concerning the implementation of international norms. This research suggests that it is a concept deserving of attention, including in states lauded as world leaders in the recognition of Indigenous peoples' rights, such as New Zealand.

Notably, the research supports a shift in the international human rights system's predominant focus on shaming states for behaviour that does not conform to international Indigenous rights norms to models that simultaneously focus on encouraging and supporting states to continuously improve their observance of Indigenous rights. It is not so much that dialogue-building and capacity-building have had an arresting impact on state conformity to international Indigenous rights norms in the two case study states: these techniques did not feature prominently in the approach of the experts in either state, Anaya's efforts in Guatemala being the primary exception. Rather, the research shows that the reigning technique of shaming states has had a notable lack of impact. The special procedures are well placed to take a leading role in this shift in approach, given that dialogue-building and capacity-building are already a component of their working repertoire. Shame still has an important role to play where states prove unwilling to improve their Indigenous rights behaviour. But, crucially, so too do strengths based approaches.

Glossary

Conquistadores	Conquerors
Hapū	Kinship group
Hīkoi	A march
Iwi	Nation
Kaupapa Māori	Māori ideology
Kōhanga reo	*Te reo* Māori immersion preschools
Kura kaupapa	Māori medium primary schools
Mana motuhake	Self-determination
Mana whenua	The exercise of authority over an area
Marae	Māori meeting place
Mestizo	A person of Spanish and Indigenous descent
Pākehā	European New Zealanders
Rangatira	Leader
Te ao Māori	The Māori world
Te reo Māori	Māori language
Tino rangatiratanga	Self-determination
Wānanga	In this context, Māori tertiary education providers
Whānau	Extended family

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