

Consultation and the International Legal Status of Indigenous Communities

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I. Introduction

An international law norm of consultation with Indigenous peoples is, in itself, an intellectually fascinating norm. Such a norm amounts to a requirement at international law that states engage in consultation with non-state actors, most specifically enunciated in the context of a new globalized instrument on Indigenous rights.¹ In other words, the duty to consult with them now gives an international law standing of sorts to communities denied membership in the state system at the Westphalian moment and subsequently, albeit communities with which some colonial powers considered that they had to engage in treaty relationships even from early contact.² A similar point would apply, of course, to some other norms in the minority rights and Indigenous rights context, particularly so with any norm of Indigenous self-determination. However, the norm of consultation provides a particular focus of study removed from some of the more complex and controversial dimensions of self-determination. In the process, it provides a useful lens with which to examine some of the broader theoretical issues arising. Notably, a norm like consultation with Indigenous peoples raises fundamental questions about legitimate modes of international law formation.

¹ *United Nations Declaration of the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007 (hereafter “DRIP”).

² For a rich tracing of the history, see generally Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford, Oxford University Press, 2005). See also Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford, Oxford University Press, 2011).

As with the traditional formation of customary international law more generally, one might frame a case for norms of consultation with Indigenous peoples in terms of state practice and *opinio juris*, and some have done so in at least partial ways.³ Such an account would naturally take account of some soft law material as well, especially legal developments related to World Bank processes that have engaged at length with questions about norms of consultation. That account would naturally involve amassing significant quantities of legal material and is appropriately pursued further elsewhere.⁴ This paper focuses, rather, on what has arguably become the most significant post-*DRIP* comment on consultation, that issued by Special Rapporteur James Anaya in his second report to the United Nations Human Rights Council as Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.⁵ As Part II of the paper will show in the context of a larger description of the report, the Special Rapporteur's Report actually tends to eschew reference to the traditional customary international law arguments. Part III will consider the claim that the Report manifests a significant fracturing around the legitimate formation of customary international law, with the possibility of something other than state practice and *opinio juris* more appropriately grounding customary international law formation in some contexts. Part IV argues that the norm formation in this instance paradoxically reflects both an interesting transformation in the role of non-state actors in law formation within the global legal order and reinforcement of more traditional state-centred law formation.

II. The Post-Declaration Duty to Consult and the Special Rapporteur's Analysis

International law developments related to the rights of Indigenous peoples have taken on a new force in recent decades as Indigenous communities have formed new international networks for purposes of furthering their rights advocacy and participated in transnational ways in norm formation exercises. At the same time, as these networks' efforts have gained momentum, particular communities, especially in the African and Asian contexts where definition of Indigeneity has been more complex, have sought recognition of an identity as Indigenous peoples in order to become part of this broader transnational movement.⁶ This movement's efforts have culminated most recently in the *DRIP*, following on long negotiations between states and Indigenous communities, thus involving from the outset non-state actors in the norm

³ See eg James Anaya, *Indigenous Peoples in International Law*, 2nd edn (New York, Oxford University Press, 2004); Stefan Matiation & Josée Boudreau, 'Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples', in Oonagh E Fitzgerald, *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto, Irwin Law, 2006) 397.

⁴ I am engaged in this process within my SSHRC grant on "International Law Norms of Consultation with Indigenous Peoples: Doctrinal, Methodological, and Theoretical Considerations" and am preparing a separate paper with extensive evidentiary material of this sort that I should complete later this summer.

⁵ UNHCHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, (15 July 2009) UN Doc A/HRC/12/34 (hereafter '*Special Rapporteur 2009 Report*'). The Special Rapporteur has been subsequently renamed (with the name now referring to Indigenous Peoples), but this paper will use the name in place at the time of the report under discussion.

⁶ For some examples, see W Kymlicka, 'Beyond the Indigenous/Minority Dilemma?', in S Allen & A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011) 183, 205-206. See also Dorothy L. Hodgson, *Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World* (Bloomington: Indiana University Press, 2011).

formation process.⁷ As a matter of strictly doctrinal international law, different parts of the Declaration will differ in whether they do or do not reflect international law, some potentially embodying pre-existing customary international law, others crystallizing it, and yet others reflecting merely aspirational norms.⁸ This is so, even though various advocates, sometimes even scholarly advocates, make claims premised implicitly or explicitly on the entire Declaration being a definitive statement of international law, without always seeking to justify such claims.⁹ Nonetheless, even on these strictly traditional theories of customary international law, the Declaration is an immensely significant instrument that fundamentally transforms the analysis of particular norms of international law related to Indigenous peoples. In this sense, if we are concerned with the present state of international law on Indigenous rights, it is proper to focus on this law specifically within the post-*DRIP* context.

On the matter of the norm of consultation with Indigenous peoples, the Declaration has a particular clarifying force. Many activists and some scholars have attempted to assert the existence of a broadly applicable international legal norm of free, prior, and informed consent (FPIC) required from Indigenous communities on a wide variety of matters of governmental action and policy before the relevant government actions are permissible.¹⁰ There are of course instances of this norm's application in specific contexts. But the claim that a widely applicable norm of this sort has clear international law status has often depended on a distortion of particular materials, including claims that the World Bank has already acceded to such a legal norm.¹¹ In fact, the World Bank has taken the more moderate position that a norm of free, prior, and informed *consultation*—for which it also confusingly uses the acronym “FPIC”—is the actual legal standard applicable in many of the contexts at issue,¹² although it has referred to achieving consent as an aim of such consultation and indeed reflective of good policy.¹³ In order to avoid confusion in this paper, “FPIC” will be used only to refer to free, prior and informed *consent*.

Special Rapporteur James Anaya has treated duties of consultation with Indigenous communities as a particularly important obligation owed to Indigenous communities. Indeed, consultation features as the “core issue” in his second report to the United Nations Human Rights Council as Special Rapporteur,¹⁴ with this report being his first on a specific substantive issue after his first

⁷ For a set of excellent comments on the *Declaration*, see Allen & Xanthaki (eds) (n 6).

⁸ For some discussion, see E Voyiakis, ‘Voting in the General Assembly as Evidence of Customary International Law?’, in Allen & Xanthaki (eds) (n 6) 209.

⁹ See eg Union of BC Indian Chiefs, ‘Implementation of UN Declaration on the Rights of Indigenous Peoples’ 18 May 2011 <http://www.ubcic.bc.ca/News_Releases/UBCICNews05181101.html> accessed 12 May 2012; Australian Human Rights Commission, ‘United We Stand – Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia’ 3 April 2009 <http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html> accessed 12 May 2012; Siegfried Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

¹⁰ See eg J Gilbert & C Doyle, ‘A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent’ in Allen & Xanthaki (eds) (n 6) 289.

¹¹ See eg World Resources Institute, ‘Empowering Communities Through Free, Prior, and Informed Consent’, 2005, <<http://www.wri.org/publication/content/8082>> accessed 12 May 2012.

¹² World Bank, *Legal Note on Indigenous Peoples* (2005).

¹³ *Ibid.*

¹⁴ See *Special Rapporteur 2009 Report* (n 5).

report focused on analyzing more generally the legal significance of the new *DRIP*.¹⁵ This second Report takes up the potentially more straightforward terminology of a “duty to consult” and seeks to define the duty contextually and in the general light of the Declaration, of International Labour Organisation (ILO) Convention No. 169,¹⁶ of human rights norms from which the Special Rapporteur suggests the duty can be derived, of observations particularly by the Committee on the Elimination of Racial Discrimination (CERD),¹⁷ and of the Special Rapporteur’s own “purposive interpretation” of the duty.¹⁸

Interestingly, although in his own leading scholarly work on international law and Indigenous peoples, Anaya has advocated a broader application of FPIC,¹⁹ his new analysis as Special Rapporteur now opts for the more limited conception of consultation envisioned by one side within the ongoing scholarly debate on the issue and thus somewhat moves back from his own past position. There is, however, no doubting that the Special Rapporteur intends the view in the second Report as reasonably authoritative. The Special Rapporteur’s third and fourth annual Reports also refer to the duty to consult (as have some of the Special Rapporteur’s country reports²⁰) but cite their legal claims on the duty back to the second Report.²¹

DRIP itself, it bears noting, contains requirements of consultation in different contexts and to different standards. First, in terms of the scope of consultation requirements, it requires consultation both in the context of permitting specific operations on established lands or traditional territories of Indigenous peoples²² and in the context of legislative or administrative measures that affect the interests of Indigenous peoples.²³ It is the second of these aspects that the Special Rapporteur considers requires particular interpretation, offering the “purposive interpretation” that a duty to consult applies “whenever a state decision may affect indigenous peoples in ways not felt by others in society”.²⁴ The Special Rapporteur’s interpretation on this point probably itself needs to be read purposively, for if read literally, difficulties would arise where a state decision affected both Indigenous communities and other non-Indigenous minority communities with some shared characteristic such as a close connection to lands. The Special Rapporteur’s purposive interpretation carefully seeks to avoid overextending the duty. In the process, as literally framed, there is a danger of its underextending the duty. It will be relatively

¹⁵ See UNCHR *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, (11 August 2008) UN Doc. A/HRC/9/9 (hereafter ‘*Special Rapporteur 2008 Report*’).

¹⁶ See ILO Convention 169: Indigenous and Tribal Peoples Convention (27 June 1989).

¹⁷ See *Special Rapporteur 2009 Report* (n 10) [40] (listing a number of such observations). The CERD is a body of experts monitoring implementation by states of the *International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. A/6014 (1966), 660 UNTS 195 (entered into force 4 January 1969).

¹⁸ See *Special Rapporteur 2009 Report* (n 5) [43].

¹⁹ See Anaya, *Indigenous Peoples in International Law* (n 3).

²⁰ There would be many examples of this point. See generally:

<<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>>

²¹ See: UNHCHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (19 July 2010), UN Doc. A/HRC/15/37 [60]-[67] (citing repeatedly to the second Report) [hereafter “*Special Rapporteur 2010 Report*”]; UNHCHR, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* (11 July 2011), UN Doc. A/HRC/18/35 (not adopting new legal principles on duty to consult).

²² *DRIP* (n 1), arts 10, 28, 29, 30, 32.

²³ See *ibid* art 19. .

²⁴ *Special Rapporteur 2009 Report* (n 5) [93].

common in the more complex circumstances of African and Asian states with many different minority communities, some recognized as Indigenous and some not,²⁵ that a state decision might impact on these communities but not others. To fail to apply the duty to consult in such circumstances would be unfortunate.

Second, the text within different provisions of the Declaration refers to the two distinct concepts of “consultation” and “free, prior, and informed consent” (FPIC).²⁶ The Special Rapporteur rightly notes that the terms reflect differentiated consultation processes,²⁷ and the Report essentially arrays them into a sort of spectrum analysis, with a more stringent FPIC standard of consultation applying in certain contexts where the underlying reasons for consultation in terms of the nature of measures and the potential impact on Indigenous peoples give rise to particularly elevated standards of consultation.²⁸ Possibly seeking to render the Declaration requirements more acceptable to states, the Special Rapporteur minimizes any discussion of FPIC as a veto power and instead seeks to consider in a unified way all consultation as geared in good faith to seeking agreement and building dialogue, with particularly stringent standards applicable to FPIC situations, but without those situations necessarily embodying the sort of veto power that FPIC is sometimes read as containing.²⁹

In these sorts of modulations, the Special Rapporteur overcomes some criticism that could otherwise come from states on the Special Rapporteur’s tendency to assume both the Declaration and ILO Convention 169 relatively definitively representative of legally established views. At the time of its adoption the Declaration met with stronger opposition from some states whose position on Indigenous rights would be considered highly pertinent than the Special Rapporteur admits in the 2008 and 2009 Reports. In addition to the abstentions that these Reports acknowledge, there were also a very significant number of absences from the final vote, there having been some significant controversies outstanding at the time of the final vote that also dilute the status of the Declaration as representing current customary international law.³⁰ And ILO Convention 169, of course, has had a very limited number of ratifications.³¹

The Special Rapporteur’s Report extends requirements from the duty to consult to corporations, both by suggesting the incorporation of duty to consult-related components into corporate codes and by recommending state monitoring of corporate compliance.³² In so doing, the Special

²⁵ Definitional issues feature significantly in the *African Commission’s Working Group of Experts on Indigenous Populations/Communities* (2005). See also D E Saunders, “Indigenous Peoples: Issues of Definition” (1999) 8 *International Journal of Cultural Property* 4.

²⁶ Cf *DRIP* (n 1) arts 10, 11, 15, 17, 19, 28, 29, 40, 32, 36, 38.

²⁷ *Special Rapporteur 2009 Report* (n 5) [42].

²⁸ *Ibid* [45]. The Report lists some of the contexts giving rise to FPIC requirements (*ibid* [47]), though there are others within the Declaration not listed.

²⁹ *Ibid* [45]-[49].

³⁰ See D Newman, ‘The Law and Politics of Indigenous Rights in the Postcolonial African State’ (2008) *American Society of International Law Proceedings*; D Newman, ‘Africa and the United Nations Declaration on the Rights of Indigenous Peoples’, in S Dersso (ed) *Perspectives on Minority and Indigenous Peoples’ Rights in Africa* (Pretoria, Pretoria University Law Press, 2010).

³¹ As of this writing, it has twenty-two ratifications, mostly in Latin America.

³² *Special Rapporteur 2009 Report* (n 5) [73].

Rapporteur draws on a developing practice by various stakeholders of evaluating corporations for their compliance with international human rights standards.³³

The Special Rapporteur seeks to provide additional support for the legal status of the duty to consult by referring to the practice of the Committee on the Elimination of Racial Discrimination, which in a number of concluding observations on State party reports has called on states party to the associated ICERD to adopt consultative processes.³⁴ However, these observations, almost without exception, consist of very brief statements recommending consultative processes as part of state action to respond to an ongoing wrong of racial discrimination in particular contexts. In the instances cited, the call for consultation is not clearly asserted as a generalizable legal requirement and could be read as more pragmatically oriented, although the inferences to come from concluding observations are of course complicated by the diplomatic language involved.³⁵ That said, this use of “soft law” is subject to critique on the basis that its legal content may not be entirely clear, although the Special Rapporteur’s development of a norm of consultation out of the various materials at hand also represents a very reasonable interpretation fitting with a generally recognized emerging principle concerning interactions with Indigenous communities.

Interestingly, despite the implication that the duty to consult represents a norm of customary international law, the Special Rapporteur’s Report makes very little reference to the traditional elements of customary international law, namely state practice and *opinio juris*.³⁶ In the context of prior claims for the legal status of the Declaration, the prior year’s report had at least briefly cited supportive practice in Bolivia’s steps to implement the Declaration and referenced citation of the Declaration in Bolivia, Ecuador, and Nepal.³⁷ The duty to consult discussion, however, makes no direct use of state practice or of statements by state representatives that would show *opinio juris* for the norm.³⁸

There is such evidence available, and though some of it arose after the Special Rapporteur’s Report,³⁹ some also existed prior to the Report.⁴⁰ Indeed, an increasing number of states now

³³ *Ibid.* [56]. The 2010 Report further explores duties on corporations: see generally *Special Rapporteur 2010 Report* (n 21).

³⁴ *Special Rapporteur 2009 Report* (n 5) [40].

³⁵ This would be descriptive of the various observations cited in *ibid.*

³⁶ See *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark)* [1969] ICJ Reports 4 (requiring a uniform degree of state practice backed by *opinio juris*). See also A D’Amato, *The Concept of Custom in International Law* (Ithaca, Cornell University Press, 1971).

³⁷ *Special Rapporteur 2008 Report* (n 15) [52]-[53].

³⁸ It also does not use World Bank practice, as has been common with this argument.

³⁹ See eg *Norwegian response to Questionnaire from Permanent Forum on Indigenous Issues* UN Doc E/C.19/2010/12/Add.6 (19 February 2010). The Permanent Forum on Indigenous Issues has also received submissions from other states that have similarly referred to their consultation with Indigenous peoples, with arguable implications that they have done so in response to international law obligations of consultation. Asian states have not featured large in this context, although Cambodia has made similar submissions: UN Doc E/C.19/2010/12/Add.5 (16 February 2010). There are ongoing developments of major significance in Latin America and elsewhere, but a full study on the point is best pursued elsewhere.

⁴⁰ See eg Norway’s submissions to the Permanent Forum on Indigenous Issues, ‘Implementation of the United Nations Declaration on the Rights of Indigenous Peoples’, presentation of Norway State Secretary Raimo Valle before Permanent Forum on Indigenous Issues (21 May 2009), http://www.norway-un.org/Statements/2009/Other-Statements/210509_Valle/ (accessed 12 May 2012).

have domestic practices of consultation or even FPIC embodied within case law, statute, or governmental practice, a point to which this paper will return. However, one of the most interesting instances that existed prior to the Special Rapporteur's Report relates in a particularly complex way to any customary law norm and to the Report. In Canada, within Canadian domestic law, the Supreme Court of Canada has developed a duty to consult doctrine since a series of cases in 2004 and 2005 in which it announced a constitutional duty on Canada's federal and provincial governments to consult with Indigenous communities in the context of possible impacts on their Aboriginal rights or treaty rights that applied, where the governments had actual or constructive knowledge of a claim, prior to final proof in the courts or settlement through negotiation of that claim.⁴¹

The Canadian 'duty to consult' in fact tracks closely the duty to consult that the Special Rapporteur now advances.⁴² To the best of my knowledge, it was the Supreme Court of Canada that pioneered the specific "duty to consult" terminology coinciding with that which the Special Rapporteur now uses.⁴³ The Court's duty to consult jurisprudence also enunciated a flexible analysis very much along the lines of what the Special Rapporteur has now adopted in the international law context. Writing for the Court, Chief Justice McLachlin described the duty to consult in these terms:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.⁴⁴

The Special Rapporteur's account of the duty to consult in international law contains a remarkably parallel spectrum, with the Special Rapporteur stating that "[t]he character of the consultation procedure and its object are...shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure."⁴⁵ The Special Rapporteur's approach to the consultation duties of corporations also has a close parallel to the Canadian approach, as do some other minor elements raised within the Special Rapporteur's Report.⁴⁶

The parallelism between the Canadian duty to consult and the Special Rapporteur's account of the international law duty to consult is not referred to by the Special Rapporteur. This is not

⁴¹ See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] SCR 511 (lead case in enunciating the doctrine); DG Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon, Purich Publishing, 2009) (discussing the initial trilogy and subsequent case law).

⁴² *Haida Nation* (n 41) [44].

⁴³ There had of course been uses of this terminology in labour law contexts.

⁴⁴ *Haida Nation* (n 41) [39].

⁴⁵ *Special Rapporteur 2009 Report* (n 5) [45].

⁴⁶ *Ibid* [54] (main duty on governments and not delegable in full but corporations may as a pragmatic matter carry out consultation), [48]-[49] (duty to consult not creating veto power), [70] (relevance of making information available as part of consultation process and helping to build capacity if needed). All are close parallels to the Canadian model: see generally Newman, *The Duty to Consult* (n 41).

surprising. The complex element of the Canadian state practice is that, although there are sometimes references made by Indigenous rights advocates to its fulfilling an international law duty to consult, it was actually adopted simply as a constitutional doctrine without any direct reference to international law.⁴⁷ Indeed, perhaps more interestingly yet, Canada was one of the four states to actually vote against the Declaration, citing as one reason for doing so its concern about the consultation provisions in the Declaration as compared to well-functioning domestic consultation processes.⁴⁸ Thus, Canada presents an interesting example of state practice but it does not fit well with arguments seeking to establish *opinio juris* for an international norm as articulated by the Special Rapporteur. If, as the parallelism of doctrine suggests, Canada's duty to consult doctrine influenced the Special Rapporteur, there was nonetheless good reason in Canada's vote against the Declaration for this influence to operate *sub silentio*.

This conclusion reiterates the point that the Special Rapporteur, then, advances a customary international norm with reference to soft law and without reference to the state practice and *opinio juris* traditionally required to establish a rule as a norm of customary international law. The formulation related to state practice and *opinio juris*, of course, has been contested for having an overly positivist focus and giving rise to various enigmas concerning the formation of new customary international law, such as questions about how states can consider themselves to be bound by a new norm as it is forming. As a result, there are competing formulations of customary international law that modify the traditional focus on these elements.⁴⁹ The Special Rapporteur's approach to arguing for a customary international law norm without relying on state practice or *opinio juris* thus is not a simple failure to satisfy the standard legal requirements; in fact it implicitly adopts a particularly novel form of these different contested approaches to customary international law. The next Part turns to an underlying theoretical significance of the Special Rapporteur's methodological approach to articulating this new customary international law norm.

III. Contextually Affected Methodology of Customary International Law

The Special Rapporteur's decision not to prioritize state practice and *opinio juris* in the advancement of a customary international law norm could represent simply one untraditional and contestable approach to determining the existence of customary international law norms. This choice would come in an era when the traditional methodology is under increasing attack from various sides in more general terms.⁵⁰ That contestation of the traditional methodology would arise specifically in the context of international law related to Indigenous peoples is perhaps unsurprising. To ascribe significance to a rigid state-centered methodology of analyzing

⁴⁷ I discuss some of its relation to international law in *ibid* ch 5.

⁴⁸ *Ibid*.

⁴⁹ See BD LePard, *Customary International Law: A New Theory with Practical Applications* (Cambridge, Cambridge University Press, 2010) (a recent comprehensive survey of theory on customary international law and an interesting attempt to formulate a new theory)

⁵⁰ See eg DP Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 *German Yearbook of International Law* 198; JL Goldsmith & EA Posner, *The Limits of International Law* (Oxford, Oxford University Press, 2005) 23-43; LePard (n 46); S Besson, 'Theorizing the Sources of International Law', in S Besson & J Tasioulas (eds) *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 163.

customary international law in this context would actually be to adopt a methodology at theoretical odds with the very norm at issue. Indeed, there would be a significant irony in developing a norm of consultation with Indigenous peoples that has normative force precisely because particular entities other than states have a compelling claim for a form of international law standing if one did so by using legal methodologies specifically denying the legal relevance of these very entities. The duty to consult, as other Indigenous rights, acknowledges in some senses a limit on the legitimacy of the claims of states to carry out all legal ordering. In opening to a legal pluralism that embraces interests and norms of Indigenous communities, the normative relevance of a methodological principle focused solely on states themselves is put particularly at issue.

This point can be couched in a broader theoretical framework. Modern analyses of international law have increasingly accepted Thomas Franck's argument that international law must aspire to norms that have legitimacy.⁵¹ To adopt the line of argument as put well by Samantha Besson, if part of what makes law actually binding, as opposed to a mere command, is its legitimacy, then 'legitimacy is an essential part of legality, in the sense that the law should be made in such a way that it *can claim* to be legitimate and hence to bind those to whom it applies'.⁵²

To achieve this legitimacy, many have focused on the idea that some international norms may need to be subjected to processes of democratic legitimation. However, any attempt at majoritarian democratic legitimation of international law norms affecting Indigenous peoples would actually carry severe risks of delegitimizing the norms, given that the norms exist precisely in response to the devaluation of Indigenous communities by hegemonic majoritarian decision-making processes over time. The consultation norm used as the central example here is one concerned with a set of limitations on state actors consisting of duties owed to specific non-state nations denied state status within the Westphalian system. The legitimation of such a norm comes not from opening more general democratic processes in international law-making but from opening the contextually appropriate legitimation processes. The appropriate processes in the context of law affecting Indigenous peoples will be processes involving Indigenous peoples, their views, and their interests as part of the law formation processes.⁵³ The way in which the Special Rapporteur writes about the contents of customary international law here show preference to *DRIP* over more general state practice precisely because the *DRIP* negotiation process was one with elements furthering the legitimation of the norms.

Such reasoning would highlight implicitly a possibility not necessarily bearing on any need for any general shift in the theory of customary international law formation but to the potential for a context-specific approach to analysis and methodology of customary international law. In areas of law formation not giving rise to legal pluralism issues, an argument grounded in legal pluralism does not call for a shift in the methodology of customary international law—though

⁵¹ T Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995) 22-26.

⁵² Besson (n 55) 176. For a different, and extended analysis relevant to these discussions, see Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, Cambridge University Press, 2010).

⁵³ For an example of a state adopting Indigenous participation in the state's international treaty-making processes, see Gib van Ert & Stefan Matiation, 'Labour Conventions and Comprehensive Claim Agreements: A New Model for Subfederal Participation in Canadian International Treaty-Making', in Oonagh E Fitzgerald (ed) *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto, Irwin Law, 2006) 203.

other arguments may call for other forms of legitimation. The argument from pluralism concerns thus contains no general pressure to move, for instance, to a natural law-based conception of custom.⁵⁴ Rather, it speaks to the appropriateness of using more soft law and, implicitly, normative reasoning within a specific context where the legal claims of entities other than states are at issue.

This account of context-specific methodology, it bears noting, is in accord with broader tendencies in international law formation. There is no doubting that certain specialized areas appear to feature different degrees of reference to soft law instruments and to less traditional forms of customary law analysis as compared to other areas. For example, specialized law formation processes are widely acknowledged as having play in the context of international trade and investment law, where non-state actors have significant roles in the development of norms and where non-state actors' interests are of significance within the norms.⁵⁵ Similarly, soft law enumerations feature more widely in human rights law analyses than in other areas of law, with this tendency sometimes leading to critique of the area,⁵⁶ but with it actually representing the nature of the area as likewise involving the international law claims of non-state entities and, thus, the appropriateness of a broader set of interests than mere state practice being under consideration, as compared to in areas of the law concerned solely with the traditional interactions between states and thus more appropriately formed by the processes of interactions between states.

In these areas of specialized norm formation, those affected by the norm are not necessarily a general democratic populus but a more specific set of non-state actors working within the coordination of the specialized norms. The non-state actors affected require careful attention. For instance, effects on local peoples from international investment law are drawing and meriting increasing attention,⁵⁷ and norms on diplomatic immunity are receiving increasing scrutiny when they run up against aspirations of criminal prosecution for harms against civilian populations.⁵⁸ Nonetheless, the point stands that different areas of international law may actually receive legitimation in different ways, and this principle has some fit with observable features of law formation as already practised. A pluralization of processes of norm formation has a significant fit with otherwise unexplained differentiations in actual practice that would have otherwise been subject to puzzlement and critique but that may actually be entirely justifiable and legitimate.

Though the Special Rapporteur's report gives no explicit explanation along these lines but simply makes the argument for the customary international norms in a different way, James Anaya had hinted in related directions in some of his own past writing. He has explicitly suggested that 'actual state conduct is not the only or necessarily determinative indicia of

⁵⁴ For discussion, see generally Lepard (n 49).

⁵⁵ John Jackson, 'The Role of International Law in Trade' (2005) 36 *Georgetown Journal of International Law* 663, 663.

⁵⁶ John Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1.

⁵⁷ See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press, 2003).

⁵⁸ See eg *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Reports 3. Cf. also *Jurisdictional Immunities of the State (Germany v Italy)*, ICJ Judgment of 3 February 2012 (with the dissenting opinion of Judge Cañado Trindade particularly subjecting traditional civil state immunities to interrogation).

customary norms’ and argued for the role of prescriptive or normative or moral dialogue between pertinent actors as an alternative component of customary international law formation.⁵⁹ Others have previously alluded to the possibility of customary law formation through such discursive processes,⁶⁰ but their arguments belong most properly in certain limited contexts, and an explanation of why this is so is an important task of this paper.

Accepting the possibility of pluralized processes of norm formation more explicitly actually opens room not for context-specific escape from accountability in relation to decision-making processes but for new attention to appropriate forms of accountability. The traditional state practice-focused approach to customary international law is obviously subject to its own imprecisions, but it does nonetheless provide a set of legal standards subject to application and capable of intelligibly guiding legal debate. Context-specific approaches to methodology in contexts calling for less emphasis on the state and thus less emphasis on state practice actually open the possibility of developing more specific standards for these different contexts. Given that the traditional standards would have led to criticisms of the Special Rapporteur’s approach, but given that they do not entirely apply, there needs to be careful articulation of what now justifies the determination of a specific legal norm in relation to state obligations to Indigenous peoples.

Here, the Special Rapporteur’s use of purposive reasoning in light of more generally agreed legal starting points has significant potential and, notably, is in keeping with the practices of other institutions having decision-making roles in this area.⁶¹ Adoption of purposive and structural forms of reasoning of the sorts perhaps more familiar in constitutional law contexts offers a specific means by which different possible approaches can be put to relevant tests. This sort of purposive and structural reasoning looks both to what legal norms live out the meaning of Indigenous rights and to what norms are pragmatically viable within the intersecting legal orders at issue.

These approaches may not, of course, remain entirely separate from traditional modes of customary norm formation. If they are successful, over time, at reshaping the conduct of states—and there is, to be clear, an ongoing development of state practice of consulting with Indigenous peoples—then they may create the very state practice by which customary international law has traditionally formed. Moral argument has influenced state practice in various areas and thereby contributed ultimately to law formation,⁶² without this reality having led to widespread claims that moral argument is a means of law formation. However, here the approach explicitly adopts a

⁵⁹ See SJ Anaya, ‘The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples’ (2005) 12 *Law & Anthropology* 127, 128. Cf. also S James Anaya, *Indigenous Peoples in International Law* (n 3) 50-51 (discussing a human rights discourse that ‘seeks to define norms not by mere assessment of state conduct but rather by the prescriptive articulation of the expectations and values of the *human* constituents of the world community’).

⁶⁰ See especially Myres S McDougal, Harold D Lasswell & Lung-Chu Chen, *Human Rights and World Public Order: The Basic Politics of an International Law of Human Dignity* (New Haven, Yale University Press, 1980) 269-274.

⁶¹ The recent African Commission decision in the Endorois case is illustrative: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (4 February 2010) case 276/2003 (ACHPR) [226]-[228].

⁶² See generally Neta Crawford *Argument and Change in World Politics: Ethics, Decolonization, Humanitarian Intervention* (Cambridge, Cambridge University Press, 2002).

sort of normatively structured legal reasoning as part of the analysis of existing law, putting the role of moral argument more squarely at issue. Purposive and structural reasoning becomes part of the process of law formation in a way that overcomes some of the limits of the traditional approach if applied in this context. At the same time, the Special Rapporteur's elaboration of the reasoning behind the conclusions within the specific Report is necessarily brief. Specific adoption of these sorts of methodologies also calls for ongoing academic engagement in the project of analyzing and rendering normatively coherent the emerging principles at stake.

IV. The Simultaneous Transformation and Reinforcement of the Global Legal Order

As intimated at the outset, it is easy to focus on the self-determination aspects of *DRIP* as its key transformative move, with one author rightly describing the Declaration as 'one of the most significant stages in the development of the right to self-determination since decolonisation'.⁶³ But the participation guarantees within the Declaration are also key transformations.⁶⁴ The duty to consult, one of these participation guarantees, receives clear shape and force through *DRIP*. Although some might try to dismiss something like a duty to consult as a mere procedural mechanism, and thus less significant than more substantive rights guarantees or full-fledged transformations of jurisdiction, the purposively read duty to consult marks a larger set of transformations. As in other parts of the Declaration, a group becomes a right-holder at international law, opening new realms of discussion for collective rights.⁶⁵ At the same time, the international law duty to consult recognizes a broader scope and subject of international law and limit on unconstrained state power in the specific context of communities that have felt particularly harshly the effects of past adherence to a Westphalian state sovereignty. Shifting any conceptions of zero-sum games pitting development against culture, a rich account of the duty to consult can see it as making new room for transcultural conversations about living together and opening new spaces within the interstices of international law.

At the same time, any proclamation of a fundamental transformation of the state-centric system of norm formation must be moderated. Two points are worth developing in this regard. First, transformation of law has been achieved not only through transformation of the normative discourse but also partly through transformation of the claims at issue. Second, change has been achieved partly even through alignment with very ordinary power interests that sought, and perhaps even attained to some degree, reinforcement of old power through this very process of change.

The Declaration receives expression in the modality of legal text, achieved legal standing substantially through support by states, and presumes relatively unchanged national and

⁶³ See H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights' in Allen & Xanthaki (eds) (n 6) 259, 260.

⁶⁴ *Ibid* 272-84.

⁶⁵ See A Xanthaki, 'The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?' in Allen & Xanthaki (eds) (n 6) 414-16 (describing key evolution toward collective rights in *DRIP*). See also Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford, Hart Publishing, 2011) (offering a theoretically grounded approach to collective rights).

international jurisdiction.⁶⁶ Indigenous communities' alignment with the Declaration marks not only the transformative recognition discussed above but also alignment with a very ordinary instrument of international law and a state order that has undergone only limited alteration, thereby also effectively reinforcing that state order.⁶⁷ State support for the Declaration was achieved through decades of negotiation, followed by last-minute alterations to the text,⁶⁸ but accompanied in a number of instances by reassurances to states of the limited effects of the Declaration generally and the duty to consult specifically.⁶⁹ Particularly importantly, states were assured in various ways that the rights being guaranteed to Indigenous peoples were guaranteed to them on account of their uniqueness and not because of their own membership in any larger category of minority groups that would now make similar claims.⁷⁰

This latter decision within the negotiations and advocacy, one categorized by a number of scholars as the construction of a 'firewall' between Indigenous rights claims and other minority rights claims,⁷¹ limits the force of any overstated conceptions of the *DRIP*-transformed field of international law. The maintenance of this 'firewall' may not stand, particularly in African and Asian contexts, in which Indigenous rights norms may yet take on further importance through further groups' alignment with Indigenous identity. But to the extent that there is movement across the categories of minority and Indigenous identity, as there has already been in some instances,⁷² such a move by rights-claiming groups may actually have the effect of reinforcing the distinction for other groups left in the category of non-Indigenous minorities. Achievement of international legal force for such concepts as the duty to consult comes about partly through transformation of the scope of the claimed right and partly through transformation of the potential rights-holders in ways that actually limit what was sought by the transnational Indigenous movement and by relevant sectors of the international human rights movement.

Second, although normative suasion obviously had its role in the acceptance by states of Indigenous rights norms, as with decolonization norms more broadly,⁷³ one should not underestimate the role of crass *realpolitik*. There is some evidence of certain states, including China, being enthusiastic to support the Declaration on the presumption that they do not themselves have any Indigenous communities but can thereby complicate the position of other states that they had seen as beneficiaries of colonialism.⁷⁴ In this sense, international law affirmations of Indigenous rights can, whatever the normative force of these claims, also function partly as a power play as between different states, thus again reinforcing state power within the international legal order through the very processes that seem aligned with change to a state-centric order.

⁶⁶ See HP Glenn, 'The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples' in Allen & Xanthaki (eds) (n 6) 171.

⁶⁷ *Ibid* 175-78.

⁶⁸ For an account of these last-minute negotiations, see Newman 'Africa and the United Nations Declaration on the Rights of Indigenous Peoples' (n 30).

⁶⁹ See eg Kymlicka (n 11) 200-202.

⁷⁰ *Ibid*.

⁷¹ *Ibid* 199.

⁷² *Ibid* 205-206.

⁷³ See generally Crawford (n 61).

⁷⁴ Cf A Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Allen & Xanthaki (eds) (n 11) 93, 103-104.

V. Conclusions

In this paper, within a discussion of international law norms of consultation with Indigenous peoples, I have sought to describe and analyze the Special Rapporteur's recent advancement of the duty to consult doctrine, arguing that this doctrine is substantively significant and, in addition, that the Special Rapporteur's method of advancing it has a theoretical salience with the substantive norms at issue. Second, I have argued briefly for the possibility of an account of context-specific modes of formation of customary international law within the changing international legal order. Third, I have argued that the development of this duty to consult doctrine, as the Indigenous rights discourse more generally, embodies a Janus-like simultaneous transformation and reinforcement of the existing global legal order, potentially expanding the subjects and scope of international law while also implicitly closing the door on some such expansion. The development of one seemingly small norm may both open and close many possibilities.