The participation of indigenous peoples and victims in treaty-making for reconciliation on colonial crimes: Between change and stability

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1. *Introduction*

Colonialism continues to raise complex issues for international law. Perhaps the most important question pertains to whether former colonial empires have an obligation to provide reparation for the acts of violence they have committed. In essence, European States tend to acknowledge their moral and political responsibility while denying any form of legal responsibility, whereas former colonies have long asserted their right to reparation.[1] Despite these irreconcilable perspectives, what is remarkable is however that, in the last fifteen years, three bilateral agreements have been concluded with the alleged intention of both acknowledging the wrongdoings and adopting some reconciliation measures to deal with colonial domination and its enduring effects.

In 2008, Italy and Libya concluded a *Treaty of Friendship, Partnership, and Cooperation* that, among many other things, aimed at 'closing' that

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[1] P D'Argent, 'Les réparations pour violations historiques', in F Flauss (ed), *La protection internationale des droits de l'homme et les droits des victimes* (Bruylant 2009) 207.

'chapter of the past', thereby dealing with the 'suffering caused by Italy's colonization of the Libyan people'.[2] The 2015 Japan-Korea Comfort Women Agreement, despite not explicitly mentioning colonial domination, has also been an attempt to provide redress to Korean women for the violence they endured during both Japan's colonization of Korea and WWII. Lastly, in 2021, after lengthy dialogue between the two governments, Germany and Namibia drafted a Joint Declaration in which Germany accepted its moral, historical and political responsibility for the colonization of Namibia and the Herero and Nama genocide.

South Korea has ultimately denounced the agreement with Japan, which was also much criticized because of a lack of victims' involvement in treaty negotiations. In early 2023, moreover, seven Special Rapporteurs of the United Nations Human Rights Council sent a communication to both the German and Namibian governments, criticizing the Joint Declaration on several grounds. A noteworthy concern pertains to 'the failure of the Governments of Germany and Namibia, as parties to the negotiations, to ensure the right of Ovaherero and Nama Peoples, including women, to meaningful participation, through self-elected representatives'.[3] In other words, the UN Special

[2] For a critical analysis of that treaty and its actual objectives beyond reparations, see C De Cesari, 'The Paradoxes of Colonial Reparation: Foreclosing Memory and the 2008 Italy-Libya Friendship Treaty' 5 Memory Studies 3 (2012) 316. See also N Labanca, 'Compensazioni, passato coloniale, crimini italiani: il generale e il particolare', in G Contini, F Focardi, M Petricioli (eds) *Memoria e rimozione: i crimini di guerra del Giappone e dell'Italia* (Viella 2010).

[3] See 'Joint Communication from the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on extrajudicial, summary or arbitrary executions; 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; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on violence against women and girls, its causes and consequences' doc AL DEU 1/2023 (23 February 2023) and doc AL NAM 1/2023 (23 February 2023). According to the Special Rapporteurs, the declaration 'fails to recognize legal responsibility', since it affirms that the past violence could be qualified as genocide only 'from today's perspective'. Moreover, the communication strongly disapproves the idea that development aid may be used as a form of reparation to victims of gross human rights violations: the Joint Declaration, therefore, also 'fail(s) to provide effective reparation to affected communities'. These two issues – the assumption of legal

Rapporteurs condemned the lack of effective participation granted to the representatives of the indigenous peoples in the treaty-making process, ultimately affirming that 'no valid negotiations can be conducted and no just settlement can be reached without them'.[4] In the Special Rapporteurs' reasoning, as we will see, the fact that victims belong to an indigenous community appears to be quite relevant.

Although non-state actors are increasingly playing a notable role in influencing the drafting of certain international agreements,[5] States usually do not have any obligation to involve individuals or groups of individuals in treaty negotiations.[6] In principle, individuals are represented by their national institutions at the international level.[7] At the same time, the internal dimension of the treaty-making power – the means by which national law regulates the exercise of treaty-making power within the organization of the State – aligns with this idea, since that power usually resides within the executive and legislative branches.

responsibility by the wrongdoer State and the reparation for the crimes committed – clearly interrelated and undeniably essential (paras 8-9).

[4] ibid.

[5] On this issue, see, for example, J d'Aspremont, 'Subjects and Actors in International Lawmaking: The Paradigmatic Divides in the Cognition of International Norm-Generating Processes' in C Brölmann, Y Radi (eds) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 32–55 and PS Berman, Paul Schiff, 'Non-State Law Making through the Lens of Global Legal Pluralism' in MA Helfand (ed) *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (CUP 2015) 15-40. For a critical account on statist approaches to international legal personality and lawmaking, see A Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law', U Fastenrath and others (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 39-57.

[6] For a different account, arguing that both Germany and Namibia have a customary law obligation to negotiate with Nama and Herero peoples, see K Theurer, 'Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia' (2023) 24 German L J 1146.

[7] For a brilliant and critical reflection on the North-South divide in understating foreign relations law and representation at the international level, see M Reigner, 'Comparative Foreign Relations Law between Center and Periphery. Liberal and Post-Colonial perspectives' in PH Aust, T Kleinlein (eds) *Encounters between Foreign Relations Law and International Law. Bridges and Boundaries* (CUP 2021) 60. For some more specific reflections on the notion of representation, see H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in S Allen, A Xanthaki (eds) Reflections on the UN Declaration on the Rights of Indigenous Peoples (OUP 2011) 267.

Nevertheless, from a *de lege ferenda* perspective, various sets of reflections may challenge these traditional assumptions, at least when it comes to agreements dealing with reparations for gross human rights violations. The recent practice of concluding reconciliation agreements concerning historical mass crimes, in fact, has brought to the forefront the question of whether States have a duty to grant victims' the right to participate in the making of those treaties. One might ponder the potential impact of recent normative developments on future agreements regarding reparations for colonial crimes or, more broadly, past mass crimes.

With these questions in mind, the article takes the following structure. It is divided into two parts: one focusing on the participation of a specific category of victims – indigenous peoples – in treaty negotiations for colonial reconciliation, the other addressing the broader involvement of victims in such negotiations. In particular, the first part is centered on the right to self-determination of indigenous peoples and examines potential international law changes on the role of indigenous peoples both in national (paragraph 2.1) and international (paragraph 2.2) treaty-making. The second part looks into possible developments regarding, more generally, the role of victims in national and international treaty-making, with a particular focus on recent South Korean practice concerning the comfort women issue (paragraph 3.1) and the increasing relevance of transitional justice principles in colonial reconciliation processes (paragraph 3.2). In conclusion, there is a drive towards change in international law in order to both strengthen the special protection afforded to indigenous peoples and give voice to victims in treaty negotiations addressing the violence experienced by those victims or their descendants. The pace of this transformation, however, will depend on the ability of those advocating for it to overcome the resistance of States seeking to preserve stability (paragraph 4).

2. *The special status of indigenous peoples and the impact of their right to internal and external self-determination on treaty-making for colonial reconciliation*

The reconciliation process between Germany and Namibia is notable for the fact that the victims are indigenous peoples. As mentioned, the genocide against the Nama and Herero peoples was indeed the main

concern between the two States and the primary reason behind their engagement in drafting the Declaration.

The definition of indigenous peoples is highly problematic. Crucially however, indigenous peoples are generally regarded as not comparable to other groups of individuals. In particular, they could not be categorized as non-governmental organizations or minorities. Unlike NGOs, in fact, indigenous peoples 'are not simply groups organized around particular interests', but rather 'long-standing communities with historically rooted cultures and distinct political and social institutions'.[8] Distinguishing indigenous peoples from minorities is more complex. Broadly speaking, while minority individuals aim 'to maintain and develop their specific identity as part of the majority community', indigenous peoples claim for preserving 'their specific society and social structures differently (or, if relevant, in parallel) with the majority community'.[9] In other words, indigenous peoples are political entities representing distinct peoples within States. Notably, this status is precisely due to their special tie to colonial history and their connection to a definite territory, as they now live within a State that originated from the colonial occupation of their ancestral lands.[10]

[8] J Anaya, 'Indigenous Peoples and International Law Issues' (1998) 92 American Society of Intl L Proceedings 98-99. In this vein, criticizing the opposite 'integrationist' approach, see also CW Chen, 'Indigenous Rights in International Law' in RA Denemark, R Marlin-Bennet (eds), *The International Studies Encyclopaedia* (online edn 2017) 5-6.

[9] M Fitzmaurice, 'The Question of Indigenous Peoples' Rights: A Time for Reappraisal' in D French (ed) *Statehood and Self-Determination* (CUP 2013) 356. On the distinction between indigenous peoples and other groups of individuals, see also T Koivurova, L Heinämäki, 'The Participation of Indigenous Peoples in International Norm-Making in the Arctic' (2006) Polar Record 211 at 102. Albeit finally settling the case in favour of the complaint, a decision of the Human Rights Committee has been criticized for basically treating indigenous peoples as minorities, see Human Rights Committee, *Angela Poma Poma v Peru*, Communication no 1457/2006 (27 March 2009) Doc CCPR/C/95/D/1457/2006. Generally speaking, it is true, however, that the geographical dispersion of indigenous peoples may render it quite complicated at times to maintain a concrete distinction between indigenous peoples and other minorities within a certain State, see J Castellino, C Doyle, 'Who Are "Indigenous Peoples"? An Examination of Concepts Concerning Group Membership in the UNDRIP' in J Hohmann, M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 32-36.

[10] As rightly observed by some authors, however, 'several minorities within post-colonial States are in minority situations within the existing boundaries of their post-colonial countries as a pure result of colonial boundaries drawn for administrative

It is not by accident, then, that a number of 'international instruments vest rights in indigenous peoples, and establish indigenous peoples as international legal actors to whom States and other international legal actors owe legal duties and obligations'.[11] According to many authors, indigenous peoples have finally achieved 'recognition of their legal personality as distinct societies with special collective rights and a distinct role in national and international lawmaking'.[12]

These achievements would somehow be a reaction to the legacies of the colonial domination or, to put it differently, the consequences of indigenous peoples' historical quest for self-determination. As we will see, in fact, both the internal and external dimensions of the right to self-determination may provide some arguments in favour of indigenous peoples' involvement in treaty-making at the national and international level. Certainly, the right to self-determination has consistently raised concerns due to its ambiguities, the potential variety of definitions, and tensions with territorial State sovereignty.[13] However, indigenous peoples' participation in lawmaking may be enhanced by the idea, developed by Jan Klabbers, that today 'self-determination is best understood as a procedural right'[14] that 'honors the importance of the political process'.[15] From this perspective, the right to self-determination certainly holds significant promise for ensuring the political participation of indigenous peoples in the process of national and international treaty-making.

reasons, having been transformed into international boundaries', see J Castellino, J Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 Macquarie L J 167.

[11] P Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30 Michigan J Intl L 177, 179.

[12] RL Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?' (1994) 7 Harvard Human Rights J 33-86.

[13] See B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Claims in International and Comparative Law' (2001) 34 New York U J Intl L & Politics 189.

[14] J Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 189.

[15] ibid 204-5.

2.1. *Internal self-determination: the impact of the requirement of free, prior and informed consent of indigenous peoples on national treaty-making for colonial reconciliation*

The ILO Convention 169 on Indigenous and Tribal Peoples of 1989 was the first international instrument referring to indigenous peoples' role in national decision-making. According to Article 6 of that Convention, in fact, 'whenever consideration is being given to legislative or administrative measures which may affect them directly', governments shall consult indigenous peoples 'with the objective of achieving agreement or consent to the proposed measures'.[16] The ILO Convention 169 has garnered only 24 ratifications so far.[17] Yet, it has had a significant impact on the domestic legislation[18] and case-law[19] of State parties. In particular, it has emerged as 'the essential source of constitutional norms'[20] for the right to free, prior, and informed consent, in Latin America countries.

[16] Art 6 of the Convention (No 169) concerning indigenous and tribal people in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

[17] Interestingly, Germany is the most recent State to have ratified it, just a couple of months before the Joint Communication.

[18] Chile, for example, in compliance with the ILO Convention, has established a special mechanism to involve indigenous peoples in the constituent process undertaken in 2016; see International Labour Organization, 'Consultations with indigenous peoples on constitutional recognition The Chilean experience (2016–17)' (ILO 2018) available at <www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_651444.pdf>.

[19] A few months ago, to give just another recent example, the Brazilian Supreme Court recalled that, in light of the ILO Convention, Brazil has the obligation of ensuring 'o direito das comunidades de participarem das decisões' relating to the administration of their lands and which affect their lives, see Recourso Extraordinario 1017365 – declaration of vote of Judge Edson Fachin (relator) at 98.

[20] C Rodriguez Garavito, C Baquero Diaz, 'The Right to Free, Prior, and Informed Consultation in Colombia: Advances and Setbacks' (2018) 13 available at <www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/GaravitoAndDiaz.pdf>.

In the 1990s and 2000s, both international human rights bodies and tribunals[21] and national[22] courts, have widely recognized the existence of a State obligation to ensure the effective participation of indigenous peoples in national decision-making affecting their interests. This duty is to ensure the free, prior and informed consent of indigenous peoples.

Eventually, in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[23] consecrated both indigenous peoples' 'right to participate in decision making in matters which would affect their rights' (Article 18) and the State obligation to 'consult and cooperate in good faith with the indigenous peoples … in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' (Article 19).[24] The well-established nature of the State obligations to consult indigenous peoples and ensure their free, prior, and informed consent has indeed been further confirmed in recent years.[25] These obligations are clearly

[21] In 2006, for example, the Inter-American Court of Human Rights, in the case of *Saramaka People v Suriname*, established that Suriname must provide indigenous peoples with certain safeguards in order to facilitate the exploitation of their natural resources, in particular it 'must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions', see Inter-American Court of Human Rights, *Case of Saramaka People v Suriname* (28 November 2006) Serie C No 146 at para 2.

[22] At the national level, one could refer to the High Court of Nairobi, specifically in the case of *Lemeiguran v Attorney General and ors,* where domestic judges also relied on the ILC Convention 169 and the then-being drafted United Nations Declaration on the Rights of Indigenous Peoples, arguing that indigenous peoples' right to participate in decision-making had been violated by Kenyan government, see High Court of Nairobi, *Lemeiguran v Attorney General and others*, First instance (by way of Originating Summons) Misc Civil App No 305 of 2004 (18 December 2006) eKLR ILDC 698.

[23] UNGA Res A/61/25 (13 September 2007) 'United Nations Declaration on the Rights of Indigenous Peoples'.

[24] The UNDRIP includes, moreover, other significant provisions that make reference to the requirement of free, prior and informed consent of indigenous peoples (such as arts 10, 11, 29 and 32). For an accurate account on the history and role of free, prior and informed consent, see M Barelli, 'Free, Prior, and Informed Consent in the UNDRIP', in J Hohmann, M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 247.

[25] In 2016, for instance, the Special Rapporteur on the rights of indigenous peoples unequivocally affirmed that 'States are obliged to establish culturally appropriate mechanisms to enable the effective participation of indigenous peoples in all decision-making processes that directly affect their rights'. To this aim, States shall engage in 'good-faith consultations to obtain their free, prior and informed consent', see 'Report of

rooted in the right to self-determination of indigenous peoples. More specifically, they safeguard the right to internal self-determination,[26] enabling indigenous peoples to preserve their cultural identity, language, and traditions, and to participate in any national decisions that may impact their lives.[27] Of course, participatory rights and the requirement for free, prior, and informed consent also apply to internal treaty-making, as it is a manifestation of national decision-making.[28]

In their letter to both the German and Namibian governments, indeed, the seven UN Special Rapporteurs acknowledged that 'international law requires the States to obtain the free, prior and informed consent of the Indigenous Peoples' in decision-making that

the Special Rapporteur on the Rights of Indigenous Peoples' UN doc A/HRC/33/42 (11 August 2016) para 17. In 2017, the same Special Rapporteur further emphasized the relevance of participation, stressing that the 'implementation of the Declaration cannot happen without the full and effective participation of indigenous peoples at all levels of decision making', see 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' UN doc A/72/186 (21 July 2017) para 22. At the regional level, for example, EU institutions have also highlighted, on frequent occasions, the 'crucial importance of further enhancing opportunities for dialogue and consultation with indigenous peoples at all levels' and of ensuring 'their full participation and their free, prior and informed consent in a meaningful and systematic way': see Council Conclusions on Indigenous Peoples adopted by the Council at its 3535th meeting (15 May 2017) 8814/17.

[26] According to art 4 of the UNDRIP, the right to self-determination of indigenous peoples encompasses 'autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'. On the notion of internal self-determination, see, among many others, A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 101 and D Thürer, T Burri, 'Self-Determination' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2008).

[27] Arguably, this comprehensive approach aligns with the United Nations General Assembly resolution 72/155 on the rights of indigenous peoples. The UN General Assembly has emphasized, in fact, the necessity 'to support measures that will ensure their empowerment and full and effective participation in decision-making processes at all levels and in all areas', see UN doc A/RES/72/155 (9 December 2018) para 21. In 2014, the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz had indeed already taken a similar stance, emphasizing the importance of 'increasing indigenous peoples' participation in decision-making at all levels' see UN doc A/HRC/27/52 (11 August 2014) paras 38-41.

[28] The most advanced example of this is probably Finnish legislation where the national Parliament has an obligation to negotiate with the Sami Parliament in relation to any decision concerning the drafting of international agreements affecting the Sami peoples, see A Thavanainen, 'The Treaty-Making Capacity of Indigenous Peoples' (2005) 12 Intl J Minority Group Rights 416.

may affect them. Remarkably, both Germany and Namibia's responses to the UN Special Rapporteurs uphold this conclusion. In its note verbale, the German government emphasized the significance of ensuring the participation of indigenous peoples 'under human rights law.'[29] Yet, Germany views this participation as pertaining to the State's relationship with its citizens,[30] thereby confirming that international human rights law mandates Namibia to establish suitable mechanisms for granting indigenous peoples' participation in national treaty-making. Admittedly, Namibia did not deny its obligations under human rights law; rather, it sought to demonstrate to the UN Special Rapporteurs that affected communities were actually involved in the process.[31]

Namibia's defensive arguments highlight the primary challenge associated with the requirement of free, prior and informed consent, which typically revolves around defining its content and ensuring its effective implementation. For instance, a long-standing debate centres on whether the requirement of free, prior, and informed consent could be interpreted as a veto power. Admittedly, some scholars have argued that when decisions on extractive activities on their lands are at stake, indigenous peoples should exercise a 'right to consent', that means essentially that the decision cannot be made without the express will of indigenous peoples.[32] National discussions on whether indigenous peoples should have veto power over specific matters indicate a rising State concern to protect the indigenous right to halt decisions that might harm their interests, particularly when State actions could threaten their

[29] Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organisations in Geneva (1 June 2023) Note verbale 159/2023 para 13.

[30] ibid.

[31] Republic of Namibia, 'Response of the Government of the Republic of Namibia to the Joint Communication from Special Procedures, dated 23 February 2023' (30 May 2023) 3.

[32] T Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law' (2011) 10 Northwestern J Intl Human Rights 54.

lands and resources.[33] Yet, the drafting history of the UNDIP,[34] the positions of the UN Special Rapporteurs on indigenous peoples,[35] the World Bank[36] and other international[37] and national[38] bodies have made abundantly clear that the requirement of free, prior and informed consent does not provide indigenous peoples with a veto power. Instead, it mandates States to set up effective consultation procedures and make every effort to obtain their consent.[39] Of course, the challenge lies then in determining the level of effort required to satisfy the requirement. This assessment cannot but be done on a case-by-case basis.

[33] Recently, within a number of countries, such as Canada and Brazil, a complex debate has arisen around whether the right to free, prior and informed consent should be interpreted as granting a veto power to indigenous peoples over development projects on their ancestral lands.

[34] On this point, see M 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 Intl J Human Rights at 268 and T Allen, JM Lundmark, 'Norwegian Law and the Swedish Sami: Rights, Paternalism and International Law' (2003) 92 Nordic J Intl L at 194.

[35] See, for example, 'Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, James Anaya' UN doc A/HRC/9/9 (11 August 2008) para 46. See also Human Rights Council, 'Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples' UN doc A/HRC/39/62 (10 August 2018) (hereinafter 'UN Expert Mechanism').

[36] World Bank Group, 'Striking a Better Balance. The World Bank Group and Extractive Industries'. The Final Report of the Extractive Industries Review (Vol 1 2003) at 50 available at <https://openknowledge.worldbank.org/server/api/core/bitstreams/63f2cff0-de23-56d8-9ac6-28003c312a5e/content>.

[37] See, for example, Committee on the Elimination of Discrimination against Women General, 'Recommendation No 39 (2022) on the rights of Indigenous women and girls' (31 October 2022) recommending to States that they 'design free, prior, and informed consent protocols to guide' decision-making processes.

[38] See, for example, Supreme Court of Canada, *Behn v Moulton, Contracting Ltd* (2013 SCC 26) para 29.

[39] The UN Expert Mechanism on the Rights of Indigenous Peoples defines consultation with indigenous peoples as 'a qualitative process of dialogue and negotiation, with consent as the objective' see UN Expert Mechanism (n 35) para 15. In 2019, at the 30th anniversary of the adoption of the ILO Convention 169, a wide debate on the rights of indigenous peoples reached the conclusion that the discussion on participation of indigenous peoples in decision-making should 'mov(e) away from the veto debate and focus instead on proper consultation procedures' (22 July 2019); an overview of this debate is available at <www.ilo.org/actemp/news/WCMS_714890/lang--en/index.htm>.

In the case of Namibia, at least three considerations come to mind.

First, the government of Namibia has underscored that, as early as 2006, multiple letters were directed to both inform the affected communities that Germany had agreed to engage in negotiations and to share the Namibian government's proposal regarding the negotiation strategy.[40] However, numerous sources suggest that, in the following years, negotiations between the two States were largely secret.[41] Of course, this would stand in contrast with the requirement of free, prior, and informed consent, since it implies an obligation to timely and properly inform indigenous peoples at each step of the decision-making process.[42]

Second, Namibia has appointed a Technical Committee to provide the executive with guidance and to thoroughly support the negotiation process.[43] The Namibian government has underscored the inclusivity of this committee by inviting affected communities to nominate their representatives. This step was intended to provide these communities with the opportunity to express their concerns and contributions.[44] However, the majority of the representatives of the Nama and Herero peoples rejected this mechanism, advocating for their direct engagement in the negotiations between the two governments. The UN Expert Mechanism on the Right of Indigenous Peoples has emphasized that proposing an alternative solution is integral to the requirement of free, prior, and informed consent. This, in turn, should have prompted the Namibian government to, at the very least, consider such a proposal.[45]

Third, and quite interestingly, the work of the UN Expert Mechanism highlights a crucial link between 'the level of effective participation' and 'the nature of rights and activities involved' in the decision-making process.[46] This means that decisions impacting fundamental aspects of indigenous 'rights, survival, dignity, and well-being' [47] require a higher

[40] Response of Namibia (n 31) at 2-3.

[41] See, for instance, European Center for Constitutional and Human Rights, 'The "Reconciliation Agreement": A Lost Opportunity' (June 2021) available at <www.ecchr.eu/fileadmin/Hintergrundberichte/ECCHR_GER_NAM_Statement.pdf>.

[42] UN Expert Mechanism (n 35) para 21.

[43] Response of Namibia (n 31) 3.

[44] ibid.

[45] UN Expert Mechanism (n 35) at paras 15 and 25.

[46] UN Expert Mechanism (n 35) para 31.

[47] ibid.

level of participation. Both judicial practice[48] and international instruments,[49] for instance, emphasize the limited possibilities available for restricting the requirement of free, prior, and informed consent of indigenous peoples in decisions affecting their lands and natural resources. This special protection finds its roots in the status of indigenous communities as colonized communities, historically deprived of their territories. As also stressed by the UN Expert Mechanism, 'historical inequities faced by indigenous peoples' must be considered, when evaluating possible restriction to their free, prior and informed consent.[50] A decision-making process on negotiating reconciliation for colonial crimes is evidently connected to indigenous peoples' dignity as victims of historical injustice.[51] Consequently, reconciliation treaties

[48] See, for instance, Inter-American Court of Human Rights, *Saramaka Peoples v Suriname*, Series C No 172 (28 November 2007) paras 134 ff. See also other human rights bodies such as the African Commission of Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, doc 276/2003 (4 February 2010) para 226.

[49] The UNDRIP, as mentioned, devotes some special provisions to land rights, such as arts 19 and 32. A strict construction of the requirement of free, prior, and informed consent when decisions concern lands and natural resources can be inferred also from the practice of other UN bodies, see Committee on the Elimination of Racial Discrimination, 'General Recommendation No 23 on the rights of indigenous peoples UN doc A/52/38' (18 August 1997) para 5 and UN Committee on Economic, Social and Cultural Rights, 'General Comment No 21 Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)' UN doc E/C.12/GC/21 (21 December 2009).

[50] As the Special Rapporteur of indigenous peoples rights has pointed out, the right to free, prior, and informed consent may indeed be subject to limitation by the State, if, as indicated in the UNDRIP, the limitation is necessary and proportional in relation to a valid State objective motivated by concern for the human rights of others, see 'Report of the Special Rapporteur on the rights of indigenous peoples, J Anaya. Extractive industries and indigenous peoples' UN doc A/HRC/24/41 (1 July 2013) at paras 32-36: in particular, the requirement of free, prior and informed consent can be restricted 'for the purpose of achieving the human rights objectives of the society as a whole'. In the case of *Angela Poma Poma v Peru* (n 9), for example, the Human Rights Committee has limited the requirement of free, prior and informed consent to State measures that would 'substantially compromise or interfere the culturally significant economic activities' of indigenous peoples.

[51] To put it in a broader perspective, as one of the former Special Rapporteur of the United Nations Working Group on Indigenous Peoples has written, since indigenous peoples did not participate in the construction of the State that colonized their territory, that same State would have an obligation to enhance a process 'of belated state-building, through which indigenous peoples are able to join with all the other peoples that

involving colonial crimes should demand that special attention be given to the consent of indigenous peoples, as is the case for decisions on lands and natural resources. Following the UN Expert Mechanism's guidance, Namibia should indeed have considered suspending and restarting the internal decision-making process when the indigenous peoples withheld their consent.[52]

2.2. *External self-determination: Towards a State obligation to involve indigenous peoples in treaty negotiations?*

Thus, international law requires States to seek the free, prior and informed consent of indigenous peoples in national treaty-making processes affecting their dignity and vital interests. Much more complex is to determine whether States have an obligation to directly involve indigenous peoples in international treaty-making.

According to the seven UN Special Rapporteurs, the Nama and Herero peoples, as indigenous peoples, do indeed have a 'legal status' that is 'different and separate from that of the Namibian Government itself', which 'requires a place of its own in the negotiations'.[53] Their participation, in practice, 'cannot be confined to external consultations', rather 'it must entail their direct engagement'.[54] This direct engagement would be 'an essential part of the much-needed reconciliation process'.[55]

Whilst there is no doubt that the UNDRIP enhances various forms of internal self-determination, it is quite a bit more challenging to argue that

comprise the state on mutually agreed-upon and just terms after many years of isolation and exclusion'. See E-I A Daes, 'An Overview of the History of Indigenous Peoples: Self-determination and the United Nations' (2008) 21 Cambridge Rev Intl Affairs 23.

[52] UN Expert Mechanism (n 35).

[53] Joint Communication UN Special Rapporteurs (n 3) 8.

[54] ibid.

[55] ibid. Interestingly, a few months earlier, on 21 February 2023, five subsidiary bodies of the Human Rights Council had sent a letter to the United Kingdom expressing their concern for the lack of commitment 'to ensure effective and meaningful participation of the Chagossians in the processes related to negotiations and decision-making concerning their homeland', see 'Mandates of the Special Rapporteur on minority issues; the Working Group of Experts on People of African Descent; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of nonrecurrence' doc AL/GBR 1/2023 (21 February 2023) 2.

it protects external forms of self-determination. During the drafting of the UNDRIP, a significant area of contention was sparked as to the scope of the right to self-determination. As expected, many States feared that reference to this principle could bring forth secessionist claims from indigenous peoples.[56] Eventually, including the right to self-determination in the UNDRIP (Article 3) was the result of a compromise achieved through the introduction of Article 46,[57] which stipulates that nothing in the UNDRIP may be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[58]

The external dimension of self-determination, however, does not only relate to the radical claim for secession. It encompasses also all those situations in which indigenous peoples – or any other people claiming self-determination – may act at the international level, for example when negotiating a treaty. Yet the UNDRIP does not explicitly recognize any form of international dimension to self-determination, let alone provide for appropriate mechanisms to secure the participation of indigenous peoples in the making of international law.[59]

The positions adopted by Germany and Namibia confirm that States still consider themselves (ie governments or, under certain circumstances, parliaments) as the sole actors in international treaty-making. Germany, in particular, has made it clear that the government of

[56] For an account on this issue M Barelli, 'Shaping Indigenous Self-determination: Promising or Unsatisfactory Solutions?' (2011) 13 Intl Community L Rev 413-436 and Luis Enrique Chavez, 'The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: the Middle Ground', in C Charters, R Stavenhagen (eds), *Making the Declaration Work: The UN Declaration on the Rights of Indigenous Peoples* (Transaction Publisher 2009) 105.

[57] See, among many others, T Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain their Right to Self-Determination' (2008) 15 Intl J Minority Group Rights at 11.

[58] To put it differently, the colonization of indigenous peoples happened so far back in history that their claims for secession have gradually made room for the principle of territorial integrity of States. Yet, indigenous peoples have never stopped advocating for a right to participate 'in decision-making processes affecting their lives', see 'Report of the Working Group on Indigenous Populations on Its Eleventh Session' UN Doc E/CN.4/ Sub.2/1993/29 (23 August 1993) 22.

[59] K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 EJIL 147.

Namibia 'represents the Namibian people in matters of international law', and it 'is therefore the point of contact for the German Government in all questions relating to bilateral relations, including the negotiations on addressing the colonial past'.[60]

Despite well-established State practice, various arguments have been put forth in favour of a change in international law in order to secure indigenous peoples an international treaty-making capacity. These arguments are fundamentally based on three main ideas: a call for a more pluralistic international society, the need to overcome the limits of democratic rights, and the potential of the right to self-determination.

First, a significant number of scholars emphasize the necessity for a more pluralistic and less statist conception of international society.[61] Generally speaking, State sovereignty, as a foundation of international law, may no longer fully grasp the full complexity of the international legal order, especially the increasing role of non-state actors in international law-making. This shift could entail recognizing indigenous peoples with the legal capacity to engage at the international level and to negotiate treaties. Notably, historical instances indicate this recognition, as indigenous communities were indeed acknowledged to possess treaty-making capacity when conferring titles of sovereignty on colonial States.[62] The paradox, therefore, would be the failure to recognize them as having a treaty-making capacity – which could now serve the purpose of enhancing their self-determination – which was previously acknowledged in the past as a means to legitimize their colonization. Finally, granting indigenous peoples the right to be recognized as subjects on par with

[60] Note verbale of Germany (n 29) para 11.

[61] R Falk, 'The Rights of Peoples (in particular, Indigenous Peoples)' in J Crawford (ed) *The Rights of Peoples* (OUP 1992) 34-35. C Charters, 'The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law' (2021) 115 AJIL Unbound 126. P Schiff Berman, 'Non-State Lawmaking through the Lens of Global Legal Pluralism' in MA Helfand (ed) *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (CUP 2015) 18. And, from a broader perspective, R Falk, 'What Comes after Westphalia: The Democratic Challenge (2006-2007) 13 Widener L Rev 243.

[62] C Stahn, 'Reckoning with Colonial Injustice: International Law as Culprit and as Remedy? (2020) 33 Leiden J Intl L 834: 'This practice indicates that statehood was not necessarily a condition sine qua non for the recognition of legal personality and that local entities were deemed to enjoy treaty-making capacity in certain contexts (e.g. conferrals of titles to sovereignty). In light of this, it does not always make sense to require that the interests of a peoples are mediated through the state in negotiations or claims'.

States at the international level would primarily be a matter of justice: a statist approach to international law risks reproducing domination logic reminiscent of the colonial era.[63]

Second, democratic rights may not be sufficient to safeguard the fundamental rights of indigenous peoples. In fact, indigenous peoples 'have been historically marginalized and neglected' by those same State institutions that should guarantee their participation.[64] In other words, individual rights to public participation may not be able to adequately protect colonized communities, since dominant societal groups would maintain an overreaching power to impose their views.[65] From this perspective, internal self-determination, even when properly implemented,[66] might not suffice and external forms of self-determination may become necessary.

Third, another set of arguments hinges on the inherent nature of the right to self-determination. Self-determination is not static; rather, it is a dynamic and relational concept with a remedial dimension. The relational aspect underscores that self-determination is grounded in the evolving relationship between peoples and State institutions, shaping the aspirations of peoples over time. In essence, the exercise of the right to self-determination should be seen as an ongoing process—an aspiration

[63] C Stahn, 'Confronting Colonial Amnesiac: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects' (2020) 18 J Intl Criminal Justice 810-3 and F Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 Texas Intl L J at 189.

[64] SA Khan, 'Rebalancing State and Indigenous Sovereignties in International Law: An Arctic Lens on Trajectories for Global Governance' (2019) 32 Leiden J Intl L 684; A Roberts, S Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale J Intl L 107 and C Brölmann, M Zieck, 'Indigenous Peoples' in C Brölmann, R Lefeber, M Zieck (eds) *Peoples and Minorities in International Law* (Brill 1993) at 216.

[65] J Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Publishers 2006) 221. In a similar vein, see S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2021) 41 Vanderbilt L Rev at 1163 and R Falk 'The Right of Peoples' (n 61) at 31: 'move toward a specific regime to be established within international law for the protection of indigenous peoples. Such movement acknowledges the impact of past experience, in particular, the appreciation that to grant mere autonomy to indigenous peoples, or to assure their participation in the dominant society on the basis of equality and non-discrimination, is insufficient'.

[66] Khan observes, for instance, that many 'states do not raise to those standards' see Khan (n 64) 683.

for autonomy that can be flexibly adjusted and reconsidered in response to changing historical contexts. In practice, one should always consider 'the provisional and incomplete nature of all exercises of self-determination',[67] as well as the ability of self-determination to serve different purposes according to the specific circumstances and aspirations of the peoples claiming it.[68] In our context, this suggests that indigenous peoples' participation in treaty negotiations could be seen as a legitimate aspiration grounded on their ongoing quest for self-determination. Finally, the capacity of indigenous peoples to act at the international level, negotiating treaties addressing colonial reconciliation, is rooted in the remedial nature of the right to self-determination – traditionally intended as a means of rectifying past injustice.

All these arguments, more or less explicitly advanced also by some United Nations bodies (including, certainly, the seven Special Rapporteurs), clash, as mentioned, with State practice and, above all, with certain principles of international law that continue to govern the realm of international relations. Essentially, even assuming that indigenous peoples have a treaty-making capacity at the international level, the above-mentioned arguments appear to somehow overlook the persistent role of State consent in international law-making.

Indeed, any international agreement between a State and a group of individuals, nationals of or residing in another State, would violate the principle of non-intervention. The research services of the German *Bundestag* has specifically emphasized that any compensation agreement between Germany and the representatives of the Herero and Nama would 'constitute interference with Namibia's sovereignty as a State, possibly constituting a violation of the principle of non-intervention under international law.'[69] Such an agreement 'would, therefore, only be lawful and make sense in consultation with and with the consent of the

[67] GJ Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 Stanford J Intl L 255.

[68] J Anaya, *Indigenous Peoples in International Law* (OUP 1996) 84: self-determination can develop 'in accordance with the present-day aspirations of the aggrieved groups, whose character may be substantially altered with the passage of time.'

[69] Research Services, Deutscher Bundestag, 'On the Admissibility under International Law of Voluntary Compensation Payments to Herero and Nama in Namibia' (11 October 2021) WD 2 - 3000 - 067/21 at 8.

Namibian government.'[70] In essence, the treaty-making power of a group of individuals shall be authorized, delegated, or consented to by the executive (or legislative) organs of the State of nationality or residency. Admittedly, this reflects the widespread State practice of authorizing sub-state entities to negotiate or conclude specific international agreements,[71] which essentially express the still perceived need to preserve the State as a unitary actor at the international level. Yet, the consent of the State of nationality or residency of the group of individuals to their direct engagement in international treaty-making is not sufficient, since the counterpart State must also consent to engage in direct negotiations with the group of individuals at hand.

3. *New trends and possible developments on the role of victims in treaty-making for colonial reconciliation: Recent State practice and transitional justice principles*

Assessing the possible emergence of State obligations regarding the participation of victims in treaty negotiations for colonial reconciliation is an even more complicated task. Victims constitute a broader, less defined category than indigenous peoples. Victims are not a group of individuals representing a distinct entity or community within a State and do not enjoy any special protection because of their collective status.[72] However, two relevant trends are seemingly also emerging in this context. Firstly, there is a growing attention being given by States to the potential role of victims of past colonial violence in the exercise of national treaty-making power. The Korean case is particularly interesting in this regard, providing insights into a potential correlation between the participation of victims in treaty negotiations and the State's ability to act

[70] ibid.

[71] DB Hollis, 'Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law (2005) 23 Berkeley J Intl L 137, at 147-155.

[72] More generally, problems may arise from the potential heterogeneity of victims' demands and the consequent difficulties in finding a way to unitarily represent all their varied concerns. Participation, moreover, requires resources and organization among the victims, as well as public outreach and information. On these aspects see, for example, L Magarrell, 'Reparations in Theory and Practice' (International Center for Transitional Justice, 9 January 2007) available at <www.ictj.org/publication/reparations-theory-and-practice>.

internationally on their behalf. Secondly, there is an increasing recognition of the relevance of transitional justice principles in the colonial context, therefore beyond purely internal State transition processes. The acknowledgment of transitional justice principles in the context of colonial reconciliation processes may ultimately lead to the affirmation of certain State obligations in the exercise of their treaty-making power; in particular, they could be required to involve victims of colonialism in treaty negotiations.

3.1. *The 'comfort women' case and the potential relationship between the power of a State to act internationally on behalf of its nationals and the individual right of access to courts*

The legal mobilization of victims has already presented to domestic courts the question of the presumed invalidity of interstate agreements on reparations, purportedly due to the absence of victims' participation in the negotiation process.[73] The Nama and Herero peoples' advocates, for instance, have brought this very issue before the High Court of Namibia.[74] Yet, the 'comfort women' case has already provided some interesting insights on the matter.

As already mentioned, in fact, the 2015 bilateral agreement between Korea and Japan was strongly criticized because of the lack of involvement of victims in treaty negotiations. Due to protests by the victims' associations, the Korean Government was ultimately forced to denounce the agreement and establish a dedicated task force to examine it with a focus on the interests of victims. In a quite interesting report published in 2017, the special task force has generally acknowledged that 'remedy and reparation should be made with the victims at the center'.[75] More specifically, the task force claimed that the Minister of Foreign Affairs of Korea did not adequately inform the victims on the measures to be undertaken on the Korean side and had 'failed to seek victims' view

[73] For a general overview on the very idea of legal mobilization and its main features, see DJ Black, 'The Mobilization of the Law' (1973) 2 J L Studies 125-149.

[74] High Court of Namibia, case no HC-MD-CIV-MOT-REV-2023/00023.

[75] The Ministry of Foreign Affairs of Korea, 'Task Force on the Review of the Korea-Japan Agreement on the Issue of 'Comfort Women' Victims' available online at <www.mofa.go.kr/upload/cntnts/www/result_report_eng.pdf>.

on the amount of reparation'.[76] As a consequence of these findings, the Korean executive has explicitly recognized that the bilateral agreement could not be seen as 'a genuine solution', since it did not 'appropriately reflect consensus of the victims'.[77] Finally, the executive has committed to 'seek victim-centered solutions while comprehensively gathering consensus from the victims'.[78]

In 2019, the Korean Constitutional Court explicitly shared the task force's approach, criticizing the lack of victims' involvement in reaching the agreement.[79] Interestingly, even though the Korean Constitutional Court did not explicitly state it, the lack of a victim-centered approach seems to be one of the elements supporting the judges' conclusion that the agreement did not in any way affect the position of individuals and their right to seek reparation before courts.[80] When reading the judgment, in fact, one is left with the impression that there is a link between the lack of involvement of victims in the negotiation process and the inability of the bilateral agreement to impact on the rights of those same victims.

In a more recent decision, this relationship seems even more evident. In 2021, in fact, the Seoul District Court confirmed the Constitutional Court's idea that the 2015 agreement would be unable to impact on the individual right to seek reparation. According to the Seoul District Court, the deal was a 'state-to-state political agreement' rather than an international treaty, as it was not adopted in accordance with the internal procedures required for the conclusion of international agreements.[81] Korean judges, moreover, emphasized that the petitioners 'are merely individuals who do not have negotiation power or political power' and, for this reason, do not have, under the current circumstances, 'effective measures to receive reparations for specific damages other than this lawsuit'.[82] Interestingly, the reasoning of the Seoul District Court mainly focuses on the negotiation process of these agreements. While not always

[76] ibid.
[77] ibid.
[78] ibid.
[79] Korean Constitutional Court, *Case on Announcement of Agreement on the "Comfort Women" Issue* (27 December 2019) 2016Hun-Ma253.
[80] See, in particular, the last part of the judgment, ibid.
[81] Central District Court of Seoul (8 January 2021) case no 2016 Ga-Hap 505092.
[82] ibid Section 4.C, para 2, 6 ii.

expressed in a linear manner, the Korean judges assert that the State's negotiation power should have been exercised while ensuring some form of victims' participation. Essentially, the judgment aligns with the Constitutional Court's idea that an interstate agreement is a possible avenue to obtain, through State action, compensation for the victims. Remarkably however, this decision suggests that the State's power to dispose of the individual right to reparation thorough an interstate agreement – and the consequent limitations to the individual right to seek compensation – may also depend on the negotiation process of the reparation agreement and, in particular, on the degree of involvement of the victims: the greater the participation of the victims in treaty negotiations, the more likely judges will recognize the State as having acted on behalf of and for them.

In conclusion, the Korean case-law certainly underscores the increasing attention States are giving to the participation of victims in treaty negotiations. It also provides a promising avenue for connecting the legal requirements of the internal treaty-making process in terms of victims' participation to the scope of individual rights of access to courts, particularly when individuals are seeking reparation for gross human rights violations.

3.2. *The principles of transitional justice and their potential impact on reconciliation processes for colonial crimes*

It is widely recognized that transitional justice assigns victims a pivotal role in all reconciliation efforts.[83] Essentially, the participation of victims would be expected to contribute to the legitimacy and sustainability of any reconciliation process.[84] Both the Korea-Japan and Namibia-

[83] For a critique on this alleged 'common rhetoric', see S Robins, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations (2017) 11 Human Rights and Intl L Discourse 41.

[84] Victims' participation also has important psychological and social effects. Active participation of the affected communities is supposed to 'reinforce social cohesion' and 'enhance perceived control and self-esteem' of victims. See C Martin-Beristain, D Paez, B Rime, P Kanyangara, 'Psychosocial Effects of Participation in Ritual of Transitional Justice' (2010) 25 Revista de Psicología Social 48-51. From the victims' perspective, it is hard to deny that their involvement ensures a sense of ownership of the reconciliation process, thereby fostering a greater readiness to accept apologies and acknowledgment of responsibility from the other party, and more broadly, to view reparation as effective.

Germany cases tend indeed to support the idea that the involvement of victims is crucial for the durability of such initiatives.[85]

However, defining transitional justice and evaluating its impact on States are complex endeavours. Transitional justice is officially defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation'.[86] Admittedly, this definition underscores the wide-ranging scope and the expansive potential of transitional justice principles.

Traditionally, transitional justice mechanisms have been crafted to navigate States through transitions from war to peace and from autocracy to democracy. Transitional justice, therefore, has often functioned as a guiding framework for political transformations and reconciliation processes within national communities. In other terms, the progressive affirmation of transitional justice principles mainly aims at influencing how national legislations address past atrocities. From this perspective, one could argue that these principles are poised to influence the exercise of national treaty-making power for reconciliation, urging States to accord victims an increasingly significant role. The growing attention of

As the UN Special Rapporteur on Torture once emphasized, victims' participation may be actually considered 'an indication of the good faith and due diligence with which governments face the challenge of truth, justice and memory for human rights crimes': JE Mendez, 'Victims as Protagonists in Transitional Justice' (2016) 10 Int J Transitional Justice 2.

[85] See, among others, T Phuong Le, 'Negotiating in Good Faith: Overcoming Legitimacy Problems in the Japan-South Korea Reconciliation Process' (2019) 78 J Asian Studies 621; LJ Laplante, 'Negotiating Reparation Rights: The Participatory and Symbolic Quotients' (2017) 19 Buffalo Human Rights L Rev 217 and C Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 U Pennsylvania J Intl L 257. The failure of these agreements could also stem from victims' legal mobilization before domestic courts. This mobilization seems in fact to be linked to the extent to which victims lack influence in the reconciliation process: the greater the exclusion, the more victims will take their case to court. As some scholars have pointed out, in fact, there seems to be a link between legal mobilization and victims' participation in transitional processes, see L Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in C Lawther, L Moffett, D Jacobs (eds) Research Handbook on Transitional Justice (Edward Elgar Publishing 2017) 385: 'victim participation can facilitate completeness and comprehensive for reparation programmes, minimising years of litigation and further mechanisms'.

[86] 'Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies' UN doc S/2004/616 (23 August 2004) para 8.

Korean political and judicial organs to the role of victims in national treaty-making for reconciliation with Japan may also be an indication of this potential impact.

Yet, the field of transitional justice has rapidly evolved over time and, precisely because of its wide scope and definition, United Nations organs are increasingly invoking its fundamental principles to promote the rule of law on a global scale and in a variety of contexts.[87] Recently, a role for transitional justice has also seemed to emerge in the context of colonial reconciliation. In 2021, reflecting on colonialism and its enduring effects, the *UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Fabián Salvioli, underlined that 'the components and tools developed by transitional justice over the past 40 years offer lessons and experiences that could be useful in responding to the legacy of these violations'.[88] The report of the UN Special Rapporteur has also emphasized that 'inclusive mechanisms with the strong and active participation of victims empowers affected populations and provides legitimacy and sustainability to efforts to address the legacy of colonialism and, ultimately, to achieve reconciliation'.[89]

It is unclear whether and what State obligations might potentially arise from transitional justice principles. It may be possible to argue that those principles will increasingly guide States willing to undertake a reconciliation process for colonial crimes. In particular, States may also take into account the direct engagement of victims in treaty negotiations addressing the colonial past. However, challenges associated with the participation of victims in treaty negotiations may be even more intricate than those faced by indigenous peoples. Besides relying on State consent,

[87] See, for instance, 'Guidance note of the Secretary-General: United Nations approach to transitional justice' (March 2010) available at <https://digitallibrary.un.org/record/682111>.

[88] 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli. Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts' UN Doc A/76/180 (19 July 2021) para 6. Many international law scholars agree on the idea that 'an important legacy of more than three decades of transitional justice is that affected communities ought to be heard in the context of peace negotiations': see, for example, JE Mendez (n 84) 4.

[89] 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli' (n 88) para 6.

it is indeed hard to consider victims as a group of individuals with a status separate from that of their State of nationality.

4. *Concluding remarks*

In his recent novel, *The Last Colony*, Philippe Sands retraces the story of an entire indigenous people forcibly displaced from their land—the Chagos Islands—by the British colonial administration. Sands narrates this story through the legal proceedings that unfolded at the International Court of Justice. Philippe Sands and his team, in particular, were convinced that the only way to persuade the Court that Britain had breached the right to self-determination of the Chagossians was to 'hear a voice from Chagos.'[90] The striking and emotional four-minute video statement before the Court by Liseby Elyseé, a Chagossian victim of British colonialism and protagonist of Sand's novel, likely had a significant impact on the content of the advisory opinion rendered by the ICJ and the individual positions of its judges.[91] Ultimately, *The Last Colony* vividly illustrates the importance of hearing the voices of victims of colonial domination to fully understand the extent of the suffering endured, its continuous effects and potential remedies. It also shows how international law has, albeit slowly and with setbacks, contributed to the process of decolonization, also through the gradual recognition of those voices.

This paper aimed to highlight signs of change in international law, recognizing the potential for an increased role for indigenous peoples and victims in both national and international treaty-making. Indigenous peoples enjoy a special protection under international law, stemming from their right to self-determination. More concretely, the right to internal self-determination of indigenous peoples requires States to ensure their effective participation in the national treaty-making process. With regards, more generally, to the involvement of victims in national treaty-making, State practice remains limited, but the process of change

[90] P Sands, *The Last Colony. A Tale of Exile, Justice and Britain's Colonial Legacy* (The Orion Publishing Group 2022) at 121.

[91] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion of 25 February 2019) [2019] ICJ Rep 95.

is likely on its way, thanks to the role of the transitional justice principles. Yet, the direct engagement of groups of individuals in international treaty-making appears to be more complicated. Governments tend to seek to preserve stability, whereas certain UN bodies strongly advocate for change. National and international judges may also play a crucial role in driving change. So far, despite the promises of external self-determination and the expansive nature of transitional justice mechanisms, the participation in treaty negotiations for indigenous peoples and victims of colonial crimes still hinges on State consent.