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**Dialogue on an optional protocol to the United Nations Declaration on the
Rights of Indigenous Peoples**

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**“The Limitations of the Current International Human Rights Law System in
Regard to Monitoring of Rights? Does it Encourage ‘Rights Ritualism’?”**

Presentation by Ms. Fleur Adcock, The Australian National University

I. Introduction

1. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the most comprehensive articulation of the contours of Indigenous peoples' rights.¹ Yet, even with its adoption, Indigenous peoples remain at the margins of power and overrepresented in negative socio-economic indicators.² Creating an optional protocol to the UNDRIP, providing for a voluntary international complaints body, is one move that could help to address this persisting Indigenous rights 'implementation gap'.³ There are important reasons for creating such a mechanism, which are set out in the Permanent Forum on Indigenous Issues' (PFII) study on an optional protocol.⁴ But my focus here is upon the limitations of the current international human rights law system in regard to the monitoring of rights. I devote especial attention to consideration of whether the current system encourages 'rights ritualism'. I do so in order that the weaknesses of the existing system can be understood and, if an optional protocol is pursued, addressed as far as is possible in the design of the new mechanism. This focus aligns with theme 2 of the PFII's concept note on an optional protocol.⁵
2. In accordance with the concept note, I begin in Section II by examining how the creation of a new body addresses some of the concerns states and human rights mechanisms have articulated during the recent treaty body reform process about the effectiveness of such bodies, the workload and issues of duplication. In Section III I consider how the new body could be different, given the burgeoning literature on the failure of the carrot and stick approach to human rights implementation, including the concept of 'rights ritualism'. I depart from the concept note in highlighting some of the limitations of establishing an optional protocol in the course of the discussion in Sections II and III rather than as a stand-alone section.⁶

II. How does creation of another body address existing concerns about human rights bodies?

3. During the recent treaty body reform process three central concerns were identified regarding existing human rights bodies: their lack of effectiveness, the high workload attached to them and issues of duplication with other bodies.⁷ The creation of an optional protocol, rather than addressing these concerns, is in danger of replicating them.

¹ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2010) ('UNDRIP').

² See, eg, Department of Economic and Social Affairs of the United Nations Secretariat, *State of the World's Indigenous Peoples* (United Nations Secretariat, 2009).

³ Economic and Social Council Commission on Human Rights ('CHR'), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen*, UN Doc E/CN.4/2006/78 (16 February 2006) at [14].

⁴ Economic and Social Council Permanent Forum on Indigenous Issues ('PFII'), *Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism*, UN Doc E/C.19/2014/7 [*'Study on an Optional Protocol'*].

⁵ PFII, *Concept Note: Expert Group Meeting: Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples 27-29 January 2015*, UN Doc PFII/2015/EGM at 2, 12.

⁶ *Ibid* at 12.

⁷ See, eg, United Nations (UN) High Commissioner for Human Rights (HCHR), *Strengthening of the human rights treaty bodies pursuant to Assembly resolution 66/254*, UN Doc A/66/860 (26 June 2012).

Effectiveness

4. Core amongst issues regarding the functioning of the international human rights system are perceptions of its low impact on the enjoyment of human rights domestically.⁸ There are few rigorous empirical scholarly analyses of the impact of the international human rights system on Indigenous peoples' domestic enjoyment of their human rights.⁹ In part, this is because of the difficulties associated with assessing influences on state behaviour. Even where moves have been made by a state government to act on rights issues that form the subject of international human rights bodies' recommendations, assessing whether those actions have been taken in response to the body or other actors or considerations is difficult. Governments infrequently acknowledge the motivations for their actions so assessing such bodies' influence requires imputing motivations.¹⁰ Often a complex combination of actors and factors will be responsible.¹¹ However, the persisting Indigenous rights implementation gap itself suggests that the international system is not significantly delivering for Indigenous peoples on the ground.
5. Two prominent features of the current international system affect its impact. First, although states are encouraged to cooperate with human rights bodies, they cannot be compelled to do so.¹² This is the case even where a state has, for example, ratified the UN human rights treaty or optional protocol to which the monitoring body is attached or issued a standing invitation to special procedures of the UN Human Rights Council. This can translate into low state engagement with human rights bodies.¹³ As a body likely established through a voluntary optional protocol the new body will be susceptible to low state engagement: states may choose not to sign up to the optional protocol and, even where they do, may ultimately not engage with the new body or, may engage with it in a way that is superficial or ritualistic (a behaviour I explore in some depth below).
6. Secondly, states similarly cannot be compelled to comply with any findings or recommendations by bodies within the current international human rights law system. This includes binding decisions made by bodies such as the UN Human Rights Committee under the first optional protocol to the International Covenant on Civil and Political Rights. Even where the bodies' findings are binding, they do not possess the power to directly coercively enforce state compliance with them. This contributes to the seemingly low rates of state conformity to

⁸ See, eg, Oona Hathaway 'Do Human Rights Treaties Make a Difference?' (2001-2002) 111 *Yale Law Journal* 1935.

⁹ The author's doctoral dissertation involved such an analysis: Fleur Adcock, *The United Nations Special Procedures and Indigenous Peoples: A Regulatory Analysis* (PhD dissertation, The Australian National University, 2013) [*The UN Special Procedures*].

¹⁰ Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?' (2011) 52(2) *Harvard International Law Journal* 561 at 574; Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185 at 220 [*Reconceiving the UN*]; Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998) at 49-50.

¹¹ See, eg, Surya P Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' (2011) 15(2) *The International Journal of Human Rights* 249 at 258.

¹² The UN Charter affirms the principles of national sovereignty and non-interference in domestic affairs. *Charter of the United Nations*, art 2(7).

¹³ See, eg, HCHR above n 7 at 21-23; Ted Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, 2010) at x, 23-24, 75.

recommendations and findings made by these bodies. For example, research I conducted into the influence of the UN Human Rights Council's special procedures' mechanism on state behaviour towards Indigenous peoples found that the mechanism's impact although perceptible was slight. In the two case study states (Guatemala and Aotearoa New Zealand) rather than openly resisting the special procedures experts' recommendations both states' dominant response was to engage in rights ritualism.¹⁴

7. Ritualism is a particularly concerning behavioural response as it can act to mask state resistance to norms (and the authorities that advance those norms) behind apparent conformity to them. The concept derives from Robert Merton's paradigm of individuals' behavioural adaptations to normative orders. Ritualism is one of Merton's five logically possible behavioural adaptations. According to Merton, ritualism occurs where an individual abandons culturally prescribed aspirations but 'almost compulsively' abides by the socially structured avenues for realising those aspirations.¹⁵ Merton points out that this adaptation has not often been viewed as deviant, given that the overt behaviour of the individual aligns with institutionalised norms.¹⁶
8. The near universal state endorsement of the UNDRIP, and evidence of states' domestic steps to legislate for the international Indigenous rights norms it affirms, coupled with the striking gap in Indigenous rights implementation suggests that ritualism could be a common state response to international Indigenous rights norms and the international human rights system that promotes them. In this context, the culturally prescribed aspirations are the aspirations of international Indigenous rights norms, such as for all Indigenous peoples to enjoy the right to self-determination or to be free from non-discrimination. The socially structured avenues for realising those aspirations are the accepted means for their realisation, such as the enactment of laws and policies affirming and providing for Indigenous peoples' rights to self-determination and non-discrimination.
9. John Braithwaite, Toni Makkai and Valerie Braithwaite have adapted and developed Merton's concept of ritualism in the course of a sustained comparative study of aged care regulation. They define ritualism as the 'acceptance of institutionalised means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves.'¹⁷ They argue that it can take many forms, often simultaneously.¹⁸ For example, rule ritualism, where a rule is produced instead of a solution to the problem; documentation ritualism, where the documentation is right but the actions towards fulfillment of the regulatory goals are wrong; legal ritualism, where the letter rather than the spirit of the law is followed; and, participatory ritualism, where procedures are followed that purport to improve participation but instead alienate the intended participants.¹⁹ These are responses of the regulated, what Braithwaite, Makkai and Braithwaite term

¹⁴ Adcock *The UN Special Procedures* above n 9; Fleur Adcock, 'The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A Study in Compliance Ritualism' (2012) 10 *New Zealand Yearbook of International Law* 97 [*The UN Special Rapporteur*].

¹⁵ Robert K Merton, *Social Theory and Social Structure* (The Free Press, Enlarged ed, 1968) at 238.

¹⁶ *Ibid* at 238, 241.

¹⁷ John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (Edward Elgar, 2007) at 7.

¹⁸ *Ibid* at 220-59.

¹⁹ *Ibid* at 221.

‘compliance ritualism’.²⁰ Regulators can also engage in ritualism. Braithwaite, Makkai and Braithwaite refer to this as ‘regulatory ritualism’.²¹

10. Hilary Charlesworth is one scholar who has specifically embraced the ascription of ritualism as a behavioural response to states.²² She does so in the process of examining the international community’s role in the protection of human rights in the context of international peace-building efforts. A large part of her focus is on how the international community has engaged in the protection of human rights in Cambodia, with especial emphasis on Michael Kirby’s time as Special Representative of the Secretary-General for human rights in Cambodia. She draws on Merton, Braithwaite, Makkai and Braithwaite to argue that in ‘the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions’, including in Cambodia.²³ She argues:

Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses. Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.²⁴

11. For example, she points out that, despite signing up to several core international human rights treaties, Cambodia has failed to implement these international human rights commitments into domestic law.²⁵ However, as my own research on the special procedures found, enacting domestic legislation that reflects international human rights commitments can itself be a form of rights ritualism where the policies, processes and resources to give effect to those commitments are lacking.²⁶ Charlesworth argues that the practice of rights ritualism has been ‘tacitly endorsed’ by the international community ‘perhaps as the path of least resistance in a political system that is inhospitable to human rights claims.’²⁷ Nor is the tactic restricted to states from the global South. Charlesworth suggests that Australia also engages in rights ritualism.²⁸

12. Yet, states display other behaviours too. Charlesworth acknowledges that Cambodia has edged closer to disengaging behaviours at times, resisting human rights when it is the subject of strong criticism.²⁹ But she posits that it is rights ritualism that has enabled Cambodia to successfully avoid deep international human rights scrutiny.³⁰ The rights ritualism that Charlesworth focuses on is

²⁰ Ibid at 264, 302.

²¹ Ibid at 302.

²² Hilary Charlesworth, ‘Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict’ (2010) 29 *The Australian Year Book of International Law* 1. Other legal scholars have recognised the prevalence of human rights ritualism among states, although they use different terminology. See, eg, Ryan Goodman and Derek Jinks, ‘Incomplete Internalization and Compliance with Human Rights Law’ (2008) 19(4) *The European Journal of International Law* 725 at 729-31.

²³ Charlesworth above n 22 at 12-4.

²⁴ Ibid 12-3.

²⁵ Ibid 13.

²⁶ See, eg, Adcock *The UN Special Procedures* above n 9 at 209-12.

²⁷ Charlesworth above n 22 at 13.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at 14.

compliance ritualism: the ritualism engaged in by states. However, in pointing to the international community's tacit endorsement of the practice, she alludes to the regulatory ritualism engaged in by the international authorities advancing human rights norms. As with Charlesworth, it is 'compliance ritualism' that I focus on here. Following Charlesworth, I refer to this phenomenon simply as 'ritualism' or 'rights ritualism'.

13. The language of ritual and its synonyms is prevalent in Indigenous scholars and advocates' reflections on states' domestic protection of international Indigenous peoples' rights too. Ana Pinto observes that the UN's first International Decade of the World's Indigenous People 'has been a good ritual but has not produced the results it could have'.³¹ Victoria Tauli-Corpuz reflects that the response of most states domestically to international Indigenous rights norms 'has been ceremonial, not actual'.³² Further, Jeff Corntassel makes a distinction between the recognition of 'paper rights' and the 'actual realization' of Indigenous peoples' rights.³³
14. The New Zealand Government's response to the UN special procedures' recommendations regarding discriminatory land legislation is illustrative of this behaviour. In 2004 the New Zealand Government passed legislation vesting those areas of the foreshore and seabed where Māori might have an interest in the Crown and instituting onerous tests for Māori to prove new legislatively constrained customary rights. The former Special Rapporteur on the rights of indigenous peoples, Rodolfo Stavenhagen (amongst others), recommended that the Act be repealed or amended so that Māori rights to the foreshore and seabed could be recognised. Eventually it was. However, the replacement legislation was almost equally discriminatory towards Māori, despite the New Zealand Government professing to have taken on board the subsequent Special Rapporteur, James Anaya's, advice regarding its content.³⁴ Here we have outward moves in apparent accordance with the experts' recommendations but resistance to the land rights underlying those recommendations.
15. This emerging body of research suggests that rights ritualism is a concept deserving of attention in the development of an optional protocol: a new body established under the optional protocol could potentially experience similarly low rates of state conformity to its recommendations and findings and face ritualised state engagement. In the operation of any new body the experts will need to remain alive to rights ritualism on the part of states. The body itself will also need to consciously guard against descending into regulatory ritualism, such as through perfunctory examinations of states' conformity to the UNDRIP.
16. One of the reasons that ritualism is able to thrive is because of a lack of institutionalised follow-up of implementation of human rights bodies' recommendations. In the longer term states may be caught out where it becomes apparent that the rights issue remains unaddressed. Yet, ritualism buys states time.

³¹ Ana Pinto quoted in Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137 at 162.

³² Victoria Tauli-Corpuz in Cultural Survival, *Second International Decade of the World's Indigenous People Renews Hope* (7 January 2005) <<http://www.culturalsurvival.org/news/karin-oman/second-international-decade-worlds-indigenous-people-renews-hope>> quoted in Corntassel above n 31 at 162.

³³ Corntassel above n 31 at 162.

³⁴ Adcock *The UN Special Rapporteur* above n 14 at 109-13.

At the point at which the shallow nature of the Indigenous rights commitment is revealed, a future government administration will likely have to deal with it. Worse, the ritualised commitment may keep the continuing violation permanently hidden from the view of all but those who bear its brunt. In order to mitigate against rights ritualism, any new body should prioritise institutionalised follow-up of implementation of its recommendations.

17. However, states' Indigenous rights ritualism gives us something to work with too. Where a state engages in Indigenous rights ritualism it reveals that state's concern to have a favourable international Indigenous rights reputation. This suggests that states may be susceptible to reintegrative shaming techniques and strategies designed to enhance their Indigenous rights reputations, concepts that are touched on in Section III below.

Workload

18. A second major concern regarding the current international system's monitoring of human rights is the workload it creates. It creates this workload for multiple actors: the experts who sit on the relevant body, the secretariat or institutional actors who support the body, victims of human rights violations as well as human rights advocates who engage with the body, and states.
19. Both Charter and non-Charter UN human rights bodies are overworked and underfunded. For example, the UN human rights treaty body reform process emphasised that resources for the treaty bodies falls far behind the expanding workload of the bodies.³⁵ Similarly, the literature on the UN special procedures has highlighted the extensive time demands made of the special procedures experts, who – like the treaty body experts – do not receive a salary for their role.³⁶ The lack of financial remuneration is touted as an important part of the experts' independence and impartiality.³⁷ However, in the absence of a salary the experts generally need to retain their existing jobs and sources of income. This can be onerous for the experts. For example, while the UN advises special procedures mandate-holders that they need to commit around three months of time to the mandate each year, in reality, the workload is full-time.³⁸ Given the broad reach of the UNDRIP, and how active Indigenous peoples already are in leveraging international human rights mechanisms, the time demands on the experts sitting on the new body could be significant. Careful thought will need to be given to the expertise and capacities of the experts sitting on the body. It also means that the UN secretariat and institutional support provided to the new body will be crucial.
20. It is unclear where the UN secretariat and institutional support for the new body would come from. The quality and extent of UN support provided to experts on

³⁵ HCHR above n 7 at 26.

³⁶ See, eg, Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 419 at 454.

³⁷ See, eg, Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *The International Journal of Human Rights* 232 at 234.

³⁸ See, eg, Baldwin-Pask and Scannella above n 36 at 454.

UN human rights bodies has come under fire.³⁹ The Office of the High Commissioner for Human Rights (OHCHR) supports many UN human rights mechanisms (including the treaty bodies, the UPR process and the special procedures mandates) but it is already chronically underfunded and understaffed. The OHCHR receives only approximately a third of its funding requirements from the UN's regular budget, it is otherwise reliant on voluntary contributions from states.⁴⁰ In 2012 the High Commissioner for Human Rights (HCHR) described the OHCHR as 'stretched to breaking point'.⁴¹ Any new body will need to receive sufficient UN secretariat and institutional support to ensure its effective functioning.

21. International human rights bodies also make time and financial demands on those victims of human rights violations and human rights advocates who participate in their processes, such as through making complaints, monitoring state responses and collecting and providing information. The new body would make the same demands of Indigenous peoples and Indigenous rights advocates who are often already time-poor and stretched for resources. Scholars such as Jeff Corntassel have questioned the value of Indigenous peoples' investing their time, resources and energy into international mechanisms that take them away from grass roots activism and lobbying.⁴² Conscious of the seemingly constrained domestic impact of international mechanisms, serious consideration needs to be given to whether the new body would produce results that would justify the investment made by Indigenous peoples and Indigenous rights advocates (and others). At the same time, such assessments take a narrow view of impact. The new body, like others in the current international human rights system, could conceivably influence state behaviour by empowering Indigenous peoples and civil society in their advocacy through public recognition and independent legitimation of their struggles, their ability to influence the discourse surrounding rights issues (including encouraging states to understand issues from a human rights perspective) and preventing states' descent into even greater rights abuses.⁴³ The new body could help to mitigate concerns around its time and resource demands on Indigenous peoples, Indigenous rights advocates and others by streamlining its processes and working methods to ensure that they are not too burdensome.
22. States are called on to invest time and resources in human rights bodies' processes too. For some, especially those from the global South, this is taxing. This is particularly so given the growing number of international human rights bodies in the international system: while the reporting requirements of each individual body

³⁹ See, eg, Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 206 at 210; Christen Broecker & Michael O'Flaherty, *The Outcome of the General Assembly's Treaty Body Strengthening Process: An Important Milestone on a Longer Journey* (2014) <<http://www.universal-rights.org/component/k2/outcome-of-ga-treaty-body-strengthening-process>> at 7.

⁴⁰ OHCHR, *About OHCHR Funding* <<http://www.ohchr.org/EN/ABOUTUS/Pages/FundingBudget.aspx>>.

⁴¹ Navi Pillay, 'Opening Statement' (Statement to the HRC, Geneva, 10 September 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12486&LangID=e>>.

⁴² Corntassel above n 31 at 140.

⁴³ Regarding the indirect impact of the UN special procedures experts' work in the field of human rights generally see Alston 'Reconceiving the UN' above n 10 at 220. Regarding the indirect impact of the Special Rapporteur on the rights of indigenous peoples' work see Jennifer Preston et al, *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (IWGIA, 2007) at 35-6, 42.

may not be problematic, cumulatively they can be. This again underscores why streamlined processes and methods for the new body are important.

Duplication

23. Related to the issue of the multiplicity of international human rights bodies is that of duplication of their function. While there is no existing international body dedicated to serving as a complaints body for breaches of the UNDRIP, a host of bodies already perform this role to some degree. The Special Rapporteur on the rights of indigenous peoples is explicitly mandated to investigate allegations of Indigenous rights violations.⁴⁴ Although lacking a formal mandate to do so, the PFII and the Expert Mechanism on the Rights of Indigenous Peoples regularly receive information regarding such allegations and the PFII has undertaken activities to investigate specific rights infractions.⁴⁵ As the concept note on an optional protocol identifies, the Human Rights Council, through its Universal Periodic Review, the UN human rights treaty bodies and the International Labour Organization also consider states' conformity to international Indigenous peoples' rights norms. It will be necessary to carefully demarcate the role of the new body from the existing international bodies that also comment on states' conformity to the UNDRIP. Further, where multiple bodies comment on the content and applicability of the UNDRIP the commentary may be conflicting, contradictory or promote lesser articulations of the rights in the UNDRIP.⁴⁶ It will be important that the experts on any new body are familiar with the work of other international and regional bodies' commentary on the UNDRIP and advance strong articulations of the rights that it affirms. Care will also need to be taken to ensure that the new body does not allow states to avoid scrutiny through the existing mechanisms, as the study on an optional protocol notes.⁴⁷

III. How could this new body avoid the failures of the carrot and stick approach?

24. There are strategies that the new body could embrace to help avoid the failures of the carrot and stick approach to human rights implementation, including rights ritualism. These strategies revolve around building the strengths and capacities of states rather than solely focusing on what states do wrong.
25. Shaming is the primary regulatory tool engaged by much of the UN human rights machinery.⁴⁸ It is at the weak end of the 'stick' approach to implementation. In this context shaming is reliant on the state being made aware in private or in public that it is non-compliant with international human rights norms and that this non-compliance is disapproved of. The idea being that this disapproval will shame or embarrass states into better compliance. Stronger forms of the stick approach involve threats and the potential deployment of economic and military coercion. But these stronger forms are generally not available to international human rights

⁴⁴ *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples*, Human Rights Council (HRC) Res 24/9, UN Doc A/HRC/RES/24/9 (8 October 2013) para 1.

⁴⁵ See, eg, PFII, *Summary and Recommendations of the Report of the Mission of the Permanent Forum on Indigenous Issues to the Plurinational State of Bolivia*, UN Doc E/C.19/2010/6 (21 January 2010); Fleur Adcock 'Meeting Notes: Permanent Forum on Indigenous Issues: Tenth Session' (May 2011); Fleur Adcock 'Meeting Notes: Expert Mechanism on the Rights of Indigenous Peoples: Fifth Session' (July 2012).

⁴⁶ The Study on an Optional Protocol alludes to this. PFII *Study on an Optional Protocol* above n 4 at [9].

⁴⁷ *Ibid* at [40].

⁴⁸ See, eg, Elvira Dominguez Redondo, 'The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review* 673 at 687.

bodies. In contrast, the ‘carrot’ approach involves rewards for steps towards implementation of norms. In general terms, the international human rights system lacks the financial resources to economically reward (the conventional understanding of this approach) states for human rights compliance and so this approach is rare in such contexts.

26. Both approaches have failings when it comes to implementation. As a dialogue-based tool shaming has no coercive dimension and, thus, can be ignored without direct economic or military penalty. Yet, scholars have pointed out that most actors prefer to rely on dialogue before offering rewards or engaging in coercion because states, like individuals, tend to react to threats by redefining ‘their interests in the direction of resisting the threat’, and ‘that extrinsic incentives (rewards or punishments) undermine intrinsic motivations to comply’, thus undermining long-term commitment in favour of short-term compliance.⁴⁹
27. In fact, scholars have begun making a connection between the general failure of the human rights project to elicit compliance and its predominant naming and shaming approach. For example, Luis Rodríguez-Piñero observes ‘that the effectiveness of “name and shame” techniques has long been superseded by crude facts’.⁵⁰ As an alternative, some scholars have advocated for more cooperative approaches to human rights promotion. Elvira Domínguez Redondo explains that ‘those in charge of human rights mechanisms, scholars and practitioners tend to neglect the potential value of cooperative approaches to human rights implementation and focus instead on the confrontational approaches’.⁵¹ Rodríguez-Piñero articulates the forms such cooperative approaches can take. He underlines ‘the importance of empowering rights-holders, of reinforcing duty-bearers’ capacities, and of the role of technical cooperation’ in heralding a more sophisticated approach to rights implementation.⁵² These cooperative approaches are relationship enhancing, which is important given that the optional protocol will be dependent on the cooperation of states, as well as Indigenous peoples and others, in their work.

Capacity-building

28. In this context, capacity-building involves helping states to meet international Indigenous rights standards where they wish to meet them but lack the capacity to do so, such as through furnishing technical advisory assistance.⁵³ It does not necessarily require the provision of financial resources to the state concerned. Capacity-building differs from shaming in that it is proactive rather than simply reactive: it develops capacity to avoid further rights violations rather than only responding to existing violations.

⁴⁹ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) at 558. Goodman and Jinks make a corresponding argument in support of ‘softer’ international human rights law enforcement mechanisms such as reporting and monitoring. Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54(3) *Duke Law Journal* 621 at 689.

⁵⁰ Luis Rodríguez-Piñero, “‘Where Appropriate’: Monitoring/Implementing of Indigenous Peoples’ Rights under the Declaration’ in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 314 at 329.

⁵¹ Domínguez Redondo above n 48 at 683.

⁵² Rodríguez-Piñero above n 50 at 330.

⁵³ Regarding the definition of capacity-building generally see Braithwaite and Drahos above n 49 at 26.

29. The idea of embracing a focus on cooperative capacity-building for the realisation of human rights is gaining ground with those charged with advancing human rights. Surya Subedi, the Special Rapporteur on the situation of human rights in Cambodia, cites the argument of some developing states that the move to a more constructive approach, which focuses on ‘guiding and offering concrete advice towards improving a situation’ rather than naming and shaming, would help to dispel ‘the perception of “us” versus “them”’.⁵⁴ In a similar vein, former HCHR, Sergio Vieira de Mello, has observed ‘[i]t is not enough to blame. It is also necessary to help governments or regimes to emerge from their own mistakes or their own contradictions.’⁵⁵
30. Notably, a shift to focus on capacity-building is supported by former Special Rapporteur on the rights of indigenous peoples, Anaya, in the Indigenous rights domain. In 2013, when reflecting on the lessons he had learned during his two terms as Special Rapporteur, Anaya remarked that he hoped ‘that future work of the mandate will be able to focus more on moving beyond reacting to denouncements of alleged human rights violations, to helping to assist indigenous peoples and states to develop concrete proposals and programmes of action for advancing the rights of indigenous peoples.’⁵⁶ He observed that ‘[t]he promotion of good practices and providing technical assistance are key areas in which the Special Rapporteur has seen his work have a positive effect, with many of his recommendations being taken up in legal and policy reforms made at the international and national levels.’⁵⁷ My own research highlighted the superficiality of some of these moves by the Guatemalan Government, to whom the Special Rapporteur provided technical advisory assistance. However, Anaya’s comment suggests that it is an approach worthy of greater investment by the new body. Anaya’s call for capacity-building assistance to be provided directly to Indigenous peoples (not just states) to support them in their own initiatives to realise their rights is also a welcome suggestion for the new mechanism.⁵⁸
31. A capacity-building approach also carries attendant risks. States may cite cooperation with human rights bodies, including the new body, as evidence of their proactive efforts on human rights even where those efforts are lacking, reluctant or ritualistic (as Guatemala did).⁵⁹ Time and resources, both of which are precious given their limited supply, are then expended on states that lack a genuine commitment to the project. There is also the dilemma whether human rights bodies should cooperate with states that are known to commit grave human rights violations. But states with positive track records of cooperation with human rights bodies can be favoured for technical assistance by the new body.⁶⁰ And reintegrative shaming theory suggests that a strategy of principled engagement with states, which dictates ‘respectful engagement with the state and its people

⁵⁴ Surya P Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33 *Human Rights Quarterly* 201 at 228.

⁵⁵ Sergio Vieira de Mello in Jean-Claude Buhrer and Claude B Levenson, *Sergio Vieira de Mello, un Espoir Foudroyé* (Mille et une nuits, 2004) 84-5 quoted in Paulo Sergio Pinheiro, ‘Being a Special Rapporteur: A Delicate Balancing Act’ (2011) 15(2) *The International Journal of Human Rights* 162 at 167.

⁵⁶ General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/68/317 (14 August 2013) at [5].

⁵⁷ *Ibid* at [16].

⁵⁸ *Ibid*.

⁵⁹ Adcock *The UN Special Procedures* above n 9 at 214-19.

⁶⁰ Piccone above n 13 at 39.

while firmly disapproving' of the rights violation, will yield more influence for the new body than stigmatising the state and treating it as a pariah.⁶¹

Continuous improvement

32. Encouraging states to continuously improve their Indigenous rights conformity is an important related cooperative approach open to the new body. 'Continuous improvement' is a management philosophy capturing the notion of an ongoing effort to improve or ratchet-up standards.⁶² It involves praising actors for what they are good at and building on those strengths. Human rights bodies embracing such an approach would start by endeavouring to understand what a state is good at and would then build human rights commitment outwards through shared projects.⁶³ Notably, continuous improvement has been identified in the regulatory literature as a principle that can help to move beyond ritualism. A strengths-based regulatory approach that fosters continuous improvement features centrally in Braithwaite, Makkai and Braithwaite's strategy for transcending ritualism in aged care regulation.⁶⁴ John Braithwaite argues that the approach can help to reengage those regulatees who have disengaged from the regulatory system because, when the focus is on what an actor is good at, it 'provides a point of entry to getting them engaged with projects of continuous improvement that regulator and regulatee can begin to see as shared projects.'⁶⁵ Ultimately, Braithwaite, Makkai and Braithwaite hypothesise that in the long run 'the most important thing regulators do is catalyse continuous improvement.'⁶⁶

33. Continuous improvement's focus on a learning culture rather than a culture of blame has been singled out by Charlesworth as potentially useful in fostering improved human rights protection:

How can we work against human rights ritualism, so often present in international peacebuilding? The regulatory literature offers the idea of continuous improvement, which emphasises incremental, constantly monitored steps, rather than great leaps forward. It means 'doing better every year than the previous year in terms of a regulatory objective'. This can be achieved by moving from a culture that administers blame to a culture that encourages learning, a development that would be useful in the field of international human rights protection.⁶⁷

34. Care must be taken to ensure that embrace of this principle is not counter-productive, however. Charlesworth cautioned of the 'need to guard against the process of continuous improvement itself becoming ritualised.'⁶⁸ A commitment to continuous improvement should not prevent the new body from being critical where necessary. If pushed too far the principle may contribute to a state's inability to see the true extent of rights violations within the country and its liability for them. In addition, any new body will need to take care not to alienate

⁶¹ John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU EPress, 2012) at 32.

⁶² Braithwaite and Drahos above n 49 at 25, 35, 615-16.

⁶³ See, eg, John Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475 at 501.

⁶⁴ Braithwaite, Makkai and Braithwaite above n 17 at 330.

⁶⁵ Braithwaite above n 63 at 501.

⁶⁶ Braithwaite, Makkai and Braithwaite above n 17 at 322.

⁶⁷ Charlesworth above n 22 at 14-5 (citations omitted).

⁶⁸ Charlesworth above n 22 at 15. See generally Braithwaite, Makkai and Braithwaite above n 17 at 207-8.

Indigenous peoples – the greatest potential advocates of its findings – who will expect the body to communicate the gravity of their human rights situation forcefully to governments. The new body will need to strike a ‘delicate balance’ between the criticism of rights violations and praise and encouragement for rights promotion.⁶⁹ Patience will also be necessary: this approach may take some time to see results, a troubling reality given the severity of Indigenous rights violations.

35. Much as the study on an optional protocol identifies that ‘cooperation and partnership should define the work of developing the mechanism, as this reflects the spirit of the Declaration’,⁷⁰ so too should cooperation and partnership define the operation of the optional protocol. The inquiry procedure, proposed in the study to ‘invite a more proactive process that would prompt attention and, eventually, dialogue and negotiations by the parties concerned rather than a punitive approach’,⁷¹ is a good step in this direction. However, shaming should still have a role where there is not continuous improvement in a state’s Indigenous rights situation.⁷²

IV. Conclusions and recommendations

36. The current international human rights law system faces a number of key limitations in regard to the monitoring of rights that a new voluntary international complaints body for the UNDRIP is in danger of replicating. It may have a low impact, including because states engage in ritualistic behaviours when responding to the body; impose a high workload on the experts that sit on the body, the secretariat or institutional actors who support the body, Indigenous peoples, Indigenous rights advocates and states; and, duplicate the work of other international human rights bodies. Even engaging cooperative strategies of capacity-building and continuous improvement to foster the effectiveness of the body could backfire with states gaming offers of capacity-building assistance and ritualising the process of continuous improvement.
37. To help to address these limitations any optional protocol to the UNDRIP, providing for a voluntary international complaints body, should:
- a. remain alert to Indigenous rights ritualism, carefully inspecting below the surface of states’ formal Indigenous rights practices;
 - b. prioritise institutionalised follow-up of implementation of the body’s recommendations;
 - c. carefully select experts with sufficient expertise and capacity to sit on the body who are familiar with the work of other international and regional bodies’ commentary on the UNDRIP and who will advance strong articulations of the rights that it affirms;
 - d. provide for robust UN secretariat and institutional support for the body;
 - e. ensure that the body’s processes and working methods are streamlined and not overly burdensome;
 - f. carefully demarcate the role of the new body from the existing international bodies that also comment on states’ conformity to the UNDRIP; and

⁶⁹ Charlesworth above n 22 at 16.

⁷⁰ PFII *Study on an Optional Protocol* above n 4 at [40].

⁷¹ *Ibid* at [41].

⁷² John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) at 202.

- g. ensure that the body devotes attention to building the strengths and capacities of states rather than solely focusing on what states do wrong. To guard against states gaming these cooperative approaches, the body could favour states with positive track records of cooperation with human rights bodies for technical assistance; undertake principled engagement with states; and strike an appropriate balance between criticism of rights violations and praise and encouragement for rights promotion.