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On the right to diplomacy: historicizing and theorizing delegation and exclusion at the United Nations

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Abstract

This article analyses the disregarded notion of the *ius legationis* (right of legation), revisiting historical debates in diplomatic theory and law over who possesses or ought to have this right. By examining how the *ius legationis* manifested into a volitional or subjectional or natural right, we argue that this renders it not merely a legal issue, but a highly political and ethical question that is of direct relevance to contemporary international relations. In an era where inclusivity is rhetorically promoted at the United Nations, we suggest that a rekindled *right to diplomacy* (R2D) – conceiving diplomacy as a right that is claimed but also contested – can shed light onto inequalities of representation and the role international law can play in remedying asymmetries and ethicizing the practice of diplomacy. Beyond its primary normative contribution, we argue that the R2D can also provide an analytical framework to understand UN's efforts at institutionalizing diplomatic pluralism, its logics of inclusion and exclusion, as well as the struggles of diverse groups to obtain accreditation, consultative status, and negotiation ability within multilateral diplomacy.

Keywords: Diplomatic law; diplomatic theory; multilateral diplomacy; sovereignty; United Nations

> Great it is to have the right of legation [*magnum esse legationum ius*]
> Alberico Gentili, *De Legationibus*, II.i.

> Although it is usual to refer to a 'right of legation', it is controversial whether (apart from treaty) the sending and receiving of diplomatic envoys involves a right in the strict legal sense, or whether it is rather a matter of competence.
> *Oppenheim's International Law*, 9th Edition, 1056.

> I am on my way to the League of Nations, and stopped off to tell why, to you who care to know.
> Chief Deskaheh, Speaker of the Six Nations of the Iroquois, 1923a, 3.

Introduction

With the intention of petitioning and seeking membership to the League of Nations for the Iroquois, Chief Deskaheh crossed the Atlantic and made it to Geneva in July 1923. Although the UK and Canada blocked the Iroquois delegation from formally speaking to the League, Deskaheh persisted for 18 months, gathered local help, and hired the *Salle Centrale* theatre in Geneva for a public event that was 'attended in thousands'.[1] His position paper, 'The Redman's Appeal for Justice',[2] handed to the Secretary-General of the League, was circulated 'through unofficial channels' to state delegations at the League's Assembly. This compelled Canada to formally respond about the lack of a *locus standi*, let alone a case for Iroquois membership.[3] By contrast, Deskaheh considered that he had 'a special right at Geneva' and the League of Nations that the Iroquois, through their participation in the Great War, 'helped to make possible'.[4]

A century after this historic delegation, it is an opportune time to ask what this 'special right' might entail – not least, when a lasting image of COP26 was indigenous delegations protesting on the streets of Glasgow against their exclusion from negotiating spaces. To be sure, multilateral diplomacy at the League's successor, the United Nations (UN), is currently more amenable to indigenous and non-state delegations. But it is still riddled with exclusions, hierarchies, and contradictions of participation. Beyond states with full membership rights, there are others with *fewer rights* at the UN, such as observer states, non-sovereign polities, Non-Governmental Organizations (NGOs), and minority groups variably invited to participate in or that struggle to join sessions of UN organs, forums, and conferences. What is one to make of this plethora of delegations claiming representation status or special competency? Do they enjoy a natural right or just a moral right that may be recognized periodically by positive international law and global institutions?

For Deskaheh and his political descendants the 'right to a place in the international community' was a natural right.[5] It stemmed from the fact that the Iroquois Nations of the Grand River were autonomous and self-governed, recognized so by colonial treaties. Yet, regardless of colonial international law and its civilizational biases,[6] it appeared preposterous to them that 'the Speaker of the Council of the Six Nations, the oldest League of Nations now existing' would be denied access and standing to make a petition to the newly established and putatively global League of Nations.[7] For the objectors, however, such a right could only be granted volitionally by the contractual parties. Even though a right of legation (*ius legationis*) as general practice existed historically, there were significant conditions as well as inconsistencies of application. As a claim to partake in multilateral diplomacy, therefore, Deskaheh's challenge epitomizes not only a contestation but also a conundrum on whether such a special right was *lex lata* (i.e. already existed and, if so, what it entailed) or *lex ferenda* (i.e. ought to exist and, if so, what it should cover).

In this article, we approach this conundrum from a novel angle by conceiving diplomacy as a right. We utilize *lex lata*, specifically by revisiting and reconceiving

[1]Akwesasne Notes 2005, 41–47.
[2]Deskaheh 1923b.
[3]League of Nations 1924, 829–38.
[4]Deskaheh 1923a, 7–8.
[5]Akwesasne Notes 2005, 30.
[6]Anghie 2007.
[7]Akwesasne Notes 2005, 53.

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the historical *ius legationis*, yet broach the right to diplomacy (R2D) as *lex ferenda* on the basis of new demands for global multilateral participation that were inconceivable in renaissance diplomacy. Although we generally use the *R2D*, *right of legation*, and *ius legationis* interchangeably, we acknowledge a shift in meaning and note that it is only the latter two terms that are *lex lata* and have been used by international jurists from the 14th century onwards. By coining the R2D and aspiring to introduce this as *lex ferenda*, we seek to capture the broader ontology of diplomatic practice that includes rights of communication, representation, standing, and negotiation.

To suggest diplomacy as a right that one has, is denied, or aspires to possess, appears at the outset to be superfluous or mere scholarly fancy. The proliferation of various types of rights has been critiqued as a utopia that promises to deliver emancipation, but leads to dystopic instrumentalization, becoming a strategy for institutional power.[8] From this perspective, the R2D seems an unnecessary or excessive right, piling courtly privilege onto fantasies of status and entitlement in and beyond the UN. We argue the contrary. We suggest that the normative exploration of an R2D is important for three interlinked reasons: the necessary revision of state-centric international/diplomatic law; the evident pluralization of diplomatic practice and proliferation of transnational advocacy; and the recognition of struggles for inclusivity at the UN.

With regards to the first, diplomatic law – the branch of international law dealing with diplomatic relations and immunities of accredited diplomats[9] – is a rather technical and restrictive field. Within this field, the right of legation is rarely mentioned nowadays. There is scarce consideration of the key question of who has the right to send a diplomatic mission, how this is decided, and what kind of support and protection a mission should receive. Regarding the latter, it also bypasses the question of immunity and the duties deemed functionally necessary for the effective performance of diplomatic agency. These duties are taken for granted in the case of state delegations, but remain a major problem with non-state delegations challenging state policies at the UN, such as the protection of human rights advocates, as we show below. In other words, by treating the right of legation as a closed question – as something that only sovereign states possess – diplomatic law reinforces rather than interrogates the power structures and biases of the hierarchical diplomatic system. To ponder an R2D is therefore an ethical challenge to the unwillingness to think beyond state or intergovernmental diplomacy, and to reconsider a historically and ideologically specific right that has become an exclusivity and privilege of sovereignty.

Second, an R2D builds on the rise of polylateral diplomacy[10] and calls for the transformation of the hierarchical diplomatic system, including struggles for recognition beyond legal sovereignty,[11] and towards sustainable practices of diplomacy.[12] Not that acknowledgement of such right should be a prerequisite for diplomatic practice, as diplomacy also takes place outside formally established spaces of interaction.[13] R2D becomes a pressing concern, however, when the acceptance of delegations to key forums is at stake, that is, where not mere communication of interests

[8]See Douzinas 2007; Koskenniemi 2010. [9]See Hardy 1968; Denza 2016; Behrens 2017.
[10]Wiseman 2010. [11]Adler-Nissen and Zarakol 2021. [12]Constantinou and Der Derian 2010.
[13]See Dittmer and McConnell 2016; Neumann 2020; Constantinou *et al.* 2021.

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but accreditation of diplomatic agency is required and struggled for. Accreditation can potentially translate into meaningful participation: that is, going beyond the right to represent to the right to be fully consulted, allowed to submit, advocate for and negotiate proposals, and, to give informed consent over decisions and the development of legal instruments that affect lives and habitats. Thus, a range of fundamental rights that we expect a democratic global polity to abide by are propagated by opening up a discussion on not just a right of representation – a right to appear and make a case on behalf of X – but a more ambitious R2D – a right to negotiate the relations, interests, and rights of X in multilateral contexts.

Third, the politics and stakes of multilateral diplomacy at the UN today make the exploration of an R2D topical. The UN is more than an aggregate of states and can act autonomously from them.[14] It is also more than an intergovernmental organization. The aspirations of the post-1945 world order are reflected in the opening of the UN Charter: 'We the Peoples of the United Nations'. In principle, and progressively in practice, the UN is supportive of the expansion of diplomatic representation at its various forums. This has become especially relevant with the recognition of minority and indigenous rights, and a proliferation of UN venues where these rights are deliberated and assessed. Furthermore, Sustainable Development Goal (SDG) 16 aims 'to promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions at all levels',[15] implemented through a series of multilateral and multilevel meetings, such as the High-Level Political Forum on Sustainable Development. Recognizing the R2D as a volitional or natural right is in the spirit, if not in the letter, of this broad goal, promoting inclusivity and accessibility for all, and thereby transforming deliberative politics not only within national societies but also at the UN.

In what follows, we first chart the rise and fall of *ius legationis*, briefly outlining its genealogy, tracing the state monopolization of the right, and explaining how and why it was *not* codified in the Vienna Convention on Diplomatic Relations (1961). We pay attention not only to what the right of legation entails but also what it has legitimated in practice. This leads us to delineate three manifestations of the R2D: legation as volitional right, as subjectional right, and as natural right. Using history not as a way of collecting antiquities from the past or making legal and moral judgements, but opening up to ethical scrutiny our past and present political choices, we employ this framing to then examine how the R2D is variously manifest at the UN depending on rules, competencies, and power. Focusing particular attention on how unrecognized states, minority and indigenous groups seek to engage in diplomacy at the UN, we illustrate how the instrumentalization of *ius legationis* by sovereignty is only part of the story. Overall, we suggest that the terminology of the R2D troubles and questions who can legitimately speak and negotiate for whom and for what matter within the UN.

We conclude by sketching out the possible ethical and practical implications if the R2D were to become an operative principle. Although its contestation regarding specific groups continues to create challenges in formalizing the R2D, the right nevertheless instantiates and provides a potential framework for implementing a

[14]Barnett and Finnemore 2004.

[15]UN 2030 Agenda.

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counterhegemonic legality within the UN system. Reconnection with the *ius legationis* as *lex lata* and projection and interrogation of the R2D as *lex ferenda* helps to reframe and reengage the problem of inclusivity at the UN. On this basis, we suggest ways of cultivating an ethos and a corresponding duty of care within the UN system so that the inequalities of diplomatic participation are fully recognized and reduced.

The rise and fall of the *ius legationis*

The *ius legationis*, or right of legation, is an underrated concept in contemporary scholarship. Behrens' *Diplomatic Law in a New Millennium*[16] does not mention it at all. Hardy's *Modern Diplomatic Law* views it as 'an accordable liberty' and not 'a de jure attribute', having limited purchase and unworthy of much discussion.[17] Denza's *Diplomatic Law* 'doubts whether reference to the right of legation would serve a useful purpose'.[18] Dembinski's *Modern Law of Diplomacy* is scathing in its dismissal: 'the right of legation did not have any real content and therefore could not take the form of a subjective right'.[19] Even Young's extensive review of the history of diplomatic law makes only a few passing references to the right of legation given its non-codification in legal instruments.[20]

Beyond diplomatic law, in most diplomacy textbooks there is no reference to *ius legationis* whatsoever.[21] In Sen's *A Diplomat's Handbook of International Law and Practice*, the right of legation is 'no more that the "competence" of a sovereign state' to accredit and receive envoys, with exceptions to aspiring, intergovernmental or state-like entities.[22] In Satow's *A Guide to Diplomatic Practice*, an entire chapter is reserved to the 'Right of Legation'.[23] Being viewed as an entitlement of sovereignty, however, the discussion is limited to procedural matters of recognition and accreditation. With regards to the permanence of a legation, Satow concludes that it is essentially an issue of courtesy and discretion, 'a matter of *comity*, and not of *strict right*'.[24] Subsequent editions of Satow's *Guide* further weakened the right of legation by dropping the adjective strict – 'a matter of *comity*, and not of *right*'.[25]

A jurisprudential conundrum

If diplomacy is indeed an exclusivity of sovereignty, then there is no need for much discussion about the *ius legationis*. One only needs to determine who is sovereign and who is not. But sovereignty is not uncontested legally or in its ability to control territories and populations. From this perspective, the *ius legationis* can raise ethical and political doubts as well as support the aspirations of autonomous, self-governing communities. Even whilst predicated on sovereignty, or precisely because of that, claiming to possess the *ius legationis* can be a symbolic means of challenging the sovereign claims of others.[26]

[16]Behrens 2017. [17]Hardy 1968, 13–14. [18]Denza 2016, 22. [19]Dembinski 1988, 29.
[20]Young 1964, 149, 151, 164. [21]Inter alia, Barston 2014; Berridge 2015. [22]Sen 1988, 9–17.
[23]Satow 1917, 175–80; Gore-Booth 1979, 67–75. [24]Satow 1917, 180; emphasis in original.
[25]Gore-Booth 1979, 67; emphasis in original. [26]Constantinou and Der Derian 2010, 10.

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References to a *right* of legation first appear in the works of Bartolus of Sassoferrato in the 14th century, subsequently developed by Bernard de Rosier and Martino Garati da Loci in the 15th century. They all specify that the *ius legationis* is based on majesty, supremacy, or significance – juridical or actual – and the legal formula that predominates with Martino is that of *superiorem non recognoscens*.[27] That is to say, the *ius legationis* is reserved only for someone who does not owe allegiance to or recognize a legal superior, although it can also be possessed if so authorized by one's legal superior. Other prominent international jurists, like Gentili, Grotius, and Vattel, extensively discussed the right of legation from the perspective of superior or sovereign authority, but with interesting variations that we outline in the following section.

Early jurisprudential debates, consequently, were instrumental in extricating the *ius legationis* from 'minor' affairs. It was 'a slow development of the diplomatic phenomenon as a public phenomenon', which rejected the notion of diplomacy as an interpersonal affair or discharged by institutions with limited autonomy.[28] The *ius legationis* became a concern in state monopolization of social institutions, in its drive to centralize power and fend off the competition of non-state, non-territorial modes of political organization – feudal, imperial, ecclesiastical, and piratic.[29]

The rationale for non-codification

Ambivalence with regards to its projected jurisdiction can explain, at least in part, the waning of the *ius legationis* and the failure to codify it in modern diplomatic law, namely the 1961 Vienna Convention on Diplomatic Relations. Its non-inclusion, however, was not a foregone conclusion as the records of the International Law Commission (ILC) that prepared the Convention reveal. Notably, the Draft submitted by the Special Rapporteur flagged the *ius legationis* in the very first article, which read as follows: 'If two States having the right of legation agree to establish permanent diplomatic relations between them, each of them may establish a diplomatic mission with the other'.[30] Moreover, the Memorandum on diplomatic law and practice, submitted by the UN Secretariat to the Commission included the *right of legation* as reserved for sovereign states but acknowledged 'exceptions to this principle', including self-governing dominions that 'acquired, and whenever they find it convenient, do exercise, such right'.[31]

The deliberations before the ILC are revealing of the 'exceptions' and the road-not-taken. On the one hand, there was acknowledgement of 'other forms of diplomatic intercourse' that extended beyond '"sedentary" diplomacy' and permanent embassies, that is, 'roving or ad hoc diplomacy' and 'persons conducting negotiations or engaged in special diplomatic missions' that differed in name and status. Yet, as one member put it, 'it might be more convenient for the Commission to begin by confining itself to diplomatic agents in the strict sense, provided that at a later stage it went on to study the position with regards to the category […] that was increasing continually in numbers and in importance'.[32] The confining happened. The future study was not acted upon.

[27]Fedele 2017, 124. [28]Ibid., 120. [29]Spruyt 1996; Holzgrefe 1989. [30]ILC 1955, 10.
[31]ILC 1956, 153. [32]ILC 1957, 2–6.

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On the other hand, specifically with regards to the 'right of legation' enshrined in Article 1 of the Draft Convention, some members of the Commission expressed strong reservations. They argued that the right was redundant and pleonastic, given that the ILC decided to deal only with sovereign states that had it *ab initio*. One member suggested: 'The presence or absence of the so-called right of legation would hardly add or detract anything'. Other members submitted that 'the so-called right of legation was not a right at all', that 'its inclusion would raise controversial questions', and that it 'would be unwise to bring in the concepts of independence and sovereignty' in determining who has it.[33] Given its purported conceptual complexity and inconvenience for the ILC, the *ius legationis* was dropped and never made it to the final draft of the Convention.

Beyond the ILC, other efforts to codify diplomatic law featured similar erasures, or modified inclusions, of the *ius legationis*. There was in effect a shift towards more specific and restrictive rights: representation, standing, or communication. The 'right of representation' features in Article 1 of the Havana Convention Regarding Diplomatic Officers (1928) and Article 1 of the Diplomatic Agents Project of the International Commission of American Jurists (1927). Also, in Pessoa's Draft Code (1911) 'the right of legation' is mentioned and 'the right to be represented, one to the other' is the founding principle of the Code.[34] The *ius representationis* encapsulates legal capacity to make representations on all issues (*omnimodae*) as an ordinary or plenipotentiary agent.[35] This is linked to *ius standi* – the 'right of standing' – which in customary international law establishes 'who has rights to appear before a tribunal or to make representations to another under international law'.[36] Yet these rights are not necessarily aligned and may be quite restrictive. For example, someone may be a representative and not be able to stand in an assembly or court, or asked to withdraw when specific matters are discussed, or not allowed to speak more than once. Another term used is the broader 'right to communication', as registered in Lord Phillimore's 1926 Proposed Codification of the Law Regarding the Representation of States.[37] For Phillimore, right to communication is different than Vitoria's colonial *ius communicationis* (more below) and it applies only to state representatives and 'the conveying and receiving communications on any matters'. Interestingly, it strengthens the duty of states to receive communications from others, that is, disallowing 'unreasonable refusal' in the absence of permanent legation.

Reconceiving legation: volitional, subjectional, or natural right?

In attending to what the right of legation *is or entails* it is important to also interrogate what the right *does and legitimates* in practice. To do so, we examine in more detail the writing of key legal scholars and shifts in practice over time, and through this delineate three manifestations of the R2D: legation as volitional, subjectional, and natural right. Whilst it is important to note that these are not mutually exclusive understandings and practices of *ius legationis* – as we demonstrate there are

[33]Ibid., 6–10. [34]See Diplomatic Privileges and Immunities 1932, Appendixes 4, 6, and 7.
[35]Fellmeth and Horwitz 2009, 158. [36]Ibid., 159.
[37]Diplomatic Privileges and Immunities 1932, Appendix 8.

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important intersections, overlaps, and tensions between these rights – nevertheless, distinguishing between them enables us to impose a conceptual order on claims and contestations over the R2D.

Legation as volitional right

The idea that historically evolved in Europe that diplomacy was a public institution reserved for higher authorities (*auctoritas superioris*), reinforced the logic that legation was an exclusive right and 'most illustrious Mark of Sovereignty'.[38] Yet restricting the right of legation to sovereignty created a legal puzzle as to its enforceability upon other sovereigns. Hugo Grotius sought to resolve this puzzle by suggesting that the right of legation was not part of natural law but 'the volitional law of nations'.[39] Like other 16th and 17th century scholars,[40] legation for Grotius only pertained to representatives of 'sovereign powers'.[41] But whereas active legation – the right to send an embassy – can easily materialize by any sovereign aspirant, passive legation – the obligation to receive an embassy – requires sovereign consent. According to Grotius, a sovereign having absolute authority over a given territory can reject receiving permanent legations without explanation. However, the sovereign cannot reject non-permanent legations 'without cause'. The cause for rejection 'may arise in the case of the one who sends the ambassador, or in the case of the one who is sent, or in the reason for the sending'.[42] In effect, for Grotius, the sovereign volitionally determines the sender's right and the corresponding duty to receive a legation on the basis of: (a) the sender's diplomatic status, that is, whether the legation is dispatched from an equal/sovereign subject; (b) the ambassador's character, that is, whether he is a persona grata given his past conduct; and (c) the rationale or subject matter of the mission.

For Alberico Gentili, writing earlier, the matter is not so clear. The volitional excesses of sovereigns – specifically, the liberal granting of the title *legatus* – add to legal complexity. Although 'the right of embassy is not possessed by one who is not transacting state business with the sovereign' or 'been sent' to a sovereign, Gentili noted that 'it is only on what is called a rigid interpretation of the law [*de stricto iure*] that these principles hold'.[43] In practice, sovereigns may send embassies that are clandestine or spurious, that is, embassies that conduct business with non-sovereigns or to rebels in rival states or on private business. Sovereigns may also grant the right of legation to brigands, criminals, rebels, non-equals, and even to runaway slaves, that is, retaining the freedom to talk to anyone they feel like talking to. The volitional right, therefore, stretches a long way in actuality. Still, it could not be extended to subjects (*subditos*), only to foreigners that are outside of one's authority (*legationis ius externo*).[44] Writing before the Westphalian order and being himself a protestant 'refugee-diplomat',[45] Gentili had a broad understanding of externality that included heretics, schematics, dissidents, and suppliants.

[38]de Wicqeufort 1997, I.ii.
[39]Grotius 1925, XVIII.i-ii.
[40]I.e. Gentili, Paschal, Kirchner, and Leibniz.
[41]See Holzgrefe 1989, 16–17; Fedele 2017, 337–61.
[42]Grotius 1925, XVIII.iii.
[43]Gentili 1924, II.iii.
[44]Ibid., II.x.
[45]Pirillo 2018.

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Overall, given that superior authority is non-restrictive, a plurality of practice operates within the volitional scheme of diplomatic exchange, instrumentally limiting or elevating different kinds of missions to a legation – to *diplomatic* missions – at the sovereign's will. With sovereignty, consequently, *ius legationis* is manifest as reciprocation between equals or a top-down granted privilege to chosen interlocutors than a recognition of intrinsic right that political communities may have.

Legation as subjectional right

European diplomatic norms were selectively utilized, bypassed, or hybridized in colonial diplomatic encounters.[46] The main feature of such legations was non-reciprocation of rights or token reciprocation, whilst taking interventionist liberties and consolidating 'imperial subjection'. Francisco de Vitoria, reflecting on the legal basis of colonial practices in the 'Indies', envisions European missions outside the framework of *ius legationis*. Still, Vitoria brands 'the Spaniards to be ambassadors of Christianity [*Hispani sunt legati Christianorum*]' which grants them specific diplomatic rights for 'as ambassadors they are inviolable under the law of nations [*quia legati iure gentium sunt inviolabiles*]'.[47] With Vitoria, therefore, different forms and manifestations of legation are 'corrupted' into a subjectional right in the 'new world'.

Vitoria fragments the diplomatic encounter into a series of natural rights (*iure naturali*) that the 'ambassadors of Christianity' apparently possess. These rights – being natural, not granted volitionally – can be enforced by whoever has the power-to-subject and regardless of indigenous non-recognition of such rights. Specifically, the Spaniards have the right to travel (*peregrinandi*) and to sojourn (*degendi*) in these foreign lands. They also possess the right to negotiate (*negotiari*), broadly understood as ability to trade and reach commercial agreements with the natives, as well as the right to communicate (*comunicatione*) and to participate (*participatione*) in the commons that the natives share with 'foreigners'. Finally, Spaniards have the right to preach the gospel and propagate Christianity (*ius praedicandi et annuntiandi Evangelium*).[48]

When added up, these natural rights deliver overpowering forms of legation that 'legally' allow Europeans to impose their presence globally, contra diplomatic representation-communication in renaissance Europe.[49] It essentially gave Europeans license and disallowed the indigenous people the right to forbid or restrict the activities of foreign missions in their land. Thus, Vitoria serves as a precursor of the so-called 'benevolent colonialism':[50] deeming natives unworthy to possess the 'civilized' customs of European legation was a powerful move for taking control of their polities.

This diplomatic asymmetry also precluded reciprocation and denied indigenous people the right of active legation to European sovereigns. The first American Indians visited the courts of Europe involuntarily or as 'curiosities' for the entertainment of the 'civilized man'. From the 18th century, as colonial powers consolidated their authority through treaties and alliances with local tribes, 'official tribal

[46]Sharp 2009, 149–68; Black 2010, 90–95; Opondo 2010.
[47]de Vitoria 1917, III.8.
[48]Ibid., III: 1–10.
[49]Lazzarini 2015.
[50]Todorov 1999, 149–50.

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ambassadors' of friendly indigenous communities were ceremoniously transported for official visits to London, Paris, and Madrid.[51] When 'unauthorized Indian delegations' started turning up to European capitals uninvited, assuming a right of legation, the subjectional character of colonial diplomacy was exposed by rendering illegal – through the passage of national law – the offensive liberty of indigenous delegations.[52] Similarly, following American independence, Indian delegations to Washington required authorization by the Commissioner of Indian Affairs, and 'there had to be sufficient justification to warrant the time and expense involved'.[53] Still, Indian delegations continued to turn up in Washington 'uninvited', demanding to meet the 'Great Father', protesting the violation of treaties and demanding his intervention.

Legation as natural right

Moving beyond the question of superiority and legitimate authority, the right of legation also features as a natural right based on the pragmatic autonomy displayed by diplomatic subjects. The most prominent, if largely unknown, proponent of this view has been François Le Vayer in *The Legate* (1579), where he radicalizes the legal formula of *superiorem non recognoscens*. Le Vayer views the right of legation as 'a most excellent sign of freedom', a right possessed by 'cities, princes and peoples who live according to their own willingness and will'.[54] From this perspective, the right of legation is 'only granted to those who depend on themselves, not on the power of others, and are not bound to anyone by an oath of loyalty'.[55] Key in this reformulation is the *de facto* recognition of the independence/autonomy/freedom of a group rather than the *de jure* recognition of it by others.

This view is echoed by Vattel who, contra Grotius, sees the right of legation as 'a right which nature itself has given to every independent society'.[56] The denial of the right of legation thus 'breaks the bonds which unite the Nations together, and thereby does an injury to all of them'.[57] If an autonomous community had consistent 'reservations' about surrendering its right of legation to the sovereign, or customarily enjoyed the 'right to negotiate' even whilst 'under the sovereignty of a State', then it could continue to do so.[58] Note, however, that Vattel's jurisprudence has been influenced by 'protestant republicanism' which autonomized the nation as 'personified collectivity', and could be read to function as 'diplomatic casuistry' for sovereignty.[59] Still, his nuanced extension opens up juristic possibility. For natural law now extends the right of legation beyond legal sovereignty, if a community possessed it before, or successfully protests its denial, or displays *de facto* autonomy and independence of action, as suggested by Le Vayer.

As Oppenheim explained in discussing 'the conception of the right of legation' (in a passage from the 1912 edition, remarkably left out in the latest edition), there exists 'the duty of every member to listen, under ordinary circumstances, to a message from another brought by a diplomatic envoy […] and this duty corresponds to the right of every member to send such envoys'.[60] This right is granted to any

[51]Viola 1995, 13–21. [52]Ibid., 18–19. [53]Ibid., 39. [54]Quoted in Fedele 2017, 341.
[55]Fedele 2017, 341–42. [56]de Vattel 1916, IV.63. [57]Ibid., IV.63. [58]Ibid., IV.59–60.
[59]Hunter 2010. [60]Oppenheim 1912, 723–24.

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'member' of the 'Family of Nations' with the corresponding duty to receive, if not permanent legations, at least, representations and communications. Thus conceived as *lex lata*, the issue of its enforceability remains, rendering the *ius legationis* 'a perfect right in principle but imperfect in practice'.[61]

It is to the continued contested nature of this right in the contemporary period that we now turn. Using our charting of the historical context of the rise and fall of *ius legationis* as a starting point, we now consider the broader and *lex ferenda* R2D. This in a world where – as Chief Deskaheh realized in petitioning the League of Nations – the prominence of multilateral diplomacy offers opportunities and challenges for those claiming and contesting diplomatic agency that are different in nature and scope to the bilateral exchanges of renaissance diplomacy. Specifically, we work through how our tripartite delineation of this right – as volitional, subjectional, and natural – offers a productive framing to reassess the ethics and the practicalities of multilateral diplomacy at the UN.

Tracing manifestations of the R2D at the UN

In returning to the question we posed in the Introduction – who has the right to send a diplomatic mission and what kind of support should such a mission receive by states and international organizations – we use the worked example of access to, (safe) participation and ability to represent, be consulted and negotiate positions at the UN to think through ongoing tensions between volitional and natural law interpretations of *ius legationis*, as well as the prevalence of subjectional methods used to maintain and entrench the privilege of state sovereignty.

This allows us to examine how the granting or denial of the R2D plays out legally, politically, and ethically, against the background of the seemingly irreconcilable tension between inclusive diplomatic pluralism, and the resolute defense of sovereign state authority. For, whilst there is both admirable ambition in the moral language of the UN's Charter, and much utopian rhetoric from the organization's initiators and supporters, there is also an inherent ambiguity in this foundational treaty. Squaring the circle of upholding universal values whilst at the same time protecting sovereignty and territorial integrity has proved to be an as yet unachievable task. To that extent, tracing the messy picture of how the R2D is granted and denied in practice to a wide range of political actors exposes the moral and practical implications of the disjuncture between official policy and everyday practice at the UN. We also trace how *claims* to the R2D are articulated in this key site of polylateral diplomacy. Here we distinguish between claims made to rights to participation, communication and negotiation by NGOs on the basis of competence and for strategic reasons, and claims made to the R2D as a natural right made by peoples and polities based on autonomy and self-governance. The latter points both to the creative potential of the R2D and the moral and practical problems that arise from implementation.

[61]Calvo 1896, 197.

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Diplomacy as volitional right: exclusivity and privilege at the UN

Just as there was an opening up of diplomatic space with the 'discovery' of the 'new world', so the diplomatic realm expanded rapidly in the 20th century. The dramatic increase of newly independent states during this period was in many ways facilitated by the UN, particularly through the work of the Fourth Committee. On the one hand, this proliferation of diplomatic rights holders within the context of a pluralized 'new diplomacy', was not as democratic as the rhetoric implied. As Mazower argues, the UN was a product of empire and the idea of imperial internationalism underpinned its early evolution.[62] Indeed, the paternalism of Western powers persisted and the hypocrisy of their preaching of universal human rights did not go unnoticed by emerging powers.[63] However, on the other hand, as the 20th century progressed and as states won independence, support for anti-colonialism waned, with new UN members quickly turning into staunch defenders of the established hierarchies of sovereign/non-sovereign, state/non-state, and member/non-member.

At first glance, the evolution of the UN represents a continuation of the progressive narrowing of the R2D to align with sovereign statehood as outlined in the previous sections. The prioritizing of recognized, sovereign independence effectively excludes other forms of self-government. Indeed, it would appear that the R2D is a clear cut one at the UN: as an international organization constituted and governed by member states, it is those members who determine which actors have the right to attend, speak at, and negotiate within its physical and metaphorical walls. In other words, this is a space infused by Grotian values whereby actors are either recognized sovereign states that are UN members and therefore fully exercise the R2D, or are not recognized states, are non-members, and are therefore denied the right. With international recognition enacted at the discretion of sovereign states,[64] the R2D that comes with UN membership is an exclusivity and a privilege and, as we trace here, the way that members exercise their volitional right to grant or deny it to diverse others offers insights into wider geopolitical relations and hierarchies.

Yet, care needs to be taken not to paint too neat a picture of state monopoly over the R2D at the UN as it is precisely the practice aberrations of the UN system beneath the sovereign state façade that are revealing of how the R2D is granted and denied in practice. Within the seemingly clear distinction of members/non-members there are sharp social stratifications between member states[65] as well as paradoxical cases. Moreover, whilst membership of the UN is open only to 'states',[66] at no point is the term *state* defined in the organization's charter. This leaves ample room for interpretation both in terms of formal membership and other forms of participation in its various organs and programmes.

On the one hand, there have been cases of polities that were granted membership without being independent states. For example, India became an original member of the UN in 1945, two years before its independence. There are also cases of UN member states not being recognized by all other members (e.g. Israel's recognition by 162 of the 193 UN member states). Further, there are new

[62]Mazower 2009. [63]Thakur 2001. [64]Dugard 1987; Crawford 2007. [65]Pouliot 2016.
[66]UN Charter Articles 3 and 4.

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states (e.g. South Sudan) and very small states (e.g. Marshall Islands) which have membership but which struggle to realize and exercise the attendant R2D due to financial, human, or technical resource restrictions.[67]

On the other hand, there are *de facto* states such as Somaliland and Abkhazia that are explicitly denied membership, and the case of Taiwan, a founding member of the UN representing China, whose UN membership was, in 1971, transferred to an alternative claimant to state sovereignty (the PRC). With its status downgraded to a province of China, Taiwan is not permitted to become a party to treaties for which the UN's Secretary-General is depositary, and is thus denied the full right of legation.[68] Within the realm of sovereign (or almost-sovereign) states, therefore, the R2D at the UN is not a 'matter of competence',[69] but, like the practice of recognition that underpins it, is one dictated by the discretion of polities within the 'club'.[70]

Between the extremes of membership granted and denied is a fragmented picture whereby the R2D is partially extended to some non-state actors and not to others: a situation which is largely but not entirely driven by the volition of member states. The primary mechanism whereby a degree of *ius legationis* is granted is through the assigning of particular statuses to polities and organizations. In this regard, there are structures of jurisprudence in place across various UN bodies, whereby polities are recognized as having a (degree of) independent status and a (limited) right to negotiate with others, at least over specific issues that directly affect them or over which they have acknowledged expertise. What emerges is a distinct but notably not formally codified spectrum of engagement with and participation in the UN.

At the most accommodating end of the spectrum is the R2D granted to those given the status of 'permanent non-member observer state' at the UN which confers rights almost on a par with those enjoyed by member states. Only two polities currently hold this status – the Holy See and Palestine – and the differences in the ease with which such a status was granted to these polities offers insights into the highly politicized and discretionary imperatives underpinning UN membership.

Moving down the 'pecking order'[71] of non-state engagement with the UN there are a range of polities, including international organizations, which have been granted observer status. Yet the fact that there are no provisions for observer status in the UN Charter means that this is a status granted via decisions and resolutions made by the General Assembly, often on an ad hoc basis for a particular meeting. As a result, each observer status comes with a slightly different suite of rights. Such pragmatic plurality of practice extends beyond the designation of observer status to even less well-defined categories of actors. Cases in point are 'members/support staff' of Frente Polisario and the Turkish-Cypriot Community, both of which are granted 'registration' with the UN protocol and liaison office which enables them

[67]Ross 2017; McNamara 2009.

[68]https://web.archive.org/web/20160331070613/; https://treaties.un.org/doc/source/publications/FC/English.pdf. Due to pressure from the PRC, Taiwan has been excluded from, or its membership downgraded in, most IOs. However, reflecting the inconsistencies of international politics it does have independent membership of the International Olympic Committee and WTO, albeit often under the name of 'Chinese Taipei' rather than 'ROC' due to demands from the PRC.

[69]Oppenheim 1912.

[70]Crawford 2007, 174–95.

[71]Pouliot 2016.

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to apply for building passes to the UN headquarters in New York and accreditation to official meetings. As parties to conflicts that the UN has active peacekeeping missions in (MINURSO and UNFICYP respectively) the granting of rights of representation and negotiation to officials from the Sahrawi Arab Democratic Republic and the Turkish Republic of Northern Cyprus – though notably not under the names of those aspirant states – can be read through the lens of 'engagement without recognition'.[72] This mechanism enables a degree of practical interaction with *de facto* states, whilst maintaining their status as not *de jure* or less than independent actors.[73] Its manifestation in the granting of partial rights of legation to parties to conflicts again reflects the volitional authority of member states and the continued exercise of sovereignty in maintaining hierarchies of polities of different statuses. In a move that Gentili may well have appreciated, the missions of these polities are temporarily elevated to a legation under specific circumstances as a special privilege, but are simultaneously and emphatically not deemed to be equal to member states.

Political actors whose international standing has consistently been subservient to states are NGOs, although the diplomatic rights afforded to these organizations have increased significantly in recent decades.[74] The involvement of NGOs in public decision-making within UN bodies was initiated in 1947 and, since 1996, particular NGOs have been granted a degree of *ius legationis* at the UN through being accredited with consultative status with the Economic and Social Council (ECOSOC) on the basis of recommendations from the Committee on Non-Governmental Organizations ('NGO Committee'). In addition to a dramatic increase in the number of NGOs being granted consultative status – from 45 in 1948 to 4045 in 2019 – this involvement has significantly broadened and deepened over recent decades. NGOs have increasingly been granted rights to representation, participation, and negotiation at the UN but not, as we note below, as natural rights holders as in most cases they do not claim to or aspire to represent autonomous self-governing communities.

The primary aim of granting consultative status is an instrumental one in order for NGOs to offer advice and expertise to UN bodies and agencies, but the status also affords a degree of standing at the UN: it enables accredited NGOs to not only gain access to but also to *participate* in a number of UN fora and mechanisms. For example, accredited NGOs can make statements to the Human Rights Council during its thrice yearly sessions,[75] organize side events that run concurrent to the Council's plenary discussions, submit information to the Universal Periodic Review mechanism, and, through the Arria formula, 'meet informally but regularly with members of the… Security Council'.[76] Thus, whilst the term 'consultative status' signals a secondary role of NGOs as advice-givers but not decision-makers, this

[72]Cooley and Mitchell 2010.

[73]Ker-Lindsay and Berg 2018.

[74]This trend is mirrored in other international organizations with a range of non-state actors increasingly gaining rights of access, participation, and negotiation, that is, the admission of companies to working groups of the ITU; the independent role for unions and companies in the ILO; and the extensive civil society participation at UN climate change conferences.

[75]Rights to freedom of Peaceful Assembly and of Association: Note by the Secretary-General. UN General Assembly, 69th Session, 1 September 2014, UN doc A/69/365 Para. 24: https://daccess-ods.un.org/TMP/6265202.76069641.html.

[76]Alger 2007, 704–05.

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distinction is blurred in practice, with 'indications of an expanding role of NGOs as agents, implementers, and supervisors of treaty-based norms'.[77] At first glance, this enhanced role of NGOs at the UN might appear to be an example of the extension of *ius legationis* beyond sovereignty. However, with states being the ultimate arbiter of the status of a particular NGO and the extent of its access to and participation in the UN, this remains a right that requires the volition of UN members.

In sum, the right of access and the nature of participation are highly fragmented within the UN system. In being granted the right to (some) deliberations and negotiations at the UN, and to engage and communicate with member states and (some) UN bodies, a range of non-members are given standing but not recognized as full diplomatic subjects. The simultaneous granting of different rights to different actors is not only a direct continuation of the plurality of practice that operated within far earlier volitional schemes of diplomatic exchange discussed above, but it enhances the ambiguity that underpins the R2D. This ambiguity can be useful in allowing diplomatic discretion, flexibility, and responsiveness, and member states can and have used their privileged powers in combination with ad hoc practices of accreditation at the UN to exclude or limit the engagement of polities that challenge the liberal international order. For example, with prerequisites for participation in some UN bodies including disavowing the use of force or disarming, this has enabled states to block access to rebel and armed insurgent groups engaged in active conflict, as has been the case with Al-Qaida, Islamic State, and the Lord's Resistance Army. However, as noted above, exceptions can be made on an ad hoc basis when deemed politically expedient in order for such groups 'to provide testimony… or negotiate the terms of agreements regarding ceasefires, peacekeepers, or on other humanitarian issues'.[78] As we discuss in the conclusion section, the framing of diplomacy as a *right* has the potential to offer ethical and practical routes to resolving the conundrum of whether this engagement does, or should, legitimize the political subjecthood of these actors.

Diplomacy as subjectional right: bullying and blocking at the UN

The instrumental and geopolitical employment of a volitional understanding of the R2D in the UN system thus reflects the complexities of international politics and has a range of normative implications. Here we turn attention to cases where tactics used to maintain and entrench the exclusivity and privilege of member states at the UN constitute practices whereby volition tips over into abuse and unjust exercise of power. Whilst not as flagrant as the 'disavowal of colonial diplomacies'[79] discussed above, nevertheless it is possible to trace member states using their diplomatic status to actively silence non-sovereign, 'non-civilized' peoples and polities at the UN.[80] Tactics for actively denying the R2D include the deliberate blocking of access for particular communities, and restricting a polity's ability to make representations at

[77]Bhuta 2012, 67; Willetts 2000. In obscuring this distinction further, the International Committee of the Red Cross, Order of Malta, and the International Federation of Red Cross and Red Crescent Societies have been granted permanent status as observers in the General Assembly, though the extension of this status to other NGOs has been stopped (Aviel 2005). [78]Coggins 2015, 114. [79]Opondo 2016.

[80]We are considering here polities whose actions and aspirations do not pose a threat to the international order nor disavow the values of the UN Charter.

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the UN, as well as reprisals before, during, and after visits to the organization. Overall, the effect of such tactics is the subjection of aspirant peoples and polities – in particular marginalized minority and indigenous peoples – to domestic governmental control and jurisdiction, notwithstanding their recognition of rights of representation and communication.

There are numerous cases of states using their position on the NGO Committee to block applications from NGOs that either work on issues that they object to, or on self-determination cases that they deem challenges their sovereignty or territorial integrity.[81] This politicized blocking of ECOSOC registration ensures increased vulnerability and reduced effectiveness of organizations that are kept within the grey area of being officially unregistered. They must seek the patronage of registered NGOs which agree to provide accreditation under their name, and are therefore unable to autonomously participate in the workings of UN mechanisms. This effectively denies such organizations, and the communities they advocate for, both the right to communication and the right of representation. When representatives of minority or indigenous communities do attend the UN – either with official accreditation or attending forums that do not require ECOSOC status (e.g. Forum on Minority Issues and Permanent Forum on Indigenous Issues) – they can face attempts by member states to block their participation. A tactic used by states to challenge and harass representatives of minority communities is to interrupt the latter's speeches with points of order during plenary sessions of the Human Rights Council, or the Forum on Minority Issues.[82] The Ninth session of the Forum on Minority Issues in 2016 saw an unprecedented number of interruptions by member states of delegates from minority communities in, amongst others, Iran, China, and Ethiopia. These were 'deliberately disruptive acts', intended to discredit minority speakers and shut down the space that these representatives have within the forum.[83]

In essence, states exploit privileges of protocol that UN membership grants them in order to deny minority communities the right to communication and to representation. However, the denial of their R2D goes further still in cases where states seek to discredit the communities themselves by lodging objections to the names representatives use to describe their homeland. For example, Indonesia's state representative to the UN has raised points of order challenging the name of the Aceh-Sumatra National Liberation Front, an organization that calls for self-determination of Aceh.[84] In response to similar attempts to delegitimize their cause, other self-determination movements have dropped names of their homeland from their organization in acts of self-censorship.

Beyond using bureaucratic means and political influence at the UN, some states harass and intimidate human rights defenders, frustrating their partial R2D through the exercise of domestic legal superiority. This includes: preventing activists from going abroad by not issuing travel documents, confiscating passports, or detaining them; publicly undermining their credibility; or enacting reprisals on their return to prevent future advocacy.[85] A case in point is the Sri Lankan state authorities' targeting of civil society activists in 2012 who were speaking at

[81]ISHR 2018. [82]McConnell 2020. [83]Ibid., 1027. [84]Liddell *et al.* 2019, 20.
[85]ISHR 2016; Liddell *et al.* 2019.

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Human Rights Council meeting which prompted the then UN High Commissioner for Human Rights to release a statement noting an 'unprecedented and totally unacceptable level of threats, harassment and intimidation directed at Sri Lankan activists who had travelled to Geneva to engage in the debate, including by members of the 71-member official Sri Lankan government delegation'.[86] Across these blocking and bullying tactics what we see is member states failing to uphold the duties that underpin diplomacy as a social practice: abusing the privileges of 'club membership' to subjugate others and deny them agency as international actors.

Diplomacy as natural right: inclusivity and pluralism at the UN

The extreme end of the denial of the R2D has not gone unnoticed at the UN. Those in leadership positions have expressed concern regarding states' silencing of dissent,[87] and the current Secretary-General, António Guterres, has argued that with 'the human rights agenda losing ground to the national sovereignty agendas', multilateral governance is increasingly needed.[88] As assertive authoritarian states close down space for dissenting voices this is thus a call to return to the original normative ideals of pluralism and inclusivity that underpins UN diplomacy. Yet, to what extent has there been a *practical* embracing of a more progressive Vattelian notion of *ius legationis* premised on a broadening of the right beyond sovereign states? And, in turn, how is the R2D claimed and exercised by non-sovereign polities at the UN?

Pluralism and polylateral diplomacy at the UN – in the form of recognition of a wide range of actors as diplomatic interlocutors[89] – is perhaps most immediately associated with the increasing rights of participation exercised by NGOs. However, the claims to an R2D articulated by NGOs are made on the basis of specialized expertise: these are organizations that can demonstrate 'competence', but are not natural rights holders on the basis of having a long-standing autonomous existence and demonstrating independence of action.[90] Groups that meet – or claim to meet – such criteria range from insurgents and rebels who aspire for statehood and/or control over territory, to indigenous peoples and minority ethnic communities who non-violently claim the right to self-determination. We leave the question of whether the R2D should be extended to the former – whether they have a natural right and are thus entitled to the privileges and immunities of diplomacy – to the discussion of the scope of the R2D in the following section, and here examine how the differing experiences of how indigenous peoples and minority ethnic communities have claimed and, to varying degrees had their rights extended, is revealing of the extent to which the R2D is also understood as a natural right at the UN.

[86]UN News, 'Senior UN official warns against harassing Sri Lankan human rights defenders', 23 March 2012: http://www.un.org/apps/news/story.asp?NewsID=41617.

[87]For example, since 2010, the UN Secretary-General has provided an annual report to the Human Rights Council on reprisals against human rights defenders who cooperate with UN human rights mechanisms.

[88]https://www.theguardian.com/world/2017/may/10/un-reform-secretary-general-antonio-guterres.

[89]Wiseman 2010.

[90]Willetts 2000.

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Minority groups and indigenous communities both often claim a degree of autonomy, if not sovereignty – including in some cases possessing the right of legation in the past – and thus often have a fractious relationship with the states in which they reside. As Feldman argues in the case of national minorities, these groups are 'constructed as international security concerns within diplomatic discourse because they obstruct nation-states from mutually securing themselves through diplomacy'.[91] A similar argument can be made with respect to indigenous communities, with their claim to the right of self-determination posing an existential threat to states' claims to sovereignty over territory. That the practice of modern diplomacy should reproduce structural inequalities between states and peoples who claim autonomy is thus not unexpected, and the granting of the R2D to these communities continues to be contested.

At face value, both groups are rights holders within the UN system with the normative foundations of the rights regimes set out in Article 1(2) of the Charter in the case of indigenous peoples (respect for the self-determination of peoples) and Article 1(3) for minorities (which bars discrimination). However, the success with which these groups have been able to (re)claim their R2D at the UN on the basis of natural law has varied, both between these groups and over time. In the interwar period minorities and mandate peoples occupied an ambiguous position in international law. As Wheatley notes, they 'appeared as figures in international law, yet simultaneously lacked true legal subjectivity'.[92] Yet the fact that sub-state subjects were even being considered within international law challenged long held assumptions regarding who could speak and be heard in international diplomacy, and it was in the League of Nations where experimentation around how the legal capacity of non-state entities and the recognition of their claims occurred.[93]

Under the auspices of the Office of the High Commissioner for Human Rights, the UN has 'gradually developed a number of norms, procedures and mechanisms concerned with minority issues'.[94] Minority communities can represent themselves at the annual Forum on Minority Issues, held at the UN's offices in Geneva. At face value, the Forum is an unusually accessible space at the UN and there is a degree of parity of participation between state and non-state stakeholders. Consultative status is not a prerequisite to participation, and representatives of states, UN agencies, NGOs, and minority communities have equal speaking time during the moderated debate. This is thus a diplomatic arena wherein minority groups demand their right to be recognized as a separate other; to participate in, and to communicate their affairs as an autonomous, legitimate polity.[95] Yet, the Forum is a structurally limited space within the UN: the Minorities Declaration (1992) is non-binding and thus recommendations made by the Forum are not matched by an obligation for states to report on compliance.[96] Unlike UN treaty-based bodies where advocacy by civil society groups can seek to influence State parties' compliance with their treaty obligations, the rights to participation and negotiation afforded to minority groups at the Forum are tokenistic.

Whilst international law and institutions have traditionally not been welcoming to indigenous peoples, in comparison to minority communities they have a higher

[91]Feldman 2005, 219. [92]Wheatley 2017, 272. [93]Ibid. [94]OHCHR 2012, 2.
[95]McConnell 2020. [96]Lâm 2007.

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profile and more established position within the UN.[97] In addition to sponsoring mechanisms that have developed dialogue between states and indigenous peoples, the majority of UN member states adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and indigenous issues have been institutionalized within the UN via the establishment of the Permanent Forum on Indigenous Issues (UNPFII). Through these initiatives representatives of indigenous peoples have made the UN 'a tool that allows them to make their voices heard'.[98] This has been premised on indigenous claims to subjecthood under international law, underpinned by their right of self-determination and their recognition as 'peoples': both of which are ongoing sources of contention between member states and indigenous communities, but which also offer avenues for the claiming of an R2D as natural right.

Indeed, it is within efforts to extend – or 'enhance' – the rights of participation of indigenous communities at the UN that claims to the R2D have been made most forcefully in recent years, and in ways that highlight the ongoing tension between volitional and natural law interpretations of *ius legationis*. At the World Conference on Indigenous Peoples in 2014, member states committed to reconsider the nature of indigenous participation at the UN and, in 2017, the General Assembly adopted a resolution titled, 'Enhancing the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them'.[99] There is ongoing consultation on this 'enhanced participation' across UN bodies and indigenous caucuses, with discussions ranging from conference room dynamics and equity of speaker lists at the UNPFII,[100] to proposals to introduce a new category of 'indigenous representative Institutions'. The latter – which can be read as the UN attempting to regularize indigenous participation and confine it to polities within a realm familiar to member states – has provoked consternation amongst indigenous groups, including a direct challenging of what is interpreted as a renewed volitional framing of *ius legationis*.

Two sets of criteria have been proposed for determining who is a legitimate representative institution. These are (1) evidence of 'representativity' and (2) evidence of indigeneity for which a number of criteria are set out (including history of dispossession/colonization, self-recognition, collective history, and connection to land). On the one hand, the greater access to UN treaty bodies and the General Assembly that this enhanced status would afford goes further than previous efforts to recognize the representative agency of indigenous peoples and grant them meaningful agency in decisions that affect their lives. It moves indigenous peoples closer to holding the natural rights granted to and claimed by every independent society. On the other hand, given that it is member states who are determining who is or is not indigenous based on these criteria, this is a far cry from the recognition of indigenous groups as natural rights holders as implied by the right to self-determination.[101] Rather, this is participation based on recognition given by sovereignty and thus arguably perpetuates the subjugation of indigenous peoples.

[97]Dahl 2012. A notable exception is the Arctic Council which, since its establishment in 1996 has included indigenous communities as 'Permanent Participants' which grants them right to active participation and full consultation but not decision-making. [98]Müller 2013, 15. [99]A/RES/71/321.
[100]Sapignoli 2017. [101]Bellier 2013.

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The increasing formalization of indigenous participation within the UN has the effect of mainstreaming their diplomatic subjectivity and practice. This process of normalization, whereby indigenous representatives become familiar with the functioning of the UN and skilled in networking across its structures, has been interpreted by scholars as taking the edge of their demands, 'absorbing indigenous energies and transforming indigenous leaders into convenient interlocutors'.[102] However, viewing this mainstreaming through the lens of claims to the R2D presents it also as an act of political agency. These representatives are seeking to engage with diplomacy as a social practice that involves responsibilities, obligations, and duties to the wider diplomatic field in order for the system to function: an engagement that reinforces the notion of this as a *right* to diplomacy rather than to merely access or participation.

Yet there has been pushback against this mainstreaming, and across marginalized groups there have been attempts to claim the R2D in unconventional and innovative ways. In some cases, exclusion from key decision-making bodies in the UN has fostered creativity in how some polities exercise their right to communicate, make representations and claim an independent status. They can and do draw on a different repertoire of practices that include: heightened use of symbolism and performances of legitimacy, as demonstrated by the Palestinian Authority's touring of a 'UN Chair' as part of their advocacy for admission as a member state[103]; making use of opportunism within UN spaces, from distributing information leaflets to delegates[104] to informal lobbying of state missions in the organization's bars and cafes; and seeking to hold the UN to account through protests and petitions outside UN buildings.[105]

There have also been efforts to carve out alternative spaces of diplomacy on the margins of the UN (e.g. indigenous caucus)[106] or in parallel to the UN (General Assemblies of the Unrepresented Nations and Peoples Organization)[107]; efforts which have resonances with Chief Deskaheh's holding court in the *Salle Centrale* in Geneva in lieu of being able to formally address the League of Nations. Whilst outweighed by the disadvantages of being denied the R2D – as the case of Taiwan during the COVID-19 pandemic illustrates – the advantages of innovatively doing diplomacy without being granted the *full right* are revealing of how the R2D might be understood and implemented. Practices that disregard or subvert protocol demonstrate the freedom to be flexible, entrepreneurial, and creative, in ways that are off limits to official state diplomats, and such unconventional claims to the R2D offer fruitful insights into how voice and agency is forged through diplomacy.[108]

Conclusion: potential scope and implications of the R2D

In this last section, we raise the issue of both the ethical implications of an R2D and what an R2D may mean in practice, particularly *how* it may be grated and operationalized in the multilateral context of the UN. In raising more questions that we are able to answer, our aim here is to sketch out what the scope and implications of

[102]Ibid., 196; Müller 2013. [103]Jeffrey 2013, 1–2. [104]Sapignoli 2017. [105]Constantinou 2021.
[106]Dahl 2012. [107]McConnell 2017. [108]Ibid., McConnell 2020.

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the R2D are in broad brushstrokes – a starting point for further scholarship to investigate in more detail.

Given its inherently contested character, as shown above, there remain major challenges in formalizing the R2D at the UN and beyond. However, there are good reasons for *re-envisioning and re-engaging diplomacy as a right*. The R2D offers a means of addressing the ethical and practical problems at the core of diplomacy – the 'controversial questions' that the ILC deliberating the Convention on Diplomatic Relations left aside. To that extent, the R2D works to reposition diplomacy 'as an ethic that originates in the relational qualities of international law'.[109] It disrupts the general understanding of international law as either idealist moralizing or as apology for diplomatic practice. Instead, it promotes an understanding of international law that critically engages legal claims, whilst promoting reflexive and sustainable forms of diplomatic practice.[110] Thus, operationalizing the R2D is primarily about the cultivation of an ethos and a corresponding duty of care in the conduct of diplomacy.

Through a conceptual history of the *ius legationis*, we have demonstrated that this right is contested both in terms of what it means in jurisprudential discussions and how it was and still is instrumentally employed geopolitically. We have also argued that it is precisely because of its provocations that it should be revisited today. For, contra Satow's view that legation is 'a matter of *comity*, not of *right*',[111] the fundamental tension between *de jure* and *de facto* understandings – that is, whether one *should* be allowed to or *does* in the end send a delegation – remains central to diplomatic practice today. Furthermore, as Gentili recognized, whenever such a right of legation is granted, it can be immensely empowering, just as it is disempowering when denied. Underpinning this contestation is the debate we have traced throughout this paper – in the realms of both legal theory and diplomatic practice – regarding whether the R2D should be part of volitional law or natural law, that is, granted by a national or supranational sovereign, or recognized by the mere fact of (broadly conceived) autonomous existence.

We cannot foreclose this debate by pronouncing the R2D one way or another. We find productive, however, Oppenheim's insight in our epigraph, that is, even whilst historically employed in legal discourse the *ius legationis* might not be 'a right in the strict legal sense'. Why so? And what implications might this have? In the context of what we have been arguing, this legal fluidity – oscillating between volitional and natural law – reinscribes the R2D in a far more expansive and enriching way than is currently articulated in international law. It links it directly to debates of legal pluralism – of rights that are not enshrined in formal law yet recognized in specific locales and political contexts. This makes the exploration of the R2D not a mere philosophical exercise but an already existing counterhegemonic praxis – implicit though not always articulated as such – linked to 'cosmopolitan legality' and legal reform from below.[112]

The R2D *opens out* the practice of diplomacy, makes it more accessible to non-professionals and challenges its exclusivity by state or supranational elites. It thus encourages non-state participants to be involved and take ownership of multilateral

[109]Niezen and Sapignoli 2017, 13.
[110]Constantinou and Der Derian 2010.
[111]Gore-Booth (1979), 67.
[112]de Sousa Santos and Rodríguez-Garavito 2005.

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processes conducted in their name. It offers conceptual scaffolding towards an ethos of pluralization,[113] beyond state sovereignty and static pluralism within diplomacy. For the pluralizing act is not just a question of 'fitting more in', but realizing that it is a major political and ethical predicament. Thus the R2D can help to reconnect diplomacy to its critical humanist legacy, committed to reflecting and addressing not only the needs and interests of the Self but also those of the Other.[114] In this respect, the UN has greater moral obligation than other actors to grant the R2D. Beyond its Charter, the inference to 'inclusive institutions' in SDG 16 is testament to the UN and, at least in principle, member states' recognition that exclusion does not bring sustainable peace and development.[115] It has been rhetorically moving in this direction in various UN forums, as shown above, but practical implementations have been lagging.

Both as a counterhegemonic move and a praxis of inclusivity and meaningful participation, the R2D can form part of a *compulsory code of ethics* that UN forums should abide. If so, this code of ethics should be tied to a corresponding *duty of care*. Whether an R2D is granted or not to a particular actor can be examined on a case-by-case basis, whilst taking into consideration the issue and the forum format. Stakeholders claiming an R2D can apply to specific forums on the basis of representative status and/or autonomous existence (i.e. natural law). The forum can grant or deny them the R2D (i.e. volitional law). Denial might be on the basis of, say, terrorist activity (although one can foresee circumstances where it is granted conditionally to ensure a peace settlement), or limited or bogus representation (e.g. a Government-organized NGO co-opting civil society representation). Linking the R2D to a code of ethics and duty of care thus moves decisions over the legitimizing of political actors by granting the R2D to an exercise of scrutinizing both the privileges/immunities *and* the duties/obligations of enacting diplomacy. In practical terms an explanatory note for granting or denying the R2D can be made publicly available and attached to all decisions and legal instruments that the UN forum adopts. Thus, a comprehensive assessment and rationale for both *delegations and exclusions* can be made permanently available in each case, reflecting on the legitimacy of diplomatic outcomes and, where necessary, rectifying participation in the future.

Furthermore, the R2D can be streamlined by connecting forums within the UN system. A good example of this is the High-Level Political Forum on Sustainable Development, which combines periodic intergovernmental negotiations with deliberation at various levels and assemblies with stakeholders that have knowledge of specific SDGs or monitor national implementation. Although participation in high-level forums remains political, some stakeholders may be able to exercise their R2D within forums that are primarily reflective and consultative, whereas others may do so within forums that negotiate and vote on soft or hard legal instruments. That is to say, the right to represent and make the case may be ensured in one forum, whilst the negotiation of the legal instrument is pursued through networks and alliances in another. Power asymmetries may remain, yet the enhanced role of Chairs could be important, as well as that of UN Special Rapporteurs. In short, unlike the old *ius legationis*, which practically involved the right to travel abroad and be

[113]Connolly 1995. [114]Constantinou 2013. [115]Kamau *et al.* 2018, 268–70.

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received by the Sovereign, nowadays the R2D can be exercised and (partially) fulfilled by making a case to a UN Special Rapporteur in face-to-face meetings *in situ* or through digital multilateral assemblies.

To be sure, the R2D is not the panacea that will resolve the diachronic problems of legitimacy that international institutions face.[116] Nor would it fully reverse the inequalities of the state-centric international system and the hierarchies of multilateral diplomacy.[117] Reconnecting with the *ius legationis* and repositioning the R2D at the heart of the UN system is necessary but not sufficient condition to minimize inequality and enhance legitimacy. Yet it has the potential to go way into remedying the biases of UN multilateralism, cultivating an ethos of inclusivity and equitable representation, and supporting transformative change in the future.

In a quest for supranational justice, and in the hope that diplomacy can deliver it, Chief Deskaheh sojourned in Geneva, submitted his 'Redman's Appeal', and awaited for the gates of the League of Nations to be opened. It is this same quest and this same hope that a rekindled R2D might aspire to serve today. The gates of the UN have already opened in many ways since that event a century ago, and the R2D can help to negotiate the terms and conditions for opening them further, whilst ensuring fair, balanced, and meaningful participation for aspirant delegations.

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[116]Zürn 2018.

[117]Pouliot 2016.

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