MASTER S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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INDIGENOUS SELF-DETERMINATION AND THE HUMAN-RIGHTS BASED APPROACH TO SUSTAINABLE DEVELOPMENT: POTENTIALS AND LIMITATIONS

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Abstract:

In a global scenario of growing environmental pressure and escalating resource conflicts, Indigenous peoples have gained increased visibility. First, the recognition of their potential contributions to environmental protection, climate adaptation and resource management has positioned Indigenous peoples as fundamental agents in the pursuit of sustainability. Second, most Indigenous populations face extreme forms structural inequality, accounting for almost 19% of the extreme poor. In this regard, sustainable development appears as a *shared approach to development*, promising to respect their self-determined development, while ensuring the amelioration of their living conditions and well-being. Third, Indigenous peoples often inhabit territories rich in resources considered 'strategic' both for natural resource exploitation and conservation. Therefore, conflicts over investment and development projects in their territories are constant threats. Recent years have seen an alarming increase in the abuse of their rights, to the extent that Indigenous peoples often describe the affectations as genocide or ethnocide.

In this context, Indigenous peoples have continued to assert their right to self-determination, as foundational right for the guarantee of all their fundamental freedoms and human rights, including, in the pursuit of sustainable futures. Therefore, the following thesis seeks to explore the potentials and limitations of a human-rights based approach to sustainable development in the realization of Indigenous self-determination. To achieve the latter, it examines the scope, extent, and limitations of the right of Indigenous peoples to self-determination, and some of the international legal implications emerging from the notion of sustainable development *vis-a-vis* Indigenous peoples. This is done through the combination of a historical approach to international law and some elements of the doctrinal method. It concludes that there are significant challenges for the realization of Indigenous self-determination within the emerging regulations on sustainable development, both arising from international and human rights law's own theoretical limitations, as well as from the lack of engagement with other branches of law.

Key words:

Indigenous peoples, Self-determination, Sustainable Development, Self-determined Development

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1. INTRODUCTION

1.1. Indigenous Peoples in the Spotlight: Increased Visibility, Rising Threats

In recent decades, Indigenous peoples have gained increased visibility at the international level, standing at the intersections between international human rights, environmental and trade/economic law.[1] The progressive development of Indigenous peoples' rights has occurred parallel to the emerging notion of sustainable development. Growing interest for sustainability has put Indigenous peoples in the spotlight in several ways. First, since the 1992 *UN Conference on Environment and Development* (UNCED), the potential contributions of Indigenous knowledge to environmental protection and conservation have being strongly incorporated throughout the UN discourse. In this scenario, Indigenous peoples continue to be portrayed as fundamental agents of sustainable development. They are progressively presented as 'strategical partners' in the pursuit of sustainability, in recognition of their ancestral knowledge regarding climate adaptation, resource management, and their strong connections to land.

Second, Indigenous peoples appear as crucial 'beneficiaries' of sustainable development. Most Indigenous populations face extreme forms structural inequality, and their livelihoods continue to be "seen as inferior, primitive, irrelevant, something to be eradicated or transformed."[2] While representing 6.2% of the world's population, Indigenous peoples are nearly three times more likely to live in extreme poverty than non-indigenous peoples, accounting for almost 19% of the extreme poor.[3] Whereas Indigenous peoples' poverty is often explained as result of their 'backwardness', 'lack of development', or persistence of their traditional practices, sustainable development promises to respect their self-determined development, while ensuring the amelioration of their living conditions –'leaving no one behind.' In this sense, sustainable development is consistently portrayed as a *shared approach to development* "that will reinforce

[1] Following current legal practice, the following thesis refers to 'Indigenous peoples' as including the wide variety of local, national and regional terms that express Indigenous self-identification, such as tribes, ethnic minorities, natives, indigenous nationalities, First Nations, aboriginals, indigenous communities, hill peoples and highland peoples, among others.
[2] UNDESA 2019, para.2
[3] CEB 2020, p.3

the role of indigenous populations, contribute to the improvement of their lives and allow them to become key actors in their own development in the long term."[4]

Third, Indigenous peoples often inhabit territories rich in resources considered 'strategic' both for conservation and exploitation. Therefore, conflicts over investment and development projects in their territories are constant threats. Recent years have seen an alarming increase in the abuse of their rights, to the extent that Indigenous peoples often describe the affectations as genocide or ethnocide. According to Frontline defenders, 40% of the human rights defenders killed in 2019 were Indigenous and land rights defenders.[5] In 2020, the percentage of human rights defenders killed that were working on land, indigenous peoples and environmental rights went up to 69%, of which 26% were specifically working on Indigenous peoples' rights.[6] The intense wave of criminalization of Indigenous peoples is primarily related to a continued expansion of the extractive frontier. In the words of the Special Rapporteur on the Rights of Indigenous Peoples, "intensified competition over natural resources has placed indigenous communities, seeking to protect their traditional lands, at the forefront of conflict, as targets of persecution."[7] In a global scenario of environmental pressure and escalating resource conflicts, Indigenous peoples continue to be major victims of systematic abuse in the name of 'development.'

In this context, Indigenous peoples have continued to assert their right to self-determination, as foundational right for the guarantee of all their fundamental freedoms and human rights. They have historically resisted shifting forms of domination, exploitation, and violence. Today, around 476,6 million Indigenous peoples –amounting to more than the combined populations of the United States and Canada[8], endure legacies of colonization and continued practices of exclusion that acquire distinct manifestations at the local, national and international settings. Amid vast diversity, Indigenous peoples face consistent patterns of abuse. It is widely documented that the gravest violations of Indigenous peoples' rights often occur in tandem with the appropriation of their traditional lands.[9] While much has been said about the negative

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[4] *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples*, A/73/176, para. 51
[5] Frontline Defenders Global Analysis 2019, p.4
[6] Frontline Defenders Global Analysis 2020, p.4
[7] *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples*, A/73/176, para.4
[8] CEP, 2020, p.2
[9] UNPFII, *International expert group meeting on the theme "Sustainable Development in the Territories of Indigenous Peoples*, E/C.19/2018/7, paras. 31-35

impacts of agrobusiness and resource extraction activities in Indigenous territories, conservation, tourism, and corporatized green solutions remain relatively obscured as important drivers of land dispossession.[10] Even less has being said about how sustainable development initiatives may affect Indigenous peoples rights.

Sustainability and Indigenous peoples' rights are often assumed to go hand-in-hand. In this context, the following thesis seeks to explore the potentials and limitations of a human-rights based approach to sustainable development in the realization of Indigenous self-determination. To address the latter, the present text examines,

1. *What is the scope, extent, and (historical) limitations of the right of Indigenous peoples to self-determination?*
2. *What are some of the international legal implications emerging from the notion of sustainable development vis-a-vis Indigenous peoples?*

And, finally,

3. *What are the potentials and limitations of a human-rights based approach to sustainable development in the realization of Indigenous self-determination?*

1.2. Sources and Methods

The following thesis attempts to combine a historical approach to international law with a doctrinal analysis of its current standards, drawing upon *Third World Approaches to International Law (TWAIL)*. The text attempts to revisit the underlining tensions between the right to Indigenous self-determination, as construed within international law, and its intersections with the regulations emerging from the notion of sustainable development.

A historical analysis of legal standards allows to put claims into broader perspective, better understand their progressive development, and comprehend its current meanings and possibilities as towards Indigenous peoples. Devoid of historical weight, it is difficult to perceive the operations of power present within current standards. This effort is also animated by a desire to put into perspective the transformations that core concepts of international law take over the course of history, constituting the changing framework within which Indigenous people continue to raise their claims. The latter also allows to perceive the weight of 'soft-law'

[10] *Ibid.,* para. 34

instruments both in the elaboration of Indigenous rights and sustainable development standards, the ways 'soft law' and 'hard law' instruments are constantly interrelating, as well as evidencing law-making consequences of non-state actors. This is of considerable importance, as most of the Indigenous peoples' rights instruments are either considered soft law sources or have a relatively low endorsement.

Some of the insufficiencies of Eurocentric/Western accounts of the discipline have been increasingly emphasized in international law theory. Critical scholarship has denounced that traditional views are not only incomplete, but also conceal "the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules."[11] In this scenario, some highlight that international law doctrines facilitated European imperialism based on binary conceptions of the Self and Other that legitimized the colonizing project.[12] This approach has been criticized for being grounded in the same dichotomy it aims to expose, as it reinforces the notion of international law as a specifically European construct. Other approaches have explored non-European influences in the discipline's standards, and the phenomenon of appropriation of doctrines rooted in non-European legal traditions.[13] Examples of the latter include the rules of warfare followed by Indian kings prior to 1500; conceptions of sovereignty and non-interference in domestic affairs from Latin America; and the protection of religious minorities and the humane treatment of the war prisoners as contributions of Islam to international law.[14]

Whereas it is out of the scope of the present thesis to provide a 'non-European' history of international law, or to discuss the origins of its standards, it is relevant to question the narratives in which non-European polities, including Indigenous peoples, appear as passive objects of domination.[15] The asymmetries of power involved in the colonization process, the forms of agency that Indigenous peoples have taken face to the colonizing project and its linkages with international law have been vastly diverse. Not only the term 'Indigenous peoples' encompasses widely heterogenous and dynamic groups of people, but it has a broader meaning when considered in historical perspective. Certainly, the task of revealing these agencies in 'the dialectic of the global and the local,'[16] requires a deep understanding of the

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[11] Fassbender, 2012, p.3
[12] Anghie, 2004; French, 2013, pp.326-346
[13] Becker, 2012, p.5.
[14] Fassbender, 2012, p.4
[15] *Ibid.*
[16] *Ibid.,* p.8

colonial encounters in a case-to-case basis, as well as accessing histories that have, precisely, being largely ignored or undocumented. Therefore, there is an effort to highlight Indigenous voices and consider the extent to which international law 'fits' or 'matches' Indigenous peoples' aspirations.

The present thesis discusses both legal and complementary sources, as well as diverse academic works. It concentrates mostly on the developments within the UN system, including, primarily, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007),* the *International Covenant on Civil and Political Rights (ICCPR, 1966),* and ILO Convention No. 169 Indigenous and Tribal Peoples Convention.

1.3. Limitations

Indigenous peoples, territories and struggles are widely heterogeneous. The use of the term in the present thesis shall be regarded as 'strategic,' relative to groups of peoples united by political claims that "stem largely from a shared desire to address historical and ongoing injustices committed in the name of imperialism, colonialism, and other forms of domination perpetuated around the world."[17] Furthermore, the legal status of Indigenous peoples is strongly case-dependent. Most of the jurisprudence and legal developments regarding Indigenous peoples' rights have advanced in regional and national contexts. The present work has highly focused on the development within the UN and UN treaty body jurisprudence, considering its relevance for the early development of Indigenous rights, as well as for the notion of sustainable development. This choice necessarily omits a vast arrange of elaborations on the matter, particularly the rich jurisprudence on the rights of Indigenous Peoples produced within the Inter-American System of Human Rights.

On its part, the notion of sustainable development encompasses a broad arrange of knowledge and legal documents that are impossible to attain for a single researcher. Thus, current debates or important documents may have been omitted. Due to the very nature of the topic, encompassing three different areas of international law, the present thesis captures an overview of the most important debates on the matter, rather than a detailed and extensive doctrinal analysis of current standards. Instead, there is an effort to provide a broad picture of how Indigenous peoples claims are progressively being incorporated at the intersections of

[17] Woons, 2014, p.10

international human rights law, environmental law and, to some extent economic law, and how the process of incorporation or integration may impact their historical assertion of self-determination.

2. SELF-DETERMINING PEOPLES

2.1. Indigenous Self-determination

Indigenous peoples are gaining increased visibility in the assertion of self-determination. It is now commonly acknowledged within international settings that Indigenous peoples *have the right* to self-determination, irrespective of their position with regards to the state(s). In this regard, the common discourse explains that 'Indigenous peoples' issues' gained particular resonance in international law around the 1990s, with the joint work of a strengthened international Indigenous movement and the advocacy of the United Nations (UN). Since then, there have been growing efforts to frame their aspirations in the language of human rights, often epitomized with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP, 2007). UNDRIP is not only the most comprehensive international instrument on Indigenous peoples' rights but is in itself considered 'a response and tool against discrimination.'[18] According to its article 43, the standards contained therein "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[19]

UNDRIP condemned the doctrines, policies and practices that advocated superiority on discriminatory bases, and recognized that Indigenous peoples suffered historical injustices, particularly resulting from colonization and land dispossession.[20] It declared that Indigenous peoples "are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such."[21] It reaffirmed that Indigenous peoples are entitled to all human rights, while possessing collective rights "indispensable for their existence, well-being and integral development as peoples."[22] It specified that Indigenous peoples' rights "derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."[23] The extensive participation of Indigenous representatives in drafting UNDRIP further evidenced a rupture in the historical patterns of exclusion of non-state actors from international lawmaking.

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[18] Charters & Stavenhangen, 2009, p.10
[19] *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, Art. 43
[20] *Ibid.,* Preamble, paras. 5-7
[21] *Ibid.,* Preamble, para. 2
[22] *Ibid.,* Preamble, para. 23
[23] *Ibid.,* Preamble, para. 8

Though there is no agreement regarding the extent of UNDRIP's normative weight, there is strong support for the view that it articulates universal human rights as applicable to Indigenous peoples. Its consistency with the existing body of international human rights law, coupled with the notions of effective equality and non-discrimination, has further led some to argue that UNDRIP reflects customary international law.[24] Irrespective of whether one assumes this position, UNDRIP enjoys a great degree of legitimacy, as it resulted from a 23-year negotiation, was adopted with overwhelming support, and was "drafted with the rights-holders themselves."[25] Despite its non-binding character, UNDRIP has been increasingly invoked by national courts and regional bodies.[26] The Member States of the General Assembly (UNGA) also reaffirmed recently their support for UNDRIP in the high-level plenary meeting known as *First World Conference on Indigenous Peoples (WCIP, 2014)*.[27]

With the same words of common article 1 of the two International Human Rights Covenants, UNDRIP declared that Indigenous peoples have the right to self-determination, which entitles them to "freely determine their political status and freely pursue their economic, social and cultural development."[28] The latter constituted a historical landmark, as the right of 'peoples' to self-determination is typically understood to be realized through statehood, equating its subject –the peoples– to states. While the right under UNDRIP does not entitles Indigenous peoples to statehood, no other socio-political formation (aside from the states) has been recognized as 'peoples' for international legal purposes. However, Article 46 clarifies that the understanding of Indigenous peoples as 'peoples' entitled to self-determination may not be interpreted "as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[29]

On its part, the only legally binding instrument that specifically addresses Indigenous peoples' rights, namely, Convention No. 169 of the International Labor Organization (ILO) *on*

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[24] Åhren, 2016, p.77;
[25] Tauli-Corpuz 2007, para.2
[26] Belize, Botswana, Canada, Chile, Colombia, Guatemala, Kenya, Mexico, the Russian Federation; IACHR-Saramaka People v Suriname, 32, 2
[27] *Outcome document World Conference on Indigenous Peoples*, A/RES/69/2, paras. 3, 4, 5, 7, 8, 20, 21, 27, 29, 30, 32, 40
[28] *International Covenant on Civil and Political Rights* (ICCPR), 1966, Art. 1; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1996, Art. 1; UNDRIP, 2007, Art. 3
[29] UNDRIP 2007, Article 46

Indigenous and Tribal Peoples (1989),[30] makes no references to self-determination. Even more, it clarified that the use of the term peoples for the purposes of the Convention was "not to be construed as having any implications as regards the rights which may attach to the term under international law."[31] Therefore, it excluded interpretations that would entitle Indigenous peoples to the right to self-determination as contained in ICCPR and ICESCR. In this sense, under a strict view, the right to Indigenous self-determination is first dependent on whether UNDRIP is considered customary international law.

As regards to its content, Indigenous self-determination is primarily articulated through forms of autonomy and self-government, while safeguarding the territorial integrity or political unity of the states. According to UNDRIP, in the exercise of self-determination, Indigenous peoples have "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[32] The maintenance of their distinct institutions is considered not conflict with their "right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[33] In fact, the emphasis is put on the creation, maintenance and strengthening of Indigenous distinct institutions within the State's borders and structures.[34] Therefore, the right is often operationalized through institutional and administrative arrangements that 'authorize' different degrees of Indigenous local autonomy and participation in decision-making processes, "through representatives chosen by themselves in accordance with their own procedures."[35] The latter involves the right to "determine their own identity or membership in accordance with their customs and traditions."[36]

In addition, aside from the general right to effective participation in decision-making processes, Indigenous self-determination implies the rights to Consultation and to Free, Prior and Informed Consent (FPIC). Before adopting or implementing legislative or administrative measures that may affect Indigenous peoples, states have the duty to "consult and cooperate in

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[30] ILO Convention No 169 attempted to recognize Indigenous peoples' aspirations 'to exercise control over their own institutions, ways of life, and economic development.' Convention No. 169 remains the only legally binding instrument specifically addressing Indigenous peoples. Three decades after opening for ratification, it has only been ratified by 23 States. According to ILO's statistics, about 75% of Indigenous peoples continue to fall outside the protection of the Convention.
[31] ILO C169, 1989, Arts. 1 (2) and 1 (3)
[32] UNDRIP, 2007, Art. 4
[33] *Ibid.,* Art. 5
[34] *Ibid.,* Arts. 5, 20, 34
[35] *Ibid.,* Art. 18
[36] *Ibid.,* Art. 33 (1)

good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent."[37] Convention No. 169 also recognizes the right "to consultation, in good faith, with the objective of achieving agreement or consent in legislative or administrative measures that may affect them, as well as in the formulation of national and regional development plans."[38] According to ILO, the purpose of consultation is obtaining agreement or consent, but the latter must not be seen as an independent requirement, therefore does not provide Indigenous peoples with 'a veto right'[39]. However, ILO has also explained that "a simple information meeting, where indigenous peoples could be heard without having any possibility of influencing decision-making, cannot be considered as complying with the provisions of the Convention."[40] In this context, the presumption of good faith is emphasized.

Consultation and FPIC are particularly stressed when conducting projects related to Indigenous lands, territories and resources traditionally owned, occupied or otherwise used or acquired,[41] and when the decisions may affect Indigenous peoples' means of subsistence, or their rights to engage freely in traditional and other cultural, political and economic activities.[42] According to UNDRIP, "Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress."[43] In addition, the right to consultation "is not limited to the right to react to externally initiated or imposed measures."[44] That is, consultation is to be understood in relation to the notion of active participation, which also involves the possibility for Indigenous peoples to propose measures, programs and activities in exercise of control over their economic, social and cultural development. In this sense, participation is extended to "the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[45]

The right to "own, use, develop and control the lands, territories and resources that they possess"[46] is also of significant importance for the realization of the right to self-determination. Indigenous territories hold the material, symbolic and spiritual elements necessary for

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[37] *Ibid.,* Arts. 19, 32 (2); CERD *General Recommendation No. 23*, 4
[38] ILO C 169, 1989, Art 6 (2)
[39] ILO Handbook, 2013, p.16
[40] *Ibid.*
[41] UNDRIP, 2007, Arts. 32 (2), 26 (1)
[42] *Ibid.*Art. 20 (1)
[43] *Ibid.*Art 20 (2)
[44] ILO Handbook, 2013, p.19
[45] ILO C 169, 1989, Art 7 (1)
[46] UNDRIP, 2007, Art. 26 (2)

guaranteeing the reproduction of their lives, cultures, and governance systems. Convention No. 169 is the only treaty that refers specifically to the right to land, territories and natural resources. Part II of the Convention, from Articles 13 to 19, are dedicated to the matter, recognizing the spiritual value, collective character, and 'special importance' of land, territories, and natural resources for Indigenous peoples. Article 13 provides that,

> 1. Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
>
> 2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

The spiritual relationship to land and territories denotes that, further than means of economic subsistence, Indigenous territories are the source of their spiritual, cultural and social identity. Convention No. 169 emphasizes that the terms 'lands', as related to Indigenous peoples, should be understood to include the concept of territories, "which covers the total environment of the areas which the peoples concerned occupy or otherwise use."[47] Recognition of the interconnectedness between culture, land, and territories, in a collective sense, as well as the notions of *'traditional' ownership, occupation, use or acquisition*, distances the terms from the common understanding of an individual right to property. As explained in Article 14,

> 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
>
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
>
> 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Moreover, Convention No.169 declared the right to use, manage and conserve the resources of these lands; the establishment of penalties for unauthorized intrusion; measures for the protection and environmental preservation of these territories; and the right not to be removed from their territories unless considered an exceptional measure, in which case it requires

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[47] ILO C 169, Article 13 (2), 14

Indigenous peoples' free and informed consent.[48] In cases in which the State retains ownership of mineral or subsurface resources, the Convention provides that consultation is required, and Indigenous peoples shall participate in the benefits of such activities and/or receive compensations for damages.[49]

Furthermore, the right to self-determination involves safeguarding Indigenous peoples' life and cultural integrity. As expressed in UNDRIP, the right to life not only includes individual 'physical and mental integrity, liberty and security of person', but also, the collective right to 'live in freedom, peace and security as distinct peoples.'[50] In this regard, Indigenous peoples have first, the right "not to be subjected to forced assimilation, integration, racial or ethnic discrimination, or destruction of their culture."[51] Second, there must be positive measures that allow Indigenous peoples to practice and revitalize their cultures; maintain, control, protect and develop their cultural heritage, traditional knowledge, sciences and technologies; and practice, develop and teach their spiritual and religious traditions, customs and ceremonies.[52] Since the latter includes the protection of Indigenous peoples' spiritual relationship to lands, territories and resources, guaranteeing access to, effective possession and control of their lands, including prevention from dispossession or forced population transfers, are also necessary measures in the protection of Indigenous peoples physical and cultural integrity, and therefore, their self-determination.[53] As expressed in HCR *General Comment No. 23*, the right to enjoy a particular culture "may consist in a way of life which is closely associated with territory and use of its resources, particularly in the case of Indigenous peoples."[54]

It is noteworthy that the right to culture in the case of Indigenous peoples is differentiated from the general requirements of non-discrimination[55] and to equality before the law and equal protection of the law,[56] which apply to "all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority."[57] According to *General Comment No. 23* the protection of rights considered under article 27 "is directed towards ensuring the survival and continued development of the cultural, religious and social

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[48] *Ibid.,* Arts 15 (1), 18 and 16 (1), (2) and Art 7 (4), respectively
[49] *Ibid.,* Article 15 (2)
[50] UNDRIP, Art. 7
[51] *Ibid.,* Art. 8
[52] *Ibid.,* Arts. 11, 12
[53] *Ibid.,* Art. 25, 31
[54] HRC, *General Comment No. 23*, 3.2., 7
[55] ICCPR, 1966, Art 2.1.
[56] ICCPR, 1966, Art 26
[57] HRC General Comment No. 23, 4.1., 2

identity of the minorities concerned."[58] Therefore, it implies positive measures that may be legitimate as long as they are "aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27[,] provided that they are based on reasonable and objective criteria."[59] As expressed in CERD *General Recommendation No. 14* on the definition of racial discrimination, "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate."[60]

In addition, the right to Indigenous self-determination may be expressed through an external dimension without secession. According to UNDRIP, Indigenous peoples have the right "to maintain and develop contacts, relations and cooperation […] with their own members as well as other peoples across borders."[61] Despite particularly intended for Indigenous peoples divided by international borders, the provision does not exclude contacts, relations and cooperation with 'other peoples.' In fact, their increasing participation in international bodies and institutions such as the *Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP), the *Permanent Forum on Indigenous Issues* (UNPFII) or the *Human Rights Council* (HRC), may be understood as expressions of this right.[62] Additionally, Indigenous peoples have the right "to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors."[63] According to UNDRIP's preambular considerations, this is considered "the basis for a strengthened partnership between indigenous peoples and States."[64]

The latter provisions, as well as the overall negotiation process and adoption of UNDRIP, marked an important shift in dominant international legal doctrine. The Declaration is often described as a 'groundbreaking achievement' or 'milestone' in international human rights law. In fact, Indigenous peoples' rights are frequently highlighted for their transformative effects within the discipline. The recognition of the term 'peoples' as entailing actors other than the

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[58] *Ibid.,* 9
[59] *Ibid.,* 6.2.
[60] ICERD *General Recommendation No. 14*, 114; Despite the CERD Convention does not refer to Indigeneity, the Committee highlighted in General Recommendation 24 (1999) concerning Article 1 that ICERD "relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples." Moreover, the CERD has emphasized the need of special measures directed at tackling structural and systemic discrimination to ensure their equal enjoyment of human rights and fundamental freedoms, which should not be confused with Indigenous peoples' rights as such.
[61] UNDRIP, 2007, Art. 36 (1)
[62] Charters, C. & Stavenhagen, R., 2009, p.125
[63] UNDRIP, 2007, Art. 37
[64] *Ibid.,* Preamble para. 15

states for international legal purposes, and the advancement of collective rights are the most prominent examples. Following UNDRIP, the *American Declaration on the Rights of Indigenous Peoples*, a non-binding instrument adopted by the OAS General Assembly in 2016, also enshrined the right to Indigenous self-determination in the same terms of the Declaration.[65] In some countries, diverse institutional arrangements and domestic legislative measures have been made to ensure certain levels of Indigenous autonomy and self-government, the maintenance of distinct institutions, and the creation of participation mechanisms with the overall objective of advancing Indigenous rights.[66]

However, the realization of Indigenous self-determination largely depends on whether and how States recognize the right.[67] They continue denouncing "the tendency of indigenous governance structures to take on a corporate form within a Western regulatory framework."[68] Whereas the recognition of Indigenous self-determination in UNDRIP may not be underestimated, international law still fundamentally protects the State's discretion to decide how to understand and *allow* Indigenous self-determination. However, acknowledging the difficulties involved in the realization of Indigenous self-determination is not an attempt to 'return to an unattainable past.'[69] Rather, it is an effort to resist falling into the 'unreflective pragmatism' described by Koskenniemi: "the implicit assumption that the problems of theory are non-problems and that the sociological and normative issues of world order can be best treated by closely sticking to one's doctrinal task of analysing valid law."[70] Challenging the 'linear and triumphal' narrative of human rights allows us to engage with its complexities. Therefore, it is imperative to continue to historicize legal concepts, highlight absences in its discourses and try to engage with what gets lost in translation.

2.2. The Historical Legality of Indigenous Dispossession, Exploitation and Assimilation

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[65] *American Declaration On The Rights Of Indigenous Peoples*, 2016, AG/RES. 2888 (XLVI-O/16)
[66] See: IWGIA (2018) *Indigenous Peoples' rights to autonomy and self-government as a manifestation of the right to self-determination* on the operationalization of the rights to autonomy and self-government in Bolivia, Chile, Peru, Colombia, Panama, Mexico, Canada, Greenland, Sápmi, Russia (Yakutia), Nepal, India, Philippines and Kenya.
[67] *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination. Draft report of the Expert Mechanism on the Rights of Indigenous Peoples*, 2021, A/HRC/EMRIP/2021/2, 43
[68] *Ibid.*
[69] Woons, 2014, p.10
[70] Koskenniemi, 2009, p.

Early international law echoed the practices and views of European powers throughout colonial encounters and the rise of nation-states. Whereas international law is conceived as concerning inter-state relations, first theorists attempted in fact to outline principles governing relations with non-states. In the effort to 'organize the world' through law, many engaged in the task of elucidating their legal ties with Indigenous peoples and non-European worlds. Initial concerns with the legality and morality of colonization are often illustrated with the works on the legitimacy of Spanish colonialism by Bartolomé De las Casas and Francisco De Vitoria. According to Anaya, De las Casas was "an ardent defender of the peoples indigenous to the Western Hemisphere who became known to the world as (the other) Indians."[71] The missionary opposed the enslavement and massacre of Indigenous people and was acutely critical of the encomienda system, which granted Indigenous lands and labor to Spanish settlers.[72]

De Vitoria, on its part, was primarily concerned with *inferring* the legal and normative parameters that governed relations with Indigenous peoples under natural law. Based on the notion of cultural difference, he argued that 'Indians' possessed reason and were, therefore, bound to the universal law of *jus gentium.*[73] In this sense, he situated Indigenous peoples as international legal subjects with rights, including forms of land property.[74] However, in De Vitoria's view, Indigenous peoples who 'opposed Christianity or impeded colonial trade and land exploitation,' failed to comply with the 'universal standards' they were bound to –thus being in violation of international law.[75] In consequence, the 'disciplinary measures of war' were justified, "directed towards effacing Indian identity and replacing it with the universal identity of the Spanish."[76]

De Vitoria's rationalization was also supported by the argument that Indigenous peoples were incapable of sovereignty and self-government. Despite considering them 'rational enough' to be bound by the law of *jus gentium*, De Vitoria claimed Indigenous peoples were "unfit to found or administer a lawful State up to the standard required by human and civil claims."[77] The shared humanity between Indigenous and European peoples under De Vitoria's theory was only stretched enough as to unilaterally bound them to his own 'universal' law, merely to

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[71] Anaya, 1996, p.10
[72] *Ibid.*
[73] Anghie, 2004; Ahren 2016
[74] Merino, 2021, p.130; Marks, 1991.
[75] Merino, 2021, p.130
[76] Åhrén, 2016, p.9
[77] Francisco de Victoria, *De indis et de ivre belli relectiones* (Classics of International Law Series, 1917), quoted in Anaya, 1996, p.11

subsequently announce Indigenous peoples' alleged lack of civilization, thus justifying the need for corrective measures. The latter allowed De Vitoria to defend the 'legitimate administration' of Indigenous territories by Spaniards, "so long as this was clearly for their benefit."[78] The characterization of Indigenous peoples as subjects of law in need of attunement to their 'universal obligations' was replicated by other important theorists of the time.[79]

Following the Peace of Westphalia (1648), it was the notion of sovereignty which served both to halt religious wars in Europe, and to direct and justify violence towards societies 'insufficiently similar' to themselves.[80] As constitutive discourse and practice, the sovereignty doctrine rationalized the primacy of the (European) nation-state and its law-making prerogative. The universal code of natural law was transformed "into a bifurcated regime comprised of the natural rights of individuals and the natural rights of states."[81] In line with the individual/state dichotomy, the Treaty of Westphalia "triggered the decoupling of property from territory, meaning that territory was conceived as the spatial and political extent of a sovereign state whereas individuals could only hold limited property rights over cultivated and improved land."[82] Since non-European societies were, by definition, non-States, they were excluded from international law, both as its objects or subjects.

First, those outside the borders of the newly constituted nation-states were invisibilized by legal doctrine, and their territories appeared as lands without a sovereign. According to the *terra nullius* doctrine, a territory was to be considered *uninhabited* for international legal purposes if not under the authority of a (European) sovereign, for which the doctrines of discovery, occupation, conquest and/or cession came into place.[83] Second, while claimed incapable of being sovereign or self-governing, non-European peoples *came into being* as legal subjects, only when subjected to a sovereign's power: they could only appear as (legal) subjects of domination. In this scenario, the legitimacy of land ownership was conceived under limited property rights, and therefore granted in accordance to productivity. The British and Spanish crowns, for instance, recognized some forms of collective or communal Indigenous property only insofar as they implemented maximum cultivation and land improvement practices.[84]

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[78] Francisco de Victoria, *De indis et de ivre belli relectiones* (Classics of International Law Series, 1917), quoted in Anaya, 1996, p.11
[79] Anaya 1996, pp.11-23
[80] *Ibid.*, p.10
[81] Anaya 1996, p.13
[82] Merino 2021, p.129
[83] Åhrén 2016, p.16; Anghie 2004, p.82; Merino 2021, p.129
[84] Merino 2021, p.129

Otherwise, the lack of an exploitative relationship to land would justify settler's dispossession under the notion of private property, thus causing either dispossession of Indigenous territories or the destruction of their livelihood systems.

Classical liberal theory rationalized the latter by arguing that the sovereign's power emanated from the free consent of the governed. Anaya notes that Vattel, for instance, conceptualized the state as 'free, independent and equal' in line with the rights of its individual constituents: the state's sovereignty appears as a "means of maximizing the interests of the corresponding nation."[85] However, neither European nor Indigenous peoples *freely consented to adhere* to the emergent nation-states. Rather than expressing the will of individuals who 'freely and deliberately' agreed to be governed by a sovereign, the consolidation of the Westphalian system of states was largely a product of territorial control and military power, that suppressed multiple nations.[86] Coercion was not only an acceptable practice within international law, but the power to acquire control over alien territories and peoples was precisely one of the distinct features and exclusive rights of sovereignty holders. As sovereignty was presumed to embody indistinctively territorial unity/control, nationhood and statehood, the doctrine served to order territory and its inhabitants, while erasing the multiplicity of nations, ethnicities or groupings entangled in these creations.

With the rise of positivism, the idea that international law was exclusively concerned with the rights and duties of states displaced the question of Indigenous peoples' status under international law.[87] However, the differentiation between the 'civilized' and 'uncivilized' continued to legitimize Indigenous subjugation. The latter may be best exemplified in *Chapters on the Principles of International Law (1894),* in which Westlake maintained that,

> When people of the European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers. [88]

In justification of colonialism, or 'supremacy on the soil', Westlake recognizes that 'American or African tribes' have 'complex lives in their homes,' and that they enjoyed certain security

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[85] Anaya 1996, p.15
[86] Åhrén 2016, p.11; Anghie 2004, p.72
[87] Anaya 1996, p.19
[88] Westlake, Chapters on the Principles of International Law (1894), quoted by Anaya, 1996, p.20

and well-being before the arrival of 'strangers'. However, he states, after contact with European peoples, Indigenous peoples' prime necessity is a government capable of protecting them from the 'disturbances' caused by 'contests' between European powers. In other words, since European powers are battling for supremacy over the land, Indigenous peoples need a government capable of protecting them from such battles. Then he asks,

> Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and want of it… The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied.[89]

Westlake answers that only a European government can protect Indigenous peoples from 'unstoppable civilization', by assuming sovereignty over their peoples and territories, therefore bringing them into 'civilization' (which Indigenous peoples are in want of). Whereas Westlake relates 'civilization' to the 'inflow of white race' wherever there is land, ore, commerce, sports or curiosity, he also places civilization as the capacity of a government to protect its peoples from foreign intervention –a (military) power which only Europeans possess. The argument to justify European sovereignty over Indigenous peoples and territories is that only Europeans can build a government capable to protect them from (the unstoppable) Europeans themselves: because only we can, and we will not stop.

As Westlake finally adds,

> If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilised.[90]

Westlake argues that a government is necessary to keep 'the whites' out from Indigenous territories, but such government cannot be Indigenous peoples themselves. Again, the argument is that, since Indigenous peoples cannot be sovereigns or self-governing, European colonization and 'treating Indigenous peoples as uncivilized', is necessary for their own sake. The latter view prevailed throughout the 19th century, most of the 20th century and, arguably in many cases, until today.

In 1923, Deskaheh of the Haudenosaunean, Cayuga Chief, traveled to Geneva and appealed to the League of Nations but was denied entrance. Deskaheh represented the Mohawk, the

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[89] *Ibid.*
[90] *Ibid.*

Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora, united under the Six Nations of the Iroquois Confederacy. The Iroquois prepared a Letter to the League's Secretary General, known as 'The Redman's Appeal for Justice,'[91] claiming recognition of their sovereignty and seeking membership in the League of Nations to resolve a dispute with Great Britain and Canada:

> Under the authority vested in the undersigned, the Speaker of the Council and the Sole Deputy by choice of the Council composed of forty-two chiefs, of the Six Nations of the Iroquois, being a state within the purview and meaning of Article 17 of the Covenant of the League of Nations, but not being at present a member of the League, I, the undersigned, pursuant to the said authority, do hereby bring to the notice of the League of Nations that a dispute and disturbance of peace has arisen between the State of the Six Nations of the Iroquois on the one hand and the British Empire and Canada, being Members of the League, on the other.[92]

They Six Nations explained that,

> The constituent members of the State of the Six Nations of the Iroquois […] now are, and have been for many centuries, organized and self-governing peoples, respectively, within domains of their own, and united in the oldest League of Nations, the League of the Iroquois, for the maintenance of mutual peace […] they being justly entitled to the same recognition by all other peoples.[93]

The Letter referred to an 'open alliance' sustained with Great Britain over 120 years; agreements of protection and recompenses; treaties signed between the Six Nations and the Dutch, French, and British; and the continued recognition of independence of the Six Nations by Great Britain,[94] which strongly opposed the petition of Deskaheh to speak at the League. The colonial power argued that support for Deskaheh constituted an interference in domestic affairs, and that there was a need to stop the assertion of nationhood by Indigenous peoples.[95] Whereas the League refused to hear Deskaheh, the Cayuga later submitted a case to international arbitration. In *Cayuga Indians (Great Britain) v. United States (1926),* the tribunal held that the Cayuga were 'not a legal unit of international law', that they 'have never been so regarded', and that "from the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied."[96] The tribunal further argued that the 'sole judge'

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[91] The Redman's Appeal for Justice, 1923, 1
[92] *Ibid.*
[93] Ibid., 3
[94] Ibid., 4, 6, 7, 8, 16
[95] Venne, 2011, pp.558-559
[96] *Cayuga Indians (Great Britain) v. United States,* 1926, p.177

of relations with 'the tribes' has always been the power which has sovereignty over the land, the rights acquired by discovery being exclusive.[97]

Around this time, at the beginning of the 1920s, the International Labor Organization (ILO) started to be growingly concerned with the continued exploitation, marginalization and discriminatory working conditions that particularly affected Indigenous peoples.[98] In fact, according to the organization, the "discrimination and exploitation of indigenous and tribal workers *directly inspired* the adoption of labour standards, such as the ILO Forced Labour Convention, 1930 (No. 29)".[99] In 1957, ILO became the first modern international institution to adopt, on behalf of the UN system, an international treaty specifically concerning Indigenous peoples. For the first time, Convention No. 107 on the *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations* deplored that Indigenous peoples "did not benefit from the rights and advantages enjoyed by other elements of the population"[100], and reiterated the right of all human beings "to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[101]

Noteworthily, ILO Convention No. 107 mentioned the right of Indigenous peoples to *collective* or individual ownership of the lands they traditionally occupy, and the right not to be removed from their territories *without their free consent*.[102] However, it also provided that forced removal could occur in cases relating national security, health concerns, or in the interest of the national economic development[103] –the latter being a typical justification for dispossession. In general, ILO Convention No. 107 promoted the integration of Indigenous Peoples within majoritarian societies through measures related to education, the improvement of working conditions, social security, and economic assistance.[104] Instead of recognizing Indigenous peoples as distinct societies, its general objective was to achieve their successful assimilation into dominant societies. Convention No. 107 is now closed for ratification but remains in force in seventeen countries.[105]

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[97] *Ibid.*
[98] ILO, 2013, p.xi
[99] *Ibid.*, p.4, emphasis added
[100] ILO C107 *Indigenous and Tribal Populations Convention,* 1957, Preamble, para. 5
[101] *Ibid.,* Preamble, para. 6
[102] *Ibid.*, Arts. 11, 12, emphasis added
[103] *Ibid.*, Art 12
[104] *Ibid.,* Arts. 2 (c), 4, 6, 14, 15, 16, 17, 18, 19, 20
[105] Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea - Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syria and Tunisia.

Further than concerning the legal relations between states, international law long endorsed the dispossession, exploitation and assimilation of Indigenous peoples. In the task of regulating non-European worlds, the first commonly known international law theorists argued in favor of dominance over Indigenous peoples and territories in different ways. Be it by recognizing Indigenous peoples as subjects of rights failing to comply with their universal obligations; by denying they were capable of sovereignty or self-government; by condemning their lack of an exploitative relationship to land; or by excluding them from statehood because their alleged lacked of civilization, these all concluded that Indigenous peoples ought to be colonized for their own sake. While the rationality of power has been historically related to the consent of the governed, the consolidation of the nation-state was in the practice a result of military power and territorial control, which then suppressed alternative nationhood.

By the beginning of the 20th century, the Six Nations of the Iroquois Confederacy attempted to employ international law to claim recognition of their sovereignty, their historical governance systems, and the treaties signed with different colonial powers. However, they were denied the right to speak at the League of Nations, and a posterior arbitration case defended that Indigenous peoples *have never being* a concern of international law, and that Indigenous peoples *have always being* under the *exclusive protection* of the power that *discovered, conquered or acquired them by cession.* The emergence of the nation-state, the sovereignty doctrine and the (legal) dispossession, exploitation and assimilation of Indigenous peoples were mutually constitutive. The argument that domination is necessary for Indigenous peoples' own benefit has long prevailed. In fact, despite progressive at its time, ILO Convention No. 107 has been now condemned for its assimilationist character, yet it remains in force in seventeen countries.

2.3. Third World Self-Determination and the Limits of Decolonization

Self-determination within international law is commonly linked to the territorial reorganization of Eastern Europe after the First World War, when it functioned as an *ad hoc* principle for the fragmentation of the German, Austro-Hungarian, and Ottoman empires. The American (1775) and French (1799) revolutions have also been analyzed as early expressions of the idea of self-determination of nations or peoples. The concept broadly relates to the free assertion of a 'peoples will' in determining their overall collective organization, including their political, economic, social, cultural and further related systems. Therefore, the notion of self-

determination has also been employed to challenge foreign domination or the legitimacy of governments, commonly related to democratic ideals of governance. The free consent of the governed as basis for sovereignty and the notion of 'just power' are inextricably linked to the idea of self-determination.

After the First World war, the colonial character of international law became increasingly questioned. Jurists of the League of Nations recognized that previous approaches "had endorsed, if not authored, a system of international law that sanctioned conquest and exploitation."[106] Despite not incorporated in the League of Nations Covenant nor having a strong legal status, self-determination appeared as a fundamental concept in the efforts to reform the discipline's colonial character. However, albeit acknowledging the harmful effects of colonialism, none of the developments at the time challenged the legitimacy of colonial administrations. On the contrary, "treaties and traditional doctrines continued to be considered binding despite recognition of their colonial character, and that they were unequal and achieved by force."[107]

The *Åland Islands Case* (1920) early illustrated some of the ambiguities within the notion. Following Finland's independence (1917), Ålanders claimed self-determination to demand integration with Sweden. Finland argued this was an exclusive domestic matter, while Sweden demanded respect for the wishes of Ålanders. The case was taken to the League of Nations and constituted a precedent-setting case for the peaceful resolution of international disputes. The appointed International Committee of Jurists considered that, if self-determination was "not possessed by a large or small section of *a nation,* neither can it be held by the State."[108] Correspondingly, they argued, secession was not justified if the State guarantee[d] respect for the cultural identity of minorities, for whom self-determination ought to be seen as a "compromise, based on an extensive grant of liberty."[109] The Committee did not question whether Ålanders were, in fact, part of the Finnish 'nation', but accorded them status as minorities. Subsequently, it resolved to preserve Finland's 'incontestable' sovereignty over the islands (1921) by aligning the idea of a *state's right* to self-determination with minority protection.

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[106] Anghie, 2004, p.144
[107] Anghie, 2004, p.168
[108] *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, League of Nations, October 1920,* para.17, emphasis added
[109] *Ibid.*, para.24

With the adoption of the UN Charter (1945), the "principle of equal rights and self-determination of peoples" was established as principle and purpose of the UN, and as a basis for peaceful and friendly relations among nations.[110] In this context, the establishment of the International Trusteeship System led to an increasing distinction between self-determination as expressed in Articles 1 and 55 of the Charter, namely, a general principle applicable to all 'nations and peoples'; and self-determination as relating the progressive attainment of 'a full measure of self-government' of colonized peoples, contained in Article 73. Though self-determination was not explicitly mentioned in the latter, the responsibility "to develop and assist the progressive achievement of self-government with due account of the political aspirations of the peoples" was understood as an application of self-determination.[111]

In fact, subsequent UNGA resolutions, operating on the basis of Article 73 (e) on the duty to transmit regular information on the decolonization process, explicitly examined the communications "with particular emphasis on the right to self-determination."[112] Gradually, the dominant interpretation of self-determination shifted from a political principle relating the (re)construction of European states, to being primarily seen as a fundamental right entitled to non-self-governing territories, in their achievement of independence. In 1950, the *Draft International Covenant on Human Rights* already characterized self-determination as a fundamental human right, despite not yet bindingly recognized.[113] The Draft Covenant adopted at UNGA's fifth session, called upon the Economic and Social Council to request the Commission on Human Rights "to study ways and means which would ensure the right of peoples and nations to self-determination, and to prepare recommendations for consideration by the General Assembly."[114]

The concrete application of self-determination in the case of non-self-governing territories was coupled with the principle of *uti possidetis juris* and the doctrine of recognition. Therefore, the

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[110] UN Charter, 1945, Arts. 1(2), 55
[111] See: *Repertory of Practice, Article 73 (1945-1954), paras. 1-8*
[112] *Res. 742 (VIII) on the Factors which should be taken into account in deciding whether Territory is or is not a Territory whose people have not yet attained a full measure of self-government,* 1953, asserted that "each concrete case should be considered and decided upon in the light of the particular circumstances of that case and taking into account the right to self-determination of peoples" (para 4). Res. 848 (IX) (1954) recalled Res. 637 (B) on the right to self-determination. Res. 850 (IX) (1954), expressed the opinion that "communications received from Members concerned relating to the cessation of the transmission of information under Article 73 e of the Charter in respect of any Non-Self-Governing Territory should be examined with particular emphasis on the manner in which the right to self-determination has been attained and freely exercised" (para 1.)
[113] UNGA Res. 421 (V)
[114] *Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights*, A/RES/421 (V), 6.

self-determination process of former colonies did not provide a territorial, political, or social reorganization in recognition of the 'peoples will'. According to *uti possidetis*, colonial borders were to be maintained in the achievement of independence 'for the sake of territorial stability.'[115] According to the doctrine of recognition, the emerging states had to fit a specific geopolitical construct, determined by foreign powers, to be considered independent. In this context, former colonial states engaged in nation-building processes that emulated the Westphalian state model, often reproducing the civilizing mission within their borders.[116] Diverse forms of assimilation, dispossession and control of minorities and Indigenous peoples were replicated. Nation-building corresponded to "breaking down competing ethnic or cultural bonds, a policy engaged in even by, or perhaps especially by, newly independent states."[117] In many cases, the colonization of the 'uninhabited lands' of Indigenous peoples continued through domestic intervention.

Paradoxically, coupling self-determination with *uti possidetis juris* and the doctrine of recognition continued to reinforce the view that colonial rule was necessary to ensure the well-being of colonized peoples. In the Assembly's 7th session, the Belgium delegate contended that labor exploitation of Indigenous peoples was obsolete; and that colonialism should not be confused with "the systematic exertions made by a highly developed people with the object of helping backward indigenous peoples under its administration in their efforts towards political, economic, social, and educational advancement."[118] According to the Delegate, this was "a different and indeed contrary activity, based on the highest motives and entirely consistent with the provisions of the Charter."[119] The resulting resolution on *Racial Discrimination in Non-Self-Governing Territories* sustained this view, asserting there was a "fundamental distinction between discriminatory laws and practices, on the one hand, and protective measures designed to safeguard the rights of the indigenous inhabitants."[120]

By the Assembly's 12th session (1957-1958), representatives of the emerging postcolonial states continued to raise objections to the reiterative distinction between the status of administering powers and other countries, as well as to the growingly restrictive interpretation

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[115] Åhrén, 2016, p.34
[116] Anghie, 2004, p.10
[117] Anaya, 1996, p.44
[118] A/PV.392, 24-25
[119] A/PV.392, 24-25
[120] UNGA Res. 644 (VII) *Racial discrimination in Non-Self-Governing Territories,* Preamble, para. 3

of self-determination.[121] Based on the notion of sovereign equality, they argued that "all States, without exception, were expected to promote the realization of this right."[122] The critique aimed to challenge the inequalities in bargaining power against formal sovereign equality. Post-colonial peoples stressed that colonial powers were not entitled to decide how the decolonization process should unfold. Advocates of this view also maintained that, despite formal recognition, some members states were "still subject to international political and economic domination [and were, therefore,] not entirely free to decide their own affairs."[123]

The emerging 'Third World' states continued to use UNGA as a platform to argue that self-determination should apply 'to all peoples deprived of the right,' including countries other than non-self-governing territories, minority groups 'living under domestic dictatorship' and, generally, 'dependent peoples everywhere.'[124] In 1960, the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (UNGA Res. 1514 (XV)) established the normative basis for the independence of colonized territories and "solemnly proclaimed the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."[125] Res. 1514 (XV) expressed self-determination as a right entitled to all peoples,[126] and declared that "the subjection of peoples to alien subjugation, domination and exploitation constitute[d] a denial of fundamental human rights."[127] Significantly, the resolution stressed that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."[128] In line with the Westphalian assumption of nation/territorial unity, Res. 1514 also provided that the 'partial or total disruption of the national unity and the territorial integrity of a country' was incompatible with the UN Charter.[129]

Later that year, Res 1541 (XV) declared that 'a full measure of self-government', *i.e.,* self-determination, was to be achieved by (a) the emergence as a sovereign independent state; (b) the free association with an independent State; or (c) integration with an independent State[130]

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[121] *Repertory of Practice of United Nations Organs,* Supp. 2, vol. 1, Article 1(2) (Separate study), para. 72
[122] *Ibid.,* para. 72
[123] *Ibid.,* para.71
[124] *Repertory of Practice of United Nations Organs,* Supp. 2, vol. 1, Article 1(2) (Separate study), paras.71-72
[125] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res. 1514 (XV), Preamble, 1960, para. 13
[126] *Ibid.,* Art. 2
[127] *Ibid.,* Art. 1
[128] *Ibid.,* Art. 3
[129] *Ibid.,* Art. 6
[130] *Ibid.,* Principle VI

–thus revealing an exclusively state-centered approach. As to the subjects of self-determination, 'geographical separateness' and 'ethnic distinctness' were listed as primary factors in the determination of which territories were to be considered non-self-governing and thus, entitled self-determination/independence.[131] However, 'ethnic distinctness' or geographical separateness were determined under *uti possidetis* and the recognition doctrine, thus subordinated or implicated within territorial control, assumed to be a question of minority's representation, if any. In this sense, self-determination was entitled to peoples already encompassed within the established (colonial) territorial borders. Post-colonial countries were bound to maintain the colonial structures in achieving their independence.

In 1966, self-determination acquired legal force by treaty when inscribed the two International Human Rights Covenants as a right. According to common Article 1 of the ICCPR and ICESCR,

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[132]

In 1984, the Human Rights Committee (HRC) affirmed in *General Comment No. 12 (1984*) clarified its view concerning self-determination. First, it affirmed the right as an "essential condition for the effective guarantee and observance of individual human rights,"[133] and acknowledged its character as an inalienable right.[134] With regards to paragraph 1, the HRC mentioned that the exercise of the right is in the practice allowed through constitutional and political processes.[135] As to paragraph 2, it affirmed that self-determination contains an economic aspect, entailing corresponding duties for all States and the international

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[131] UNGA Res. 742 (VIII), Annex: List of Factors, First Part, (B) (2) and Second Part, (A) (4); Res 1541 Principles V and VI
[132] ICCPR, 1966, Art 1; ICESCR, 1966, Art 1
[133] *HRC General Comment No. 12,* para. 1
[134] *Ibid.,* para. 2
[135] *Ibid.,* para. 4

community.[136] In both cases, it urged states to provide information on the matter rather than deepening on its content.

Concerning paragraph 3, the Committee mentioned that the right to self-determination imposes obligations both in a domestic sense and "*vis-à-vis* all the peoples which have not been able to, or have been deprived of the possibility to, exercise their right to self-determination."[137] It noted these obligations include positive actions and "exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not."[138] However, it clarified that these actions are presumed to refrain from "interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."[139] Thus, it remained unclear which positive obligations could exist *vis-à-vis* 'all peoples' unable to exercise the right to self-determination, without interfering with the internal affairs of other states, and thus violating the right (of the state) to self-determination.

Shortly after the adoption of ICCPR and ICESCR, the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (UNGA Res. 2625 (XXV) 1970) similarly construed the right, but it acknowledged a fourth expression of self-determination. Besides independence, association or integration with a State, Res. 2625 (XXV) proclaimed that self-determination could be achieved through "the emergence into any other political status freely determined by a people,"[140] while safeguarding the territorial integrity and political (instead of national) unity of the State.[141] Despite including the territorial integrity limitation, the Declaration signaled a shift in the discourse, as it provided that,

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent *States conducting themselves in compliance with the principle of equal rights and self-determination of peoples* as described above and thus possessed of a government *representing the whole people belonging to the territory without distinction as to race, creed or colour*.[142]

In this sense, Res 2625 (XXV) evidenced a growing concern with the meaning of self-determination from a people-centered, related to the guarantee of equal rights, no-

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[136] *Ibid.,* para. 5
[137] *Ibid.,* para. 6
[138] *Ibid.,* para. 6
[139] *Ibid.*, para. 6
[140] Res. 2625 (XXV), 1, para 37
[141] *Ibid.,* 1, para 40
[142] *Ibid.,* para 40, emphasis added

discrimination, and representation, rather than expressing unlimited state sovereignty. Res 2625 (XXV) is currently regarded as the most authoritative instrument on self-determination and was recently reaffirmed by the ICJ as the applicable law on the matter.[143]

The adoption of the *Helsinki Final Act* in 1975, at the Conference for Security and Cooperation in Europe (CSCE), was also of significant importance for the development of the right. Despite declarative in nature, the fragmentation of self-determination into an 'external' and 'internal' dimension, enshrined in Principle VIII, became common practice. The principle provided that,

> all peoples always have the right, in full freedom, to determine, when and as they wish, their *internal and external* political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[144]

This allowed to put forward an interpretation under which the preservation of the state and its territorial boundaries could be favored (external self-determination), while claims within the state could be addressed through democratic mechanisms of participation and representation, including minority protection (internal self-determination). With the adoption of the *UN Minorities Declaration* (1992), the question of whether minorities had a right to self-determination was mostly understood as expressed in the standards of protection of the rights of *individual members* of minority groups.[145] The Committee of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD, 1965), which condemned 'racial discrimination in all its forms and manifestations,'[146] also noted in 1996 that self-determination of ethnic or religious groups is not basis for a right of secession,[147] and stressed its internal dimension, coupled with the territorial integrity limitation.[148]

The prevalence of the territorial status quo was evident in the early jurisprudence of the International Court of Justice (ICJ). In the *Western Sahara Opinion (1974),* the ICJ stated that neither the recognized social and political organization of the Western Sahara peoples,[149] the existence of 'chiefs competent to represent them,'[150] nor their land rights[151] amounted as to establish territorial sovereignty. In the *Frontier dispute (1986)*, the Court expressly accorded

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[143] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p.137
[144] *Helsinki Final Act*, Principle VIII, emphasis added
[145] *Ibid.,* Art 3(1), emphasis added
[146] ICERD, Preamble 6, 10, 12, Arts.2, 4, 5, 6, 7
[147] ICERD General Recommendation 21 (1)
[148] ICERD General Recommendation 21, 4, 6
[149] *Ibid,* .81
[150] *Ibid,* .81
[151] *Ibid.*, 150

prevalence to territorial integrity and *uti possidetis juris* over self-determination, arguing that African states had *judiciously consent* to respect the colonial frontiers in the interpretation of self-determination as a guarantee of stability; "in order to survive, to develop, and gradually to consolidate their independence."[152] In two separate opinions, Judge Abi-saab and Judge Luchaire questioned the absolute conception of *uti possidetis juris* over an interpretation in light of its function.[153] The former also questioned the excessive reliance in French domestic law for the case and the 'frantic search for a written legal title' in the examination of the right.[154] On its part, Judge Luchaire stressed that "the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces, and this may actually result from the exercise of the right of self-determination."[155]

Recently, the ICJ pronounced on the right to self-determination in two advisory opinions. In the first, concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)*, the Court confirmed the status of self-determination as an essential, and unquestionable principle of international law,[156] but failed to address its content and scope. The ruling primarily referenced previous instruments and jurisprudence on the matter to conclude that the wall "*severely impeded* the exercise by the Palestinian people of its right to self-determination."[157] In the second case, concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010),* the Court mentioned that self-determination developed as to create "a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation,"[158] yet it remains unclear whether it also implies a right to secession.[159] Thus, the Court concluded that the question was beyond the scope of the case,[160] and affirmed that the declaration of independence did not violate any general nor *lex specialis* applicable rule of international law.[161] Both rulings denote the ambivalences between guaranteeing a 'peoples' right to self-determination and the presumption that the State already

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[152] *Frontier Dispute (Burkina Faso/Republic of Mali),* 1986, 25
[153] *Ibid.,* separate opinion of Judge Abi-Saab, para.13
[154] *Ibid.,* separate opinion of Judge Abi-Saab, para.15
[155] *Ibid.,* separate opinion of Judge Luchaire, p.653
[156] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I. C.J. Reports 2004, p. 136
[157] *Ibid.*, 122
[158] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, I.C.J. Reports 2010, 79
[159] *Ibid.*, 82.
[160] *Ibid.*, 83.
[161] *Ibid.*, 122.

embodies the right. In both cases, the approximations of the Court, namely, that the wall 'severely impeded' the right, and that the declaration of independence 'did not violate' international law, seem to favor the peoples concerned, yet reveal the difficulties to challenge the territorial and political status quo through the right to self-determination.

Commonly linked to the American (1775) and French (1799) revolutions, as well as to the territorial reorganization of Eastern Europe after the First World War, self-determination has been related to a sense of collective freedom, grounded upon consent as the basis of sovereign power. In the practice, the notion has also been employed to challenge foreign domination and the legitimacy of governments. In the early 20th century, the concept was increasingly employed to challenge the colonial character of classical international law, expressing the 'free will' of colonized peoples to achieve political independence. With the adoption of the UN Charter (1945) and the *Declaration on the Granting of Independence to Colonial Countries and Peoples,* the latter became the predominant interpretation of self-determination.

Whereas self-determination mobilized decolonization, its application was limited by the principle of *uti possidetis juris* and the doctrine of recognition, which crystallized the colonial territorial boundaries, government structures and nation-building practices. Therefore, while legitimizing the independence of colonized territories and peoples, the decolonization process did not provide a territorial, political, or social reorganization in recognition of the 'peoples will'. On the contrary, post-colonial states were bound to maintain the colonial borders and claimed to still be subjected to international political and economic domination regardless recognition of their formal sovereignty. After achieving independence, many of these engaged in governing practices that reproduced the civilizing mission domestically. The view of Indigenous peoples and territories as uninhabited and in need of domination continued to be endorsed. Therefore, self-determination continued to evolve as to express concern for the fundamental character of governments and the legitimacy of power, related to principles of democratic governance. The latter was particularly evidence in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation*.

Under current standards, self-determination is to be achieved by (a) the emergence as a sovereign independent state; (b) the free association with an independent State; (c) integration with an independent State; or (d) the emergence into any other political status freely determined by a people. However, there is still much debate on whether the right to self-determination is basis for secession. When inscribed in article 1 of the two International Human Rights Covenants, namely, ICCPR and ICESCR, self-determination acquired character as an

inalienable right and legal force by treaty. It is considered essential for the guarantee of other human rights and fundamental freedoms. The fragmentation of the right into an internal and an external dimension is not contained in any binding instrument but has become common practice. The latter has provided a growing focus on self-determination as a peoples' right concerning democratic mechanisms of participation and representation, including minority protection, without challenging the state's territorial boundaries.

It remains unclear which positive obligations states may possess *vis-à-vis* peoples unable to exercise the right, without challenging the territorial and political integrity of other states. Recent pronunciations on the matter are limited to repeating previous jurisprudence, denoting its contentious character. In the practice, the application of self-determination has been characterized by a prevalence of the territorial status quo inherited from colonization. Contrary to its purpose, the application of self-determination during decolonization appeared to "centre on the control of established political units, which then inform[ed] the identity of peoples and the self-determination process."[162] While 'peoples' are the subjects of the right, self-determination has been operationalized when mobilized by the existing powers and accompanied by an overall concern for the character of government institutions.[163] Despite enshrining an absolute political authority –a sense of collective freedom–, self-determination has been in the practice sanctioned by existing powers, and the rules and procedures for its exercise are dictated and controlled as to provide specific outcomes, rather than manifesting a collective peoples' will.

2.4. Building Collective Rights

Around the 1960s, Indigenous peoples began positioning themselves strongly at the international level, demanding increased awareness of their existence as peoples "with historically based cultures, political institutions, and entitlements to land."[164] In 1971, the *Economic and Social Council* (ECOSOC) mandated the *UN Sub-Commission on Prevention of Discrimination and Protection of Minorities* to conduct a comprehensive study on their situation. Few years later, and before the study was published, the first UN Conference with participation of Indigenous delegates took place. The *International Non-Governmental*

[162] French, 2013, p.229
[163] Anaya, 1996, p.76
[164] Anaya, 1996, p.46

Organization Conference on Discrimination against Indigenous Populations in the Americas (1977) brought together more than 250 delegates at Geneva, with representatives of more than 60 nations and peoples.[165] The Indigenous delegates denounced the 'brutal colonization', 'massacres of millions of native peoples for centuries', 'the continuous grabbing of their land', and the 'denial of self-determination'.[166]

Many of the elements recognized today as part of the Indigenous rights regime were already proposed by Indigenous representatives in the *Program of Action* resulting from the 1977 Conference. The delegates recommended a revision of ILO Convention 107 to 'remove its emphasis on integration'; and called for respect of their traditional law and customs; cultural and social integrity; communal ownership and control of land and natural resources; recognition of their special relationship to land; and prevention of the extinguishment of their land rights without their full and informed consent.[167] The outcome document also proposed the establishment of a *Working Group on Indigenous Populations* under the UN Sub-Commission and a '*Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere'*.[168] The Draft Declaration rejected the status of Indigenous peoples as minorities and called for their recognition 'as nations, and proper subjects of international law' with equality of rights, independence, and capacity to enter into treaties and agreements.[169]

The Draft Declaration also contained provisions rejecting state jurisdiction over 'Indigenous nations or groups' and their territories, unless pursuant to a freely made treaty or agreement with the state –the exercise of self-determination.[170] It specified that Indigenous nations or groups had the 'sovereign power to determine their own membership,' and that "no state shall claim or retain, by right of discovery or otherwise, the territories of an indigenous nation or group, except such lands as may have been lawfully acquired by valid treaty or other cession freely made"[171]. Furthermore, the Draft Declaration proposed the creation of a procedure for the settlement of disputes between Indigenous peoples and the states, "mutually acceptable to

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[165] *International Non-Governmental Organization Conference on Discrimination against Indigenous Populations in the Americas (1977*), Statements and Final Documents, paras.1-2
[166] *Ibid.,* para 6
[167] *Ibid.,* paras. 15, 16, 17, 18, 19, 20, 30
[168] *Ibid.,* paras. 12, 27
[169] *Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere*, 1977, 1, 3, 4, 5
[170] *Ibid.,* 7
[171] *Ibid.,* 12, 8

the parties, fundamentally fair, and consistent with international law"[172]. Finally, it included a clause relating environmental protection, proposing unlawfulness of 'any action or course' that would result in the destruction or deterioration of Indigenous peoples due to the depletion, displacement of destruction of natural resources vital to their livelihoods.[173]

The same year of the conference (1977), Sandra Lovelace, an Indigenous Maliseet, submitted a petition to the HRC alleging violations of various rights by the Canadian government.[174] The case, resolved in 1981, was reviewed by the Committee under Article 27 of the ICCPR, which provides that

> in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[175]

Lovelace argued that the Canadian Indian Act was discriminatory, as she had lost her status as Maliseet Indian for marrying a non-Indigenous man and, consequently, her right to live in the Tobique reserve where she was born.[176] The case challenged the state's authority to define Indigenous belonging or membership and provided an instance of application of the ICCPR in relation to events prior to its entry into force. Based on the consideration that culture was to be enjoyed 'in community with the other members of the group', the HRC found a violation of the right. The Committee determined that Lovelace's access to her 'native culture and language' continued to be denied because there was "no place outside the Tobique Reserve where such a community exist[ed]."[177] Furthermore, it considered there was no 'reasonable justification' for such interreference with her right to culture.[178] Despite the alleged violations occurred before the ICCPR came into force in Canada, the decision was submitted in favorable terms for the claimant, on the grounds that the violation had continued effects until the date of resolution of the case.

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[172] *Ibid.*, 9
[173] *Ibid.,* 11
[174] Non-discrimination; equal rights of men and women; protection of family and equal rights of spouses; equal protection of the law; and the right of minorities to enjoy their culture, language and religion, ICCPR 2 (1), 3, 23 (1) (4), 26 and 27, respectively
[175] ICCPR, Art 27
[176] *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981)., 1, 7.4.
[177] Sandra Lovelace v. Canada, 1981, 7.4.
[178] *Ibid.,* 18

Few years later, the Martínez Cobo studies supported some of the views proposed by Indigenous peoples in the Draft Declaration and Lovelace's claim. From 1981 to 1983, the Special Rapporteur submitted a series of extensive reports on '*the Problem of Discrimination Against Indigenous Populations*' that emphatically highlighted 'Indigenous self-identification' as a relational notion of group consciousness and acceptance by the group as for recognition of Indigenous membership.[179] It affirmed that,

> the question of definition [of Indigeneity] is one that must be left to indigenous communities themselves [and] there must be no attempt to define them according to the perceptions of others through the values of foreign societies or of the dominant sectors in such societies.[180]

The Martínez Cobo report deplored that Indigenous cultural, social and legal systems had been 'constantly under attack at all levels,' including the 'distortion or denial of their history and ways of life,' which continuously threatened "their social and cultural integrity, and their very physical existence."[181] Therefore, it stressed that the notion of Indigenous populations under international law should derive from their "historical rights to land [and] to be different and to be considered as different."[182] The report provided extensive recommendations for the recognition of Indigenous collective rights to lands, resources and institutions.

Meanwhile, the international Indigenous movement continued to strengthen. The 1977 conference had provided a space for shaping transnational solidarity around Indigenous peoples' common concerns. Since then, they continued to appeal to United Nations bodies by articulating their demands through human rights. In 1982, the *UN Working Group on Indigenous Populations* (WGIP) was established as subsidiary organ to the *Sub-Commission on the Promotion and Protection of Human Rights*. The WGIP consisted of five independent experts and provided an opportunity for indigenous peoples to raise their concerns at the UN. In this regard, the Martínez Cobo report suggested the need for ensuring 'genuine indigenous representation' at the WGIP sessions and joint action from ILO, UNESCO, WHO and FAO on the matter.[183] Gradually, the UN's approach shifted from an assimilationist view towards the promotion of Indigenous self-governance. Aside from a continued international advocacy,

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[179] *Study of the Problem of Discrimination Against Indigneous Peoples,* Final Report, 30 September 1983, E/CN.4 Sub.2 /1983/21/Add.8, 372-381
[180] *Ibid.,* 368
[181] *Ibid.,* 374
[182] *Ibid.*, 373-375
[183] *Ibid.*, 310, 355, 352

developments in the Human Rights Committee (HRC), arising from Indigenous peoples' claims, played an important role in this task.

In 1980, the Mi'kmaq tribal society claimed possession of their territory and lands before the HRC, on the basis of a protection treaty signed with Great Britain (1952).[184] The Mi'kmaq alleged denial of their right to self-determination and the suppression of their means of subsistence by Canada, therefore requesting to be recognized as a State.[185] Canada rejected admissibility *ratione materiae,* appealing to the principle of territorial integrity of the State, and affirming that recognition of statehood was beyond the competence of the Committee.[186] Though the HRC did not refer to the latter, it found the communication inadmissible on the grounds that the author had failed to prove he was 'personally a victim' of a violation of his rights.[187] In a separate opinion, Mr. Roger Errera questioned the Committee's lack of consideration of the content and scope of the right to self-determination, whether self-determination was justiciable under the Optional Protocol, and whether the Mi'kmaq could, in fact, constitute a people.[188]

In 1985, Ivan Kitok similarly claimed a violation of his rights to self-determination and to culture by the Swedish Government before the HRC.[189] According to Swedish legislation, Kitok would lose membership from the Sami peoples because of engaging in a profession other than reindeer breeding for more than three years.[190] Sweden argued the claim inadmissible, as it did not consider the Sami to constitute a people entitled to self-determination.[191] The Committee agreed with the Swedish position.[192] However, on respect to the right to culture, and despite finding no violation of the right, the Committee considered that Kitok made 'a reasonable allegation' of being arbitrarily denied his right to enjoy the same 'immemorial rights' of the Sami community.[193] Thus, it observed that the right to enjoy culture in community with the others "cannot be determined in abstract, but has to be placed in context."[194]

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[184] *Mikmaq tribal society v. Canada,* Communication No. 78/1980 (30 September 1980), U.N. Doc. Supp. No. 40 (A/39/40) at 200 (1984), 1
[185] *Ibid.,* 2.1., 2.2.
[186] *Ibid.,* 5.1., 5.3.
[187] Ibid., 8.2
[188] *Ibid.,* Appendix, Individual Opinion, paras. 3-5
[189] ICCPR, Arts.1, 27, respectively
[190] *Ivan Kitok v. Sweden,* Human Rights Committee, Communication No. 197/1985; U.N. Doc. CCPR/C/33/D/197/1985, 2.2.
[191] *Ibid.*, 4.1.
[192] *Ibid.*, 6.3.
[193] *Ibid.*, 9.1.
[194] *Ibid.*, 9.3.

The same year, Chief Bernard Ominayak submitted a communication to the HRC that provided the grounds for interpreting the right to culture as entailing positive obligations in the regulation of resource extraction activities of private actors when concerning Indigenous peoples. Ominayak alleged a violation of the right to self-determination due to the expropriation of the Lubicon Lake Band's territory for corporate exploitation. He argued this had caused irreparable injury to the livelihood, subsistence economy, and culture of the Lubicon Lake Band peoples, as well as to 'their way of life as a social and political entity.'[195] As with previous jurisprudence, Canada argued inadmissibility, denied the Lubicon Lake Band were a people and contended the author lacked standing to bring a communication relative to a collective right.[196] However, Ominayak argued that "the concept of self-determination should be held applicable to [Indigenous peoples] as it concerns the right of a people to their means of subsistence."[197] In a further submission, he stated he was 'not requesting a territorial rights decision,' but a recognition that their existence was *seriously threatened* by the activities of the company in cooperation with Canada.[198]

In the admissibility examination, the Committee noted that, whereas the author could not claim to be an individual victim of the violation of a collective right, the facts raised claims under article 27 of the Covenant and declared the communication admissible.[199] This was the first time the HRC demonstrated a position inclined towards a certain recognition of Indigenous rights, as well as the incipient inextricability between the rights to self-determination, culture, land and livelihoods of Indigenous peoples. Though the Committee abstained from considering whether the Lubicon Lake Band constituted a people, it argued there was "no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication."[200] In the examination of the merits, the HRC considered that the 'way of life and culture' of the Lubicon Lake Band territory was threatened by the exploitation of natural resources amounting to a violation of ICCPR article 27.[201] Though the Committee asserted it considered the communication in its individual character, the decision was clearly directed towards the community.

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[195] *Lubicon Lake Band v. Canada,* Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), 3.2., 3.8.
[196] *Ibid.,* 6.1.
[197] Ibid., 7.
[198] Ibid., 12
[199] *Ibid.,* 13.4
[200] *Ibid.,* 32.1.
[201] Ibid., 33.

In 1992, Ilmari Länsman and forty-seven members of the Muotkatunturi Herdsmen's Committee of the Sami people claimed that stone quarrying by a private company in their territory interfered with their traditional livelihoods, thus constituting a breach of their right to culture.[202] Both parties agreed that the question of land ownership was not *per se* the subject matter of the case.[203] The state argued there ought to be a margin of discretion in the regulations aimed at protecting livelihood activities under article 27.[204] The Committee considered that the 'scope of freedom' "was not to be assessed by a margin of appreciation, but by reference to the obligations arising from article 27"[205] –the question being whether the impact of the extractive activities *denied* the right. Therefore, it adopted the position that, since there had been a process of prior consultation and Indigenous peoples could continue to ensure their livelihoods, there was no breach of the right.[206] Significantly, and despite finding no violations, the Committee clarified that the right to culture, as placed in context, not only protects traditional means of livelihood, but also 'adapted' livelihood methods and acknowledged the territory's continued 'spiritual significance' as relevant to the interpretation of the right.[207]

In 2000, Apirana Mahuika and 18 other members of the Maori people, belonging to seven different iwi (tribes), claimed that the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act (1992) by the government of New Zealand constituted a violation of various rights, including their right to self-determination.[208] The authors alleged that self-determination could only be effective when peoples have access to and control over their resources, rights which had been recognized by the British Crown, predecessor of the New Zealand, yet the treaty now 'confiscated'.[209] The claimants explained the new Quota Management System implemented by New Zealand gave 'exclusive possession of property rights to non-Maori,' threatened their way of life and culture and interfered with traditional fishing, which did not distinguish between commercial and non-commercial purposes.[210] In the admissibility examination, the Committee argued that 'only the consideration of merits' would enable to

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[202] *Länsman et al. v. Finland,* Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994), 3.1.
[203] Ibid., 8.6.
[204] *Ibid.,* 7.9., 7.10.; 7.13.
[205] Ibid., 9.4., 9.5.
[206] *Ibid.,* 9.6, 10
[207] *Ibid.,* 2.6., 9.3.
[208] *Apirana Mahuika et al. v. New Zealand,* 5.1., 6.1.; ICCPR Arts.1, 2, 16, 18, 26 and 27.
[209] *Apirana Mahuika et al. v. New Zealand,* 5.1., 6.1.
[210] *Ibid.*, 6.2., 6.3.

determine the relevance of self-determination in respect to the claims under the right to culture.[211]

New Zealand, on its part, affirmed that the Fisheries Settlement Act was, to the contrary, a step taken in consideration of the right to culture, as it aimed to secure the right to revenue through quota, constituting 'the modern-day embodiment of Maori claims to commercial fishery', and allowing them to 'expand their presence in the market' and 'diversificate.' The difficulties for the states to meaningfully engage with Indigenous livelihoods and worldviews resulted evident in New Zealand's argumentation. The Government further referred to the need for 'reasonable regulation' and 'other controls or limitations' in respect of the right to culture and recalled carrying out 'an extensive process of consultation' to reach common understanding with the Maori, arguing therefore that the Fisheries Act reflected a 'necessary balance' to ensure the sustainability of the resource.[212]

In response, the Maori stressed that these type of agreements 'were not always adequately disclosed or explained to tribes and sub-tribes,' thwarting their possibility to exercise informed decision-making.[213] Furthermore, they emphasized that the negotiators with which the government had engaged in consultation, "had no authority and did not purport to represent individual tribes and sub-tribes."[214] They questioned the lack of evidence regarding the 'necessity and proportionality' in the interferences with their rights, and emphasized that the significance of fishing had to be understood within the context of Maori culture, as it "required particular practices and a sense of inherited guardianship of resources [in a] sense that goes beyond quantitative and material questions of catch volumes and cash incomes."[215] In this regard, they explained that fishing,

> encompasses a deep sense of conservation and responsibility to the future, which colours their thinking, attitude and behaviour towards their fisheries [and] includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or "belonging", but also of personal or tribal identity, blood and genealogy, and of spirit [meaning that] a "hurt" to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana […] a manifestation of a complex Maori physico-spiritual conception of life and life's forces.[216]

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[211] *Ibid.*, 3
[212] *Ibid.,* 7.1., 7.4
[213] *Ibid.*, 6.2.
[214] *Ibid.,* 5.8.
[215] *Ibid.,* 8.2.
[216] *Ibid.*, 8.2.

The case raised important questions regarding the right to self-determination, its connection to the right to culture, and considerations of fairness and representation in relation to the rights of consultation and FPIC. While the HRC acknowledged that the treaty limited the Maori right to culture, it determined that New Zealand had fulfilled its obligations under article 27 because it engaged in a consultation process and considered the sustainability of fishing activities.[217] Therefore, it concluded that no article of the Covenant had been breached, denoting the limited capacity of the right to culture to uphold Indigenous worldviews when in tension with the state. Nonetheless, despite not engaging with the meaning of the right to self-determination in its collective sense, the Committee attributed to it an interpretive nature in relation to other rights protected by the Covenant, particularly the right to culture.[218]

The same year, Jouni Länsman, Eino Länsman, and the Muotkatunturi Herdsmen's Committee submitted a communication alleging to be victims of a violation of the right to culture, due to the continued logging activities carried out by Finland in their territory since the 1980s.[219] According to the authors, these interfered with reindeer herding and resulted both in a significant reduction in the reindeers permitted in herding areas, as well as a complete loss of lichen in the areas affected, allegedly lasting for hundreds of years.[220] In response, Finland recalled that "measures which have a certain limited impact […] do not necessarily violate article 27"[221] and that the areas concerned are owned by the State "which is entitled, inter alia, to log forests and construct roads at its discretion."[222] As with the first Länsman case, the Committee found the impacts not "serious enough as to amount to a denial of the authors' right to enjoy their own culture."[223] However, it noted that "an infringement may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority [including] the effects of past, present and planned future logging."[224]

In 2006, Ángela Poma Poma, an Aymara descendant, alleged that the diverting of the course of the river Uchusuma by Peru "caused the gradual drying out of the wetlands where llama-raising is practised in accordance with the traditional customs of the affected families […] and

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[217] *Ibid.,* 9.6., 9.8 10
[218] *Ibid.,* 9.2.
[219] *Lansman, J. et. Al. V Finland*, 3.1.
[220] *Ibid.,* 3.2., 3.3.
[221] *Ibid.,* 6.2.
[222] *Ibid.,* 7.4.
[223] *Ibid.*, 10.3.
[224] *Ibid.,* 10.2.

which has been part of their way of life for thousands of years."[225] Poma Poma affirmed Peru's activities 'destroyed the ecosystem' in a way that resulted in the collapse of their livelihood means and lead the community to poverty.[226] Whereas the Committee denied justiciability of article 1, it considered the facts under article 27, and declared it admissible in conjunction with article 2, paragraph 3 (a), concerning the right to effective remedy. In view of the Committee, the question to be considered was whether the water diversion authorized by Peru had "a *substantive negative impact* on the author's enjoyment of her right to enjoy the cultural life of the community."[227]

Contrary to its previous jurisprudence, the HRC did not assess whether the activities in question *denied* the right. The Committee argued that measures that 'substantially compromise or interfere' with economic activities that are culturally significant for a minority or Indigenous community, may be admissible only in consideration of whether the community has effectively participated in the decision-making process and whether they will continue to benefit from their traditional economy.[228] In this respect, it mentioned that effective participation requires "not mere consultation but the free, prior and informed consent."[229] Moreover, the Committee condemned the lack of studies or measures taken to minimize the consequences of the activities. Therefore, it considered that the state actions had "*substantively compromised* the way of life and culture of the author, as a member of her community," concluding there was a violation of the right.[230]

Whereas UNDRIP is the only declaration to explicitly recognize Indigenous self-determination, the HRC has interpreted the right to self-determination in ways specific to indigenous peoples, with special attention to control over traditional lands and natural resources, and the inextricability between Indigenous livelihoods, economic activities, and culture. The view that the right cannot be determined in abstract, but must be placed in context legitimized the collective dimension of Indigenous peoples' rights, despite not expressly mentioned as such. In fact, the scope of the right to culture, as contained in ICCPR Article 27, has been interpreted to include both traditional and modern economic and social and economic activities in the case of Indigenous peoples, as well as their territorial rights and the spiritual

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[225] *Ángela Poma Poma v. Peru,* Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006, 2.2. 2.2.
[226] *Ibid.,* 3.1.
[227] *Ibid.,* 7.5.
[228] *Ibid.,* 7.6.
[229] *Ibid*., 7.6.
[230] *Ibid*., 7.8.

significance of land. In consequence, the right to culture is understood to entail positive and negative obligations in the regulation of resource extraction activities in indigenous territories.

In assessing whether a violation has occurred, the HRC emphasized whether the individual continued to benefit from the activities related to culture, whether there were studies or measures taken by the state to assess and minimize the consequences of an interference in Indigenous territories, and whether there was consultation and the extent of participation of the communities affected. Participation must be effective and there must be a view towards achievement of agreement or consent in good faith. Under HRC's jurisprudence, the extent of interference with the right is determined on the basis of whether there has been *substantive negative impact* on the enjoyment of the right to enjoy the cultural life of the community. A violation of the right may also result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one territorial area. Finally, the Committee ascribed an interpretive nature to the right to self-determination, that can be used to assess the violations of other rights contained in the Convention. In a recent decision on admissibility concerning a case raised by Tiina Sanila-Aikio against Finland, the Committee reaffirmed that, despite not justiciable, "it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated."[231]

The international Indigenous movement and Indigenous rights claims further strengthened with the creation of the *UN Permanent Forum on Indigenous Issues* (UNPFII) in 2000 as subsidiary body to the Economic and Social Council.[232] It constitutes an international platform for providing thematic reviews wish issues concerning Indigenous peoples. Specifically, UNPFII was mandated to,

> (a) Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council;
>
> (b) Raise awarenessand promote the integration and coordination of activities relating to indigenous issueswithin the United Nations system;
>
> (c) Prepare and disseminate information on indigenous issues.[233]

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[231] *Tiina Sanila-Aikio v. Finland,* Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication, 8.6.
[232] ECOSOC *Establishment of a UN Permanent Forum on Indigenous Issues,* E/2000/22
[233] *Ibid.,* 2

UNPFII is composed of independent experts, eight nominated by Governments and elected by the Council, and eight appointed by the President of the Council.[234] It holds an annual session and submits a report on its activities, including recommendations that are distributed to United Nations organs.[235]

With the adoption of UNDRIP in 2007, a paradigm shift was evidenced. UNDRIP declared for the first time that Indigenous peoples have the right to self-determination, and thus, the right to determine their political status and freely pursuit their own development. It affirmed the equality of Indigenous peoples and all other peoples and reiterated that Indigenous individuals are entitled to all human rights recognized in international law. Article 1 recognized that "Indigenous peoples have the right to the full enjoyment, *as a collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[236] In addition, it expressed that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.[237] Therefore, despite its non-binding character, the Declaration set the basis for understanding Indigenous rights as deriving from the recognition of Indigenous peoples as 'peoples' for international legal purposes, and the articulation of their rights in application of the rights to equality and non-discrimination.

The same year, the WGIP was reformed under the Human Rights Council resolution 6/36, to establish the *Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).* EMRIP was created as subsidiary organ to provide thematic expertise.[238] It is currently composed of seven independent experts, one from each of the Indigenous sociocultural regions. In 2016, EMRIP's mandate was amended to,

> provide the Human Rights Council with expertise and advice on the rights of indigenous peoples *as set out in the United Nations Declaration on the Rights of Indigenous Peoples*, and assist Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples.[239]

The most recent thematic reports conducted by EMRIP concern free, prior and inform consent (2018), recognition, reparations, and reconciliation (2019) and the right to land (2020). At the

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[234] *Ibid.*, 1
[235] *Ibid.,* 4, ,5
[236] UNDRIP, Article 1; Article 2
[237] UNDRIP, Preamble, para. 21
[238] *Human Rights Council Resolution 6/36*, 1
[239] *Ibid.*, 1, emphasis added

date of writing this thesis, EMRIP is receiving submissions for its next report, expected to be published in September 2021, precisely concerning the right to self-determination. The Draft Report, entitled *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, emphasized the right to self-determination "as the fundamental norm upon which indigenous rights are grounded."[240] In view of EMRIP, self-determination constitutes the 'normative basis of their relationship with the State.'[241]

In 2019, the Mandate of the *Special Rapporteur on The Rights of Indigenous Peoples*, first established by the Commission on Human Rights in 2001, was also renewed. Under the current mandate, the Special Rapporteur has the responsibilities to (a) examine ways of overcoming obstacles for the protection of Indigenous peoples; (b) gather, request, and receive information on alleged violations of their rights; (c) formulate recommendations and proposals; (d) work in close cooperation with the HRC, the EMRIP and other relevant UN bodies; (e) enhance engagement with UNPFII and the EMRIP; (f) develop regular cooperative dialogue with relevant actors; (g) promote the UNDRIP and (j) submit an annual report in the implementation of the mandate.[242] The latest reports summited by the Special Rapporteur have also focused on Indigenous self-governance (2018) and the right to autonomy or self-government as an exercise of Indigenous self-determination (2019).[243]

Currently, much of the UN's work concerning Indigenous peoples is oriented towards ensuring the implementation of UNDRIP.[244] The Outcome Document of the WCIP requested in 2014 the development of a "*UN System-Wide Action Plan to ensure a coherent approach to achieving the ends of the Declaration.*" Known as SWAP–Indigenous Peoples (2015), the action plan has the goal of implementing UNDRIP by "increasing UN system coherence in addressing the rights and well-being of indigenous peoples in its work, including in support of Member States."[245] The Action Plan has outlined six focus areas, namely, (1) raising awareness on the UNDRIP; (2) support the implementation of the UNDRIP at the country level; (3) support the realization of Indigenous peoples' rights in the implementation and review of the

[240] A/HRC/EMRIP/2021/2, 1
[241] A/HRC/EMRIP/2021/2, 3
[242] A/HRC/RES/42/20, 1
[243] A/73/176; A/74/149
[244] SWAP-Indigenous Peoples, p.6; Implementing the United Nations Declaration on the Rights of Indigenous Peoples, A/73/176, para.4
[245] SWAP-Indigenous Peoples, p.5

2030 Agenda for Sustainable Development; (4) map existing standards and guidelines, capacities, training materials and resources; (5) develop the capacities of States, indigenous peoples, civil society and United Nations personnel; and (6) advance the participation of indigenous peoples in United Nations processes.[246]

In November 2020, SWAP-Indigenous Peoples was 'revitalized,' calling to action on "building an inclusive, sustainable and resilient future with indigenous peoples."[247] It reaffirmed its commitment to "supporting Member States in the promotion, protection and realization of the rights of Indigenous peoples and redoubling efforts to ensure collaborative and coherent United Nations system action to support the rights and well-being of indigenous peoples."[248] Among its objectives, SWAP-Indigenous Peoples seeks to (1) ensure more systematic participation of Indigenous peoples in the UN; (2) strengthen targeted actions at the country level to support the rights of indigenous peoples and learning from good practices; (3) ensure greater accountability and visibility for the action plan; and (4) strengthen the disaggregation of data on indigenous peoples to ensure greater visibility of indigenous peoples and their situation. With the adoption of the Agenda 2030 for Sustainable Development in 2015, the need to ensure the rights of Indigenous peoples in its implementation has being widely expressed.

[246] *Ibid.*, p.1
[247] *Ibid*., p.2
[248] *Ibid.*

3. DEVELOPMENT, SUSTAINABILITY AND WELL-BEING

3.1. Over-Exploited Worlds, and the Creation of Global Poverty

The notions of well-being, development and progress have been fundamentally linked to international law since the establishment of the UN. Whereas exploring the meaning of these concepts can go as far as the ancient philosophical debates on what constitutes 'a good life', the idea of seeking progress and development *as a cooperative international effort* is particularly characteristic of the spirit mobilized by the UN. With the adoption of the UN Charter, international law and cooperation were seen as common grounds for the global pursuit of 'conditions of stability and well-being.'[249] Chapter IX, concerning 'international economic and social cooperation' entrusted the UN with the purpose to support the creation of higher standards of living, employment, and economic and social progress; to foster development and cooperation for global solutions; and, generally, "to promote universal respect for, and observance of, human rights and fundamental freedoms for all."[250] Soon, development became "the geopolitical program of the postcolonial era […] a key category for the justification of power."

The creation of the World Bank and the International Monetary Fund (IMF), "designed to establish the economic foundations of peace"[251], provided the institutional framework for an interventionist process that would otherwise have been accused of infringement of sovereignty. With the introduction of the Marshall plan for European postwar reconstruction, the World Bank focused on financing, promoting, and providing technical assistance for international development investment.[252] Increasingly, issues previously considered to be domestic matters, such as poverty reduction, employment, macroeconomic stability and national economic growth, became matters of international regulation. 'International law and development' emerged as "typically directed toward states that ha[d] already been designated as developing, emerging, in transition, or 'failed', and their perceived inability to either catch up or measure up to conventional benchmarks of economic and social performance."[253]

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[249] UN Charter, Art 55
[250] *Ibid.*
[251] *Press Release No. V-180, Treasury Department Washington (December 27, 1945)*
[252] World Bank Archival Record. *Memo on United States - International Bank relations,* Jan. 6, 1953 (1071217), p.4.
[253] Rittich, 2016, p.829

The report *Partners in Progress* (1951), presented to the U.S. President Truman by the International Development Advisory Board, warned that global 'hunger, poverty, disease and illiteracy' were the second main threat to U.S.'s national security after 'military aggression and subversion.'[254] The report emphasized that economic interdependence was 'so inextricably forged' that strengthening the 'underdeveloped economies' and their living standards ought to be considered 'a vital part' of U.S.'s defense deployment.[255] The Advisory Board identified an 'strategic dependence' on areas of Latin America, Africa, the Middle East, Asia and Oceania, which provided 73% of imported materials.[256] Therefore, it recommended the 'maximum use of all available resources' to increase the productivity of individuals in 'underdeveloped countries.'[257] Noteworthily, the report stressed that the main objective should not be to 'mine and get out', but to strive for a 'balanced economic development' under which workers would "receive a full share in the benefits as quickly as possible."[258] According to the Advisory Board, building a lasting peace was not a question "of preserving an existing order in the world but of building a new structure in which all nations [could] work together, exchanging their skills, labor and capital to mutual benefit."[259]

Nonetheless, 'underdevelopment' justified the external management of postcolonial economies in inequitable terms. The predominant discourse was that "the greatest development need [was] not external capital, but domestic action", including reforms in public investment, and fiscal and administrative policies.[260] In this context, "private actors, hybrid public/private institutions, and technocrats competed and collaborated with states in the creation of global norms relating to development."[261] In a 1953 *Memo on United States - International Bank relations* that described the World Bank's nature and operations in relation to U.S. foreign policy, it was expressed that, "because of its character as an international cooperative institution, [the Bank] was able to make its assistance to underdeveloped areas effective through the imposition of conditions of a type which no national government could easily had imposed."[262] Thus, these institutions began effectively shaping an international economic

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[254] International Development Advisory Board, *Partners in Progress*, 1951, p.1
[255] *Ibid.*, pp.2-5
[256] *Ibid.*, p.1
[257] *Ibid.*, p.1, p.5
[258] *Ibid.*, p.7
[259] *Ibid.*, p.11
[260] World Bank Archival Record. *Memo on United States - International Bank relations,* Jan. 6, 1953
[261] Rittich, 2016, p.828
[262] World Bank Archival Record. *Memo on United States - International Bank relations,* Jan. 6, 1953, p.11

system grounded on the liberalization of the 'underdeveloped' worlds, and the inequitable introduction of low-cost *resources* –human and natural– into the global market.

In this process, postcolonial countries repeatedly condemned the perpetuation of international economic inequality and neocolonialism at the General Assembly. They stressed that 'foreign and financial interests' sought to perpetuate colonial regimes through the continued exploitation of their peoples, territories, and natural resources, as well as the alienation of Indigenous lands.[263] They demanded the creation of conditions for a more equitable international order. Many UNGA's resolutions insisted in 'regretting the refusal' of colonial powers to effectively implement the Declaration on Decolonization and called for ceasing the sustained violations of rights in former colonies.[264] Meanwhile, external development aid continued to be conditioned to the removal of import tariffs and protection measures, as well as the establishment of preferential terms and the privatization of national economies.[265] As Beckett explains, the "imposition 'by *legal diktat*' of an open, investor-friendly, economy" restricted the ability of postcolonial governments to exercise authority over foreign investment or regulate the activities of transnational corporations, thus propitiating a continued reduction of sovereignty and capacity to regulate their own development.[266]

In this context, the emerging 'Third World' furthered the principle of 'permanent sovereignty over natural resources' at the General Assembly, as a tool to reclaim domestic control over their economic activities, natural resources and labor. In 1962, UNGA Res. 1803 (XVII) on the *Permanent sovereignty over natural resources* declared "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and in respect for economic independence."[267] UNGA Res. 1803 stated it was 'desirable' to promote international cooperation for development based on the principles of equality and the right of peoples to self-determination,[268] and that foreign assistance "must not be subject to conditions which conflict with the interests of the recipient state."[269] It highlighted mutual respect based on sovereign equality, 'free and beneficial' sovereignty over natural

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[263] A/RES/2288(XXI), Preamble 7, 1, 2, 3, 4, 10
[264] Res 2105 (XX), 4, 5; Res 2189(XXI), 6, 10, 11, 12; A/RES/2326(XXII), A/RES/2465(XXIII), A/RES/2548(XXIV)
[265] Beckett, 2016, p.992
[266] Rittich, 2016, p.831
[267] G.A. Res. 1803, Preamble, paras. 4, 10, Art 1, 5
[268] *Ibid.*, Preamble, para. 7
[269] *Ibid.*, Preamble, para 8.

resources,[270] and the furtherance of cooperation for 'independent national development', including public and private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information.[271]

A few years later, in 1966, the International Covenants on *Civil and Political Rights* (ICCPR) and on *Economic, Social and Cultural Rights* (ICESCR) were adopted. In the latter, UN Member States bindingly committed to 'take the steps,' to the 'maximum of available resources,' to achieving progressively the realization of Economic, Social and Cultural Rights (ECSR). The rights to work and social security, an adequate and continuously improving standard of living, the enjoyment of the highest attainable standard of physical and mental health, and the rights to education, culture, and scientific research were recognized.[272] Most of the latter had already been included in the *Universal Declaration of Human Rights* (UDHR, 1948)[273] and, as such, considered customary international law. However, contrary to the UDHR, the ICESCR did not include any structural provisions, such as the UDHR right "to a social and *international order* in which the rights and freedoms set forth in th[e] Declaration can be fully realized"[274].

The same year (1966), the adoption of the *International Convention on the Settlement of Investment Disputes (ICSID)* established a framework that placed the World Bank as mediator between governments and states in international investment disputes, despite the fact these "would usually be subject to national legal processes."[275] Meanwhile, international economic inequality continued to grow, and the capacity of postcolonial states to 'take the steps' to achieving the realization of ESCR lessened. The 'continued problems of colonialism' and the widening gap between the 'economically developed and developing countries' were subjects of major discussion at the *International Conference on Human Rights (1968)*.[276] The resulting *Proclamation of Teheran* stressed the importance of the universal realization of self-determination, the indivisibility of all human rights, and the profound interconnection between the realization of human rights and economic development. Importantly, it highlighted the structural dimensions of economic and social justice, and thus the needs to (a) understand

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[270] G.A. Res. 1803, 5
[271] *Ibid.*, 6
[272] Respectively, ICESCR, Art 2; Art 6, 7; Art 9; Art 11 (1); Art 12; Arts 13, 14; Art 15
[273] UDHR, Arts 20, 21 (2), 22, 25, 26, 27
[274] UDHR, Art 28, emphasis added.
[275] ICSID, 1966, Preamble 3
[276] A/CONF.32/41, 9, 12, 13

development as a 'collective international responsibility;' (b) readjust the terms of international trade and economic measures; and (c) provide international aid on equitable terms.[277]

Progressively, Third World's demands for the creation of a New International Economic Order (NIEO) became a central question at the General Assembly. In 1969, UNGA Res. 2542 (XXIV) *Declaration on Social Progress and Development* declared the rapid expansion of national income and wealth, equitable distribution, and the elimination of inequality, exploitation, colonialism and racism, as common concerns of the international community.[278] A year later, UNGA Res. 32/130 (1970) explicitly articulated economic inequality and the 'unjust international economic order' as major obstacles for the realization of rights in 'developing' countries.[279] Furthermore, it reinforced NIEO as an essential requirement for the effective promotion of human rights.[280]

In 1973, the Special Rapporteur of the HR Commission presented an extensive report on the matter, entitled 'the widening gap.'[281] The Rapporteur stressed that the "gap between the rich and the poor, the privileged and the underprivileged [kept] widening both within and between countries,"[282] with many of the related factors such as debt and trading policies, being in the 'rich countries' control.[283] Thus, the report suggested the need to combine rapid growth and modernization with social justice, as 'complementary requirements' for achieving the 'highest standards of development worldwide.'[284] The Rapporteur also recommended increased financial resources and more favourable economic and commercial policies, appealing to Articles 55 and 56 of the UN Charter as implying an international obligation of all Member States in the global pursuit of development.[285]

A year later, UNGA adopted the *Declaration on the Establishment of a New International Economic Order (NIEO, 1974)* to "correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development."[286] The NIEO Declaration continued to condemn the "remaining vestiges of alien and colonial domination, foreign

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[277] A/CONF.32/41, Res XVII Preamble 7, paras. 3, 5
[278] Res. 2542 (XXIV), 7,2, 9
[279] UNGA Res. 32/130 (1971), Preamble paras. 8, 11; Art1(b)(f)
[280] UNGA Res. 32/130 (1971), Art1(d), (f)
[281] E/CN.4/I108/Add.5
[282] E/CN.4/I108/Add.6, 10, 11
[283] *Ibid.*, 21, 93
[284] *Ibid.*, 53
[285] *Ibid.*
[286] UNGA Res. 3201 (S-VI), Preamble 3

occupation, racial discrimination, apartheid and neo-colonialism," as 'the greatest obstacles' for developing countries in achieving 'an even and balanced development.'[287] It also recalled the inextricable relationship between "the prosperity of the developed countries and the growth and development of the developing countries."[288] Therefore, it reinforced principles such as sovereign equality, self-determination, territorial integrity, non-interference, and permanent sovereignty over natural resources for the furtherance of NIEO, and included new principles, such as cooperation based on equity; full and effective participation of developing countries; and the regulation and supervision of the activities of transnational corporations.[289]

The same year, UNGA also adopted the *Charter of Economic Rights and Duties of States (1974),* containing 'the fundamentals of international economic relations,' the 'economic rights and duties of the states' and 'common responsibilities towards the international community.'[290] Among others, it emphasized the need to accelerate "the economic growth of developing countries with a view to bridging the economic gap,"[291] for which it reiterated most of the NIEO principles. Noteworthily, the Charter stressed that the 'free exercise of full permanent sovereignty' not only included "possession, use and disposal, over wealth natural resources and economic activities,"[292] but also the right to regulate and exercise authority over foreign investment and to regulate and supervise the activities of transnational corporations.[293] Whereas the Charter emphasized the primary responsibility of the state to promote its own development,[294] it also provided that cooperation should 'facilitate more rational and equitable international economic relations' and encourage structural change.[295]

Nevertheless, UNGA Declarations were barely reflected in economic, trade and investment law. The possibilities of developing countries to tackle poverty "were affected not only by quantitative restrictions but also by the complexity of the proliferating barriers to trade and the adverse effects of the new protectionisms from industrialized countries."[296] According to the World Bank's first *World Development Report (1978),* 'development countries' had imposed restrictions to some countries or products despite the establishment of the Generalized System

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[287] *Ibid.*, 1
[288] *Ibid.*, 3
[289] *Ibid.*, 4
[290] *Charter of Economic Rights and Duties of States (1974)*, Chapters 1, 2, and 3, respectively
[291] GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50, Preamble 6(e)
[292] *Ibid.*, Article 1
[293] *Ibid.*, Article 2 (b)
[294] *Ibid.*, Article 7
[295] *Ibid.*, Article 8
[296] World Bank, 1978, p.58

of Preferences (1971). This was described as 'unilateral preferential schemes,' "designed so as to avoid harming producer interest in industrialized countries."[297] These types of regulations created inequities in the patterns of growth "large enough to offset the attempts to improve the well-being of the relatively poor through welfare measures."[298] However, economic growth continued to be furthered as the straightforward solution to global poverty. The need to accelerate income growth and raise productivity were highlighted as means to achieve 'progress.'[299]

By the end of the decade, the rise of systematic violence in many postcolonial states, often conducted by or in complicity with governments, produced a shift of focus in the development discourse. With the increasing elaboration of international human rights law, and the adoption of the International Human Rights Covenants, the reproduction of colonial practices of domination and violence in what was known as the Third World were framed as domestic failures to observe human rights. Progressively, the links between the international legal economic order, 'the widening gap', and the realization of human rights were offset by an increased focus on the promotion of democratic governance through development cooperation mechanisms. The full responsibility for the protection –and therefore denial– of human rights was allocated to the states in a domestic sense, with no references to the private sector, non-state actors nor the international economic regime. The relationship between the international economic order and the sovereignty and well-being of postcolonial states was increasingly obscured.[300]

Whereas development had been consistently framed at UNGA as a common international concern since the establishment of the UN, the notion served to impose a "market-centred economic growth […] fused with the promotion of liberal democratic reforms."[301] UNGA resolutions were non-binding in nature, while debt and structural adjustment programs, the rules governing the privatization of national industries and foreign trade and investment law were binding agreements. These agreements, in turn, specifically designed to regulate 'developing' economies, were seen as depoliticized measures of market efficiency, and thus necessary "for successful transition to modernity and heightened economic growth."[302] The

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[297] *Ibid.,* p.58-59
[298] *Ibid.,* p.63-64
[299] *Ibid.,* 26
[300] Rittich, 2016, p.824
[301] *Ibid.,* p.834
[302] *Ibid.,* pp.823-826

latter has been described by Anghie as the employment of Third World's sovereignty as their 'consent to be bound' to a system of subordination: these fields appeared as in need of *sui generis* rules "to manage, specifically, the Third World."[303] While there was a strengthened protection of investors, property rights and contracts, issues concerning ESCR were described as 'interventions' that "risk[ed] impairing the efficient operation of markets and, by extension, prospects for welfare gains through economic growth."[304]

The UNGA *Declaration on the Right to Development (1986)* evidenced this shift of focus. Whereas the Declaration mentioned some distributive issues, it framed development as an individual right, accentuating the fundamental duty of the State to guarantee *equality of opportunity* for *individuals* with a view to realizing the 'free and complete fulfillment of the human being'.[305] The 'human person' was centered as main subject of development, which was described as "a comprehensive economic, social, cultural and political process […] aimed at the constant improvement of the well-being of the entire population and of all *individuals*."[306] Development was now conceptualized as an individual and collective right expressed, first and foremost, through *active participation in, contribution to, and enjoyment of*, the economic, social, cultural and political development of the State.[307] In turn, states had the obligations to guarantee minimum ESCR standards 'to the maximum of available resources' and take "resolute steps to eliminate the massive and flagrant violations of the human rights."[308]

3.2. The Shift to Sustainability

In the 1970s, the management and regulation of natural resource exploitation entered the international sphere, particularly in connection with human rights law. Concerns over the negative environmental impacts of 'human activity' and intense natural resource exploitation for economic growth, led to an increasing awareness of the links between environmental conservation and human well-being. The Stockholm *Declaration on the Human Environment (1972)* was the first UN instrument to refer to the environment as essential to human well-being

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[303] Anghie, 2004, p.249
[304] Rittich, 2016, p.825-826
[305] UNGA 41/128, Preamble, para.16; arts 1, 6, 3 (3), art 2 (2); art 7
[306] *Ibid.,* Preamble, para.2; Article 2 (3)
[307] *Ibid.,* Art 2(1)
[308] *Ibid.,* Arts 5, 6 (3)

and thus, to the full enjoyment of human rights.[309] It declared "the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment"[310]. Previous approaches had focused on resource extraction regulation with the objective of avoiding or managing interstate conflicts over natural resources, or the consequences of its exploitation, such as transfrontier pollution.[311] However, the predominant view was that environmental standards were to be defined at the domestic level.

The *Trail Smelter Arbitration* (United States v. Canada, 1941), and the *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania, 1949) were fundamental in the formulation of some of the core principles of international environmental law relating transfrontier pollution and extraterritorial harm. The first concerned alleged damages caused to the state of Washington due to the emission of sulphur dioxide fumes at the Trail Smelter Canadian-based corporation.[312] The arbitration tribunal not only examined the questions of damages and indemnity, but also whether there was a requirement to refrain from causing future damages, and which measures or regime should be adopted in such case.[313] The tribunal concluded that harm had occurred and that,

> no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[314]

In *Corfu Channel*, the question was whether Albania was responsible for the explosion of two British warships due to a minefield lying in Albanian territorial waters, and which resulted in the death of 44 British officers and personal injuries. The International Court of Justice (ICJ) examined the case and concluded that the laying of the minefield "could not have been accomplished without the knowledge of the Albanian Government."[315] Therefore, it stated that Albania had the *obligation to notify* of the existence of a minefield in Albanian territorial water,

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[309] A/CONF.48/14/Rev.1
[310] *Ibid.*, Part I, Preamble, para.2
[311] For example, the *Convention Relative to the Preservation of Fauna and Flora in their Natural State* (London, 1933), the *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere* (Washington, 1940), or the *International Convention for the Regulation of Whaling* (1946) are commonly highlighted as early international environmental law treaties.
[312] *Trail Smelter Arbitration* (United States v. Canada, 1941), p.1922
[313] *Ibid.,* p.1939
[314] *Ibid.,* p.1965
[315] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgement of April 9th, 1949, p.22

based on ‘elementary considerations of humanity’, ‘the principle of the freedom of maritime communication’ and “every State's obligation *not to allow knowingly its territory to be used for acts contrary to the rights of other States*.”[316]

However, it was only around the 1970s that raising concerns about the effects of human activity in the environment led to seeking internationally coordinated resource management. In 1968, by resolution 2398 (XXIII), the UN General Assembly (UNGA) agreed to organize a *World Conference on the Human Environment,* later known as the Stockholm Conference (1972). Within the Conference, speakers from developing countries placed important emphasis on ‘the urgent task facing humankind’ to solve the ‘problems of poverty, malnutrition, illiteracy, and misery’[317], and protested the exploitation of natural resources by developed countries in their territories and the activities of multinational corporations.[318] Whereas ‘developed countries’ agreed with these aims, they emphasized the need of taking environmental considerations into account in national development strategies ‘in order to avoid the mistakes made by developed countries in their development.’[319] The general agreement was that the concept of ‘no growth’ was inviable, but there was a need to ‘rethink the traditional concepts of the basic purposes of growth.’[320]

Five outcome documents resulted from the Conference: (1) The Declaration of the United Nations Conference on the Human Environment; (2) Action Plan for the Human Environment; (3) Resolution on institutional and Financial Arrangements; (4) Other Resolutions; and (5) Recommendations for Action at the National Level. The Declaration generally proclaimed that ‘Man’ had reached a stage in which it “acquired the power to transform his environment in countless ways and on an unprecedented of production scale.”[321] Therefore, it stressed a need to “shape our actions throughout the world with a more prudent care for their environmental consequences”[322]. It was argued that both the natural and the man-made aspects of the ‘human environment’ were “essential to his well-being and to the enjoyment of basic human rights.”[323]

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[316] *Ibid.*
[317] Report of the United Nations Conference on the Human Environment, 1972, A/CONF.48/14/Rev.1, Part Three, Chapter VIII, 44
[318] *Ibid.,* Part Three, Chapter VIII, 45
[319] *Ibid.,* Part Three, Chapter VIII, 44
[320] *Ibid.,* Part Three, Chapter VIII, 37
[321] *Ibid.,* Preamble para.1
[322] *Ibid.,* Preamble para.6
[323] *Ibid.,* Preamble para.1

In this sense, the 'protection and improvement of the human environment' appeared as necessary to ensure both 'the well-being of peoples and economic development.'[324]

The Declaration set forth 26 principles. Despite non-binding, Principle 1 became primarily significant, as it was the first to recognize a connection between environmental protection and human rights:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[325]

In consequence, the Declaration called for resource management with a view to safeguarding natural resources for present and future generations, including careful planning and waste management.[326] On its part, 'economic and social development' was mentioned as essential for guaranteeing improved conditions of the quality of life, including the relationship between environmental problems and 'under-development', which ought to be remedied through financial and technological assistance; stability and adequacy of prices for primary commodities and raw materials; and the adoption of environmental policies that did not adversely affect the 'development potential of developing countries.'[327] Finally, the Declaration called for an integrated, coordinated and rational development planning, including demographic policies, national institutions, science and technology, and education and scientific research with environmental concerns.[328] In particular, principle 21 provided that,

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[329]

The latter acquired significant relevance and is considered to express customary international law, balancing the sovereignty of natural resource exploitation with extra-territorial harm, as previously recognized in the *Trail Smelter Arbitration* and *Corfu Channel*. Principle 22 on its

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[324] *Ibid.,* Preamble para.2
[325] *Ibid.,* Principle 1
[326] *Ibid.,* Principles 2-7
[327] *Ibid.,* Principles 9-12
[328] *Ibid.,* Principle 13-20
[329] *Ibid.,* Principle 21

part, called states to further cooperate in the development of international law regarding liability and compensations for extra-territorial harm.

Since environmental regulations imposed limitations to economic activities, principle 23 expressed that,

> Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Finally, Principles 24 to 25 recalled the need for a 'cooperative spirit' between states and international organizations for the protection of the environment, and Principle 26 avowed for the complete destruction of nuclear weapons.[330]

A year after the Stockholm Declaration (1973), the General Assembly adopted resolution 3129 (XXVIII) on *Cooperation in the field of the Environment concerning natural resources shared by two or more States.* Pursuant to the resolution, the Governing Council of the United Nations Environment Programme (UNEP) requested the establishment of an Intergovernmental Working Group of Experts to draft 'Principles of conduct for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States'.[331] The principles reiterated Stockholm principle 21, and included an obligation to notify, equality of access for non-residents to administrative and legislative procedures and non-discrimination.[332] The principles were approved at UNGA's 33rd session, but many governments deemed them acceptable only if maintained as guidelines rather than expressing binding obligations. Most considered the principles to be used as a 'negotiating basis' for bilateral or multilateral treaties, while Brazil and Ethiopia strongly disapproved them, explaining these were an excuse for interference in environmental policies and that the principles were 'vague, ambiguous, too general, incomplete and impractical.'[333]

However, environmental concerns continued to permeate the human rights and development discourse. In 1974, the UN *Charter of Economic Rights and Duties of States (1974),* contained

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[330] *Ibid.,* Principles 25-26
[331] *Report of the Governing Council of the United Nations Environment Programme,* Res 33/87, 15 December 1978
[332] *Draft principles of conduct for the guidance of states in the conservation and harmonious exploitation of natural resources shared by two or more states*, 1977
[333] A/34/57, 6(b), Annex, Summary of views of individual governments on General Assembly Resolution 33/87

in resolution 3281 (XXIX), also mentioned among its purposes the creation of conditions for "the protection, preservation and enhancement of the environment."[334] The Charter included a section on the 'common responsibilities towards the international community,' which provided that the 'sea-bed and ocean floor beyond national jurisdiction' were a common heritage of mankind.[335] Therefore, it called for the establishment of an international regime applicable to these areas and resources. Furthermore, the Charter declared the responsibility of all states for the 'the protection, preservation and enhancement of the environment for the present and future generations', and the duty to establish environmental and developing policies accordingly.[336] Among its final provisions, the Charter emphasized the obligation of all states to "contribute to the balanced expansion of the world economy, taking duly into account the close interrelationship between the well-being of the developed countries and the growth and development of the developing countries."[337]

In 1983, UNGA resolution 38/161 welcomed the creation of a 'Special Commission on the Environmental Perspective to the Year 2000 and Beyond', later known as the *World Commission on Environment and Development* (WCED). The Commission was entrusted with the task of proposing long-term environmental strategies for achieving *sustainable development* 'to the year 2000 and beyond', including recommendations for cooperation, understanding of 'the interrelationships between people, resources, environment and development' and actions to be taken "to deal successfully with the problems of protecting and enhancing the environment."[338]

In 1987, the WCED presented to the General Assembly the outcome of its three-year study.[339] The resulting report, *Our Common Future* (1987), introduced the notion of *sustainable development* that currently mobilizes the international agenda —that which "meets the needs of the present without compromising the ability of future generations to meet their own."[340] Mostly known as the *Brundtland report*, the document presented global concerns and challenges, emphasizing that 'a new development path was required.'[341] Importantly, the report

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[334] UN General Assembly, Charter of Economic Rights and Duties of States, A/RES/3281, Preamble 5 (f)
[335] *Ibid.*, Article 29
[336] *Ibid.,* Article 30
[337] *Ibid.,* Article 31
[338] *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond,* 1983, 38/161, emphasis added
[339] *Ibid.* 10
[340] *Report of the World Commission on Environment and Development: Our Common Future*, Chapter 2, I, 1.
[341] *Ibid.* Overview I (1) (10)

highlighted that the 'forces of an insensitive economic development over which they have no control,' threatened Indigenous peoples with their virtual extinction.[342] Its last chapter, *Towards Common Action,* called for institutional and legal changes, seeking to 'elevate sustainable development to a global ethic.'[343] Increasingly, the notion permeated multiple spheres of international policy, politics and law.

In *Our Responsibility to The Seventh Generation: Indigenous Peoples and Sustainable Development (1992),* Clarkson and Morrissette examined the interrelations between the progressive detriment of Indigenous livelihoods and the national and international economic development frameworks. The authors emphasized that, contrary to the common perception of Indigenous livelihoods and economic systems as disconnected from the modern economy, traditional livelihood systems often functioned to subsidize the commercial sector. They explained, for instance, that commodity prices for Indigenous-produced goods are kept low because Indigenous peoples complement their livelihoods through activities of subsistence, thus heightening the rate of exploitation of Indigenous producers.[344] A recent EMRIP report (2018) confirmed the latter, as it found that, for example,

> pastoralists are estimated to contribute between 10 and 44 per cent of the GDP of African countries […] 90% of the meat consumed in East Africa comes from pastoralism [and] an estimated $3 billion of agricultural commodities [in the U.S.]come from Indian and Alaska Native producers. [345]

Similarly, Beckett refers to 'the false history of development', under which,

> the living standards currently enjoyed in the developed world are subsidized by the continuing exploitation of the developing world: there are not sufficient resources for everyone to enjoy our 'developed' lifestyle. The promise of development cannot be realized, and human rights critiques function to disguise this fact by setting impossible conditions for the entitlement to develop."[346]

Clarkson and Morrissette emphasize that the historic processes of impoverishment of the Third World had disproportionate effects on Indigenous peoples, directly resulting from how globalization was regulated.[347] The authors challenged the 'supposed inferiority of traditional economies' by putting into perspective the devastation resulting from the Western narrative of development, and the view that underexploited resources are 'wasted', instead of ensuring the

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[342] *Ibid.*
[343] *Ibid.* Chapter 12 (2)
[344] Clarkson, L., Morrissette, V., and Regallet, 2001, p.26
[345] E/C.19/2018/7, 15
[346] Beckett, 2016, p.1009
[347] Clarkson, L., Morrissette, V., and Regallet, 2001, p.31

viability of the land for future generations.[348] In fact, they mentioned chronic malnutrition and the decreased capacity of lands as result of the Western production system.

Therefore, they called to action for policy change upholding the notion of inter-generational equity as relevant to Indigenous perspectives,[349] including, first, the protection of traditional ways of life, self-determined development, protection from encroachment and access to UN and regional decision-making bodies.[350] Second, the recognition of traditional knowledge and practices for environmental protection and, therefore, the need to develop working relationships with Indigenous peoples based on equality. The authors called for the promotion and protection of traditional knowledge in ways that strengthen Indigenous societies, and following culturally appropriate research methods.[351] Finally, the authors advocated for the creation of healing programs, education for cultural survival, and sustainable economic development strategies based on the foundations of Indigenous cultures.[352]

3.3. Integrating Indigenous Knowledge

After the Brundtland report, the international agenda continued to integrate environmental concerns within development and human rights debates, commonly referring to the notion of sustainable development. The concept was extensively included throughout the five outcome documents of the second UNCED meeting, known as the Earth Summit (1992). The general outcome document, *Rio Declaration on Environment and Development,* built upon the Stockholm Declaration to endorse a human-centered approach to sustainable development.[353] The sovereign right of states to exploit natural resources, no extra-territorial harm, and the interconnections between development, environmental protection, and the eradication of poverty and global disparities were recalled.[354] Furthermore, principles 6 to 9 developed the notion of 'common but differentiated responsibilities', situating developing countries as the 'most environmentally vulnerable', while referring to developed countries as responsible to

[348] *Ibid.,* p.66
[349] *Ibid.,* p.76
[350] *Ibid.,* pp.78-80
[351] *Ibid.,* pp.81-83
[352] *Ibid.,* pp.84-87
[353] A/CONF.151/26 (Vol. I), Annex 1, *Rio Declaration on Environment and Development,* Preamble, principle 1
[354] *Ibid.,* Principles 2-5

eliminate unsustainable patterns of production and consumption and to strengthen the capacity building and technology transfer to developing countries.[355]

The Declaration also outlined domestic and international responsibilities. At the domestic level, states were called to ensure participation and awareness of all citizens in environmental concerns, provide effective access to judicial and administrative procedures, and to create effective environmental legislation.[356] At the international level, the responsibilities included the promotion of a 'supportive and open international economic system'; the development of liability and compensation rules for environmental damage; the need to discourage or prevent the transfer of harmful substances; and the protection of the environment in armed conflict. [357] The vital role of women and youth in environmental management and development was also stressed.[358] In particular, principles 15 to 19 have acquired major prominence as core concepts of international environmental law and sustainable development. Principle 15 referred to what is known as the precautionary approach, namely,

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[359]

Principle 16, known as the polluter pays principle, states that,

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[360]

On its part, principle 17 referred to the general responsibility to conduct environmental impact assessments and principles 18 and 19 concern the duty to notify on potential transboundary affectations, as well as consultation in good faith 'at an early stage.'[361]

Additionally, the Declaration recognized the 'interdependence and indivisibility between peace, development and environmental protection,' calling to peaceful resolution of disputes and cooperation in good faith.[362] After the Rio Conference, there has been a general consensus in that sustainable development comprises the integration of environmental, trade and human

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[355] *Ibid.*, Principles 6-9
[356] *Ibid.,* Principles 10-11
[357] *Ibid.,* Principles 12, 13, 14, 20, 21
[358] *Ibid.,* Principles 23, 24
[359] *Ibid.,* 15
[360] *Ibid.,* 16
[361] *Ibid.,* 17, 18, 19
[362] *Ibid.,* 25, 26

rights law. The Action Program of the Conference, namely, Agenda 21, insisted on the legal aspects of sustainable development and the adoption of international standards accordingly.[363]

Significantly, principle 22 of the Rio Declaration recognized for the first time the 'vital role' of Indigenous peoples in environmental management and development, as follows:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[364]

Aside from the general outcome document, two treaties were opened for signature from the Rio Convention, namely, the *UN Framework Convention on Climate Change (UNFCCC)* and the *Convention on Biological Diversity (CBD)*. The UNFCCC has the objective of stabilizing greenhouse gas emissions through 'coordinated responses', cooperation and participation of all states in accordance with their 'common but differentiated responsibilities'.[365] Aside from the principles contained in the Rio Declaration, UNFCCC explicitly mentioned 'the promotion of sustainable development' as a right and duty of the states.[366] The Conference of Parties was established as 'supreme body' of the Convention,[367] and the Kyoto Protocol (1997) operationalized the UNFCCC by following individually agreed targets and establishing a review system.[368] In line with the principle of common but differentiated responsibilities, the Protocol places a heavier burden for sustainable development on developed countries.

On its part, the *Convention on Biological Diversity* (CBD, 1992) was adopted for the "conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources"[369]. The CBD repeated the definition of sustainability as, in this case, using biological resources in a way that maintains its potential to meet the needs and aspirations of present and future generations.[370] Furthermore, CBD was the first international treaty to recognize the "close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on

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[363] *Ibid.,* Agenda 21, Chapter 39
[364] *Ibid.,* 22
[365] *United Nations Framework Convention on Climate Change* (UFCCC), 1994, Preamble, paras, 21-22, 1, 3, 6, 8
[366] *Ibid.,* Art 3 (4)
[367] *Ibid.,* Art 7 (2)
[368] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* Kyoto, 11 December 1997, Arts. 3 (1), 8, 9, 13
[369] *Convention on Biological Diversity,* 1992, Art. 1
[370] *Ibid.,* Art 2 (17)

biological resources, and the desirability of sharing equitably benefits"[371], as well as, the responsibility of the states to,

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[372]

Accordingly, CBD included Indigenous peoples' 'specialized knowledge' in the procedures for exchange of information relevant to conservation and sustainability, in combination with technologies;[373] and the creation of cooperation methods "for the development and use of technologies, including Indigenous and traditional technologies."[374]

Few years after the Earth Summit, the *Copenhagen Declaration on Social Development,* adopted in the UN World Summit for Social Development (1995), recognized "the expansion of prosperity for some, unfortunately accompanied by an expansion of unspeakable poverty for others."[375] It mentioned that global wealth had 'multiplied sevenfold in the past 50 years', yet more than one billion people in the world live in abject poverty.[376] Among its resolutions, it committed to recognize, support and respect the rights of Indigenous peoples in the pursuit of development, "in accordance with their identity, traditions, forms of social organization and cultural values."[377] The Cartagena Protocol on Biosafety adopted in 2000 to CBD also recognized the value of biological diversity to Indigenous peoples and encouraged states 'to cooperate on research and information exchange' on the socio-economic impacts of living modified organisms as regards Indigenous peoples.[378]

Several other conferences concerning sustainable development were organized under the auspices of the UN. In 2002, the *Declaration on Sustainable Development,* adopted in the Johannesburg *World Summit on Sustainable Development (WSSD)* reaffirmed the Stockholm and Rio Documents and the global commitment to sustainable development,[379] including the

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[371] *Ibid.,* Preamble 11
[372] *Ibid.,* Art 8 (j)
[373] *Ibid.,* Art 17 (1)
[374] *Ibid.,* Art 18 (4)
[375] A/CONF.166/9, 4
[376] A/CONF.166/9, 15 (a); 16 (b)
[377] A/CONF.166/9 para 26 (m); Commitment 4 (f); D (75)
[378] *Cartagena Protocol on Biosafety,* Article 26
[379] A/CONF.199/L.7, 1, 2, 8

recognition of the 'vital role' of Indigenous peoples on the matter.[380] This time, broader attention was given to development and poverty eradication, while environmental concerns were relegated to a second place. There was only one reference to environmental damages,[381] and natural resource management was explicitly mentioned as a tool for economic and social development.[382] The Declaration mentioned the need to use "our rich diversity for constructive partnership for change for sustainable development"[383], and 'speedily increase access to basic requirements.'[384] The 'ever-increasing gap between the rich and the poor, and the developed and developing worlds' were highlighted, as well as the uneven distribution of the benefits and costs of globalization.[385] Therefore, the Declaration placed an increased importance in access to financial resources, open markets, technology and capacity building to 'banish forever underdevelopment.'[386] It referred to the legitimate activities of the private sector, assistance for increasing incomes and employment and corporate accountability.[387]

In 2010, the adoption of the Nagoya Protocol to the CBD, on *Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* regulated genetic resources and the fair and equitable share of benefits from their utilization, including several provisions on Indigenous peoples' traditional knowledge. The Nagoya Protocol noted

> the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities.[388]

Therefore, it recognized the diverse and unique circumstances under which Indigenous knowledge is held, the rich heritage relevant for conservation and sustainability, and the condition of Indigenous peoples as rightful holders of traditional knowledge, recalling UNDRIP and Indigenous peoples' rights as relevant for the interpretation of the Protocol.[389]

Article 5 of the Protocol proclaimed the responsibility of the states to ensure, through legislative, administrative and policy measures the fair and equitable share of benefits arising

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[380] *Ibid.,* 25
[381] *Ibid.,* 13
[382] *Ibid.,* 11, 21
[383] *Ibid.*, 16
[384] *Ibid.,* 18
[385] *Ibid.,* 12, 14, 21
[386] *Ibid.,* 18
[387] *Ibid.,* 27
[388] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, Preamble 22
[389] *Ibid.,* Preamble 23, 24, 25, 26, 27

from the utilization of genetic resources held by Indigenous and local communities, "in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources."[390] In this regard, article 12 provided that States parties shall,

> (1) in accordance with domestic law *take into consideration* indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.
>
> (2) with the effective participation of the indigenous and local communities concerned, *establish mechanisms to inform* potential users of traditional knowledge associated with genetic resources about their obligations
>
> (3) *endeavour to support*, as appropriate, the development by indigenous and local communities, including women, of:
>
> > (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;
> >
> > (b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and
> >
> > (c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.
>
> (4) *as far as possible, not restrict* the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.

Additionally, various provisions of the Protocol refer to ensuring prior and informed consent in obtaining access to traditional knowledge associated with genetic resources held by Indigenous peoples and ensuring mutually agreed terms, including the responsibility of the state to provide information on relevant competent Indigenous authorities.[391] With regards to capacity building in least developed countries, the Protocol provides the need to facilitate in this context the involvement, participation an identification of priority needs of Indigenous and local communities, leading to the adoption of special measures, with emphasis on Indigenous women.[392] Finally, the protocol includes requirements on awareness raisins regarding the importance of traditional knowledge associated with genetic resources, including meetings,

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[390] *Ibid.,* Article 5
[391] *Ibid.,* Arts. 3 (f), 6 (2), 7, 13 (1)(b), 14 (3), 16
[392] *Ibid.,* Art. 22, 25 (3)

codes of conduct, best practices or standards, as well as on participation and information on community protocols.[393]

In 2016, the first legally binding climate change agreement adopted at COP 21, the *Paris Agreement* (2016) recognized human rights and, explicitly the rights of Indigenous peoples:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[394]

The Agreement proclaimed that adaptation to climate change must be country-driven, gender-responsive, participatory, and fully transparent, taking into consideration, among others, traditional, Indigneous and local knowledge systems.[395]

In 2018, Under Decision 2/CP.23, the Conference of the Parties established the *Local Communities and Indigenous Peoples Platform* (LCIPP) with the purposes of (a) strengthening, protecting and preserving traditional Indigenous and local knowledge systems, technologies and practices; (b) building capacity for the engagement of Indigenous peoples in the UNFCCC process and as towards state parties and other actors; and (c) facilitate the integration of diverse knowledge systems, practices and innovations in designing and implementing international and national actions, programs and policies in respect for the interests and rights of Indigenous peoples and local communities. At COP 24, the Facilitative Working Group was established to operationalize LCIPP. The Facilitative Working Group (FWG) is composed by 14 representatives, 7 corresponding to the state Parties, and 7 from Indigenous organizations.

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[393] *Ibid.,* Art. 21
[394] *Paris Agreement,* FCCC/CP/2015/10/Add.1, Preamble 11: Decision 1, Preamble 7, 15
[395] *Ibid.* Art 7 (5)

4. CONVERGENCES AND DISENCOUNTERS

4.1. Considerations on Self-determination

In theory, the idea of self-determination mobilizes a discourse of freedom and/or liberation in a collective sense; the materialization of a 'peoples' free will in pursuit of their interests. From this perspective, it appears as a tool to challenge power imbalances, domination, or the legitimacy of governments: a claim for the realization of a suppressed 'collective will'. However, from a state-centric perspective, self-determination is expressed through the maintenance of the territorial status quo, because it aligns 'peoples' and the state, presuming their self-determination is *already* expressed and manifested through the states' borders and institutions. Despite the inequality of power between the state and peoples ought to be balanced with a presumption in favor of the right, the preservation of the territorial status quo is favored in the practice. Territorial integrity remains the most compelling limitation to the right to self-determination because it is inherent to sovereignty and fundamentally linked to other core principles for the observance of international law, such as exclusive territorial jurisdiction, non-intervention in domestic affairs, political independence, and the inviolability of the state frontiers.

Central difficulties for reconciling these tensions arise from the Westphalian individual/state dichotomy, which supposes the state embodies a 'collective will' united by common cultural, sociological, or ethnic characteristics, to the extent that its rights (of the state) must be protected above and against individual and collective aspirations within. However, the formation of modern nation-states was largely a product of military power and territorial control, which suppressed multiple nations. In the practice, self-determination informed the territorial reorganization of Eastern Europe after the war, but generated opposing claims from excluded minorities, that did not see their collective will represented nor materialized in the newly established borders. It underpinned decolonization for the achievement of independence of colonized peoples but perpetuated colonial borders and structures. It was later employed by post-colonial countries to challenge the unequal character of the international legal and political system and, at the same time, to exclude, subjugate and assimilate minorities and Indigenous peoples in the name of nation-building.

In this context, Indigenous peoples continued to challenge the myths of national and territorial unity of the modern states since the beginning of the 20th century, as well as the legitimacy of

state sovereignty –as grounded on the free consent of governed. Further than concerning interstate relations, early international law concentrated on regulating non-European worlds. Whether through neglect or recognition, international law often adopted paternalistic and discriminatory approaches vis-à-vis Indigenous peoples, sanctioning their dispossession, exploitation, and assimilation. During decolonization, self-determination developed as to legitimate the borders and structures previously established by colonial powers. In fact, it was the notion of self-determination which, through the universalization of the Westphalian nation-state in accordance with the principle of *uti possidetis juris,* crystallized the negation of Indigenous authority, governance systems and territorial organization. With the Declaration on Friendly Relations, a shift in the self-determination discourse was perceived, moving towards a more people-centered approach. The Declaration coupled the territorial integrity limitation with the 'conduct' of the states, expressing these must comply with equal rights and represent the whole peoples of their territories without discrimination.

In this context, the fragmentation of self-determination into an 'external' and 'internal' dimension both allowed for the recognition of self-determination as a right and simultaneously re-enacted the primacy of the state. Whereas Indigenous peoples continued to exert and claim recognition of their sovereignty throughout history *as nations*, these were displaced with the conceptualization of self-determination as a right. The latter both allowed certain level of recognition long neglected, while at the same time limited its application in relation to historically marginalized nations, because redressing historical patterns of dispossession, exploitation and assimilation involves a territorial and socio-political reorganization that contests the borders and structures universalized during the post-war period, as well as the haunting ideal of culturally homogeneous nation-states. While 'internal' self-determination as democratic means of participation or representation may, in some cases, serve the purpose of manifesting 'the peoples' will', it remains unable to address the legacies of the prolonged colonialism to which Indigenous peoples have been, and continue to be subject.

The conceptualization of Indigenous self-determination as a right, in coexistence with Westphalian conceptions of sovereignty and statehood remain unable to express the complexities involved in fully implementing Indigenous self-determination. Without disregarding crucial efforts, the standards on the right to self-determination fall short to the depth and extent of Indigenous practice, as well as to the Indigenous assertion of *inherent*

authority to self-determine.[396] As Woons puts it, "Indigenous self-determination is not something that has been lost or destroyed. Instead, centuries of colonization have set in motion events and created circumstances that have forced Indigenous peoples to *adapt in how they assert their authority to self-determine within their homelands*."[397] In this process, Indigenous peoples have used and asserted universal human rights to seek redress from historical violence, address ongoing injustices and counter approaches that discriminate, dispossess, exploit, and oppress them, often based on moral or cultural superiority. Nonetheless, when primarily operationalized as rights of inclusion, the subordination of Indigenous authority is often replicated.

In this context, some argue Indigenous rights may be seen as pre-existing the current international law system, "in the sense that they are not developed from the legal system of surrounding states but arise *sui generis* from the historical condition of indigenous peoples as distinctive societies with the aspiration to survive as such"[398] –their inherent authority to self-determine. In fact, Indigenous peoples have had 'traditions of diplomacy' long before contact with Europeans, which "included rituals for establishing relationships and expressions of sacred obligations."[399] In this sense, Indigenous self-determination not only comprises (first,) the various "approaches pursued within and against modern states that all too often perpetuate colonialism by ignoring –or even promoting– its logic and effects."[400] It also denotes (second,) the multiple situated forms of individual and collective resistance that safeguard Indigenous peoples' lives and heritages, encompassing both historical and modern systems of relations, which surpass their relations to the States. As recently expressed by the Special Rapporteur,

> insufficient attention has been devoted to the interpretation by indigenous peoples themselves of those rights and to their own initiatives to realize them […] indigenous peoples' interpretation should be the starting point for the development and adoption of the legal, policy and administrative measures required for implementation.[401]

For instance, Picq analyzes the opposition to extractivism present in many Indigenous struggles as a claim to self-determination that entails recognizing 'plural forms of territorial authority' and a 'redistribution of rights' that contests current assumptions of statehood, sovereignty and

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[396] Woons, 2014, p.11, emphasis added
[397] Woons, 2014, p.9, emphasis added
[398] Marks, 1991, p.5
[399] Carpenter, 2021, p.118-119
[400] Woons, p.5
[401] A/74/149, 18

concentration of power.[402] On its part, De Costa explores how administrative and legal practice on defining Indigenous peoples and membership continues to constitute a perpetuation of colonial systems of domination."[403] In another example, Rowse proposes an understanding of Indigenous self-determination as self-transformation, underlining its character as "both backward-looking and forward-looking[:] not only conservative and restorative, but also exploratory of progressive change."[404] In this context, the author mentions that, while Indigenous self-determination may be realized as societal/communitarian transformation, these processes occur 'in a context shaped by non-Indigenous authorities' that 'they have not chosen, yet cannot ignore' –thus highlighting the asymmetries of power in the exercise of the right.[405]

On its part, Kuokkanen defines Indigenous self-determination as "a foundational value that seeks *to restructure all relations of domination premised on inequality and injustice,* [including] settler colonialism, neoliberal capitalism, paternalism, misogyny, sexism, homophobia, and gender violence."[406] Under this perspective, self-determination as a 'value', constitutes a "shared articulation of what a group considers indispensable for their wellbeing as individuals and as a people, which guides lives, actions, choices and decisions collectively and individually."[407] According to the author, Indigenous self-determination therefore "fosters the norm of integrity manifested in two central forms, integrity of the land and individual integrity, including freedom from bodily harm and violence."[408]

According to Kuokkanen, Indigenous self-determination today is expressed in a spectrum. On one side, the author situates the case of Greenland as a 'precedent-setting case,' in which the Inuit "have arguably achieved the most extensive degree of Indigenous self-determination in the world."[409] At the other side of the spectrum are the Sápmi, which "hold symbolic significance, but do not have jurisdiction over their own affairs[;] a situation where Indigenous political institutions are limited to self-administration and consultation with the states."[410] In this respect, Kuokkanen emphasizes that 'merely inserting' indigenous views within the state structure is an adjustment unable to reflect or represent the meanings of self-determination for

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[402] Picq, 2014, p.31
[403] De Costa, 2014, p.19
[404] Rowse, 2014, p.43
[405] *Ibid.*
[406] Kuokkanen 2019, p.1, emphasis added
[407] *Ibid.,* p.218
[408] *Ibid.,* p.2
[409] *Ibid.,* p.97
[410] *Ibid.*, p.98

Indigenous peoples, and its full normative implications, particularly in the case of Indigenous women.[411] Therefore, the author proposes a third dimension of Indigenous self-determination, which involves "dismantling the existing structures and a radical shift in Indigenous governance through the restoration and reclaiming of the political roles and authority of Indigenous women alongside traditional governance structures and political orders."[412]

In this respect, the efforts of diverse social scientists to 'translate' Indigenous cosmologies can also be illustrative. For instance, in an attempt to understand Amazonian worldviews, Viveiros de Castro describes what he calls 'Amerindian multinaturalism'. The author explains that, contrary to the Western assumption of unity of nature (objective universality) and multiplicity of cultures (subjective particularity), the 'Amerindian' conception supposes spiritual unity and corporeal diversity.[413] Human and non-human beings are all bestowed with the same (universal) personhood or subjectivity. What differs is their multiples 'natures' or 'perspectives' of the world and of each other.[414] Personhood, understood as 'the capacity to occupy a point of view,' is shared by all human and non-human beings, and each occupies this point of view from a different perspective. Put in other words by Mendoza, "the caveat here is not that they see no difference between the bodies of animals and humans, but that animals, a jaguar, for instance, possesses his own perspective of the world."[415] Since relations between different natures are always based on a shared personhood, their governance and legal systems encompass a much broader array of relations than those conceptualized by Western law.

In fact, one of the basic assumptions of human rights, as constructed within the humanistic secular project, is that humans and animals fundamentally differ, and that there is something inherently valuable in human activity against other forms of life. Whereas the commonalities and differences between Indigenous and Western ontologies may not be as 'clear-cut' as described by Viveiros de Castro, the example is illustrative of the limitations within human rights discourse as regards Indigenous peoples. In *'Who Speaks for the Human in Human Rights,'* Mignolo traced the foundations behind this disengagement: "From the sixteenth century to the *Universal Declaration of Human Rights* (UDHR), He who speaks for the human is an actor embodying the Western ideal of being Christian, being man and being human."[416]

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[411] *Ibid.*, p.30
[412] *Ibid.* p.4
[413] Viveiros de Castro, 2016, pp.196-205
[414] Viveiros de Castro, 2016, pp.203-204
[415] Mendoza, 2018, p.118
[416] Mignolo, 2009, p.10

Seeking to distinguish themselves from others, European Renaissance humanists construed the 'human' as necessarily opposed to animals and to communities perceived as a threat; "[b]eing human meant to be rational, and rationality was limited to what philosophers and political theorists of the Enlightenment said it was."[417]

In this context, it is useful to refer to what Ahenakew calls 'grafting' Indigenous ways of knowing onto non-indigenous ways of being. Whereas the author uses the concept in an analysis of academic research settings, it contains useful insights regarding the Indigenous rights regime, because it highlights the power dynamics in 'recognition' and the limitations of inclusion and integration. Ahenakew uses the notion of 'grafting' to describe "the act of transplanting ways of knowing and being from a context where they emerge naturally to a context where they are artificially implanted"[418] –when Indigenous epistemologies are interpreted through non-Indigenous ontologies. Though Ahenakew does not condemn the process of grafting itself, and recognizes that the search for 'hybridity' can be a generative process, he explains that the 'severely uneven interface' between Indigenous and non-indigenous worldviews produce a situation in which "the grafting/hybridizing does not happen as a mutual exercise, but as assimilation."[419]

Similarly, 'grafting' Indigenous self-determination within human rights discourse poses critical paradoxes. Certainly, it appears as a tool for Indigenous peoples to position themselves internationally as distinct societies with the right to live as such. It *recognizes* the 'legitimacy' of Indigenous ways of being as formally equal to other societal formations –a shared humanity long neglected. The problem with recognition is when it appears as a rearticulation of power, mobilizing a view under which Indigenous rights, rather than related to a process of historical reparation, are seen as a state's concession, a permission granted. Under this view, the concrete outcomes of the enjoyment of rights are unilaterally defined by States.[420] Moreover, when perceived as concession, Indigenous rights may be "used to co-opt or promote inadequate compromises."[421] As Ahenakew explains, Indigenous views may be either "incorporated as a colourful (but insignificant) alternative to what is considered 'normal' […] or perceived as

[417] Mignolo, 2009, p.14
[418] Ahenakew, 2016, p.323
[419] Ahenakew, 2016, p.324
[420] A/74/149, 20
[421] Woons, 2014, p.9

something that is already integral to the dominant logic and therefore also insignificant, given that it offers nothing new."[422]

In addition, framing and construing Indigenous self-determination from within international law's 'tradition' without acknowledging its own theoretical limitations, reproduces a subordination of Indigenous self-determination, authority, and the full normative implications of their overall governance systems. The exercise of local autonomy, participation within state institutions, the right to consent or to retain their lands as long as they are not in the 'public interest,' may be paradoxically used to prevent the transformation of the state. These forms of autonomy, participation, consent or 'land tenure' are expected to be inserted within, and reproduce, state institutions and referents that are assumed to be neutral. The latter naturalizes the subordinated position of Indigenous peoples and their knowledge/governance systems by continuing to present the non-indigenous as the depoliticized members of society. In this sense, 'grafting' Indigenous self-determination into the existing state structures may further contribute to assimilation and diminish the perceived worth of Indigenous systems, practices and aspirations, which appear as particularized, rather than as possessing universal value.

In fact, the overemphasis of Indigenous self-determination as relating exclusively their *internal and local affairs* situates Indigenous authority as disconnected; as if Indigenous peoples were not inserted in (and most disproportionately affected by) the national, regional and global regulations. This apparent disconnection often means that their authority is rendered powerless face to the multiple 'external' flows that 'indirectly' affect them. It reinforces the divide between Indigenous peoples and the rest; as if their struggles do not concern the 'universal human,' but rather particular, localized minorities. Recent environmental concerns could be changing this, as the protection of the environment and natural resources, begins to be seen as a pressing need of all humanity. But when, how and to what extent can Indigneous peoples speak? The increasing recognition of Indigenous ecological knowledge has put Indigenous peoples in the spotlight, gaining unprecedented momentum for being situated at the intersections between global debates on how to build sustainable futures that respect human rights (just, fair, equal), environmental protection (climate change) and economic development (poverty reduction, hunger) in a global governance framework.[423]

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[422] Ahenakew, 2016, p.336
[423] Merino, 2021

Nonetheless, conventional legal practice tends to interpret Indigenous self-determination as 'deduced' from the particularization of general principles, rights, and standards, rather than practiced by Indigenous peoples throughout history. Notwithstanding key efforts, Indigenous self-determination, as a right, continues to be *given content and scope* as to adapt and reproduce what the states perceive (*opinio juris*) and grant (state practice) it to be: it is grafted into a state-centered system that fails to meet them as equals. The result is often an arrangement of varied forms of local autonomy and accommodation into state institutions, many of which are precisely built upon a denial of Indigenous self-determination. Since human rights often appear as unquestionable and virtuous *per se*, embodying 'the universal language of social justice,'[424] it is harder to grasp their theoretical limitations and often-dual character. The Indigenous rights discourse both promotes and constrains Indigenous self-determination or, in other words, promotes an incomplete understanding of Indigenous self-determination. Diverse authors have explored the ways in which international and human rights law may promote Indigenous self-determination but are also complicit in denying it.

4.2. Emerging Regulations for Sustainability

The notions of well-being, development and progress have been fundamentally linked to international law since the establishment of the UN, as a common responsibility of all states. However, the creation of international economic institutions and the progressive internationalization of development became a justification for the external management of postcolonial economies. The liberalization of the 'underdeveloped' worlds signified in the practice an interventionist process for the inequitable introduction of low-cost human and natural resources into the global market. External development aid, for instance, was conditioned upon the removal of import tariffs and protection measures, as well as the privatization of national industries. Since development became relevant within international law precisely as towards states perceived as 'developing', the latter resulted in a continued reduction of their sovereignty in the regulation of foreign investment and development activities. At the same time, it propitiated the accumulation of wealth of those that were not subject, but beneficiaries, of these restrictions –the 'developed' world.

[424] Rittich, 2016, p.835

In the attempt to reclaim domestic control over their economic activities, Third World countries continuously denounced the perpetuation of colonial regimes through human and resource exploitation, land grabbing, and unequitable terms of exchange. Therefore, they called for establishing the principle of permanent sovereignty over natural resources and a New International Economic Order (NIEO). However, the NIEO provisions were barely reflected in international economic, trade and investment law. After colonialism effectively destroyed traditional livelihoods, social and governance systems, postcolonial independence through self-determination was not only subject to maintaining colonial borders and structures, but also wealth distribution patterns.[425] The exploitation of previously colonized peoples and territories, now framed as the 'Third World', continued to be exerted through their integration into the world market in unequal terms.[426]

In this context, the rise of systematic violence in many postcolonial states, as well as the advancement of the human rights discourse, led to a shift of focus in development. The 'human person' was centered as main subject of development, which served to contest the rise of authoritarian rule and extreme violence in some countries. However, it also displaced the debate on the structural roots of economic inequality and how the international legal order was complicit in producing them. If development is a human right, underdevelopment is a lack of it. Paradoxically, the rise of human rights violations in many postcolonial states, as well as the very strengthening of the human rights discourse, served to place the sole responsibility for (the lack of) development on exploited states themselves, while obscuring the links between the international legal economic order, 'the widening gap', and the realization of human rights. 'Developing' countries appear as the sole accountable for the most flagrant human rights violations: since they are the responsibility-bearers of the well-being of their peoples, they are also the ones guilty of their own lack of development.

This picture fails to consider how international actors, particularly powerful states and private companies as lawmakers, are complicit in producing and profiting from these situations outside their borders. Not only their wealth has been largely produced by a prolonged colonialism and over-exploitation of other peoples and territories, but the material results of this exploitation – the accumulation of extreme wealth on the one side, and extreme conflict and poverty on the other– appear as justification for (and confirmation of the need of) foreign domination

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[425] *Ibid.,* 2016, p.829
[426] Beckett, 2016, p.993

(international regulation). Therefore, international law has been instrumental in this task. The administration of overexploited worlds has been a central function of international law since its inception: it responded to the encounters with others by justifying their exploitation, domination and dispossession. The development discourse itself became a main driver of over-exploitation. With the recent centering of 'the human person' in development, the emphasis was put in strengthening the individual's capacities to participate in global markets and the promotion of democratic governance, while human rights violations were seen as a cause, rather than consequence, of global inequality.

In this scenario, Beckett argues that global poverty is 'created, maintained, and regulated' by international law. In the words of the author, it is a 'man-made phenomenon,' produced by a legal regime that "benefit[s] some groups of people, even as they massively disadvantage others."[427] In an examination of the agenda imposed by international financial institutions, the World Trade Organization (WTO), bilateral investment treaty regimes and the terms of trade agreements with the European Union, U.S., and China, the author concludes that international economic and investment regulations are intended to maintain a "supply of cheap resources to the world market, secured at the cost of decreasing wages and social support, and increasing exploitation."[428] For instance, he explains, while "tax evasion is unlawful, it is also facilitated by law through client confidentiality protection […] patent laws are globalized, and antitrust measures universalized, but labor standards are rarely exported."[429] Moreover, many trade and investment agreements effectively constrain the possibility of Third World governments to protect or subsidize national economic sectors, encouraging "the mass exploitation of their people and resources."[430]As the author explains,

> The average lifestyle in the developed world depends on the constant resource flow from South to North which is materially unavailable to the majority of the planet's inhabitants; there are simply not enough resources to allow it […] Even the more modest consumption patterns in the United Kingdom would require the resources of 3.1 Planet Earths to replicate universally. The wealth of the North produces (and is produced by) the poverty of the South […]
>
> The citizens of the developed world sit atop the human food-chain, the 'ultimate predator'. Yet these same citizens are taught to conceive of themselves as enlightened and civilized, the bearers of humanity. This dissonance (the denial of the link between poverty and wealth) is managed through law. The naturalization of poverty allows us

[427] *Ibid.,* p.986
[428] *Ibid.,* p.993
[429] *Ibid.,* pp.994-995
[430] *Ibid.*

> to believe in our development from—rather than implication in—the plight of the extremely poor.
>
> Poverty-blindness is achieved by naturalizing our sense of entitlement to the spoils we enjoy as beneficiaries of a global order that perpetuates extreme poverty. This in turn is achieved through an extremely partisan analysis of the causes of poverty. Such analyses typically present poverty as caused by localized human rights abuses (themselves inexplicable), and imply that if human rights were respected, economic development would follow, and poverty would be eradicated. If only the Darker Nations could learn to implement human rights, then they too could be like us. This is simply untrue.[431]

The conventional (ahistorical) ways in which human rights law tells the story of development, progress, and well-being, places states as sole responsible for guaranteeing (or causing the lack of) 'minimum standards' of well-being towards its populations. However, the 'pressing need' to continuously accelerate economic growth and productivity, in tandem with protectionisms and trade and investment restrictions continued to exponentially direct the benefits of growth to industrialized countries through the activities of transnational companies. Global poverty, in its most extreme forms, is framed as a particularized 'problem' of countries that are ironically rich in resources and people. As produced by an unequitable international economic, investment and trade law, the overexploitation of materials, peoples and knowledge of postcolonial states has in fact sustained the enrichment of global powers over centuries and the consequent impoverishment of a great percentage of the global population. The assumption that human rights compliance is merely a matter of political will neglects that control over resources is a necessary requirement for the full guarantee of human rights: "Human rights compliance does not make a society rich, quite the contrary; a society must already be rich in order to afford human rights compliance."[432]

In this context, developing countries urged for hardening notions such as sovereign equality, self-determination, territorial integrity, non-interference and permanent sovereignty over natural resources. Paradoxically, the legal tools that serve postcolonial countries to regain control over their political and economic development, are the same tools that serve to contest Indigenous self-determined development. As recently explained at UNPFII,

> Investment treaties typically recognize that States have the right to expropriate land in order to allow investments, often establishing legal standards of protection for investors that undermine internationally recognized indigenous peoples' rights.[433]

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[431] *Ibid.,* p.990-998
[432] *Ibid.,* p.1010
[433] E/C.19/2018/7, 37

Though it was assumed Indigenous peoples would benefit from decolonization, most were subjected to a rearticulation of the coloniality of power.[434] In the quest to 'catch-up with modernity,' many post-colonial states re-enacted practices of systematic territorial dispossession, labor exploitation and assimilation policies, aimed at turning Indigenous peoples into 'productive members of society.'[435] Remaining collective systems or communal lands from colonial administrations were dismantled, and Indigenous peoples were denied both nationhood and territoriality. Seen as 'backward peoples' in need of actualization, Indigenous peoples were disproportionately affected by the emerging regulations of a globalized, open, investor-friendly market economy. The pursuit of economic development in the Third World was understood "principally in terms of the furtherance of industrialization and modernization, [which was] expected to marginalize ethnic identity."[436] Until today, Indigenous peoples continue to be affected by

> […] land grabs taking place under investment treaties signed between States and private investors. These changes in the legal framework are in favour of the investors and to the detriment of indigenous peoples, who are not informed of or protected in such treaties.[437]

With the increasing concerns for environmental damage, there are growing efforts to regulate natural resource management and exploitation at an international scale. This is of particular importance for Indigenous peoples, as they often live in territories that are rich in natural resources, which are now becoming subject to international regulation. In fact, the increasing trends of systematical human rights abuse of Indigenous peoples are mostly caused by conflicts over natural resources in their territories and land grabbing. In the context of the emerging law concerning sustainability, states are called to create effective environmental legislation while ensuring extensive civil participation. However, engaging with the current international legal system also derives in continuous tensions for Indigenous peoples. It poses the paradoxes of appearing as opposing the majorities' needs and the 'legitimate aspirations' of states to expand privatization, private property, the logics of land improvement and overall territorial possession of the state, which has the authority to determine 'how to better exploit the land' in the quest for eradicating extreme poverty and its related deprivations. Indigenous peoples are often viewed as the ones saying 'no' against the majoritarian *needs.*

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[434] Quijano, 2000, p. 567
[435] *Ibid.,* p. 567
[436] Anghie, 2004, p.206
[437] E/C.19/2018/7, 36

Furthermore, the notion of common but differentiated responsibilities has led to the identification of developing countries as the most environmentally vulnerable while developed countries are called to the take the lead. However, this is not applied, for instance, to the goals of economic growth (necessarily linked with resource regulation). In Hickel's analysis of resource use and greenhouse gas emissions with respect to the Sustainable Development Goals, the author mentions that a sustained aggregate GDP growth at 3%/ year, as presently formulated, is incompatible with the objectives on resource use and climate change.[438] The author explains that,

> past a certain threshold, additional GDP is no longer necessary for achieving these objectives […] It makes little sense to call for growth in nations where GDP is already significantly above this level. In such cases, human development objectives can be achieved by distributing existing GDP more fairly, and by investing in social services (healthcare, education, etc).[439]

While the global North seeks to take the lead in climate change mitigation, the latter necessarily entails undue pressure on South compensation with their resources.[440]

On its part, the Rio Declaration recognized for the first time the 'vital role' of Indigenous peoples in environmental management, highlighting the importance of their knowledge and traditional practices for sustainable development. However, it is possible to observe the commodification of the Indigenous spiritual relationship to land in the context of CBD. It recognizes, specifically, the relationship between Indigenous peoples and 'biological resources' as a relationship of dependency and the 'desirability of sharing benefits.' It focuses on the preservation and maintenance of Indigenous knowledge, innovations and practices *relevant for the conservation and sustainable use of biological diversity* to promote a wider application of such knowledge and encourage the equitable sharing of benefits.[441] Indigenous peoples are explaining that, in response to the CBD,

> States have increasingly identified greater areas for protection, often in the territories of indigenous peoples. These are often particularly appealing for conservation precisely because indigenous peoples have managed these territories in a sustainable manner for millennia. Ironically, indigenous peoples are thus penalized for their sustainable livelihoods in the name of conservation and protection of the environment. The expansion of protected areas is taking place not just at the behest of Governments, but also as a result of international conservation organizations applying great pressure on Governments to conserve more areas. Indigenous peoples must be aware of "green

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[438] Hickel, 2019, p.827
[439] *Ibid.,* p.880
[440] E/C.19/2018/7, 35
[441] CBD, Art 8 (j)

> grabbing" when sustainable development initiatives are being used against the rights of indigenous peoples.[442]

The Nagoya Protocol to the CBD (2010) contains perhaps the most extensive set of legally binding measures concerning Indigenous peoples in respect to sustainability. The importance of traditional knowledge is emphasized for the conservation of biological diversity and for Indigenous peoples' sustainable livelihoods. Whereas it recognizes Indigenous peoples as rightful holders of traditional knowledge and recalls UNDRIP,[443] there are reasons for concern. Article 5 for instance, specifies that the fair and equitable share of benefits is to be done "in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources."[444] Given the low ratification of ILO Convention. No 169 and contended character of UNDRIP, these are likely to acquire a secondary character over economic investment regulations, since investment treaties tend to privilege the States' sovereignty over natural resources (even if balanced with no extraterritorial harm) and investor protection. The provisions of article 12 of the Nagoya Protocol are also written in a soft way: *take into consideration* Indigenous customary laws and protocols and *endeavor to support* the development of Indigenous and local communities.

The Protocol effectively develops the requirements on *how to access* Indigenous traditional knowledge for biodiversity conservation through the establishment of *minimum requirements* for mutually agreed terms, and the intention to, *as far as possible, not restrict* the customary use and exchange of resources associated with traditional knowledge. Traditional knowledge must be accessed, in accordance to the rights of Indigenous peoples recognized at the domestic level and minimum requirements relative to this access. Within this scenario, Indigenous self-determined development within sustainability discourses is not simply threatened by a lack of human rights compliance. Aside from the question of implementation, and the limitations intrinsic to the right to self-determination, multiple tensions arise in the integration of Indigenous knowledge within environmental concerns, arising from what Santos calls 'abyssal thinking': "on one side of the abyssal line, there is knowledge considered to be objective and to have universal worth; on the other side there are values and traditions with only local (if

[442] E/C.19/2018/7, 35
[443] Nagoya Protocol, Preamble 23, 24, 25, 26, 27
[444] *Ibid.,* Article 5

any) value".[445] In respect to the incorporation of Indigenous knowledge within the 'mainstream' of sustainability, Nakashima and Roue wonder,

> are scientists serious enough about this emerging issue to go so far as to question the construction of their own knowledge? Or at the end of the day, will they do little more than add a veneer of traditional ecological knowledge (TEK) and then carry-on business as usual?[446]

For the authors, it is clear that the integration of Indigenous knowledge into science for sustainability implies a validation process that "purportedly separates the useful from the useless, objective from subjective, indigenous 'science' from indigenous 'beliefs'".[447] Whereas science is conceived as independent from practice, Indigenous knowledge includes know-how, practice, and the unification of the empirical and objective with the sacred and intuitive.[448] The authors warn that in this process, "knowledge corresponding with the paradigm of Western science is extracted, and the rest is rejected".[449] Similarly, Ahenakew problematizes the strategies of inclusion and integration of Indigenous knowledge within research, "where dominant norms and populations still determine what can be said and how."[450] He mentions as points of discordance, for instance, "the way Indigenous knowledge places 'animals, plants, and landscapes in the active role of teacher' […] or the notion that knowing 'literally comes from the ground, above, and beyond, from the wisdoms of continuous metaphysical engagements and familiarity with "all our relations.""[451]

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[445] Santos, 2007, 80.
[446] Nakashima & Roue, 2002, p.1
[447] *Ibid.,* p.1
[448] *Ibid.,* p.2
[449] *Ibid.,* p.1
[450] Ahenakew, 2016, p.324
[451] *Ibid.,* p.327-328;

5. CONCLUSIONS

Indigenous peoples have long engaged with the international legal system to demand recognition of their self-determination, as expression of their legitimate collective aspirations, concerns, and worldviews. International law, in turn, has long attempted to define Indigenous peoples' legal status, rights and obligations. In fact, the history of international law is inextricably linked to relations with Indigenous peoples, as it advanced parallel to the encounters with 'new worlds.' However, the international legal order developed historically in support of colonialism, even in the wake of decolonization. The principles and rules that shaped the modern system of states effectively denied Indigenous peoples' authority to freely pursuit their development under conditions of equality. The territorial integrity of the state remains the most compelling limitation to the right to self-determination because it is inherent to sovereignty and fundamentally linked to other core principles for the observance of international law, such as exclusive territorial jurisdiction, non-intervention in domestic affairs, political independence, and the inviolability of the state frontiers.

In this context, Indigenous peoples have continued to assert their inherent authority to self-determine, including the exertion of governance and legal systems that encompass a much broader array of relations than those conceptualized by Western law. However, 'grafting' Indigenous self-determination within human rights discourse poses critical paradoxes. It both promotes and constrains Indigenous self-determination in a system in that fails to meet them as equals. In the present context, when Indigenous self-determination stands at the intersections of human rights law, environmental law, and trade and investment law, it is ever more important to recognize the legacies of coloniality in these frameworks, historicize legal concepts, and engage with the meanings that self-determination involve for Indigenous peoples. Furthermore, the human rights approach to development has been increasingly endorsed in the context of sustainable development. However, beyond listing a set of responsibilities, it is necessary to engage with analysis of the regulations required to guarantee the material conditions necessary to fulfill these obligations, which are traversed by other areas of international law. International development interventions have, in many cases, created the problems they attempt to address.

The increasing efforts to regulate natural resource management and exploitation at an international level also derives in continuous tensions for Indigenous peoples. For instance, it is possible to observe the commodification of the Indigenous spiritual relationship to land in the context of the Convention on Biological Diversity. Within this scenario, Indigenous self-

determined development within sustainability discourses is not simply threatened by a lack of human rights compliance. Aside from the question of implementation, and the limitations intrinsic to the right to self-determination, multiple tensions arise in the integration of Indigenous knowledge within environmental concerns, arising from what Santos calls 'abyssal thinking'. Indigenous peoples are invoked in their power *to transfer* their 'traditional knowledge' and 'save modernity'; they appear in their ability to transfer ecological knowledge and shared the benefits arising from it. In this sense, sustainable development still relies in a division of labor that regulates poverty, the marginalization of non-Western alternatives to development and instrumentalized notions of human rights. In this sense, there are significant challenges for the realization of Indigenous self-determination within the emerging regulations on sustainable development, both arising from international and human rights law's own theoretical limitations, as well as from the lack of engagement with other branches of law.

Conventional human rights analysis fails to engage with the links between the international legal economic order, 'the widening gap', and the realization of human rights, and the ways in which international actors, are complicit in producing the impoverishment and exploitation of peoples outside their borders. In this context, the legal tools that served postcolonial countries to regain control over their political and economic development, are the same tools that serve to deny Indigenous self-determined development in the operationalization of investment treaties. The Third World sovereignty and exclusive territorial jurisdiction that is malleable for foreign investment and intervention, hardens when it comes to realizing Indigenous peoples' land rights. The challenge in the liberalization of trade and natural resources is ensuring the material conditions for the states to fulfill their human rights obligations. The lack of international regulations on international trade allows for the system to operate on a non-reciprocate basis, meaning that human rights and environmental concerns continue to be subject to economic regulations. Therefore, it is necessary to adopt a critical look and question, who has benefited from the internationalization/liberalization of the economy? And now, who will benefit from the internationalization/shared management of natural resources?

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