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**Development with culture and identity and regional Human Rights bodies: a comparison
on the concept of development adopted by decisions of the Inter-American Court of
Human Rights and the African Commission and Court on Human and Peoples Rights in
light of indigenous-peoples' self-determined development.**

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ABSTRACT

Development with culture and identity and regional Human Rights bodies: a comparison on the concept of development adopted by decisions of the Inter-American Court of Human Rights and the African Commission and Court on Human and Peoples Rights in light of indigenous-peoples' self-determined development.

This dissertation aims to analyze the concept of development adopted by the American and African regional bodies for juridical protection of human rights. The analysis is composed through the lenses of transcivilizational perspectives on human rights, following ideas from critical theorists on International Law, and underscoring the active contribution of indigenous peoples' movements for decolonizing International Human Rights Law. A theoretical examination of development, and the right to development, will be addressed, with particular focus on development matters regarding indigenous peoples' rights. Greater attention will be given to the concept of development with culture and identity as debated in international human rights fora. In this framework, we will ponder on selected cases from the regional bodies to elucidate the approach given by their jurisprudence on the matter.

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*To my parents, above all,
for their unconditional support through my tortuous paths.*

I. Introduction

The reckless development policies are known to be one of the main factors for the disruption of many indigenous cultures around the globe. Historically, indigenous peoples' physical and cultural survival has long been threatened by the expanding wheels of the mainstream economic system, either through annihilation or forced assimilation, and still today indigenous peoples from different regions have to resist pressures from a development mentality that undermines their characterization as backward, less sophisticated, and therefore destined to extinction in the name of a culturally dominant ideal of "civilizational progress". This ongoing trend finds its roots in colonial projects of the past that were backed by international legal norms and customs in which colonial states were represented, and indigenous peoples excluded.

Contradictions such as these may also be found among contrasting human rights narratives. According to traditional juridical and political theories, human rights would find their philosophical foundation on classic North-Atlantic conceptions of liberty and individualism which often served to justify colonialist practices towards indigenous peoples. Such classic doctrines tend to deny, for instance, the collective angle of human dignity and well-being, a central aspect for the protection of indigenous peoples' rights. Not only that, but they also reproduce misconceptions that separate societies between a "civilized", individual-centered West and a "savage", community-centered East and the "rest". On the other hand, thanks to the decolonization movement, states have recognized the right to self-determination in common Article 1 of both 1966 Human Rights Covenants as a basic human rights principle, and since the last decades of the twentieth century several cutting-edge interpretations on human rights ideas have been push forward in the International fora.

From the last decades of the 20th Century, indigenous peoples' movements were able to address their demands Internationally and achieved the acknowledgement of their distinct status as groups within States and the recognition of their entitlement to specific legal protections enshrined in specific instruments, especially the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the 1989 ILO Convention No. 169. Through constant engagement of indigenous peoples at different International and regional bodies, it was possible to develop a normative framework on the rights of indigenous peoples, such as the right to self-determination, the right to free, prior and informed consent, the right to lands, territories and resources and a broad set of cultural rights.

Indigenous peoples have called attention to negative effects of development policies, as state agents and other actors still today understand indigenous peoples and the ways of life they represent as an obstacle to their effort to continue promoting a colonial paradigm of development (whether economic, social, cultural, etc). Alternative views on development, and the right to development, have been proposed in order to confront such colonial practices and reconcile development agendas with more culturally sensitive human rights perspectives, with particular attention to the rights of indigenous peoples. In this sense, the UN Permanent Forum on Indigenous Issues, a subsidiary body of ECOSOC, promotes the concept of development with culture and identity, interpreting how human rights set the guidelines for development policies when indigenous peoples are involved, highlighting the importance of a holistic approach to the well-being of the community, and of respect for indigenous peoples' self-determination.

As to the formal application of these legal standards to specific cases, both the Inter-American Court of Human Rights and the African Commission and Court of Human Rights have taken on an important role to validate the protection of indigenous peoples' rights and their

cultural distinctiveness, in light of existing International human rights instruments as well as regional and domestic instruments. The considerations of the regional bodies regarding cases connected to development policies may be relevant to further inquiries on the prevailing understandings of development as a human rights issue, and on how international institutions may influence the design of development policies by states in different regions by endorsing or rejecting one or another understanding.

The scope of this thesis is to examine the extent in which regional human rights bodies have been permeable to juridical questionings brought by indigenous self-determined notions on development. Recent advancements in International Law on indigenous peoples' rights demands for a revision of the classic interpretation on the international human rights system. The controversies over indigenous peoples and development projects point to the same direction, and reflect on several juridical contentions that implicates on matters of land rights, right to self-determination, among many other. It is relevant, in this sense, to analyze the understanding of regional human rights bodies on the right to development, as well as its legal application in concrete cases. In order to sufficiently address this inquiry, it is crucial to engage in a theoretical discussion over legal approaches not only on the right to development *per se*, but also on the level of inclusion of indigenous peoples and their worldviews in the international system as a whole: it is not possible to appreciate the complexity of legal matters on indigenous peoples self-determined development, nor the relevancy of a regional human rights body endorsing or rejecting it, without covering a broader debate on the colonial history behind the creation of International Law - and the legal concepts it represents.

To this end, rather than building an extensive but simplistic description of the Court decision, we chose to approach the subject in a progressive manner, in hope of connecting the

adoption of the concept of indigenous peoples' self-determined development by regional Courts with the pertinent questionings from International Law theory. For this reason, the thesis will initially engage in a broader contextualization on critical perspectives on the International human rights system (including on what concerns indigenous peoples), before approaching current debates on development and indigenous peoples in International Law. On its turn, such debates are of great significance for analyzing the decisions of the regional Courts' in study, since they reflect on the arguments adopted by these bodies.

Following a qualitative approach, the current research engages on this debate by analyzing human rights ideas through the lens of a critical approach to International Law, with focus on indigenous peoples and development, and investigates how the Inter-American and African regional bodies decide on the matter. In Section II we will present an initial critique on classic legal theories to human rights law, pondering on its colonial undertones, and pinpointing the contribution of specific authors writing on the subject. Further, the active role of indigenous peoples' movements for decolonizing the approach given by International Human Rights Law to indigenous peoples will be covered. Section III will address the international legal treatment reserved to development in light of indigenous peoples rights', through a brief discussion on the contrasting notions of development, with particular focus on the rights of indigenous peoples and the concept of development with culture and identity. Finally, in Section IV we will examine selected cases of the Inter-American Court of Human Rights, the African Commission on Human and Peoples Rights, and the African Court on Human and Peoples Rights; the cases were singled out based on the relevancy of the bodies' decisions on the subject, as poignant precedents to the institutional interpretation given on both the negative impacts of state-endorsed development projects and a rights-based approach to development regarding indigenous peoples.

II. International Law, Human Rights, and Indigenous Peoples: the contribution of the international Indigenous Peoples' movement to the decolonization of the international human rights discourse

1. Critical theory of International Law and human rights: is human rights another chapter of colonialism?

Although critiques on the colonial control over territories have long been subject of debate, it is possible to affirm that a structured examination on the notion of colonialism itself expanded its reach since what came to be called the “decolonization era”, in the mid-twentieth century, to question the several manifestations of colonial practice in the world. A central concern of postcolonial studies is the understanding that colonial practices does not only refer to the direct rule of one (Westphalian) nation-State by another, but includes the perpetuation of political, legal, social, economic, and cultural structures that were established and fostered to sustain colonial societies. That is to say, the decolonizing process is not completed until the colonial past is revisited, engaging in a critical analysis on the lingering effects of colonial subordination. As Leela Gandhi inferred, “*postcolonial amnesia is symptomatic of the urge for historical self-invention or the need to make a new start - to erase painful memories of colonial subordination. [...] In response, postcolonialism can be seen as a theoretical resistance to the mystifying amnesia of the colonial aftermath. It is a disciplinary project devoted to the academic task of revisiting, remembering and, crucially, interrogating the colonial past.*”¹.

¹ Leela Gandhi, *Postcolonial Theory: a critical introduction*. (New York, Columbia University Press, 1998), 4.

The impact of colonizing experiences are indeed far too profound to be easily reversed, and colonial structures usually are pervasive enough to all too often perpetuate themselves once the colonial ruler is withdrawn. Naturally, this remains true for indigenous peoples, who still today continue to struggle for recognition and realisation of their rights as culturally distinct peoples. To a large extent, such struggle also includes the revisiting of legal institutions that legitimize colonial practices. As we will discuss further in the next chapter, it could be recalled how legal concepts - like *terra nullis*, *uti possidetis*, or the Doctrine of Discovery - have until so recently served to push away the legal recognition of indigenous peoples' lands, despite the fact that these concepts were flagrantly coined to justify the metropolitan rule over territories under colonial domination.

In this sense, it is crucial to have in mind the persisting colonial rationales that are embedded in International institutions when analyzing how International Law addresses indigenous issues, including within human rights institutions. In this chapter, we will briefly discuss some core ideas put forward by selected critical theorists that denounce colonizing perspectives that underlie International Law, more specifically regarding international human rights law, in order to better examine the contention regarding indigenous peoples' claims for culturally sensitive approaches to development, and how it connects to human rights instruments.

1.1. The problem of the origins of human rights ideas: the misleading narrative of human rights as the undisputed product of Western civilization

The historical evolution of Western institutions since the Modern Era, whether within Europe or over the respectively colonized regions, goes hand in hand with the creation of domination structures, within International Law, designed with the purpose of enforcing the

subjugation of the colonized population². Remnants of colonial thinking are found in several institutions, including in the International system, in such a way that they may seem only natural for the inattentive eye. This remained fairly true in a classic approach on human rights ideas, which magnifies the historical (“civilizing”³) role of Western powers and their respective canonical thinkers to the conceptualization of human rights institutions in the first half of the twentieth century. The uncritical belief on Western civilization as the exclusive birthplace (thus undisputed bastion) of higher values that today are represented by human rights is a notion that, identifiable with colonialist mentalities, puts in question the globality of human rights institutions.

The philosophical foundations of human rights, as commonly presented, would find their origin in the liberal theories developed during the Enlightenment period, with special attention to authors such as John Locke, Rousseau, and, most importantly, Immanuel Kant⁴. These ideas would trigger a process of constant humanitarian evolution, inaugurated with the advent of liberal Revolutions that took place in Europe and the Americas during the late 18th and early 19th Centuries. The French Declaration on the Rights of Man, the Constitution of the United States of America, and other pioneering documents proclaimed at the time are recognized as initial steps of an expansive movement of recognition of rights, in both geographical and qualitative terms. Several other historical milestones (for example, the Mexican Constitution of 1917, the Weimar Constitution of 1919) would then follow those revolutionary experiences, finally culminating in

² “Not long after the Marshall decisions, international law abandoned consideration of indigenous peoples as political bodies with rights under international law, yielding to the forces of colonization and empire as Western colonizers consolidated indigenous lands within their respective spheres of political hegemony and control. The major premises of the late-nineteenth- and early-twentieth-century positivist school ensured that the law of nations, or international law, would become a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples.” James S. Anaya, *Indigenous Peoples in International Law*, (New York, Oxford University Press, 2004), 26.

³ See Anaya, *Indigenous peoples in International Law*, 31-34.

⁴ An example of this classical narrative can be found in Jack Donnelly, *Universal human rights in theory and practice* (Ithaca, Cornell University Press. 2013).

the adoption of the Universal Declaration of Human Rights and the establishment of the respective international human rights system, with an esteemed contribution from Eleanor Roosevelt⁵.

Although the philosophical relevance of Western canonical thinkers to the construction of contemporary political institutions is arguably decisive - along with the historical contribution of the referred milestones for the creation of what we refer to today as the International human rights system - reality is far more complex, and that storyline is but one part of the story.

More recently, human rights authors have been posing strong counterpoints to a linear approach on human rights history, questioning the appraisal of Western modern history as the history of the evolution of human rights. According to Moyn, the narrative that identifies the origin of human rights to historical events of Western History that took place before the 20th Century (such as the United Kingdom's campaign against slave traffic, or the ideas introduced by the United States' Independence and the French Revolution) is not historically accurate⁶. Such attempt ignores the political context of historical times, and selects isolated cases in a political scenario that is closer to sheer humanitarian disaster than to a generalized and systematic defense of human rights values. Furthermore, what we understand as human rights today do not correspond to what was understood as rights in the political discourse of those historical periods. Essential elements for human rights theory were not concerns of the time. The universal reach of human rights for instance, if we remember it as the validity of human rights independently from political regimes adopted by national states', was not an element in the

⁵ For a critical review on the origins of human rights, see Stefan-Ludwig Hoffman, *Genealogies of Human Rights*, in. *Human rights in the twentieth century*, ed. Stefan-Ludwig Hoffman (New York, Cambridge University Press, 2011).

⁶ "An alternative history of human rights, with a much more recent timeline, looks very different than conventional approaches. Rather than attributing their sources to Greek philosophy and monotheistic religion, European natural law and early modern revolutions, horror against American slavery and Adolf Hitler's Jew-killing, it shows that human rights as a powerful transnational ideal and movement have distinctive origins of a much more recent date". Samuel Moyn, *The Last Utopia: human rights in history* (Massachusetts, Harvard University Press, 2010), 7.

former Declaration on the Rights of Man, which like it or not were tied to State's sovereignty - rights, therefore, were conditioned to the individuals with status as state citizens⁷.

To speak of a "history of human rights" - understood as a consistent international movement in favor of universal values common to humanity - would only make sense from the mid-20th Century, in the aftermath of the World Wars, and especially through the political activism of social movements in favor of a human rights agenda.. It is through the 1970's that human rights ceased to be a peripheral topic, not so well entrenched in world politics, to gain its own rhetorical strength of worldwide reach, improving its institutional relevance. Successful examples of this new activism that took place in the 1970's spread through different parts of the world, such as the civil confrontations against Latin-American dictatorships, the *Solidarnosc* movement in Poland, the anti-apartheid movement in South Africa, the civil right movements in the United States, etc⁸.

Similarly, it was around the 1970's that indigenous peoples from different regions, after many attempts, were able to articulate a consistent International movement claiming recognition of their existence and respect for their cultural traditions. In 1971, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was assigned to conduct the "*study of the problem of discrimination against indigenous populations*", known as the Martinez-Cobo study, triggering a process of growing pressure of indigenous representatives at the United Nations for recognition of their specific rights as peoples⁹. Not incidentally, it was through a human rights discourse that indigenous peoples would push forward their claims in the

⁷ Moyn, *The Last Utopia*, 12-14. Also, Hoffman, *Genealogies of Human Rights*, 4-13.

⁸ Samuel Moyn, *Return of the prodigal: the 1970's as a turning point in human rights history*, in *The Breakthrough: human rights in the 1970s*, org. Jan Eckel and Samuel Moyn (orgs.) (Philadelphia, University of Pennsylvania Press, 2014).

⁹ Augusto Willemsen-diaz, *How Indigenous Peoples Reached the UN*, in *Making the Declaration Work: The United Nations Declarations on the Rights of Indigenous Peoples*, ed. Claire Charters and Rodolfo Stavenhagen. (Copenhagen, IWGIA, Distributors Transaction Publisher [and] Central Books, 2009), 18-31.

International arena, leading to the approval of the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

The debate on the origins of human rights as political ideas is far from feeble. By exalting or diminishing one or another historical perspective, human rights can be associated with a particular historical tradition (i.e. Western civilization), while others are considered archaic, backward, incompatible with human values. Indeed, many have been the critiques of human rights approaches that bear a colonizing prospect, calling attention for hegemonical (and not rarely, cynical) uses of human rights instruments.

1.2. Re-thinking human rights: the critical theory on International Law appeal for a decolonizing perspective on human rights theories

Several human rights authors became concerned with the contradictions that arise from a human rights perspective that is historically and philosophically tributary to institutions that were set to legitimize colonial and imperialistic hegemonies over the respectively subdued nations. In fact, as will herein be discussed, many parallels are found between the reasonings used to justify the subjugation of entire continents and a certain human rights perspective that uncritically appraises Western traditions.

Analyzing the problem from the angle of the colonization and decolonization experiences in African countries, Makau Mutua describes how hegemonic perspectives on human rights are notably similar to previous narratives connected with the colonization project¹⁰: common to these narratives is the implicit implication that Western culture is more sophisticated and morally

¹⁰ Makau Mutua, "Savage, Victims and Saviors: The Metaphor of Human Rights", *Harvard International Law Journal*, Volume 42, Number 1, (Winter 2001): 209 - 219.

elevated than non-Western, archaic and backward cultures, which must be brought to salvation by the hands of Western actors - in other words, they all represent, in their way, the “white burden” proposition.

Such imperialistic instrumentalization of human rights’ ideology would be symbolized in what Mutua describes as the metaphor of human rights, comprehending the ‘good against-evil’ narrative in which barbaric (non-Western) states, powerless (local) populations, and benevolent (Western) institutions are projected with the respective roles of the savage, the victim and the saviour (SVS)¹¹. Again, as Mutua argues, this narrative would be embedded within a Eurocentric human rights corpus that represents a continuity with the colonial project that places actors in hierarchical positions of superiority and subordination. The author further identifies additional flaws inherent to Eurocentric human rights corpus that is represented by the metaphor, being: the exclusion of cross-cultural comprehensions, the invalidation of the universalist assertion, the neglect on how power relations between and within cultures impact human rights, and a racial connotation in which saviours are mostly white while savages and victims are generally non-white¹².

Exploring the dilemma through the lens of the SVS metaphor, Mutua proposes its reinterpretation in order to encompass the complex reality of political and cultural contexts. On what concerns the metaphor of the savage, it would represent a reflex of a classic liberal ideology that looks upon states as inherently violent and oppressive forces that must be contained, whereas they would be more of a repository of historically accumulated social practices - the real savage, in this sense, is not the state itself, but a violent imposition of a particular cultural vision that appropriates the state for the benefit of specific groups and political

¹¹ Makau Mutua, *Human Rights: a political and cultural critique* (Philadelphia, University of Pennsylvania Press, 2002) 10-11.

¹² Mutua, *Human Rights: a political and cultural critique*, 11-14.

interests¹³. Being aware of cultural particularities, its complex variables, as well as its dynamism, in this sense, is pivotal for understanding the complex chessboard where human rights violations are systematically perpetrated.

The metaphor of the victim is the central figure that gives body to the SVS narrative. The image of a degraded, helpless, powerless, primitive, almost childlike innocent that is subjected to the barbarian state is what commonly justifies the need of external intervention: the only path to overcome such victimization is benevolently enforcing the cultural norms that the already liberated ‘civilized’ nations bear. Mutua summarizes this construction of a victimized third-nation individual remembering that “the view that the ‘native’ is weak, powerless, prone to laziness, and unable on his own to create the conditions for his development was a recurrent theme in the Western representations of the ‘other’”¹⁴, pointing out how the human rights narrative can easily reproduce the colonial mentality.

On its turn, the metaphor of the savior would find its origin within the “Enlightenment’s universalist pretensions, which constructed Europe as superior and as center of the universe”¹⁵, and which informed the foundations of International Law. In this sense, the author questions the neutrality of International institutions, denouncing the little to no space given to non-Western states in their early formulations¹⁶. Human rights, as such, would be part of the imposition of Western ideology, seen as an instrument to redeem the world from non-liberal, non-European like societies.

¹³ Mutua, *Human Rights: a political and cultural critique*, 22.

¹⁴ Mutua, *Human Rights: a political and cultural critique*, 31.

¹⁵ Mutua, *Human Rights: a political and cultural critique*, 31.

¹⁶ We will discuss in the next chapter how this remains true for indigenous peoples, which, as distinct nations within colonial states, would be deliberately excluded from any representation in the International system put in place since the dawn of the Westphalian order.

Following his critical analysis over human rights institutions, Mutua explains how the dominant human rights narrative, represented in the SVS metaphor, carries an ideological backdrop that is intrinsically related to conceits of Western supremacy, albeit presenting itself as a neutral formulation. As such, the classic human rights regime would require the reconstruction of governing structures to mimic Western liberal institutions, at the expense of state sovereignty and cultural diversity¹⁷. Within this scope, ideals of liberalism, democracy, and human rights would come intimately connected, nurturing from the same roots¹⁸, and proper attention should be given to who are the ones elaborating human rights norms, and thus whose worldview they represent.

Makau Mutua's critique is a sour point of view to how human rights have often been presented at the International community. The author is deeply critical to unilateral action from Western states, and is particularly sceptical about the role of International human rights actors, namely International Organizations as the United Nations, World Bank, etc, as well as International Non-Governmental Organization. Mutua himself makes it clear that his critique is not to be understood as a complete repulse to human rights values. Rather, his objective is to discuss the problems that are identifiable within the *modus operandi* of the International human rights system, which was originally conceived within a context of undisputed Western supremacy to begin with, and are part of a larger institutional framework that is tributary to Western ideologies. His argument, the author recognizes, is for refounding the human rights narrative, taking in consideration the colonialist undertones that currently prevail and aiming for a system that is capable of respecting states' sovereignty and embracing cultural diversity.

¹⁷ Mutua, *Human Rights: a political and cultural critique*, 41.

¹⁸ Mutua, *Human Rights: a political and cultural critique*. 44-47.

By contrast, Onuma Yusaki makes an attempt to further elaborate on human rights' theories to embrace cultural diversity within its scope. Elaborating on a transcivilizational response to the admittedly Western-centric origins of International Law, Yusaki poses interesting arguments for rethinking human rights foundations and overcoming the excessive anchorage of human values on Western philosophical traditions. Similarly to Mutua, Yusaki perceives human rights as a product from modern Europe, connected to a sentiment of inexorable expansion of the modernizing values of Western civilization - an image that is widely questioned today¹⁹. Yusaki, however, goes beyond the exposure of colonialist practices embedded in the human rights discourse to question the assumed correlation of human rights values to liberal individualist European traditions, and proposes the integration of transcivilizational perspectives to human rights values.

As a starting point, Yusaki puts in perspective the assumption of the universalism of human rights within Western parameters (and as a gift from civilized nations to the rest of the world). For instance, the authors stresses how the ideals of 'rights of men' were originally denied to non-Europeans with the argument of historic, cultural, political, distinctions, and remembers the initial struggle of non-Western nations to expand the protection of those rights in spite of Western resistance²⁰. Further, the author call to mind that "every civilization had its own mechanisms to pursue the spiritual and material well-being of humanity" even if not characterized as human rights²¹. In this sense, Western-centric conceptions of the world must be overcome in order to allow for a multi-civilizational appreciation of human rights as representing universal values that are inherent to every cultural setting.

¹⁹ Onuma Yusaki, *A transcivilizational perspective on International Law* (Leiden, Martinus Nijhoff, 2010), 344

²⁰ Yusaki, *A transcivilizational perspective on International Law*, 347-349.

²¹ Yusaki, *A transcivilizational perspective on International Law*, 351.

Particular attention is given by Osuma to the reduction of the human rights discourse to liberal and individualist political rhetoric, due to Western-centric conceptions of the world - a theme which the author refers to as liberal-centrism and individual-centrism. On the earlier, Yusaki argues that while the prominence of liberal thinking on human rights have brought greater emphasis on civil and political rights, little space is admitted for addressing the negative effects of capitalism and the free market economy on the well-being of individuals and communities. Socio-economic rights for instance, in this sense, have often been reduced as a matter of future economic development, rather than a concern of structural imbalances that render people vulnerable to deprivations as a consequence of misguided policies.

Another result of the excessive focus on liberal thinking on human rights is the legalistic approach that elects the Judiciary as the primary and sole instrument for the protection of human rights, which was better designed to address civil and political rights according to Western institutions than to embrace the interdependency of human rights and also include the protection of socio-economic and cultural rights. Here, Yusaki acknowledges the cultural and historical particularities between societies, which might not have so well-established classic juridical institutions as idealized by Western liberal thought. Nevertheless, there might be other mechanisms in place that, in their way, work in favor of effective recognition and protection to human rights values within societies. Thus, recognizing the validity of these endogenous mechanisms might be a good path for addressing human rights violations more effectively, while respecting the existence culturally diverse politico-juridical institutions.

For its part, Yusaki's thoughts on individual-centrism on the human rights' discourse well explains the many misconceptions that remain over non-Western societies. States have

strongly resisted the recognition of collective rights²², which are commonly considered in frontal opposition to individual rights as depicted by classic Western political ideas. Yusaki's critique on individual-centrism retraces the origin of the characterization of humans as individuals to the disassociation of the *corps intermédiaires* during the formation of nation-States throughout modern Europe. The author argues that albeit the prevailing notion that individuals exist independently from States, they are necessarily subjected to the authority of a nation State, through the imposition of nationality, and can only exist as an individual member of the nation State²³. According to the author, it is the abstract idealization of the individual as separated and in collision with the collective (a notion that is fruit of the modernistic thinking) that lies behind the false dichotomy between an individualistic West and a collectivistic "East". For Yusaki, such dichotomy is a myth that is "based on a one-sided and falsely constructed monolithic image of the "East", the "Orient", or Asia, or Africa, etc"²⁴. Indigenous peoples were inserted into the same reasoning, it could be added: as representatives on non-Western societies, their collective structures are too often depreciated and automatically reduced to supposedly violent forms of suppression of individual rights²⁵.

Further, Yusaki recalls how the excessive focus on the notion of individuals as opposed to collectives have been counter-productive to the protection of human rights. It is so in the extent that different groups within societies (i.e. women, minorities, people under colonial rule, indigenous peoples, etc) have had their demands historically neglected, but also through the negative effects of the dissolution of traditional communities, in the name of the liberation of the

²² For an overview on the recognition of group rights in international law, see Corsin Bisaz, *The concept of group rights in international law: groups as contested right-holders, subjects and legal persons* (Leiden, Martinus Nijhoff Publishers) 2012.

²³ Yusaki, *A transcivilizational perspective on International Law*, 382-383

²⁴ Yusaki, *A transcivilizational perspective on International Law*, 385.

²⁵ For more on this debate over recognition of collective or group rights within the human rights legal framework, and a critique on the liberal mindset that views them in opposition with individual rights, see, for instance, Will Kymlickal, *Multicultural citizenship: a liberal theory of minority rights* (Oxford, Oxford University Press, 1995).

individual, without replacing the former systems of mutual support, this leading to a wide array of social problems²⁶. Finally, Yusaki remembers that the history of human rights has demonstrated that it is through the collective action from people bonded by ties of collective consciousness (whether ethnicity, gender, religion, culture, class, etc) that people have sought to achieve realization of their human rights²⁷.

Yusaki's offers an interesting analysis of the ideological backdrop that so often is behind a Western-centered human rights discourse. His reflections seem appropriate for understanding the context in which indigenous peoples have mobilized for the recognition of their worldviews, framing it as a human rights matter. Indeed, it is difficult to understand the rationale of indigenous peoples rights without bearing in mind not only the ideological underpinnings of the dominant human rights discourse, but also the need of overcoming it for reaching a transcivilizational human rights perspective, more adequate for postcolonial States and societies. For Yusaki, the 1992 Vienna Declaration (along with the 1946 Universal Declaration and the 1966 Covenants) is a good starting point for reaching a global consensus on that sense. However, the author recognizes that the major international human rights instruments to a large extent represent the compromises between States by the time of their adoption, and that other actors must be involved in the elaboration of the content of human rights; reconceptualizing human rights for a transcivilizational perspective, therefore, requires the inclusion of variant worldviews represented in cultures, religions, etc, for a full protection the value of human beings against "violent forces of various kinds"²⁸.

If a critical analysis of the classic human rights discourse as part of a Western, modern, colonial mentality unveils an important reflection of the political implications that fall behind its

²⁶ Yusaki, *A transcivilizational perspective on International Law*, 385-386.

²⁷ Yusaki, *A transcivilizational perspective on International Law*, 387.

²⁸ Yusaki, *A transcivilizational perspective on International Law*, 387-410.

automatic acceptance as universal - and thus imposable to other cultures and societies -, to focus exclusively on the Western paradigm as the sole representative of human rights may omit other possible interpretations for the universality of human rights values. Yusaki himself alerts to this risk, arguing that to reduce the debate to a “West vs. East” dilemma falls into the trap of interpreting the world through Western-centric notions, since the conception of an “East” as a unison bloc, diametrically opposed to Western civilization in political and cultural terms, is *per se* a fruit of Eurocentrism and colonialism.

On his turn, Abdullah Ahmed An-na'im elaborates on how to achieve a global consensus on common values of humanity through a cross-cultural human rights perspective. Aware of imperialist impulses within human rights discourses, An- nai'im is primarily devoted to recognize the existence of human values within every culture, and glimpses a conceptualization of a human rights theory that is capable of preserving self-determination²⁹ without withdrawing from an ideal of universal validity. For its remarkable envisioning of the possibility of distilling the content of human rights through inter-cultural dialogue, we believe that An-na'im's theory is of great value for understanding the logic of indigenous peoples' rights within the scope the International human rights' framework, including regarding the right to development which is our focus.

An-na'im's is particularly concerned with transcending imperialism, understood as the human impulse to force their will and values on others and establish relationships of domination and subordination. Such impulse, witnessed on different levels, would be a primordial obstacle to be surpassed in order to effectively redress physical and emotional vulnerabilities that all human beings may be subjected to. For this purpose, the author stresses “the need to organize our social

²⁹ It should be noted that the author, when mentioning self-determination, does not necessarily refers to indigenous peoples per se. Acknowledging the particularities of the right to self-determination for the latter, nevertheless, his ideas are arguably applicable for the matter of indigenous peoples as well.

and political affairs in ways that are most conducive to liberating each and every human being from fear, which is the cause of all inhibition, the father of all moral perversion and behavioral distortion”³⁰. Therefore, far from accepting violent hierarchical structures inevitable to humanity, An-na’im understands domination as a vicious cycle that can be avoided by “creating conditions of mutual acceptance and respect”³¹.

Bearing in mind the described possibility of actively establishing non-hierarchical virtuous relationships among humans (and societies), An-na’im argues that it is possible to conceive human rights notions that better represent the ideal of shared values that human beings are entitled by virtue of being human - what the author describes as human values. Within his rationale, for achieving this it is necessary to construe a cross-cultural consensus on these values, an open process that implies constant redefinition and refinement of the content of human rights. For the author, therefore, human rights must not correspond to a plastered ideological concept, but an ongoing effort to empower people to respond to shared vulnerabilities that are empirically experienced³².

The concepts of citizenship and self-determination become key to this vision of human rights: while the first is viewed as the plurality of senses of community that grounds emancipatory claims, the latter is recognized as the means for overcoming imperialism. For An-na’im, it is through the exercise of citizenship and self-determination that the content of universal human values can be legitimately defined, aspiring for a wide consensus with extensive participation of the concerned. It is through this process of consensus building that it is possible to accept a concept of universality that is “truly inclusive of all human beings as active subjects

³⁰ Abdullah Ahmed An-na’im, *Transcending imperialism: human values and global citizenship* (Berkeley, University of California, 2010), 76.

³¹ An-na’im, *Transcending imperialism: human values and global citizenship*, 79.

³² An-na’im, *Transcending imperialism: human values and global citizenship*, 83-86.

in their own rights, not mere objects of the universalizing projects of others”³³. Essential, in this sense, is the reform of International institutions through participation and consensus building, opening more space for cross-cultural dialogues and better representing groups that were formerly excluded from the decision table on human rights concerns.

The experience of indigenous peoples at the United Nations, culminating with the UNDRIP, seen in these terms, might appear as a good practical example of how an inclusive negotiation process on the content of human rights, however challenging, is attainable in the long-run. Resulting from years of difficult negotiations between indigenous representatives and states, the UNDRIP is a culmination of a process of confronting the colonizer’s perspectives on the international system, and brings to light indigenous peoples’ worldviews and takes their perspectives into consideration to define how human rights instrument must apply in order to fully protect their self-perceived ideas on human dignity from violations that constantly threaten their existence³⁴. However imperfect and incomplete the work of the UNDRIP may be, it is, on this scope, undeniably a large step towards a human rights perspective that is capable of conciliating cultural diversity with universality in more horizontal terms.

Relevant to mention, finally, An-Na’im argues that the active role of local and global civil societies, as social networks that mediate between the power structures typical to modern States and the political-social realm of peoples, is of great relevance for reaching a world without imperial dominations³⁵. While working politically as a democratic collective, both local and civil societies would be a mechanism for people to exercise their self-determination according to their particular worldviews and concerns.

³³ An-na’im, *Transcending imperialism: human values and global citizenship*, 87.

³⁴ See, for instance, Julian Burger, . *The UN Declaration on the Rights of Indigenous peoples: from advocacy to implementation in Reflections on the UN Declaration on the rights of indigenous peoples* ed. Stephen Allen and Alexandra Xanthaki (Oxford, Hart Publishing, 2011).

³⁵ An-na’im, *Transcending imperialism: human values and global citizenship*, 92.

Similarly to An-na'im, Boaventura de Sousa Santos argues for the elaboration of a truly multicultural approach to human rights ideas. Also attentive to the deleterious impacts of an excessively Western-centric formulation of human rights' universalism, Santos recalls that such human rights discourse is not exempt from being settled in premises that are not only culturally specific, but politically biased. In this sense, he presents an analytical frame on globalizing forces, in order to reaffirm the emancipatory potential of human rights through progressive policies that are at the same time globally comprehensive and locally legitimized.³⁶ In this scope, the portuguese author traces a clarifying portrait of the globalization processes, distinguishing them according to the power relationships implied within each of them³⁷. For instance, the most trivial perception of the globalization phenomenon - the process in which a specific cultural circumstance is able to extend its influence to the entire globe, characterizing others as local - can be perceived as the successful globalization of determined localism, meaning that all global phenomena would have a local root. In this sense, it is impossible to speak of globalization without looking at its inherent local aspects and repercussions.

Following this rationale, Santos classifies the existing globalization phenomena between *hegemonical* (broadly corresponding to what the above-quoted authors referred as imperialistic impulses) and *counter-hegemonical* (following the multicultural, trans civilizational approach to the globalizing experience). Within the hegemonic examples of globalization, the author recognizes what he describes as *globalized localism* and *localized globalism*. Globalized localism and localized globalism are two interconnected knits at the world-system, and can be understood as two faces of a same coin: whereas the first refers to the successful globalization of a local circumstance (i.e. the global adoption of the technical regulations upheld by a specific

³⁶ Boaventura de Sousa Santos, "Por uma concepção multicultural de direitos humanos", *Revista Crítica de Ciências Sociais*, nº48 (Junho 1997): P. 13.

³⁷ Santos, "Por uma concepção multicultural de direitos humanos," 15.

state), the second represents the impact of transnational practices and imperatives at the local level.

Manifestly, indigenous peoples are too commonly among those affected by localized globalism, too often having to resist rampaging forces that move forward towards their (so-to-speak) local lands, resources, and cultures. As Santos's analysis suggests, such impacts do not come as an automatic, inevitable phenomenon of modernity, but are the result of deliberate activities undertaken by several actors, including states, individuals, private companies, multinationals, and even international organizations, who thrust upon indigenous peoples' communities and their territories to push forward projects that entail a culturally hegemonic rhetoric on progress and development³⁸.

As to the counter-hegemonic forms of globalization, Santos considers that they emerge from the intensification of global interactions, but transcending the logic of the *globalized localism* and *localized globalism*. In this sense, the transnational organization of nation-States, social groups, classes, etc, that are subjugated by domination forces worldwide opens way to wide international articulations in favor of alternative, non-imperialistic approaches to the world-order - they are what the author defines as *cosmopolitanism*.³⁹ And finally, Boaventura Santos identifies as non-hegemonic the emergence of themes that are global by nature and which demands the common cooperation of the international community. Such themes are referred by the author as *common heritage of mankind*, and encompasses concerns with the sustainability of

³⁸ "There is mounting evidence that the phenomenon of globalization has been devastating to indigenous peoples and their communities, lands and resources. Globalization has become a primary cause of conflict between indigenous peoples and others, including transnational corporations (TNCs), the World Bank (WB), International Monetary Fund (IMF) and the Overseas Development Agencies (ODAs). Current manifestations of globalization are based on the premise that the best way to achieve universal economic prosperity is through a single worldwide system of trade and financial rules that promotes corporate large scale export-oriented commercial production such as commercial mining and industrial monoculture agriculture." United Nations, Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (New York, United Nations, 2009) (UN doc. ST/ESA/328), 229.

³⁹ Santos, "Por uma concepção multicultural de direitos humanos," 17.

human life, preservation of forest areas, monitoring of ocean floors, exploration of outer space, etc.

From his analysis of the globalization phenomena, Boaventura Santos suggests that, as long as universality is conceived from the formulations of a particular hegemonic culture, human rights will operate as *globalized localism*, thus representing an imperialist force, lacking local legitimacy and failing to have emancipatory effects. What should be aimed instead, is for human rights to operate as a form of *cosmopolitanism*, with multicultural approach capable of reaching at the same time global scope and local legitimacy (both seen as attributes of a counter-hegemonic globalization)⁴⁰.

Santos sets five premises for what would be a consistent transformation of the human rights narrative from a hegemonic to a counter-hegemonic approach. They are: (i) overcoming the universalism vs. cultural relativism debate, by establishing a intercultural dialogue on isomorphic concerns, and by distinguishing between the conservative and progressive trends that every culture carries, thus inducing to a maximizing (rather than minimizing) expansion of the values recognized and protected by the international community; (ii) acknowledging conceptions of human dignity within every culture that are not necessarily framed as human rights, in order to identify the referred isomorphic concerns (themes that are mutually intelligible); (iii) understanding that all cultures without exception are incomplete and problematic in their conception of human dignity; (iv) understanding that all cultures have different versions of human dignity, some more inclusive⁴¹ and open than others; and (v) all cultures tend to

⁴⁰ Santos, “*Por uma concepção multicultural de direitos humanos*,” 18-19.

⁴¹ Boaventura de Sousa Santos employs the expression “reciprocity circle” to explain how cultures may differ in terms of which social groups are included or excluded from their conceptions of human dignity.

distinguish people and social groups according to competitive principles (principle of equality or principle of differentiation) of hierarchical belonging⁴².

The thoughts of the other mentioned authors, as well as others, deserve a greater level of discussion and analysis in order to adequately highlight their contribution to the debates over the colonialist trends of some of the human rights agenda and to the formulation of alternative multicultural approaches. Within the scope of our study, however, the selected works appear as a relevant theoretical ground to better understand the legal and political context of the international articulation of indigenous peoples' movements in favor of a culturally-sensitive transformation of the human rights system. In our view, the international mobilization of indigenous peoples represents a relatively successful case of the construction of a multicultural human rights narrative that is cosmopolitan and counter-hegemonic, in response to the negative impacts of *localized globalisms*, following Santos' definitions. Through constant mobilization in domestic, regional and international levels, the indigenous peoples were able to open space for expanding the recognition of their cultural specificities, and claim for a culturally sensitive interpretation of the international human rights instruments.

2. Indigenous Peoples and International Law

Indigenous societies have constantly been affected, indirectly to say the least, by the historic process that explains the creation of the modern international system. The creation of an international legal framework for the protection of indigenous peoples from violations historically suffered, in this sense, emerges as a struggle to push back legal and political institutions that were put in place to maintain the hegemony of European states (and their

⁴² Santos, "*Por uma concepção multicultural de direitos humanos*," 21-22.

successors post-independence) over colonized societies⁴³. This contradiction between classic international law and the protection of indigenous peoples rights, as will be explored in the next paragraphs, is one key element to the comprehension on legal grounds of the intrinsic conflicts involving indigenous peoples and development projects.

2.1. The historical status of indigenous peoples before the (European) International system

As we have seen, a critical analysis of the International legal framework, including what concerns human rights, points out hegemonical and exclusionary perspectives disguised within the conception of an international system that has served the interests of powerful Western metropolitan states (and the politically dominant groups within those states) - as redundant as it may appear, it should never be forgotten that indigenous peoples usually figure among the most historically marginalized by hegemonical projects endeavored by colonialist societies, through dispossession of their lands, deprivation of their cultural particularities, and exclusion from formal participation in society. Such marginalization, is largely reflected through the elaboration of the modern International system and its respective international norms, which followed conceptions on indigenous peoples that speak for the colonizers' worldviews and their political and economic interests⁴⁴.

The establishment of international norms and customs designed to legitimize colonial practices perpetrated by past colonial powers against indigenous peoples dates back from the

⁴³ Anaya, *Indigenous peoples in international law*, 56-58.

⁴⁴ "The engagement of international law with indigenous, non-European 'others' throws into relief contemporary indigenous claims, both against and on the basis of that system. Indigenous law has persistently struggled to position indigenous, non-European 'others' in relation to a set of European-derived assumptions, principles and practices. The approach of the personality of indigenous peoples moved from basic forms of recognition through a series of benevolent or disparaging notions, to the negation of indigenous societies and loss of international personality. (...)" Patrick Thornberry, *Indigenous peoples and human rights*, (Manchester, Manchester University Press, 2002), 85.

early times of Western maritime explorations⁴⁵, and continued to function after the independence of former colonies. Although during the Renaissance era scholars as Francisco de Vitoria and Hugo Grotius argued for some level of recognition of natural rights - including land rights - of indigenous peoples encountered during the European colonial expansion, indigenous societies would not be perceived with the same status in International Law as hierarchical European states, and a ‘just war’ would be considered enough for European states to claim rights over indigenous peoples’ territories⁴⁶.

As it is known, it would be only during the Westphalian Period, however, that the foundations of our contemporary international system would be set, largely following liberal doctrines of the time and anchored in a notion of state sovereignty that ultimately excluded societies that were organized as political entities distinct from the European standard of an ideal state⁴⁷. In fact, International Law studies of the time would conveniently conclude that the most ‘developed’ form of political organization would be represented by European states, thus classifying all civilizations that deviated from this model as under-civilized, destined to follow a historical path that unequivocally leads them to ‘develop’ into European-like societies⁴⁸.

Specific instruments, customs, etc., would be elaborated to translate such reasonings into practice, creating an institutionalized system, both domestically and internationally, that

⁴⁵ “In the formative period of international law the peoples of the New World were caught up in debates which had origins outside their experience. The debates did not arise in consequence of indigenous assertions of right, but centered on the nature, scope and justification of rights which others claimed over them. (...) While the complex nexus of references refined the essence of a sixteenth-century political and intellectual system (which can be anachronistically styled ‘international law’ only for the ease of reference), the law thereby distilled was at once Eurocentric, Christian, provincial and aggressive in its incorporation of those who played part in its making” Thornberry, *Indigenous peoples and human rights*, 64.

⁴⁶ Mattias Ahren, *Indigenous Peoples Status in the International Legal System* (Oxford, Oxford University Press, 2016), 8-10.

⁴⁷ Ahren, *Indigenous Peoples Status in the International Legal System*, 10-15. See, additionally, Mark Mazower, *End of civilization and the rise of human rights in Human rights in the twentieth century* ed. Stefan-Ludwig Hoffman (New York, Cambridge University Press, 2011).

⁴⁸ Ahren, *Indigenous Peoples Status in the International Legal System*, 14.

corroborates with this germinal idea of an assumed superiority of Western civilization that serves to justify land expropriation and forced assimilation of non-conforming cultural systems. Evidently, as we have been arguing, such system was not automatically deconstructed with independence and decolonization processes.

The Doctrine of Discovery, inaugurated by the 1455 papal bull *Romanus Pontifex* to endorse the expropriatory and genocidal colonial projects of European monarchies in the newly discovered lands in name of Christendom⁴⁹, has been applied until so recently by ex-British colonies, including as a foundational part of the United States federal Indian Law system⁵⁰. Similarly, the *terra nullis* doctrine was largely employed by European states in international law to oversee indigenous peoples as traditional occupants of their lands and, denying their collective property rights and claim control over their territories and resources⁵¹. As colonies would gain independence, the theory of *uti possidetis* would serve to preserve former colonial borders, transferring the formal control of indigenous lands to the settled population represented by the newly independent state, and maintaining indigenous peoples' exclusion from the both domestic or international systems⁵².

Evidently, the demise of the 19th Century International order set by European powers with the Peace of Westphalia did not represent the falldown of such rationale. Albeit some attempts were made to break these philosophical traditions in international law, the doctrines underpinning the Westphalian system would still prevail as the basic foundations of the

⁴⁹ Tonya Gonnella Frichner, *Preliminary study of the impact on indigenous people of the international legal construct known as Doctrine of Discovery* (Permanent Forum on Indigenous Issues, Ninth Session. New York, 19-30 April 2010, UN Doc. E/C.19/2010/13), 6.

⁵⁰ In the *Johnson v. McIntosh* case, indeed, the United States Supreme Court ruled that, as non-Christians, indigenous peoples would not have the right to be organized as sovereign nations, and thus to have control over their lands, enabling the United States Government to exploit indigenous peoples' lands and resources. Frichner, *Preliminary study of the impact on indigenous people of the international legal construct known as Doctrine of Discovery*, 13.

⁵¹ Ahren, *Indigenous Peoples Status in the International Legal System*, 16-18.

⁵² Ahren, *Indigenous Peoples Status in the International Legal System*, 19.

International system, including on what regards indigenous peoples' self-determination and the recognition of their control over their lands and resources⁵³. In spite of the timid steps taken by the League of Nations, to protect national ethnic minorities for instance, the institution considered that indigenous peoples lacked capacity to hold rights over their lands, and to such degree upheld the *terra nullis* doctrine as an international principle⁵⁴. The aftermath of World-War II and the creation of the UN system, on its turn, better represented the reemergence of classic liberalism (projected in an individual-centered approach to human rights) than an opening of the international system to culturally distinct traditions. Although some instruments, such as the 1948 Genocide Convention and the 1966 International Covenants indicated some level of concern with collective entities, Western states would be very weary of recognizing collective rights, and the interpretation that initially prevailed would be one that was faithful to the belief that individual rights would suffice.⁵⁵.

In short, the foundations of the international order of today are largely rooted in doctrines that not only were blatantly designed to assert the domination of colonizers over colonized peoples, their territories and resources, but also deemed non-Europeanized societies as culturally inferior and thus not worthy of bearing the same legal prerogatives. Although the Post-World War II International system underwent meaningful transformations through the late 20th and early 21st Centuries, it is important to bear in mind that it is still widely based on the same principles that supported (and support) the many atrocities endeavored by colonial projects across the globe. Nevertheless, these traits were not left uncriticized, and continuous struggles have been relatively successful to push forward transformations in the international agenda, at least on what concerns the level of recognition of human rights.

⁵³ Anaya, *Indigenous peoples in international law*, 47-54.

⁵⁴ Ahren, *Indigenous Peoples Status in the International Legal System*, 19-23.

⁵⁵ Ahren, *Indigenous Peoples Status in the International Legal System*, 26-33

2.2. Indigenous Peoples in the contemporary international system

From the last decades of the 20th Century, many indigenous peoples began articulating internationally in favor of the recognition of their rights as culturally distinct nations within states. As a matter of safeguarding their cultural and physical existence, indigenous leaders faced the challenge of “explaining to the world the specificities of their cultures, including legal systems, customs, languages, spirituality, worldviews, concepts of economic, social, cultural and political development, traditional knowledge systems and other aspects of their ways of life that form the basis of their collective sense of who they are and what their vision is for the future”⁵⁶.

By the 1970’s, the human rights violations suffered by indigenous peoples would still be seen as a matter of humanitarian ‘kindness’ to civilizations destined to disappear through assimilation⁵⁷, and from the beginning states were very resistant to recognize indigenous societies’ rights as peoples. However, the organization of local struggles into an international indigenous peoples’ movements with the capability to interact at the United Nations, along with a momentous political shifts in several countries, would lead towards effective changes in international human rights law regarding indigenous peoples⁵⁸.

Sheryl Lightfoot argues about the transformative nature of the global Indigenous politics within the realm of international relations, forcing to rethink the above-mentioned structure in order to reach postcolonial completion. According to the author, indigenous perspectives have

⁵⁶ Elsa Stamatopoulou, *Taking cultural rights seriously: the vision of the UN Declaration on the Rights of Indigenous Peoples* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* ed. Stephen Allen and Alexandra Xanthaki (Oxford, Hart Publishing, 2011), 387–412.

⁵⁷ Stamatopoulou, *Taking cultural rights seriously: the vision of the UN Declaration on the Rights of Indigenous Peoples*, 387–412

⁵⁸ Stamatopoulou, *Taking cultural rights seriously: the vision of the UN Declaration on the Rights of Indigenous Peoples*, 387–412

been a relevant force to question and rethink matters concerning the state, decolonization, liberalism, diplomacy and Westphalian sovereignty⁵⁹, to the point of going beyond restructuring Indigenous-state relations and opening space to rethink new global political order as a whole⁶⁰. Also approaching the matter, writing on the transformative impulse of the pan-Mayan movement, Kay B. Warren expresses the inherent intent of indigenous peoples movements to expose the contradictions of a political system that tends to marginalize large portions of the population, by embracing formal egalitarianism whilst unable to recognize multifaceted aspects between social groups coexisting within a state⁶¹. James S. Anaya, on his turn, explains the political path that the indigenous peoples' movement undertook in parallel with recent transformations of the international system since the late nineteenth century - from the mobilization of Levi General Daskaheh at the League of Nations to the creation of the Permanent Forum on Indigenous Issues at the United Nations -, attesting its contestatory vigor in face of the exclusionary traditions found in the international legal framework⁶².

In this sense, the international indigenous peoples movement emerges as a unique counter-hegemonic force in the multilateral fora, confronting colonial structures that still prevail in the International system and pressuring for alternative visions on global political relations⁶³. In

⁵⁹ Sheryl Lightfoot, *Global Indigenous Politics: a subtle revolution* (Routledge, New York, 2016), 6-11.

⁶⁰ "As Anaya (1996) articulates, Indigenous thought ultimately promotes unity among diversity and, as a post-colonial alternative, represents a more human-based foundation to political relations than the current Western liberal construction of states and the international order. I take this argument even further: Indigenous political thought not only informs the future direction of Indigenous-state relations, but because the changes called for in the implementation of Indigenous rights are so substantive and strike at the fundamentals of the current international system, global Indigenous politics is subtly helping to lead the way to an entirely new global political order." Lightfoot, *Global Indigenous Politics: a subtle revolution*, 10-11.

⁶¹ "For movements that seek to mobilize around indigenous identity in Latin America, the goal is to expose the contradictions inherent in political systems that embrace democratic egalitarianism yet, by promulgating monoethnic, monocultural, and monolingual images of the modern nation, epistemically exclude major sectors of their populations. The political mainstream has often cast radical assimilation as the logical way to resolve the "ethno-national" problem and insure national unity." Kay B. Warren, *Indigenous movements and their critics: Pan-Maya activism in Guatemala*, (Princeton, Princeton University Press, 1998), 5.

⁶² James S. Anaya, *International human rights and indigenous peoples*, (New York, Aspen publishers, 2009), 3-15.

⁶³ Lightfoot, *Global Indigenous Politics: a subtle revolution*, 89.

their case, one that is sensible to indigenous ways of life and is able to protect their right to hold their own values, traditions, cultural beliefs, social structures, against the assimilating (and annihilating) pressures of external society, whether represented by the state or by private actors.

III. Indigenous Peoples and (the right to) development: towards a culturally sensitive approach on development

Since their early articulations in the 1970's, indigenous peoples movements have criticized the cultural biases of the Western-centric perspectives on development⁶⁴. As discussed above, the expansion of Western economic systems is intrinsically linked to perceptions of inferiority over societies that deviate from European paradigms of 'progress', operating in a continuous effort towards hegemonic globalization. On the mainstream narrative of civilizational progress, indigenous peoples' ways of life are commonly portrayed as backward, primitive, savage, remnants of the past, deemed either to disappear completely or to become 'civilized' through modernization⁶⁵. Through the process of capitalist expansion, therefore, not only discriminated for their cultural distinctiveness, they are also directly affected by numerous projects that, under the tag of development, frequently result in land-grabbing, destruction of sacred sites, displacement, mass-killings, etc. While resisting human rights violations and

⁶⁴ Karen Engle, *The elusive promise of indigenous development* (London, Duke University Press, 2010), 183.

⁶⁵ "Development paradigms of modernization and industrialization have often resulted in the destruction of the political, economic, social, cultural, education, health, spiritual and knowledge systems of indigenous peoples. There is a disconnect between dominant development paradigms and indigenous peoples due to the way indigenous peoples are often viewed. For example, indigenous peoples 'development' is understood to be their assimilation into the so-called 'civilized world'. Also, indigenous peoples' cultures and values are seen to be contradictory to the values of the market economy, such as the accumulation of profit, consumption and competition. Further, indigenous peoples and their culture are seen as 'obstacles' to progress because their lands and territories are rich in resources, and indigenous peoples are not willing to freely dispose of them. Permanent Forum on Indigenous Issues. *Report on the ninth session (19-30 April 2010)* (United Nations, Economic and Social Council, 2010. UN doc. E/2010/43-E/C.19/2010/15), 2.

struggling for physical and cultural survival, indigenous peoples and their traditional ways are often accused of standing in the way of development for their opposition against the deleterious effects of such projects⁶⁶. On this regard, the matter of development (or, by contrast, ‘indigenous’ development), becomes an emergency issue for the protection and realization of human rights of several indigenous peoples of the world still today.

1. What is ‘development’? Reflections on persisting colonialist practices through development policies in light of the right to development.

The perception that societies which do not fit a certain standard of living are underdeveloped is, by itself, tributary to aforementioned Western-centric traditions of thought that arbitrarily categorized societies within hierarchic statuses of most and less civilized⁶⁷. In effect, the origins of the notion of development, if understood as the civilizing ideal of ‘progress’ that must be irresistibly pursued, can be traced back to historical circumstances from eighteenth-century Europe, when “*polarities between ‘primitive’ and ‘civilised’, ‘backward’ and ‘advanced’, ‘superstitious’ and ‘scientific’, ‘nature’ and ‘culture’ became commonplace*”⁶⁸ as a consequence of cultural revolutions from the “Enlightenment”. Through the process of Europe’s capitalist expansion and of the associated colonialist projects, such dichotomies, once more, served to legitimize imperial conquest, as ‘natives’ would be identified on the side of the backward and primitive, while colonizers assumed the role of driving agents of ‘progress’,

⁶⁶ Engle, *The elusive promise of indigenous development*, 185-186.

⁶⁷ “When the term [development] was used by President Truman in a speech in 1949, vast areas of the world were therefore suddenly labelled ‘underdeveloped’ (Esteva, 1993: 7). A new problem was created and with it the solutions; all of which depended upon the rational-scientific knowledge of the so-called developed powers (Hobart, 1993: 2).” Katy Gardner and David Lewis, *Anthropology and Development: challenges for the twenty-first century* (London, Pluto Press, 2015), 10.

⁶⁸ Gardner and Lewis, *Anthropology and Development: challenges for the twenty-first century*, 10.

translated mainly into promoting economic gains for the latter and transplanting European-style culture and institutions⁶⁹.

The aftermath of colonial empires, however, did not mean a comprehensive revision of such colonial paradigms on economic and cultural advancement. On the contrary, it is notorious how development policies are still today largely connected with a wide range of violations of human rights, especially to indigenous communities, even when designed with the best of intentions. In this respect, intersecting the matter of development with the ambit of rights reveals itself to be a complex task. What would be a rights-based understanding of development, and to which extent could it be considered a right on its own? What constitutes such right, and which conception of development does it refer to? Who is entitled to it, and under what conditions is it realized? More importantly: who benefits from a given perspective on development and who is left apart?

In fact, the dilemma of the contradictions between human rights and development transcends indigenous peoples' issues, and has been a substantive matter of International concern through the second half of the last century. As affected populations retrieved scarce benefits from development models that put excessive focus on economic growth *per se*, it became evident that a more humane perspective on development should be sought if the goal is to effectively address socio-economic afflictions rather than ensure ever-growing profits for private actors. The teachings of Amartya Sen, on this scope, have offered a pivotal contribution to such debate while defending the inclusion of ethical stances to economic activity. Coining a conception of well-being that focuses on the expansion of individuals' capabilities, Sen's argument points to a reconciliation between democracy and human rights. As such, development should follow an emancipating model that accommodates societies' internal priorities while

⁶⁹ Gardner and Lewis, *Anthropology and Development: challenges for the twenty-first century*, 11-12.

allowing them access to the basic means for fully developing their human capacities - Sen emphasizes the need for accessible opportunities in order for people to effectively enjoy their freedom of choice and thus fully exercise their citizenship⁷⁰. Development, following Sen's critique, can be understood as the expansion of human capacities by removing structural deprivations, in order for people to freely pursue their well-being and achieve better standards of living.

.In the International stage, the interface between development and human rights was increasingly debated with the emerging participation of the so-called 'developing states' throughout the decolonization processes of the 1950's and 1960's, and the recognition of a human right to development came to be adopted in the 1970's through both its inclusion in the 1981 African Charter on Human and Peoples' Rights and the adoption by the UN General Assembly of the 1986 Declaration on the Right to Development⁷¹. While the first document recognizes the interdependency between civil and political rights and economic, social, and cultural rights as essential for realizing the right to development, it does not offer a specific definition on the right to development *per se*. The latter, nevertheless, states in its preamble that "*development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom*". Further, the Declaration on the Right to Development introduces fundamental facets to the right in question, comprehending peoples⁷²,

⁷⁰ See Amartya Sen, *Capability and Well-being*, in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford Scholarship Online, 2003).

⁷¹ Kamrul Hossain, "The realization of the right to environment and the right to development in respect to the Arctic", *The yearbook of polar law* 3.1, pp. 129-153, (2011), 135.

⁷² It must be noted that, at a time where the risk of secession of newly independent states was a major concern in the International community, the term 'peoples' was applied in International law as a synonym of the aggregate

right to self-determination and sovereignty over their resources, the centrality of the human person as the beneficiary of development, a shared responsibility of humans over individual and collective development, and the State as the primary duty-bearer for realizing of the right to development.

Notwithstanding the fact that the UN Declaration the Right to Development is not a legally binding instrument, it has decidedly influenced future negotiations around development, being mentioned in several major UN documents and orienting the activity of states, the International community, and regional and local actors for its realization within the human rights framework⁷³ - the UN Millennium Development Goals and the more recent UN Sustainable Development Goals agendas, in this vein, come aligned with such aspiration of reaching development through the realization of basic human rights of peoples and individuals.

That is to say, development, if understood as a right enshrined within the International legal system, has drifted from a simple matter of stimulating economic activity to comprehend the means to effectively realize the full spectrum of human rights, whether civil, political, economic, social or cultural. In this vein, development is presented as a “*‘vector’ of human rights, meaning that the development process must realize all human rights in an interdependent and integrated manner*”⁷⁴, and “*a violation of any one of the human rights that make up the right to development [...] is a violation of the composite right to development*”⁷⁵, meaning that the

population of a national state, excluding the recognition of indigenous communities as societies distinct from the culturally dominant population living within the same state. The adoption of the term ‘peoples’ to refer to indigenous, and the respective adjustment of legal regimes on collective rights, would again result from long struggles of the indigenous peoples movement for the recognition of their right to exist. See Ahren, *Indigenous Peoples Status in the International Legal System*, 96-103.

⁷³ Hossain, “The realization of the right to environment and the right to development in respect to the Arctic”, 135-136.

⁷⁴ Meredith Gibbs, “The right to development and indigenous peoples: lessons from New Zealand”, *World Development* Vol. 33, No 8, pp 1365-1378 (2005), 1367.

⁷⁵ Gibbs, “The right to development and indigenous peoples: lessons from New Zealand”, 1367

right to development “concerns the process of development as much as the outcomes of development”⁷⁶.

Still, challenges remain concerning the inherent contradictions that arise on the ground when development projects are designed and implemented, especially as they continuously tend to uncritically focus on the promotion of a shortlist of economic activities as the incontestable means to achieve development. Garavito, Kweitel and Waisbich⁷⁷ identify four areas of tension regarding the prevailing model of economic development and the realization of human rights, being: the contrasts between economic growth and human well-being; the environmental dilemma and the limits to realizing rights through the expansion of consumption; the matter of private property rights *versus* the collective managerial models for common goods - including collective property and indigenous lands; and the disputes and antagonisms that arise between those that benefit from and those that are negatively affected by a given development project (i.e: private actors and employed workers vs. indigenous peoples and local communities), as well as from disagreements on priorities and strategies regarding policies on development (i.e: income growth vs. environmental protection). The authors conclude that, on what concerns a human rights agenda on economic development, no consensus have been reached, and advise that greater attention must be given to the specificities of local contexts, while maintaining space for transnational articulation based on solid human rights principles.

For that matter, identifying the best strategies for development policies can be highly contentious when looking at their effects on the ground. Along this line, many intricacies hide within top-down, culturally-hegemonic approaches to development, which often represent a rough transplantation of development practices, hoping to reach the amelioration of broad

⁷⁶ Gibbs, “The right to development and indigenous peoples: lessons from New Zealand”, 1367.

⁷⁷ Rodríguez César Garavito, Juana Kweitel, and Laura Trabjer Waisbich, “Development and human rights: some ideas on how to restart the debate”, *Sur - International Journal of Human Rights*, Volume 9, Issue 17 (2012). 6-7.

statistic indicators rather than dealing with societies' real, structural problems. Rising levels of inequalities and exclusion, stratified social marginalization, discrimination of specific groups, gendered layers, are among challenges that have often been left unaddressed by centralized development policies that fail to look upon such socio-political complexities that come intertwined⁷⁸.

On what concerns indigenous peoples, for instance, it is evidenced that without adequate data collection and disaggregation, the high levels of inequality, discrimination, and marginalization of indigenous persons and groups remain invisible and unaddressed. Negative impacts that result from development policies - such as land-grabbing, forced displacement, cultural loss, health crisis, disruption of communal institutions, environmental crises - are frequently overlooked by policy-makers, and indigenous communities are regarded as obstacles to development in their political attempts to raise awareness to those impacts. At the same time, sensitive matters that are specific to indigenous peoples' well-being are largely disregarded, including effective participation in decision-making, health of communities and ecosystems, use of traditional knowledge, etc.⁷⁹

An additional facet of the inherent contradictions of development issues that must be highlighted is its intersection with environment-related issues. It is arguable that a good level of consensus has been reached at the International level in terms of recognizing the links between human rights and the environment, including with regards to development activities. From the Stockholm Declaration of 1972, through the paramount 1992 United Nations Conference on Environment and Development (Earth Summit), and advancing within several other International

⁷⁸ Gardner and Lewis, *Anthropology and Development: challenges for the twenty-first century*, 91-97

⁷⁹ On the problem of the inadequacy of the usual development indicators to the context of indigenous peoples' right, and the matter of adapting them indigenous peoples' realities, see Tebtebba Foundation, *Indicators Relevant for Indigenous Peoples: A Resource Book* (Baguio City, Philippines, 2008).

instruments and debates, matters of climate change and sustainable development are largely recognized as one of the central challenges of development today. Nevertheless, debates on the contemporary environmental crisis and the right to a healthy environment are still highly contentious, comprehending numerous and contradictory approaches and ideologies, with sparse reference on International instruments to a right to environment.⁸⁰ On our end, it must be emphasized that the relationship between humankind and the environment - referred to as Mother Nature, Pachamama, and many other designations evoking spiritual connections – is crucially important for indigenous peoples’ cultures. Environmental balance, to that end, is relevant not only for the material and spiritual well-being of the community and their individuals, but also as an element of their cosmologies and worldviews, which commonly do not understand human existence as a segregated phenomenon from the natural realm⁸¹.

Speaking of indigenous peoples and development, consequently, is not possible without bearing in mind indigenous peoples’ correlations between social, spiritual, material, and environmental well-being. The grave impacts suffered within and around indigenous territories, whether as an effect of localized development projects or as the consequence of climate change due to widespread mainstream ideals of economic development, transcend the question of local subsistence and availability of resources to reveal a larger significance as a problem of land rights, traditional knowledge, social belonging, and cultural loss⁸². Indigenous peoples’ cultural reverence to the natural realm is evidenced in their strong participation within environmental debates since the 1992 Earth Summit, as well the growing interest on indigenous peoples rights

⁸⁰ Hossain, “The realization of the right to environment and the right to development in respect to the Arctic”. 131-134.

⁸¹ Eduardo Viveiros de Castro, on this sense, calls attention for the abysmal distinctness between Western and non-Western cosmologies, explaining the inadequacy of the classic separation between Nature and Culture to amerindian perspectivism. Eduardo Viveiros de Castro, “Os pronomes cosmológicos e o perspectivismo ameríndio,” *Editora Mana*. 2.2 (1996): 115–144.

⁸² See Stuart Kirsch, “Lost Worlds: environmental disaster, “culture loss”, and the Law”, *Current Anthropology*, Volume 42, Number 2, April (2001): 167-198.

in relation to environmental protection and development paradigms. Indeed, human rights violations suffered by indigenous peoples as the effect of development projects often come entwined with threats to environmental protection and cultural revitalization, with close connection to weak protection of land rights, the lack of self-determination, and other rights that are key to indigenous peoples' survival⁸³.

. The ethical implications of a development agenda are manifold. Admittedly, the negative consequences of imposing projects that follow a culturally and ideologically dominant ideal of progress can be severe for the survival of indigenous peoples. That is not to say that contemporary approaches to development are absolutely undesirable - well-conceived development programs, compliant to transcivilizational human rights principles, may be important tools to overcome grave socio-economic challenges endured by a scandalous portion of the world population today. In this standard, alternative approaches to development, in light of relevant international human rights instruments, become decisive for rethinking development strategies in contemporaneity.

2. Development and Indigenous Peoples' Rights

As attested above, indigenous peoples have firmly stood against colonial practices that threaten their survival, defending themselves from the homogenizing pressures that result from the hegemonic expansion of European globalized localisms, employing Boaventura Santos' expression. Seen in the post-War era as a matter of economic progress, indigenous societies were subject to states' integrationist approaches which, blind to cultural nuances, saw the loss of

⁸³ See United Nations, Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (New York, United Nations, 2009, UN doc. ST/ESA/328), 84-127.

culture as, to the least, collateral damage⁸⁴. Sensitive to the cultural implications of a Western-style modernization, indigenous peoples sought solutions that, while preserving culture from ‘modernizing’ pressures, were able to provide the means to sustain themselves as culturally distinct societies.

Alternative models to development would therefore bring together cultural aspects of traditional knowledge and land use, which would guarantee the economic well-being to indigenous community while maintaining and renewing indigenous cultural identities⁸⁵. Further, they aim at a revision on paradigms on development, emphasizing the interrelatedness of different aspects of well-being of the community, and call for non-culturally hegemonic perspectives on traditional ways of life.

2.1. Development within International legal instruments on Indigenous Peoples’ rights.

The rationale that emerged from the evolution of International human rights instruments sets important principles that must inform states’ policies regarding indigenous peoples and development programs. On one hand, these instruments recognize necessary protections, specific to the context of indigenous peoples, against the wide range of human rights violations resulting from classic, colonialist-like development paradigms. On the other, they aim towards an appreciation of indigenous peoples’ self-determined and culturally-sensitive approaches to development, including on their right to access and control their lands and resources.

The adoption of the ILO Convention 169 (Convention concerning Indigenous and Tribal Peoples in Independent Countries), in 1989, came as an important step for reforming the

⁸⁴ Engle, *The elusive promise of indigenous development*, 186-187.

⁸⁵ Engle, *The elusive promise of indigenous development*, 191.

integrationist approach on International human rights law which fell upon indigenous societies since the first-half of the 20th century. Fueled by national-states' goals of national integration, 'modernization' and 'development', integration to the Westernized modern societies through their 'acculturation' would be championed as the most dignifying, scientific solution for the "indigenous problem"⁸⁶. After decades of negotiations, the approval of ILO Convention 169 would finally include more appropriate legal standards for the protection of indigenous peoples' rights - among these respect for social and cultural identities, rights of ownership and possession of lands, effective participation in decision-making.

As concerns matters of development, the instrument's preamble makes reference to the respect for self-determined views on development, stating that "(...) *Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, (...)*". Further, Article 7 of the same Convention includes important provisions on priority measures regarding indigenous peoples' development, including "*the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development*", and to "*participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly*". The same Article includes stipulations on the prioritization of improvement of life, work, health, and education conditions in development programs, on the conduction of studies on the impact of development activities on indigenous peoples, and on environmental

⁸⁶ Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: the ILO Regime (1919-1989)*, (Oxford, Oxford University Press, 2005), 174-199.

protection over indigenous territories, all in co-operation with the peoples concerned. Matters of indigenous peoples' development are also included in other provisions of the instrument, such as its connection to effective protection of land rights (Articles 16 and 19), or to the respect for and valorization of culturally traditional activities (Article 23).

The ILO Convention 169 introduces fundamental principles on indigenous peoples' rights at the International level, such as the right to self-determination, the right to free, prior and informed consent, land rights, as well as cultural rights. These principles call for a more inclusive interpretation on the apparatus of International law, breaking with classic theories that, as discussed above, deliberately excluded social and political entities that did not fit Western-centric standards of civilization from the International system, including the human rights system. Important to mention, the ILO Convention is itself a binding instrument, adding political weight regarding signatories' adherence to its provisions.

In turn, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is paramount in recognizing indigenous peoples as culturally distinct and historically marginalized groups within states, requiring for this reason a specific human rights regime for their effective protection against historical and ongoing violations. Hence, the successful articulation for indigenous peoples' rights at international level, with their direct participation in the negotiation process, bestows the UNDRIP with much greater legitimacy as an instrument that endorses a non-hegemonic approach to human rights. Although not legally-binding by itself, its provisions derive from equitable interpretation of the major human rights instruments, such as the 1966 Covenants on Civil and Political Rights and on Social, Economic, and Cultural Rights,

on the specific context of indigenous peoples, and as such demands its observance in order to adequately comply with International human rights norms⁸⁷.

Alluding to the interdependence, interconnectedness, interrelatedness and inseparability of human rights, the UNDRIP explicitly refers to development, and the right to development, in several of its provisions. The instrument acknowledges in its wording the historical injustices that result from colonization and dispossession of their lands, and reiterates the right of indigenous peoples to freely pursue development in a self-determined manner, and in accordance with their own needs and interests⁸⁸. While Article 23⁸⁹ explicitly mentions indigenous peoples' right to development, numerous other provisions of the instrument are addressed in connection to development - i.e. the right to maintain their political, economic and social systems or institutions⁹⁰; to economic and social conditions including on education, employment, housing, sanitation, health and social security⁹¹; use of traditional medicine and access to health⁹²; use of

⁸⁷ On the binding effects of the UNDRIP, see: United Nations, Economic and Social Council. *General comments to the follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs* (Permanent Forum on Indigenous issues: Report of the eight session, 18-29 May 2009, UN doc. E/C.19/2009/14, Annex).

⁸⁸ In the wording of the document's preamble, for instance: "Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests, (...)"; further: "Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs, (...)"; also: "Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development (...)"; and: "Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples."

⁸⁹ "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

⁹⁰ Article 20 of the UNDRIP.

⁹¹ Article 21 of the UNDRIP.

land and resources⁹³. In this vein, the instrument widely employs a holistic understanding on the right to development, referring to its social, economic, cultural, spiritual dimensions and evoking it on various topics such as education, traditional knowledge, natural resources. In contrast, with respect to external development projects affecting indigenous peoples' communities and their lands and resources, the instrument is clear in emphasizing the right of indigenous peoples to free, prior and informed consent, as well to participate in decision-making processes including regarding development strategies⁹⁴.

The existing International instruments on indigenous peoples' human rights then point towards the most inclusive interpretation on the right to development, aligning with human rights-based approaches to development but giving further emphasis on the particularities that are found within indigenous peoples' contexts. Strengthening rights protections is crucial when addressing development-related issues that affect indigenous peoples, particularly in respect for the rights to self-determination, to free, prior and informed consent, as well as the protection of land rights and cultural rights .

2.1.1. The right to self-determination

The right to self-determination can be understood as a guiding principle that must inform the logic of the legal treatment dedicated to indigenous peoples. Anchored in Article 1 of both 1966 UN Covenants on Human Rights, the interpretation of a collective right to self-determination in the context of indigenous peoples must not be mistaken by its preponderant understanding from the decolonization era - that is, the assumption that self-determination of

⁹² Article 24 of the UNDRIP.

⁹³ Article 32 of the UNDRIP.

⁹⁴ Articles 18, 19, 32, and others.

peoples' implies necessarily on the right to secession⁹⁵. Rather, it calls for rethinking state sovereignty⁹⁶ in order to encompass notions of plurinationality, and thus points for the recognition that indigenous peoples constitute distinct peoples (nations, societies) within a state's borders⁹⁷, with social, political, cultural institutions that differ from those imagined by the classic Westphalian state. Indigenous peoples' right to self-determination, therefore, would correspond primarily to its *internal* dimension⁹⁸, evoking their right to autonomy and self-government on matters of internal and local affairs, and to participate in the political, economic, social and cultural life of the state⁹⁹. Self-determination of indigenous peoples also refers to indigenous peoples' right to establish and promote development priorities and strategies in respect of their own cultural practices and worldviews, as prescribes the conjoint reading of the UNDRIP provisions, with special attention to Articles 23 and 32.

The practical relevance of the link between self-determination, cultural rights, and indigenous development is well described in several explanations over indigenous peoples' perspectives on development. Writing on the Latin American development concepts of *buen vivir*, for instance, Cunningham recalls the suppression of indigenous peoples' well-being by ongoing processes of invasion, extermination, and assimilation since the colonial era, contrasts colonial conceptions of (economic) development with indigenous peoples holistic conceptions of well-being, thus highlighting the contribution of the juridical framework of the UNDRIP for

⁹⁵ Ahren, *Indigenous Peoples Status in the International Legal System*, P. 131.

⁹⁶ Will Kymlicka, in Ahren, *Indigenous Peoples Status in the International Legal System*, 137.

⁹⁷ "It seems to be agreed that the concept of 'peoples' is not necessarily the whole population living within a State. Thus, in principle, there may be more than one 'people' living within the State's territory, each entitles to exercise its right to self-determination (...)". James S. Anaya, *International Human Rights and Indigenous Peoples*, (New York, Aspen Publishers, 2009), 65.

⁹⁸ As to the external aspect of self-determination, Mattias Ahren notes that it is not limited to a right to secession, but includes the rights of peoples to represent themselves in relation to others - an aspect that is substantiated in indigenous peoples' rights to representation at the International level. Ahren, *Indigenous Peoples Status in the International Legal System*, 131.

⁹⁹ Ahren, *Indigenous Peoples Status in the International Legal System*, 132-133. Likewise, Anaya, *International Human Rights and Indigenous Peoples*, 66-68.

understanding indigenous development within a culturally sensitive human rights perspective¹⁰⁰. In the same direction, Tauli-Corpus stresses the cross-cutting nature of self-determination, including to the right to freely pursue their economic, social, and cultural development, when analyzing violations that result from conservation initiatives on indigenous lands¹⁰¹.

2.1.2. The right to free, prior and informed consent

As to the right to free, prior and informed consent, it emerges as one aspect of indigenous peoples' effective participation within the state. In addition, It demands that states, before adopting measures that affect indigenous communities, seek the approval of the peoples concerned, adequately providing relevant information and respecting their internal decision-making instances. For this matter, the United Nations' Permanent Forum on Indigenous Issues stresses the proper application of the principle of free, prior and informed consent as an obligation of states regarding indigenous development with culture and identity, deriving from Article 32 of the UNDRIP¹⁰².

It must be noted that the observance of the right to free, prior and informed consent is far from a pointless bureaucratic obstacle to the implementation of development projects. As a procedural right it not only pays respect to communities' own, self-determined perspectives on development and well-being, it also connects to the realization of a wide range of human rights of indigenous peoples, such as the right to life, to physical integrity, to health, to the environment, etc. The neglect or failure to duly obtain free, prior and informed consent reputably

¹⁰⁰ See Mirna Cunningham, *Laman laka: our indigenous path to self-determined development*, in *Indigenous People's self-determined development: towards an alternative development paradigm* eds. Victoria Tauli-Corpus, Leah Enkiwe-Abayao, and Raymond de Chavez (Tebtebba Foundation, Philippines, 2010).

¹⁰¹ See Victoria Tauli-Corpus, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples* (Victoria Tauli-Corpus. United Nations, General Assembly, 2016, UN doc. A/71/229).

¹⁰² See, for instance, Permanent Forum on Indigenous Issues. *Report on the ninth session (19-30 April 2010)* (United Nations, Economic and Social Council, 2010), 2.

leads to the hampering of realization of a wide range of rights, growing cases of rights violations by third actors, and the emergence or exacerbation of conflicts between the state, private actors and indigenous peoples - not rarely, resulting in episodes of crude violence and massacres of indigenous peoples that attempt to protect themselves from displacement, land expropriation, destruction of sacred sites, etc¹⁰³. For this reason, it remains a sensitive aspect for the realization indigenous peoples' rights, including the right to development.

2.1.3. Land-rights

The matter of development and indigenous peoples is also intrinsically connected with the issue of land rights. It is well-known how state institutions, following colonial mentalities, set aside any recognition of indigenous peoples' rights over their traditional lands, to the interest of settler groups represented by the state. There has also been emphasis on the significance, within indigenous peoples' worldviews and their sense of belonging, of the interconnections between culture, social life, spiritual life, the environment, and their traditional lands. Securing the protection of indigenous peoples' rights over their territories, accordingly, is a matter of central relevance for the full realization of indigenous peoples' rights, all the more on the design and implementation of development strategies. As such, particular attention is given to land rights both in the ILO Convention 169 and the UNDRIP. In observance of their right to "*own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use*"¹⁰⁴, states must establish adequate mechanisms for effective legal recognition and protection of rights of indigenous peoples over

¹⁰³ Inter-American Commission on Human Rights, *Pueblos indígenas, comunidades afrodescendientes y recursos naturales: protección de derechos humanos en el contexto de actividades de extracción, explotación y desarrollo*, (Organization of American States, 2015. OEA/Ser.L/V/II.Doc. 47/15), 90-95.

¹⁰⁴ Article 26, 2., of the UNDRIP.

traditional lands and resources, with due respect to respective “*customs, traditions and land tenure systems*”¹⁰⁵”.

Crucial to the effective recognition of indigenous peoples’ land rights is overcoming classic approaches on property law - largely restricted to acquisition and protection of individual, pecuniary patterns of property owning¹⁰⁶ - to adapt their scope to the cultural particularities of indigenous peoples. Collective nature of indigenous land tenures, senses of territorial belonging, spiritual relationships with traditional lands, colonial pasts of land deprivation, must all be encompassed by legal doctrines to effectively protect the right to property in respect to indigenous customary institutions, including with regards to the management of resources found within indigenous traditional lands, whether traditionally used or not. In this sense, adequate mechanisms must be at hand not only to demarcate indigenous lands, but also for regulating the access and activities of external actors on indigenous lands and resources. This involves matters of achieving indigenous informed consent, respecting internal institutions, negotiating benefit-sharing, respecting sacred sites, redressing eventual negative impacts, and other concerns that might be relevant¹⁰⁷.

In effect, human rights reports testify to the correlation between weak or insufficient protection of indigenous peoples’ land rights and the perpetration of human rights violations, commonly related to development projects. Within this scope, the Special Rapporteur on the Rights of Indigenous Peoples has highlighted on several occasions the interrelatedness of land rights and self-determination for the realization of the human rights of indigenous peoples in

¹⁰⁵ Article 26, 3. of the UNDRIP.

¹⁰⁶ AHREN, Mattias. Op. cit. Pp. 163-166.

¹⁰⁷ Ahren, *Indigenous Peoples Status in the International Legal System*.

their totality, including the right to development¹⁰⁸. Likewise, the Inter-American Commission on Human Rights has accounted for ongoing systematic violations as the effect of development projects on lands of several indigenous peoples of the continent, many times resulting in violence, appealing for improved observance of indigenous peoples' rights as well as the respective states' obligations on policies and activities that affect indigenous peoples¹⁰⁹.

IV. Human rights and development in the regional bodies: cases from the Inter-American Court of Human Rights and the African Commission on Human Rights

Regional human rights bodies are an important segment of international mechanisms for the protection of human rights. With deeper connection to regional realities, a growing jurisprudence of regional Courts can be a resourceful tool for building precedents based on a case-by-case analysis of the practical application of human rights standards, as well as advancing legal interpretation of international human rights norms in view of reported violations.

Regarding indigenous peoples' rights, the understandings of regional institutions has evolved in parallel to advancements at the global level, with remarkable changes at the Inter-American Commission on Human rights (IACommHR) and the African Commission on Human and Peoples' Rights (ACommHPR) in particular. Both institutions have reexamined their

¹⁰⁸ See, for instance, Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of Indigenous Peoples* (United Nations, General Assembly, 2017, UN doc. A/72/186). Further, Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil* (United Nations, General Assembly, 2016. Un doc. A/HRC/33/42/Add.1); Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Australia* (United Nations, General Assembly, 2017. Un doc. A/HRC/36/46/Add.2); Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her mission to the United States of America* (United Nations, General Assembly, 2017. Un doc. A/HRC/36/46/Add.1); Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Honduras*, (United Nations, General Assembly, 2016. Un doc. A/HRC/33/42/Add.2).

¹⁰⁹ See Inter-American Commission on Human Rights, *Pueblos indígenas, comunidades afrodescendientes y recursos naturales: protección de derechos humanos en el contexto de actividades de extracción, explotación y desarrollo* (Organization of American States, 2015. OEA/Ser.L/V/II.Doc. 47/15)

approaches over regional legal norms to include the specificities of the protection of indigenous peoples' rights, weighing on central elements such as the collective features of rights, indigenous cultural distinctiveness as peoples, the significance of self-determination, etc¹¹⁰. Naturally, this is reflected in cases from both regional bodies, Commissions and Courts, which provide important clues to ponder whether and to what extent international institutions have been permeable to claims for more inclusive (and culturally sensitive) perspectives on human rights, in light of what have been discussed in the first chapter.

As to matters of development and the right to development, the decisions of the regional bodies mentioned above are pertinent in that violations of indigenous peoples human rights' addressed by these institutions commonly are intrinsically connected to issues of development. Indeed, development projects are reportedly the most common root cause of many reported violations of indigenous peoples' rights, comprehending the right to pursue their own self-determined development, the interconnectivity between development concerns and land rights, participation in decision-making, cultural rights, environmental affairs, etc. In this sense, as will further be discussed, both the Inter-American and the African system have elaborated interesting considerations to the implementation of the 'right to development' of indigenous peoples, as understood by the applicable international human rights instruments, in contrast with the development-labelled initiatives endeavoured by private actors backed by states.

In this chapter we will analyze and compare how these concerns were addressed by the institutions in selected cases. Regardless of the effectiveness of International Courts' decisions, the intent is to verify the practical adoption of a human rights perspective that is sensitive to the cultural distinctiveness of indigenous peoples by international jurisprudence, including on the matter of the perpetration of colonial practices through development policies. This would be an

¹¹⁰ Ahren, *Indigenous Peoples Status in the International Legal System*, 107-108.

indication that the observed shift on international legal instruments on indigenous peoples, following struggles of indigenous peoples' movements for recognition, is not limited to closed-doors specialized international fora. Instead, such jurisprudence would represent an important transformation of the approaches to human rights by International Law, with cutting-edge contributions of the regional bodies under discussion.

1. Indigenous peoples and development at the Inter-American Court of Human Rights

Subsidiary to the Organization of the American States (OAS) and established in parallel to the United Nations' system, the Inter-American system for the protection of human rights has followed a similar institutional path to the one observed at the global level. While the 1948 Charter of the OAS did not originally mention indigenous peoples, the 1948 American Declaration on the Rights and Duties of Man adopted a paternalistic, integrationist approach to indigenous peoples, and indigenous peoples and their communities had little to null representation in the elaboration of the 1978 Inter-American Convention on Human Rights¹¹¹. Nonetheless, the region has been in the frontline on the struggle for affirmation of indigenous peoples' rights since the late decades of the 20th century, a circumstance which was eventually reflected in the endorsement of indigenous rights by both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights¹¹².

The Inter-American Court has indeed been developing a solid jurisprudence on the adequate interpretation of regional human rights norms to the realities of indigenous peoples -

¹¹¹ Thornberry, *Indigenous peoples and human rights*, 265-273.

¹¹² Luis Rodríguez-Piñero, "The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: mutual reinforcement", in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* eds. Stephen Allen and Alexandra Xanthaki (Oxford, Hart Publishing, 2011), 458-505.

including in reference to standards set by ILO Convention No. 169 and the UNDRIP. Although the American regional legislation does not explicitly comprise the right to development, the thematic is embedded in the Court's decisions, and the institution's considerations have consistently highlighted, directly or indirectly, matters of a human rights based approach to development and development with culture and identity. The cases analyzed illustrate the adoption of such approach quite well.

In the case *Kuna de Madungandí y Emberá de Bayano y sus miembros vs. Panamá*, the Court deals with the continued impact of development projects in indigenous lands and the respective peoples, resulting from a series of evictions, lack of participation, lack of legal protection, etc. The Kuna and Emberá peoples, as the court decision states¹¹³, were evicted from their ancestral lands for the construction of the Bayano hydroelectric dam between 1972 and 1976. As the Panamanian Constitution had established in 1972 some level of recognition of collective property of indigenous peoples over their lands, indigenous peoples were offered new lands and a financial compensation. Several agreements were concluded between indigenous and state representatives between 1975-1980 for managing the area, including through the elaboration of a Program for Sustainable Development of the area at stake. Although the Panamanian government had shown some level of openness to negotiate with the indigenous peoples concerned, it was attested that the implementation of the agreements was fragile, and the effective protection of the rights of the Kuna and Emberá was not reached.

In its considerations on the case, the Court has widely endorsed the leading-edge legal standards on human rights protections of indigenous peoples, recognizing valuable principles for indigenous peoples, such as their holistic relationships with their ancestral lands, and adapting

¹¹³ Inter-American Court of Human Rights, *Caso de los pueblos indígenas Kuna de Mudangandí y Emberá de Bayano y sus miembros vs. Panamá*. (Sentencia de Octubre de 2014, Excepciones Preliminares, Fondo, Reparaciones y Costas), 19-37.

the interpretation of the provisions of the American Convention in light of such principles - particularly regarding the application of the right to property (Articles 21) in the context of indigenous peoples' collective land tenure systems¹¹⁴. Relevant noting, the court emphasises that securing juridical protection over indigenous lands, with effective delimitation, demarcation, and titling, is a necessary condition both for the perpetuation of indigenous peoples' cultures and their own self-determined development¹¹⁵. Further analyzing the case, the Court reaffirms that States must have adequate and effective juridical mechanisms at hand for the protection of alleged victims of human rights violations including for the protection of indigenous peoples right to property and other connected rights¹¹⁶.

A relatively similar scenario is found at the case of the *Kaliña and Lokono Peoples vs. Suriname*. Differently from Panamá, the Surinamese State had not officially recognized legal personality of indigenous peoples in their legal framework nor their right to collective property at the time of the Court's judgement, at most accepting to grant a "privilege" to land use, in spite of constant efforts from indigenous peoples to obtain such recognition¹¹⁷. While not offering legal appreciation of their rights, during the 1960's Suriname established natural reserves partially located over the ancestral lands of the Kaliña and Lokono peoples, following a 1958 granting of

¹¹⁴ "Debido a la conexión intrínseca que los integrantes de los pueblos indígenas y tribales tienen con su territorio, la protección del derecho a la propiedad, uso y goce sobre éste es necesaria para garantizar su supervivencia. Esta conexión entre el territorio y los recursos naturales que han usado tradicionalmente los pueblos indígenas y tribales y que son necesarios para su supervivencia física y cultural, así como el desarrollo y continuidad de su cosmovisión, es preciso protegerla bajo el artículo 21 de la Convención para garantizar que puedan continuar viviendo su modo de vida tradicional y que su identidad cultural, estructura social, sistema económico, costumbres, creencias y tradiciones distintivas serán respetadas, garantizadas y protegidas por el Estado. [...]" *Caso de los pueblos indígenas Kuna de Mudangandí y Emberá de Bayano y sus miembros vs. Panamá*, 47.

¹¹⁵ "Este Tribunal recuerda su jurisprudencia que los Estados deben tener en cuenta que los derechos territoriales indígenas abarcan un concepto más amplio y diferente que está relacionado con el derecho colectivo a la supervivencia como pueblo organizado, con el control de su hábitat como una condición necesaria para la reproducción de su cultura, para su propio desarrollo y para llevar a cabo sus planes de vida". *Caso de los pueblos indígenas Kuna de Mudangandí y Emberá de Bayano y sus miembros vs. Panamá*, 47.

¹¹⁶ *Caso de los pueblos indígenas Kuna de Mudangandí y Emberá de Bayano y sus miembros vs. Panamá*, 48-59.

¹¹⁷ Inter-American Court of Human Rights, *Case of the Kaliña and Lokono peoples vs. Suriname*. (Judgement of November 25, 2015, Merits, Reparations and Costs), 18-19.

bauxite mining concession in the region. Several interventions were made in the area subsequently to the implementation of the mining operations, including the construction of a highway and other infrastructure, the establishment of other extractive activities (prominently, legal and illegal logging), and the installation of an urban subdivision project that functions as a vacation home area for wealthy individuals. Evidently, the referred activities within the Kalinã and Lokono lands have severely damaged the natural environment, and have contributed to further marginalization of the respective peoples who dispute their displacement, destruction of their lands, and perpetuation of Maroon settlements.

In its decision, again, the Court stresses the need to adapt juridical instruments to the reality and practice of indigenous traditions, otherwise rendering human rights of indigenous peoples largely unprotected. The Courts states so in reference to standards set by the Inter-American system itself as well as several other international juridical mechanisms, with particular emphasis to interpretations on the right to property (Article 21) and political rights (Article 23). On several occasions, the Court alludes to the connections between indigenous peoples' right to development and their land rights, along with rights to maintain their own institutions, cultures and traditions. In this vein, the Court has understood that "*based on the right to self-determination of the indigenous peoples [...], such peoples may 'freely pursue their economic, social and cultural development' and may 'freely dispose of their natural wealth and resources' to ensure that they are not 'deprived of their own means of subsistence'*" (emphasis added)¹¹⁸, and that "*The preceding analysis supports an interpretation of Article 21 of the American Convention that requires recognition of the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural, and economic development, which includes the right to enjoy the particular spiritual relationship with the*

¹¹⁸ *Case of the Kalinã and Lokono peoples vs. Suriname*, 34.

territory they have traditionally used and occupied” (emphasis added)¹¹⁹. Further on the topic, the Court clarifies that “*The culture of the indigenous communities corresponds to a particular way of being, seeing and acting in the world, based on their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are a component of their world vision, their religious beliefs and, consequently, their cultural identity, so that the protection and guarantee of the right to use and enjoyment of their territory is necessary in order to safeguard not only the survival of these communities, but also their development and evolution as a people*” (emphasis added)¹²⁰.

Condemning the subsequent marginalization of indigenous peoples since the creation of the respective natural reserves, the Court also provides relevant considerations on the interconnectedness between environmental rights and indigenous peoples’ right to control over natural resources within their lands. Underlining the socio-cultural dimensions of protected areas and remembering that indigenous traditional uses of natural resources often contribute to environmental conservation rather than the opposite, the Court admits that rights of indigenous peoples and international environmental laws are complementary¹²¹. In this aspect, the Court also makes reference to existing international instruments like the Convention on Biological Diversity, the Rio Declaration on Environment and Development, and the UNDRIP, maintaining that the protection of indigenous rights to land and the associated traditional knowledge are a key piece for achieving sustainable development¹²².

On mining operations within the aforementioned reserves, the Court also considers indigenous peoples’ procedural rights in respect to development and investment plans affecting

¹¹⁹ *Case of the Kaliña and Lokono peoples vs. Suriname*, 35.

¹²⁰ *Case of the Kaliña and Lokono peoples vs. Suriname*, 36;

¹²¹ *Case of the Kaliña and Lokono peoples vs. Suriname*, 46.

¹²² *Case of the Kaliña and Lokono peoples vs. Suriname*, 47-49.

their lands. According to the Court's decision, safeguards must be met to ensure that such plans do not represent a threat to indigenous peoples survival, comprising effective participation (including free, prior and informed consent) in accordance to their own customs and traditions; access to a reasonable benefit from the project at stake; and the preparation of a prior social and environmental impact assessment¹²³, all of which were not met by the Surinamese State. In this regard, the Court reinforces that the State had an obligation to protect both natural reserves and indigenous territories from damage caused by third parties, including before human rights abuses that result from the activity of business enterprises¹²⁴.

Both the *Kuna y Emberá vs. Panamá* and *Kaliña and Lokono vs. Suriname* cases are typical illustrations on the contradictions arising from the implementation of development programs - respectively, the construction of a hydroelectric complex and subsequent sustainable development programs for the area, and the creation of natural reserves ensuing mining concessions for private companies (together with the consequential related activities) - from the perspective of indigenous peoples' rights. While not primarily presenting themselves as opposing to indigenous peoples' claims and at different levels seeking to reach some level of accommodation through official negotiations, both states have failed to respect indigenous peoples rights in the implementation of their economic development policies. Moreover, they have not offered adequate redress from displacement, territorial alienation, environmental damage, settlement of non-indigenous population in indigenous ancestral lands, etc. In its decisions on the matter, the Court reiterated that full observance of indigenous peoples' rights is required under penalty of continuously violating a wide range of human rights of communities affected by the implementation of state-centric development projects which highly benefit

¹²³ *Case of the Kaliña and Lokono peoples vs. Suriname*, 53.

¹²⁴ *Case of the Kaliña and Lokono peoples vs. Suriname*, 58-59.

external private actors at the expense of local populations. In sum, although the provisions of the American Convention did not originally envision indigenous peoples' perspectives nor did they mention group rights (i.e. the right to environment and the right to development), the IACH has thoroughly been enforcing in its jurisprudence the right of indigenous peoples' to their own self-determined development in light of their distinct cosmovisions by adapting the interpretation of classic human rights instruments as well as adopting up-to-date international doctrines on human rights and indigenous peoples.

2. Indigenous peoples and development at the African Commission and Court on Human and Peoples Rights

In comparison to the Inter-American system, the evolution of the African regional system for the protection of human rights is relatively more recent. Generally undergoing a later colonization and decolonization process in contrast to the American continent, the matter of indigenesness represented strenuous contentious for newly-independent African States. African States were initially apprehensive of possible secession claims within their countries and thus resisted the recognition of indigenous peoples living within their borders, focusing their early post-colonial agendas to matters of nation-building, cultural unity, and efforts for development and poverty reduction¹²⁵. Nevertheless, the 1979 African Charter on Human and Peoples' Rights introduced momentous novelties in terms of expanding rights recognitions as well as adopting decolonizing approaches to human rights law, comprehending not only civil and political and

¹²⁵ Thornberry, *Indigenous peoples and human rights*, 244-246.

economic, social, and cultural rights, but also peoples (however ambiguous the term was originally) and group rights, including the rights to development and to the environment¹²⁶.

After intense international lobbying and negotiations, the work of the African Commission on Human and Peoples' Rights would play a significant role for the adoption of international standards included in the UNDRIP, and for expanding the scope of the African Charter to encompass indigenous peoples' rights¹²⁷. Indeed, the African Commission, and later the African Court on Human and Peoples Rights, have been greatly contributing to the clarification as to how indigenous rights standards apply within the continental context. Through their decisions, the institutions have introduced internationally recognized principles and reiterated their pertinence to provisions of the African Charter in regards to regional indigenous communities and their cultural distinctiveness within African countries.

The *Endorois vs. Kenya* case, on this regard, inaugurated the legal recognition of indigenous peoples at the level of regional bodies, as well as their entitlement to indigenous specific human rights standards: evoking precepts from several other international institutions, including decisions from the IACHR, the Commission set an important cornerstone for indigenous peoples' rights in the continent. Constituting an ancestral pastoralist community in the fertile region of Lake Bogoria, the Endorois were denied access to their lands since 1978, ensuing the construction of a Game Reserve by the Kenyan Government. Although compensations and benefit sharing from tourism revenues were promised by local governmental authorities, they were scarcely implemented and little consultation was carried out. Ruling on the case, the Kenyan High Court denied recognition of the Endorois as peoples as well as any

¹²⁶ Thornberry, *Indigenous peoples and human rights*, 247-249.

¹²⁷ See Rachel Murray, "The UN Declaration on the Rights of Indigenous Peoples in Africa: the approach of the regional organizations to indigenous peoples" in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* eds. Stephen Allen and Alexandra Xanthaki. (Oxford, Hart Publishing, 2011), 485-505.

collective right to property under Kenyan Law, and ruby mining concessions. In the early 2000's, ruby mining concessions were granted to indigenous peoples, associated with the construction of infrastructure for implementing the extracting activities¹²⁸.

On the merits of the case, the Commission engages in a careful examination in favor of the recognition of indigenous rights within the scope of the African Charter, underlining that indigenous communities not only do not benefit from mainstream development paradigms but are commonly debilitated by the latter, constantly having their rights violated¹²⁹. Further, it acknowledges the collective aspect of indigenous rights as peoples, their sacred relationship to ancestral lands, the significance of cultural rights for peoples' existence and development, among several other basic principles to indigenous peoples' rights.

As to the right to development, enshrined in the Article 22 of the African Charter, the Commission dedicates a specific section of its decision to its consideration. The institution reaffirms both material and procedural aspects of the right to development, concluding that it *“is of the view that **the right to development is a two-pronged test, that is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development**”* (emphasis added)¹³⁰. The Commission further establishes that from a rights perspective development projects must

¹²⁸ African Commission on Human and Peoples Rights, 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, (46th Ordinary Session, Nov. 2009), 1-3.

¹²⁹ “The African Commission, nevertheless, notes that while the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that **many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking** and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.” (emphasis added). 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 18.

¹³⁰ 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 34.

observe five criteria, that is, they must be *equitable, non-discriminatory, participatory, and transparent*. Alluding to Sen's conception of development as the expansion of human capabilities¹³¹, the Commission further recalls the relationship between indigenous development and the access and control over their lands and resources¹³², the duty to obtain free, prior and informed consent¹³³, and the requirement of benefit sharing.¹³⁴

Already under the rulings of the African Court of Human and Peoples Rights - being implemented by the same time when the *Endorois vs. Kenya* was considered by the African Commission - the *Ogiek vs. Kenya* case also represents a major victory for the recognition of indigenous peoples' right in the African continent. Alleging the protection of a local reserved water catchment zone and claiming it as part of a governmental land, the Ogiek people had the access to their lands banned in 2009 by a 30-day eviction notice. Objecting to local and national administration as one more of a series of evictions they have been subjected to since colonial times, the Ogiek had their identity as indigenous peoples continuously denied, as well as the protection of any of their rights as such¹³⁵.

¹³¹ "The result of development should be empowerment of the Endorois community. [...] The capabilities and choices of the Endorois must improve in order for the right to development to be realised". 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 35

¹³² "[...] Complainants show that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence - through grazing their animals - has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement. The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects." 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 35-36

¹³³ "The African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions". 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 36.

¹³⁴ "In this context, pursuant to the spirit of the African Charter benefit sharing must be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community". 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 37.

¹³⁵ African Court on Human and Peoples' Rights, *African Commission on Human and Peoples Rights V. Kenya*. (Application Np. 0062006, Judgement, 26 May 2017), 2-3.

Interpreting the applicability of provisions of the African Charter in the context of indigenous rights, the African Court again applies international principles - especially those provided in the UNDRIP - and refers to other sources of international Law including jurisprudence from the IAHR itself. Prominently, it reinforces among other topics the collective aspect of the right to property¹³⁶, the spiritual, holistic connections to land and the environment¹³⁷, the centrality of cultural rights to communal well-being¹³⁸.

Specifically on matters of development, the African Court explicitly remarks on the historic conditions in which indigenous peoples were affected by economic activities of politically dominant groups and large scale development programs, rendering them “*the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution*”¹³⁹. The African Court recalls the communal dimension of cultural life for the well-being and development of indigenous peoples, including with regards to land rights and natural resources¹⁴⁰. It further appreciates the right to development as included in the African Charter, to acknowledge its entitlement to ‘peoples’ as distinct constituent elements of the population of a State¹⁴¹, and to endorse the wording of Article 23 of the UNDRIP, asserting that the subjection of the Ogiek to continuous evictions without any consultation or participation (concerning their displacement or the elaboration of economic and social programs affecting them) is a violation of the right to development¹⁴². The *Endorois vs. Kenya* and *Ogiek vs. Kenya* cases, again corroborate the contention between state-centric development projects that favours private economic interests, on one side, and the right to

¹³⁶ *African Commission on Human and Peoples Rights V. Kenya*, 35-38.

¹³⁷ *African Commission on Human and Peoples Rights V. Kenya*, 48-50.

¹³⁸ *African Commission on Human and Peoples Rights V. Kenya*, 53-57.

¹³⁹ *African Commission on Human and Peoples Rights V. Kenya*, 54.

¹⁴⁰ *African Commission on Human and Peoples Rights V. Kenya*, 54.

¹⁴¹ *African Commission on Human and Peoples Rights V. Kenya*, 63-64.

¹⁴² *African Commission on Human and Peoples Rights V. Kenya*, 64.

development of indigenous peoples, on the other. In addition, it testifies how the first often comes disguised within narratives of environmental protection. In both cases, it was witnessed how indigenous communities were deliberately displaced from their lands on behalf of natural reserves that ended up being awarded to private actors for economic exploitation. Similarly to the cases of the IAHRC, the analysis provided by the African bodies demonstrate that economic interests usually lay behind the resistance of States to recognize indigenous peoples as such as well as to fully observe their rights over traditional lands and resources, to free prior and informed consent over matters affecting their lives, etc.

In other respects, the decisions from the African Commission and Court on Human and Peoples Rights represent an interesting application of legal principles of the human rights of indigenous peoples by international institutions. Once admitted that the term ‘peoples’ adopted in the African Charter is not limited to the aggregate population of a State, several provisions of the Charter reveal to be relevant and directly applicable to indigenous peoples rights, for instance in respect to the protection of traditional practices, to the right to control over natural resources, to the right to development, to the right to environment. To this end, both the Commission and Court reaffirmed the pertinence of such provisions to indigenous peoples’ affairs, and interpret their application in light of contemporary standards on indigenous peoples rights including in reference to other relevant international and regional bodies.

3. Indigenous peoples and development at regional bodies: a brief comparison

On both the Inter-American and the African systems, the regional bodies demonstrated appreciation for the International standards that derived from indigenous movements’ articulations for a reinterpretation of the perspectives of International Law on indigenous peoples

and their rights. Although following different historic-political paths, the institutions adjust the interpretation of their legal instruments in order to ascertain full protection of the rights of indigenous communities within the two continents. As discussed, the regional bodies at stake have acknowledged that projects and policies under the tag of development still arise as a main factor for the continuing violation of the rights of indigenous peoples in both continents, attesting the relevancy of strengthening a rights based approach to development and, all the more to indigenous peoples, a culturally sensitive approach to development. The cases reveal long-term negative effects of the implementation of policies that are designed and put into action without effective participation of the communities affected, and they testify the continuity of a colonial impetus represented by both the national-State and economic private actors over lands and resources of indigenous peoples.

All cases analyzed evidence that such projects are often ensued by other activities that are equally disruptive to indigenous peoples' traditional ways of life (i.e. logging, infrastructure projects, settlement of outsider populations, resulting in environmental degradation, destruction of sacred sites, etc). Another element that is common to all cases in the debate on environmental concerns: in both continents, arguments in favor of environmental protection were brought up to move away the recognition of indigenous peoples rights' over their lands, an allegation proven false both by the attested reverence of the indigenous cultures examined to their surrounding environment as well as the utter degradation of the same environment emanating from the installation of economic projects within the supposedly natural protection reserves.

Altogether, the decisions of the regional bodies stress the full observance of indigenous peoples' rights as a matter of safeguarding them against disruptive impacts of development projects, including in respect to procedural and material elements of the right to development.

Adhering to aforementioned observations of international human rights fora on the centrality of culture to the protection of indigenous peoples human rights' angle, their spiritual relationships to ancestral lands, their distinguished worldviews from Western paradigms including in terms of well-being and development, etc, the institutions of both continents were clear in asserting obligations of the State to protect indigenous peoples' rights to their traditional lands, to access and control the respective natural resources, and to free, prior and informed consent on the design and implementation of development policies.

V. Conclusion

Through the analysis proposed, it is possible to bring up further considerations over the issue of development and indigenous peoples under International Human Rights Law. Firstly, it must be remembered that the existing narratives on human rights are far from consensual. In spite of the fact that international legislation on indigenous peoples rights has greatly advanced in the last decades, it seems to have done so due to constant pressures from indigenous peoples movements and their allies, and regardless of mainstream approaches on human rights ideas. The critiques proposed by critical theorists on International Human Rights Law evidence the colonial backdrop that may come embedded within "classical" human rights narratives, and the same remains true to the context of indigenous peoples – "classic" approaches on human rights law have left indigenous peoples widely unprotected in face of ongoing violations that directly or indirectly derive from colonial practices. In this regard, we argue that adopting a transcivilizational approach to International Human Rights Law is a prerequisite to examining matters of human rights of indigenous peoples, lest we fall into the trap of reproducing colonial paradigms vested with a human rights discourse.

With that in mind, special attention should be given to the role of indigenous peoples' movements to decolonize International Law, denouncing the many atrocities historically committed with the support of the International system, all following "classic" Western-centric and state-centric ideals of 'civilization' and 'progress'. Asserting their cultural particularities *vis-a-vis* Western thought represented by state and international institutions, indigenous peoples have pushed forward an expansion of the human rights theoretical framework to encompass their own cultural worldviews, social priorities, and political realities.

Within this framework, matters of development remain a sensitive subject of debate. While several development projects until now tend to focus on the continuing expansion of economic activity over 'unexploited' indigenous territories, a rights-based approach to development points towards a conception of development that can be translated into the amelioration of the well-being of individuals and groups. In either case, indigenous peoples are too often left outside mainstream development models, seeing their ways of life stigmatized as backward, and falling prey to land-grabbing, forced displacement, and assimilationist pressures. A more adequate approach on indigenous peoples' development, must therefore acknowledge each community's cultural priorities on well-being if the goal is to effectively improve the life-conditions of all groups and individuals. Moreover, such approach must be attentive to procedural aspects of development as a matter of rights protection, in respect to principles of self-determination, participation in decision-making, free, prior and informed consent and other requisites to the implementation of development projects affecting indigenous peoples and their lands.

Within this spectrum, the decisions of the Inter-American and African regional bodies for the protection of human rights were examined to question whether, on matters of indigenous

peoples affected by development projects, they adopt a human rights perspective that is responsive to the above-mentioned debate. In the cases analyzed, the respective institutions were keen in remembering the historic perpetuation of violations through development projects, whether implemented by the state, or backed by it in favor of private economic actors. Further, they provide an interpretation of several legal provisions that is more suitable to the context of indigenous peoples, in light of standards set at international fora, and, on several occasions, mention indigenous peoples' own right to development - in respect to their holistic worldviews - in contrast to mainstream hegemonic development ideals, and in observance of the concept of development with culture and identity. In short, the Inter-American and African regional bodies have demonstrated a considerable level of openness to non-culturally hegemonic perspectives on the rights of indigenous peoples regarding matters of development. In both continents, the Courts and Commissions have been active in recognizing important elements to the protection of indigenous peoples rights in face of negative effects of development policies, including in respect to land rights, to free, prior and informed consent, as well as to indigenous peoples' right to pursue their own development priorities.

One may yet ponder on the extent that a formal recognition from regional bodies is able to, on its own, transform long-established practices on development. In other words, are they sufficient to fully implement indigenous peoples' rights in face of structural and seemingly irresistible pressures over their resources and territories? The Ogiek people, for instance, were left unconsulted and unrepresented at the Task Force created by the Kenyan government for the implementation of the decision of the African Court¹⁴³, attesting further challenges to the

¹⁴³ Lucy Claridge, Kanyinke Sena, and Daniel Kobei, "Kenyan government Task Force to implement African Court's Ogiek judgment deeply flawed, MRG and OPDP say", *Minority Rights*, 13 Nov 2017, <http://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/>.

implementation of International Human Rights Courts decisions by states. In this regard, we argue that it is important to acknowledge the political significance of a long path undertaken by indigenous movements, at the regional and global scale, to see such principles officially recognized by legal institutions, and to remember that no real advancement on the subject emerges automatically from the good will of states and other interested parties. At any rate, as far as the legal sphere is concerned, the effective application of international human rights protection mechanisms, including at the regional level, unequivocally appears as an important step for furthering the respect of indigenous peoples rights in practice.

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