CRIO WORKSHOP
CENTRE OF RESEARCH ON INTERNATIONAL ORGANIZATIONS

CRIO PAPERS

N°. 39

ARIANNA FRONTERA

A RIGHT TO SELF-DETERMINATION FOR INDIGENOUS PEOPLES IN INTERNATIONAL LAW

CRIO Papers A Student-Led Interdisciplinary Paper Series

ISSN: 2037-6006

The School of Laws
University of Catania
Villa Cerami I – 95124 Catania Italy

1. The Right to Self-determination and Indigenous Peoples: an introduction

The adoption of the Declaration on the Rights of Indigenous Peoples (UNIDRIP)[1] by the United Nations General Assembly in September 2007 represents, according to many indigenous peoples, a historic turning point that in many ways, more or less directly, condemned the past injustices and breaks new ground for the future. As a matter of fact, the Declaration contains rights that are considered of vital importance for indigenous peoples. It can be argued that for a long time, as we proved in the previous two chapters, indigenous claims of self-determination or equal rights *tout court,* were not taken into account or were –to say the least – infrequently mentioned in international human rights law. Neither were they mentioned in the Universal Declaration of Human Rights nor in the International Covenant[2]previously discussed. Despite this apparent disengagement and near absence of binding standards which could explicitly recognize and determine indigenous rights – if ascribed any – international and regional human rights system have fruitfully adopted general human rights standards to protect some indigenous rights, coherently with some specific indigenous interests.

[1] General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007, UN Doc. A/RES/61/195, October 2, 2007

[2] *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), opened for signature 16 December 1966, 933 UNTS 3 (entered into force 3 January 1976).

In order to understand the consequences of the Declaration on the Right of Indigenous Peoples and the recognition, *inter alia*, of their right to (internal) self-determination, we will have to analyze the evolution that led to the UNIDRIP. In fact, contemporary international stories of indigenous rights begin long before the post- Second World War United Nations and regional treaties. This will make even clearer the struggle that indigenous peoples have had to face in order to finally claim their long-awaited right of self-determination in the Declaration.

In order to explore this, we will try to determine the concept of "indigenous" and why the use of the term "peoples" was of pivotal importance for the drafters of the Declaration. We will also try to talk out the importance of collectiveness for the claims of indigenous peoples and to prove how, for the first time, the concept of *otherness* will be rehabilitated and purified from the extreme concept of "inclusion/exclusion"[3] that served as an excuse for colonizers to deny supposedly inalienable rights to indigenous peoples. Finally, we will witness and analyze the application of the Declaration, oft-quoted as a cornerstone of contemporary international legal standards on indigenous rights.

For the majority of indigenous peoples, the non-binding nature of the UNDRIP is of no consequence for what seems to be all but an abstract document to them.[4] In their view, it responds to real-life problems that

[3] M. KOSKENNIEMI, *The Gentle Civilizer of Nations*, Cambridge, 2009

[4] Testimony of J. ANAYA, UN Special Rapporteur, before the Senate Committee on Indian Affairs. *Oversight Hearing on Setting the Standards: Domestic Policy Implications of the UNDRIP*, 2011. He clearly explained: "Although the Declaration is not itself a treaty, it is a strongly authoritative statement that builds upon the provisions of multilateral human rights treaties to which the United States is

threaten the existence of indigenous peoples, as indigenous representatives personally stated while participating actively to the creation of the draft.[5] While doing this, indigenous peoples secured their strong voice on the world stage. Although dispersed around the world and with different backgrounds and culture, their common history of oppression and discrimination has led to share claims at the international level. As Alison Brysk would later say, the internationalization of indigenous peoples rights occurred precisely because indigenous social movements were weak domestically.[6] The international slogan "Act locally – think globally" slightly turned into what the anthropologist Stefano Varese described as "Think locally, Act globally".[7] Anghie questioned many times whether the post-colonial world could "deploy for its own purpose the law which has enables its suppression in the first place"[8] and his challenge to create a non-imperial international law was definitely embraced by indigenous peoples in their quest for justice and in their faith in the United Nations and international law. In fact, although indigenous peoples have largely not taken part in the creation of international law – and were sometimes the victims of it, as with the Doctrine of Discovery – they have refused to stand on its periphery and have instead been determined to become equal partners in its evolution.

---

bound as a party, within the broader obligation of the United States to advance human rights under the United Nations Charter".

[5] S. ALLEN, A. XANTHAKI (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

[6] A. BRYSK, «Turning weakness into strength: the internationalization of Indian rights», *Latin American perspectives*, 1996

[7] S. VARESE, «Think Locally, Act Globally», NACLA, 1991

[8] A. ANGHIE, *Imperialism, sovereignty and the making of international law*, Cambridge, 2004

The wave of support that surrounded indigenous dedication to this new, revolutionary, project has been a determining factor for the establishment of several United Nations *fora* on indigenous issues. This torrent of activity has been described as a "flooding river under an unstoppable rain".[9] The most prominent example has been the Working Group on Indigenous Populations (WGIP), established by a Sub-commission on the Promotion and Protection of Human Rights in 1982, after the Cobo study report,[10] which will be examined later on in this thesis. From this unprecedented and enthusiastic participation, one concept emerged with certainty: the discussions of the group have remarkably contributed to the better understanding of the past experiences and contemporary claims of these communities led by a truly enthusiastic will to use the same tools they have been denied to indigenous communities, i.e. international norms and rights, to inspire change.

The UNDRIP is in fact based on memory[11]. It assumes the defense of memory as an instrument for the definition of indigenous identity and the protection of indigenous rights.[12] In fact, indigenous peoples believe that history is one of their strengths. The recognition of the right of self-determination, defined as the "right of the weak"[13], resulted instead in a

[9] International law Association, Rights of Indigenous peoples, Interim report, The Hague Conference, 2010

[10] Commission on Human Right, *Final Report of the Special Rapporteur on the Study of the problem of discrimination against indigenous populations*, *José R. Martìnez Cobo,* UN Doc. E/CN.4/Sub.2/476, 30 July 1981

[11] L. NUZZO, «Between America and Europe. The strange Case of the *Derecho Indiano*, global perspectives on legal history», in T.DUVE, H.PIHLAJAMAKI (eds.), *New Horizons in Spanish Colonial Law*, 2015

[12] ibid

[13] J. FISCH, *The right of self-determination. The domestication of an illusion*, Cambridge, 2015

long-waited manifestation of justice, truly universalizing international law, outside from its Eurocentric approach. Remembering and forgetting are in fact the two key elements on which the issue of indigenous peoples' claims for identity and colonialism have been structured and from which practices of assimilation or exclusion of the indigenous subjectivity took place. It is only by remembering that the identification of an indigenous legal subject becomes possible.[14] Franz Fanon describes this condition in a very effective way while discussing the relationship between national culture and fights for freedom.[15] This time though, the "cultural obliteration"[16] did not produce the desired effects.

Indigenous identity survived and made it possible for indigenous peoples to articulate a vision for their communities removed from other actors (and the ancient juxtaposition colonizer/colonized), a vision that they firmly framed in the language of international law.[17] The political and legal battle to affirm one's diversity in the realm of international law also imposes new approaches to the law itself. But instead of dismantling the entire structure of the law, indigenous claims used the already existing principles and rights of international law in a more comprehensive way. This approach showed the inadequacy of the selected application of international law perpetrated in the past and allowed indigenous

[14] L. NUZZO, «Between America and Europe. The strange Case of the *Derecho Indiano*, global perspectives on legal history», in T.DUVE, H.PIHLAJAMAKI (eds.), *New Horizons in Spanish Colonial Law*, 2015

[15] F. FANON, *Les damnés de la terre*, Paris, 1961

[16] F. FANON, Speech at the Congress of Black African Writers, 1959

[17] R. MORGAN, «Advancing indigenous rights at the United Nations: Strategic framing and its impact on the Normative Development of International law», *Social and legal studies*, 2004

communities to reclaim their identity and their right to be included in the international arena. Through this practice, the evidence demonstrates that international law is not exclusive or sectarian (as repeatedly objected) but rather universal, as far as its principles and rights are accessible to the whole international community. The indigenous difference in fact, does not mean *otherness* – as perpetrated in the past as a tool for exclusion and denigration– but rather specificity, variation and, eventually, heterogeneity.[18]

These are few of the reasons why we will focus on important cluster of claims specifically linked with the right of self-determination. Since its inclusion in the UN Charter, the interpretation of this term has changed in accordance with necessity and evolution of international law passing through decolonization, liberation from racist regimes and affirmation of self-governance. The next important step to make is its interpretation and application to indigenous peoples as a new, logical, form of inclusion. The inherent right to self-determination of indigenous peoples has a long, interesting and complex history, as has been discussed in Chapter II. Indigenous peoples have rights deriving from the pre-colonial legal order, although their attempts to claim them have been too often unfruitful. Indigenous representatives have coveted self-determination, autonomy and self-government and sovereignty for many decades both on a domestic and international level.[19] Indigenous peoples have also repeatedly declared that the right to lands, territories and natural resources

[18] I.M. YOUNG, *Justice and the policy of difference*, New Jersey, 1990.
[19] J. ANAYA, *Indigenous peoples in International law*, Oxford, 1996

are the basis for their collective survival. These ideas inextricably link them to the right to self-determination, which will be the subject of our following paragraphs.

2. How to identify Indigenous Peoples: a controversial matter

When dealing with the rights of indigenous peoples, it is necessary to determine who is "indigenous" in order to understand to whom the laws apply. Although the outcome of this research might seem obvious, defining indigenous communities presents a controversial issue up until today. In addition, some States try to deny the indigenousness of certain groups as a way of avoiding to compliance with their obligations towards them. Other States recognize indigenous peoples but address them indifferently as "aboriginals" (Australia), "Indians" or "Natives"[20] (North and South America), or "First Nations" (Canada). Finally, some countries even constitutionally recognize indigenous peoples or legislatively acknowledge them in some way.[21]

The term "indigenous" comes from the Latin word "*indigenus*" which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere (*advenae*).[22] The term was then repeatedly used in different languages, as the French "autochtone" or the

[20] The indigenous peoples of the United States are the "Native Americans", encompassing American Indians, Alaska Natives and Native Hawaiians.
[21] B. SAUL, *Indigenous Peoples and Human Rights*, Oxford, 2016
[22] Commission on Human Rights, S*tandard-Setting Activities: Evolution of Standards concerning the Rights of Indigenous People*, Working paper by the Chair-Rapporteur Erica-Irene A. Daes, UN Doc. E/CN.4/ Sub.2/AC.4/1996/2, 10 June 1996

German "Ursprung" which were instead based on the Greek αὐτόχθων (same land) mostly referring to the first peoples existing in a particular location, affirming a sort of "priority in time" from the European discovery.

A useful starting point for the consideration of international practice can be found in the Berlin African Conference, expressed in the Final Act of the Conference, which, as we previously analyzed, used the term "indigenous" (Article 6). Later on, even the Covenant of the League of Nations (art. 22) stated the acceptance by the Members of the League, "as a sacred trust of civilization" the duty of promoting the well-being and development of the "indigenous population of those colonies and territories" which remained under their mandate. In that specific context, the term was used to draw a line between "indigenous populations seen as peoples not yet able to stand by themselves under the strenuous conditions of the modern world" from the more "advances" and developed societies.[23] Finally the Pan-American Union, in the Eight International Conferences of American States, declared that indigenous populations, as descendants of the first inhabitants of North America, had a preferential right to the protection of public authorities. As a matter of regional practice, the term in the Americas was employed to identify marginalized or vulnerable ethnic, cultural and racial groups within State borders rather than the inhabitants of the colonial territories that were distinct geographically from the administrating Power.[24]

[23] *ibid*
[24] *ibid*

In summation, the term 'indigenous' has largely referred to the descendants of the first or original inhabitants of a place, in contrast to later arrivals from elsewhere with different cultures. This definition though, was not perceived as coherent with the spirit of the indigenous communities, at least, not completely. This disparity was made evident during the 12th session of the WGIP, when some indigenous peoples' representatives claimed to be indigenous peoples when they were in fact not. On the contrary, as we mentioned above, several governments that regularly attended the WGIP as observers stated before the Sub-commission on the Promotion and Protection of Human Rights and the former Commission on Human Rights that there were no indigenous peoples in their countries, which was likewise untrue.[25]

As a consequence of these discrepancies, it has even argued whether a formal definition would be desirable as, historically, indigenous peoples have been subject to multiple definitions and classifications not necessarily mirroring their will, but nevertheless imposed by others. It seemed that a formal and static definition would have been futile,[26] limiting any flexibility in applying international instruments to various circumstances. The problem of legal definition is indeed difficult when it comes to international law, where any common concept of indigenous peoples eventually developed on a national scale must encompass a vast diversity of groups worldwide.[27] Eventually, for practical reasons and with the

[25] E.I. DAES, «An overview of the history of indigenous peoples: self-determination and the United Nations», *Cambridge Review of International Affairs*, 2008
[26] A. XANTHAKI*, Indigenous Rights and United Nations Standards,* Cambridge, 2007
[27] B. SAUL, *Indigenous Peoples and Human Rights*, Oxford, 2016

consent of indigenous peoples themselves, the first contemporary attempt to find a working definition at the UN was made by the Special Rapporteur of the Sub-Commission of the time, Jose Martinez Cobo in his valuable '*Study of the Problem of Discrimination against Indigenous Populations*'. According to this report, Cobo included the following cautious definition for the purpose of international action:

> "Indigenous communities, peoples and nations are those which, having a *historical continuity with pre-invasion and pre-colonial societies* that developed on their territories, consider themselves *distinct from other sectors of the societies* now prevailing in those territories, or parts of them. They form at present *non dominant* sectors of the society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[28]

Cobo's definition, self-evidently, allows for some fluidity and lack of precision. Yet, it was established as a working definition in the UN system, although an international consensus on who exactly is included in the term "indigenous peoples" is still lacking.[29] According to this definition, elements of indigenousness include: historical continuity with pre-invasion and pre-colonial societies, distinctiveness from other sectors of

[28] Commission on Human Rights, *Study of the Problem of Discrimination against Indigenous Populations: Final Report submitted by the Special Rapporteur* Mr. Jose Martinez Cobo, UN Doc. E/CN.4/Sub.2/1986/7 Add.1-4

[29] E.I. DAES,«An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008

the society, non-dominance and determination to preserve, develop and transmit to future generations its ancestral territories and ethnic identity, in accordance with the group's cultural, social and legal system.[30] One of the most important criteria on which this definition is based on is the concept of 'historical continuity' which Cobo explained as follows[31]:

> "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country, wholly or partially, at the time when persons of different culture of ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonized status".

Historical contiguity was also preferred to *historical priority*, definition that together with the Doctrine of Discovery would eliminate many groups in need of indigenous protection.[32]Another important aspect of the definition is related to the cultural characteristics: indigenous peoples should in fact, possess distinctive cultural characteristics that distinguish them from the prevailing society in which they live – religion, language, membership of an indigenous community, traditional dresses, lifestyle and so forth. All these elements, among others, have been accepted by the UN, which urges "a broad geographical representation"[33] in indigenous activities in all the areas where indigenous peoples live (Latin America,

[30] A. XANTHAKI*, Indigenous Rights and United Nations Standards,* Cambridge, 2007
[31]E.I. DAES, «An overview of the history of indigenous peoples: self-determination and the United Nations», *Cambridge Review of International Affairs*, 2008
[32]A. XANTHAKI*, Indigenous Rights and United Nations Standards,* Cambridge, 2007
[33] Sub-commission Resolution 1984/35C, final operative paragraph (d.)

North America, Australia, Nordic countries, Asian and Pacific countries).[34] In certain countries in fact, indigenous peoples felt shame or fear to identify themselves as indigenous, mirroring the colonial past of oppression. Recently though this trend has changed, converting shame into pride for origin and culture.

Despite the described difficulties inherent to the definition of "indigenous" at the international level, this lack of clarity has not been fatal to agreeing international legal standards on indigenous peoples. As the UN notes "the prevailing view today is that no formal universal definition is necessary for the recognition and protection of [indigenous peoples'] rights".[35] A flexible and open-ended approach was instead adopted by some UN sectors, like the World Bank.[36] This is no news in the international arena as the cooperation is possible even in absence of a firm legal definition.[37]

The most recent and authoritative statement on indigenous legal issues by the international community is the UN Declaration on the Rights of Indigenous Peoples (UNIDRIP) adopted by the UN General Assembly in 2007. Yet, even in this document we cannot find a set definition of

[34] Commission on Human Rights, The Forty-Third Session of the Sub-commission on Prevention of Discrimination and Protection of Minorities UN Doc. E/CN.4/Sub.2/1991/39 2, August1991
[35] UN Development Group Guidelines on Indigenous Peoples' Issue, 2008
[36] The World Bank, *Implementation of Operational Directive 4.20 on indigenous peoples: an evaluation of the results,* 2003. The document also states: "OD 4.20 uses the term 'IP' to cover various social groups- 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups' and 'scheduled tribes'". OD 4.20 states that these terms describe: "social groups with a social and cultural identity distinct from the dominant society, that makes them vulnerable to being disadvantaged in the development process". These IP can be identified in particular geographical areas by the presence of, in varying degrees, the five characteristics states in the directive (see Annex 2, paras. 3 to 5)".
[37] B. SAUL, *Indigenous peoples and human rights*, Portland, 2016: "[…] other concepts have also not been defined, from 'minorities' to 'terrorism' and yet, cooperation is still possible".

"indigenous peoples". This is explained by the fact that self-identification is one of the major components of the right. This component represents a strategic move: it enables indigenous peoples to assert their existence by claiming their rights from governments that could otherwise be reluctant to recognize a group as indigenous. As a matter of fact, the drafters of the UNIDRIP rejected any proposal to include a list of non-exhaustive factors that might have been taken into account when a State was called to decide whether or not to recognize a group as indigenous.[38] It goes without saying that some States and governments still refuse to recognize indigenous peoples under domestic law or try to restrict their rights contrary to the content of the Declaration, but international law proves to be the perfect instrument to put pressure on governments to lead in this new direction – at least, theoretically. Unfortunately though, States try to delay as much as possible this transition, asking for more detailed definitions and elements in order to efficiently enforce the law. This is why we will need to analyze other Conventions and working guidelines for a better understanding of the meaning of 'indigenous peoples'.

3. The International Labour Organization

The International Labour Organization (ILO), established in 1919 under the League of Nations and later absorbed as a specialized agency of the UN from 1945, has crucially contributed to the internationalization of

[38] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission Resolution 1995/32 of 3 March 1995 on its Eleventh Session, UN Doc. E/CN.4/2006/79

the concept of "indigenous peoples" by showing consistent interest in the situation of indigenous and tribal peoples. Between 1936 and 1989, seven conventions dealing with the labour rights of indigenous peoples have been adopted by States through the ILO. The earlier conventions are now regarded as 'paternalistic and extremely assimilationist',[39] even if they were progressive in many ways when they were adopted. We will instead focus our attention on the last two conventions, No 107 and No 169 (the latter replaced the former in 1989).[40]

In 1953 the ILO published an important study concerning living and working conditions of indigenous and tribal populations around the world.[41] In 1957, during the 39th session of the international labour conference, the committee on indigenous populations discussed the draft text of a convention and recommendations relating to indigenous populations in independent countries. After the governments responded to the questionnaires that ILO sent them, Convention No 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal populations in Independent Countries was adopted. It was the first Convention that explicitly focused on the rights of indigenous peoples.[42] Convention No 107 has been ratified by twenty-seven countries, fourteen of which are in Latin America, six in Africa and the Middle-East and two in Europe. Each State has to provide regular reports on the situation of

[39] B.SAUL, *Indigenous peoples and human rights*, Oregon, 2016
[40] E.I. DAES,«An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008
[41] International Labour Organization, «Indigenous peoples: living and working Conditions of the Aboriginal populations in Independent countries», *Studies and Reports*, Geneva, 1953
[42] A. XANTHAKI, *Indigenous Rights and United Nations Standards,* Cambridge, 2007

indigenous populations and the legal protection available in the country.[43] One of the most relevant aspects of the Convention No107 is its binding nature, as its provisions established specific obligations towards indigenous peoples for the first time in international law. Numerous States with relevant indigenous population living within their borders, opposed the Convention's ratification. The US stated:

> "The problems to be faced in each country differ so greatly and the means of the disposal of each country vary so much that it would appear necessary to have a flexibility in planning and executing measures to accomplish the protection and integration of these populations".[44]

Canada too, insisted on the fact that the proposed instrument was too detailed for general application and suggested that:

> "The countries concerned with the problem could more usefully ask the UN or its specialized agencies to set up study groups with a view to the exchange of information and experience".[45]

Before the adoption of Convention No 107, the ILO's initial concern was directed specifically to the so-called "Andean Indian Programme" and more broadly, to indigenous communities living in Latin

[43] International Labour Organization, Convention No 107, Article 22

[44] 'Replies from governments' in International Labour Office, Report VI (2). Protection and Integration of indigenous and other tribal and semi-tribal populations in independent countries, International Labour conference, 40th session, 1957

[45] The proceedings of the 39th session of the conference relating to Indigenous Populations in Independent Countries' in International Labour Office, Report VI (1).

America. Through this focus however, the ILO started recognizing broad parallels between indigenous communities in Latin America and the one in other countries like Asia, Africa and the Middle East. The ILO knew that indigenous peoples in the Americas had "historical antecedents" as the first peoples in the continent (despite the objections of certain States, which would deny them this status) and yet, their aim was eventually to extend the Convention to "other tribal and semi-tribal groups as well who, without being 'indigenous' in the historical sense, live in social and economic conditions comparable to those of [Latin American indigenous peoples]".[46]

However, as discussed in previous chapters, many States in Asia, Africa and the Middle East were newly achieving independence from colonial powers or were about to reach independence, so that dealing with indigenous peoples within their country was presenting an increasing challenge. They were concerned about the potential application of the conventions in their territories and viewed the term 'indigenous' with suspicion. States were worried about its association with the decolonization movements and their historically prior rights to lands and sovereignty,[47] which would have jeopardized their territorial integrity, triggering secessionist ideas. Despite these concerns, the scope of the ILO project expanded even further in the years to follow, especially after their

[46] International Labour Organization 1956, Report VIII (2) (n. 3) 107, in A. ERUETI, *The international Labour Organization and the internationalisation of the Concept of Indigenous Peoples*, Oxford, 2011

[47] International Labour Organization, Protection and Integration of Indigenous and other tribal and semi-tribal populations in independent countries, Report VI (1), International Labour Conference, 40th session, Geneva, 1956

preliminary report '*Living and Working Conditions of Indigenous Populations in Independent Countries*'[48] which covered a large number of States.[49] It can be argued that the 1956 Report together with the previous Report published in 1953 entitled 'Indigenous Peoples- Living and Working Conditions of Aboriginal Populations' proved to be a highly ambitious project.

The standards set by ILO reflected as much as possible the problems encountered by indigenous peoples in their daily life and work. Most of them were still linked to the social structure inherited from the Spanish colonial period. The most evident of these was the deprivation of a satisfactory land-base.[50] The loss of land had put them either in a semi-feudal relationship with large landowners or reduced them to landless agricultural labourers, forced to leave to find work in cities or generally, in other commercial plantations. As a consequence, the most pressing problem was to protect indigenous peoples from unwanted intrusions and loss of land, which happened sometimes without any explicit consent or a proper compensation. The consolidation of the new nation States after decolonization increased dispossession of indigenous lands via the adoption of legal frameworks that favored private ownership and established the primacy of individual rights over collective ones.

Towards the end of the nineteenth century, the principle of *terra nullius* found justification in geopolitics and in the expansion of agriculture and livestock farming together with military campaigns that continued to

[48] Also known as "ILO 1956 Report".
[49] S. ALLEN, A. XANTHAKI (ed.s), *Reflections on the UN Declaration on the Rights of Indigenous peoples,* Oxford, 2011
[50] *ibid*

decimate the population of indigenous peoples, e.g. in Argentina or Chile. This continued into the mid-twentieth century, during the 'colonization' of the Amazon and the extraction of natural resources by national and transnational corporations.[51] In order to defend indigenous sedentary communities from dispossession, the ILO sought to advance their interests by requiring States to delineate and title the lands that they occupied [52]– this time specifying that they were referring not only to cultivated land, but also 'uncultivated' ones which 'will cover the needs of coming generations, as well as land that at present may not be cultivated but which, in the course of shifting cultivation, may be put into use subsequently'.[53] This was a real turning point in the interpretation of the term 'occupation' in the history of international law.[54]

Yet, these land rights were seen as a temporary measure before tribal groups would integrate into 'western civilization'.[55] Segregation was highly discouraged and the eventual goal was the integration of indigenous peoples in acquiring the skills to survive in cities and other centers of work.[56] This integration though, "was not to be forced as indigenous

[51] Economic Commission for Latin America and the Caribbean, *Guaranteeing indigenous people's rights in Latin America. Process in the past decades and remaining challenges*, 2014

[52] Article 11: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised. » Traditional occupation though, was to be read with 'due regard to customary law'. See A. ERUETI, *The international Labour Organization and the internationalisation of the Concept of Indigenous Peoples*, Oxford, 2011

[53] International Labour Organization 1956, Report VIII (n 3) 67.

[54] E.VATTEL, *supra* Chapter I

[55] International Labour Organization 1956, Report VIII (2) (n 3) 160.

[56] S.ALLEN, A.XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples,* Oxford, 2011

communities should be given the opportunity to develop freely and to administer themselves […]".[57] The Conference Committee decided against any precise definition of 'integration' as, they explained, any definition 'would necessarily be restrictive and therefore might not cover all the many aspects of the problem'.[58]

Many countries were not keen to see their domestic powers restricted while dealing with indigenous populations within their jurisdiction or borders.[59] And yet the convention aimed to protect indigenous populations from "artificial assimilation".[60] Notwithstanding its integrationist approach, it also provided indigenous peoples with special measures "only so long as there is a need for special protection" and not, as was previously states, "to create or prolong a state of segregation".[61] This level of protection was criticized by several States, including the United Kingdom, which notably opposed "the singling out of specific sections of the community for special treatment".[62]These objections can be overturned if we understand that the special treatment was nothing more than a mere attempt of granting equality and protection to indigenous peoples from discrimination and oppression.

This is also why the Committee has interpreted Article 3 in conjunction with other international legal instruments, especially the International Convention for the Elimination of All Forms of Racial

[57] International Labour Organization 40th session Report VI (1)
[58] International Labour Organization 40th session Report VI (2)
[59] A. XANTHAKI, *Indigenous Rights and United Nations Standards,* Cambridge, 2007
[60] Article 2, paragraph 2 (c), International Labour Organization Convention No 107, 1957
[61] Article 3, International Labour Organization Convention No 107, 1957
[62] International Labour Organization, 40th session, Report VI (2)

Discrimination. An intrinsic need for special protection also arises from Article10 of the Convention, safeguarding indigenous peoples from improper application of preventive detention and reemphasizing the effective protection of their fundamental rights.[63] For the majority of States, this article seemed redundant. However it has proved necessary in light of the past history and social position of the indigenous peoples, as evidenced by the Report of the UN Special Rapporteur back in 2004, who noted a "pervasive denial of justice" towards indigenous peoples that:

> "…may be the result of historical processes such as the appropriation of indigenous land by colonizers and settlers on the basis of the new defunct doctrine of *terra nullius*,[64] the imposition of land-titling schemes from which indigenous communities may be excluded, the non-recognition of the cultural identity, the unilateral abrogation of treaties and agreements with indigenous peoples by national Governments, the pillaging of the cultural heritage of native communities, the official rejection of the use of native language, etc.".[65]

Despite good intentions, a conspicuous number of States objected to the Convention, challenging the meaning of 'indigenous 'and stating

[63] International Labour Organization Convention No 107, Article 10: "Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights. II. In imposing penalties laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned. III. Preference shall be given to methods of rehabilitation rather than confinement in prison".

[64] or Doctrine of Discovery *tout court*

[65] Commission on Human Rights, *Report of the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, Rodolfo Stavenhagen, UN Doc. E/CN.4/2004/80 Add.3, 26 January 2004

that there were no longer indigenous populations in their countries but rather *mestizos:* peoples that were nearly or fully integrated in the society. Problems with the acceptance of the term 'indigenous' persisted till the adoption of the Convention No 107, leading to an avoidance of the term throughout the Convention. The drafters decided instead to use the umbrella concept of "tribal populations." This term was also problematic, as it painted these populations as 'inferior' or less advanced. For the ILO though, such an approach was seen as merely practical and non-discriminatory. Given the problems linked with finding the effective boundaries of the Convention, this terminology was a sort of necessary compromise in order for States to ratify the document, especially in the Latin American context, where indigenous peoples have been mingled – as a strategy of conquest – with the colonizers. As we analyzed though, this did not automatically mean integration or access to same rights. In order to provide a minimum protection to indigenous populations despite States objections, the ILO decided to use the 'tribal' criterion.[66]

While this juridical strategy was acceptable for certain States, this was not true for others. Many States, namely New Zealand, Canada, Australia, and the United States, argued that such "backward" peoples no longer existed in their countries[67] or at least that they were at an advanced stage

[66]ILO 1956, Report VIII (2) (n 3) 105: "the 'tribal or semi-tribal' criterion appears to be decisive since, in its absence, the proposed instrument would be so all-embracing that it would lose much of its effectiveness […] Were this criterion not embodied in the definition, the scope of the instrument would become so vast and indefinite that it might in a number of countries cover the majority of the rural population and even certain non-indigenous urban groups".

[67] S.ALLEN, A.XANTHAKI, *Reflections on the UN Declaration on the rights of indigenous peoples*, Oxford, 2011

of integration. None of these States eventually ratified the Convention. Even some other Latin American States decided to object, using similar arguments. El Salvador argued that there were not indigenous peoples in the State stating:

> "there are no population groups in El Salvador which may be considered as indigenous, tribal or semi-tribal. The majority of the population belongs to the mestizo (cross-breed) and white races […] even though the characteristics of an indigenous race are more marked in the population of certain parts of the country, this fact is of no importance as concerns their legal, social and economic position, since there inhabitants speak the same language, practice the same religion, enjoy the same rights […]".[68]

Despite these difficulties, twenty-seven States eventually ratified ILO Convention No 107[69]. Even with the paternalistic approach of the Convention, it nevertheless served an important role in promoting the following Convention No 169.[70] It appears that the paternalistic components of the Convention 107 have gradually been "ironed out" by the CEACR[71] in a way that agrees with the spirit of the new Convention 169.[72]

---

[68] I. RODRÍGUEZ-PIÑERO, *Indigenous Peoples, Postcolonialism, and international law. The ILO Regime (1919-1989),* Oxford, 2005

[69] Four from *Africa*: Ghana; Guinea-Bissau; Malawi; Angola.
Four from the *Middle East*: Iraq; Syrian Arab Republic; Tunisia; Egypt. Fourteen from Latin America: Argentina; Bolivia; Brazil; Colombia; Paraguay; Ecuador; Costa Rica; Mexico; Cuba; Dominican Republic; El Salvador; Haiti; Panama; Peru. Two in *Europe*: Belgium; Portugal.
Three in *Asia*: Bangladesh; India; Pakistan.

[70] S.J. ANAYA, *Indigenous peoples in International law*, Oxford, 2004

[71] *Committee of Experts on the Application of Conventions and Recommendations*

[72] A. XANTHAKI, *Indigenous Rights and United Nations Standards,* Cambridge, 2007

After the adoption of the ILO Convention 107, international indigenous movements started organizing autonomously, realizing the potential benefits of establishing an international advocacy network of 'first peoples'. This commitment resulted in the creation of the UN Working Group on the Rights of Indigenous Populations (WGIP)[73] and later on with the creation of a UN Permanent Forum on Indigenous Issues (PFII). A great number of indigenous groups, although coming from different regions and cultures, were willing to claim rights of self-determination based on historical arguments and denial of their right as 'peoples' to decolonize.

The WGIP enjoyed considerable success, developing a comprehensive and widely accepted draft declaration on the rights of indigenous peoples. The keys characteristics of this group were the liberal and democratic spirit of openness and transparency. The group also made it possible for different indigenous peoples to come together claiming rights that have been denied for centuries. This spirit of support and sharing of experiences lessened fundamental difference in priorities and social, political and economic realities.[74]

This cooperation prepared the group for considerable changes in the field of indigenous rights. It was perceived as needed and inevitable, as Martinz Cobo expressed: "more suitable and precise substantive and more practical and effective procedural principles are needed. Particularly in substantive terms, stress must be placed on ethno-development and

[73] Commission on Human Rights Resolution E/RES/1982/34
[74] A. XANTHAKI, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

independence and self-determination, instead of on 'integration and protection"'.[75] These comments together with the outcome of the International NGO conference on Discrimination against Indigenous Populations in the Americas,[76] concluded in 1977, made clear that a change was indeed needed. With the adoption of the Convention Concerning Indigenous and Tribal peoples in Independent Countries (Convention No 169) in 1989, some major reform occurred, starting with the partial revision of Convention 107. This new formulation embraced the factor of 'distinctiveness' as appeared in the previous convention, but in doing so, erased any implication of an alleged 'inferiority'. Indigenous peoples were now defined in terms of their distinctiveness as well as their descent from the inhabitants of the territory at the time of the conquest, colonization or establishment of present state boundaries. This new perspective minimized the problems that the concepts of 'indigenous' and 'tribal' had previously created, since both concepts are now defined 'by the extent to which the group in question constitutes a distinct society'.[77]

Article 1 of Convention 169 also indicates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for

[75]Commission on Human Rights, *Study of the Problem of Discrimination against Indigenous Populations: Final Report submitted by the Special Rapporteur* Mr. Jose Martinez Cobo, UN Doc. E/CN.4/Sub.2/1986/7 Add.1-4

[76] In 1974, the United Nations Economic and Social Council granted consultative status for the first time to a non-governmental organization (NGO) of indigenous peoples. In 1977, the Committee on Non-Governmental Organizations held the first International NGO Conference on Discrimination against Indigenous Populations in the Americas at the Palais des Nations in Geneva.

[77] E.I. DAES, «An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008

determining the groups to which the provisions of the Convention apply. In fact, the only concrete remaining difference between the definition of "indigenous" and "tribal" relates to the principle of self-determination.

The ILO uses the terms "indigenous peoples" and "tribal peoples" because there are tribal peoples who are not "indigenous" in the literal sense, but who nevertheless live in similar conditions – for example, Afro-descended tribal peoples in Central America. A group may be tribal either by its own choice or without its consent – as a result of special legal status imposed by the State. On the other hand, a group may be classified as 'indigenous' only if he or she chooses to do so by 'perpetrating its own distinctive institutions and identity'.[78] This is why, for practical purposes, the terms "indigenous" and "tribal" are used as synonyms in the UN system when the peoples concerned identify themselves under the indigenous agenda.[79]

According to Madame Erica-Irene Daes, Chairperson-Rapporteur at the time (1984- 2001), the only valuable distinction between juridical categories was the one between "indigenous peoples" and simply "peoples" – as referred to the UN Charter and Human Rights Covenants. Groups normally identified as 'indigenous' have been unable to exercise the right of self-determination through active participation in the construction of a contemporary nation-state. In fact, although they were

[78] *ibid*
[79] Secretariat of the United Nations Permanent Forum on Indigenous Issues, PFII/2004/WS.1/3

not qualified as states and consequently they could have not been able to participate in the shaping of international law.[80]

We previously demonstrated that the right to self-determination was never granted to indigenous peoples, either during the colonization or even during and after the decolonization. This also explains the alleged inconsistency of the efforts to clarify the concept of "indigenous": it was not due to the unwillingness of the indigenous groups themselves, but rather due to the efforts of governments and States to limit the global effects of indigenous rights, especially for those countries with large indigenous populations. One of the most important principles on which the Meeting of Experts agreed on, and expressed in the Convention 169, was the "recognition of the right of indigenous peoples to be different from the dominant society in the countries in which they live. This implied a rejection of the previous notion of cultural superiority by the dominant societal groups".[81] They also emphasized the necessity that this notion must have been a dominating factor in the new instrument - i.e. Convention 169. Another pivotal aspect of the revision was the election of accurate terminology. Several experts agreed on the necessity of replacing the term "population" expressed in convention 107 with the term "peoples". According to them, the latter term indicated that these groups had an identity of their own and the right to self-determination. As a matter of fact, it better reflected the view these groups had for themselves, and was not considered degrading, as the term "populations"

[80] J. ANAYA, *Indigenous peoples in International law*, Oxford, 2004
[81] International Labour Organization, Working Document for the Meeting of Experts, 1986

was perceived to be. The latter term implied a mere factual grouping, not reflecting cultural collectiveness. It was also noted that several countries already adopted this term in their domestic legislation and that its use had become accepted in discussions in the United Nations and other international *fora.*[82]

In the light of the above, it can be argued that Convention No 169 was definitely relevant in the evolution of rights recognized to indigenous peoples. It encompasses an extensive array of indigenous rights to land, territory, environment, natural resources, and protection from displacement, as well as enshrining the principle of self-identification and emphasizing indigenous participation and consultation in decision-making affecting these groups.[83] Further, ILO Convention No 169 has been frequently cited as authoritative outside of the ILO system and has been relevantly influential in Latin American courts.[84] In the 1999 Annual Report, the Committee of Experts observed that the discussed Convention represents, up until now, "the most comprehensive instrument in international law" for the protection of indigenous and tribal peoples.[85] The only problem that arose from the procedures was the lack of participation of indigenous representatives during the drafting and adoption of the Convention.

[82] Report VI (1), ILO Meeting of Experts on the Partial Revision of the Indigenous and tribal Populations Conventions, 1957 (No 107), 1987
[83] International Labour Organization Convention No 169
[84] B.SAUL, *Indigenous Peoples and Human Rights*, Oregon, 2016
[85] A. XANTHAKI, *Indigenous Rights and United Nations Standards,* Cambridge, 2007

In terms of binding international standards of equal or higher value, signatories to ILO Convention 169 remain bound to the Convention as a minimum standard to be upheld, which if undertaken in "good faith" requires a level of protection comparable to the previsions set out in the later UNIDRIP (with the notable exception of the rights to self-determination).[86]

Unfortunately however, the application of these principles is very complex for States and can have – mostly the case – relevant repercussions on constitutional arrangements[87] or constitutions' structure and content *tout court*. This also explains why after almost two decades after its adoption, just seventeen states have ratified it. Yet, the powerful content and marks a turning point that cannot be reduced to numbers and ratifications *per se*, since the text of the Convention is eventually used as a point of reference also in countries that did not ratify it. Its role is also relevant on domestic legislation, as it can be used as guidance for the domestic provisions dealing with indigenous issues.[88]

[86] C.BALDWIN, C.MOREL, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation,* Oxford, 2011

[87] *Application of the indigenous and tribal peoples convention (No.* 169), in International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations, 87th session, Geneva, 1999

[88] D.C. BALUARTE, «Balancing Indigenous Rights and the State's Right to develop in Latin America: the Inter-American Rights Regime and ILO Convention 169», *Washington College of Law Journal*, 2004

4. The United Nations Declaration on the Rights of Indigenous Peoples and the Right to Self-determination

The adoption of the Declaration on the Rights of Indigenous Peoples ('the Declaration' or the UNIDRIP) represents a major step forward in the development and affirmation of the rights of indigenous peoples. It was adopted by General Assembly[89] by an overwhelming majority of UN Member States and it represented an undisputed celebration of indigenous peoples' efforts who had long advocated for the drafting and adoption of the Declaration. It was an acknowledgment of the human rights problems faced by indigenous peoples across the globe and that the roots of these problems mainly lay with historical colonization.[90]

A large number of scholars also claimed that the Declaration would have been the perfect juridical tool to overcome the past discrepancies and could have helped to move towards reconciliation.[91] Despite its legislative nature, the Declaration is not itself legally binding, but this element does not undermine the commitment assumed - more or less directly - by the UN Member States. As we will see, its content embodies a common understanding of the right of indigenous peoples on a global scale, yet, using the already existing rights of international law. If the Declaration on Decolonization was considered a turning point in the history of

[89] UN Declaration on the Rights of Indigenous Peoples' Preamble: "[concerned] that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation 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".

[90] *ibid*

[91] Although this term has generated debates and controversies among scholars, see A.PRATT, «Treaties vs Terra Nullius: "reconciliation", treaty-making and indigenous sovereignty in Australia and Canada», *Indigenous Law Journal* (Vol. III), 2004

international relations and powers/international justice, the UNIDRIP goes probably beyond that scope. It aims to resolve remaining conflict as peacefully as possible. We can probably say that we are "in a rare moment of potential transformation, of a tectonic shift towards a new era of human relations that extends the promise of justice beyond the boundaries set by the past".[92]

The formation of the United Nations draft Declaration on the Rights of Indigenous Peoples started in 1985 under the guidance of the United Nations Working Group on Indigenous Populations (WGIP), a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[93] As previously emphasized, the participation was enthusiastic and the help of very supportive chairpersons made it possible for indigenous representatives to achieve almost equal rights to the States in expressing their views on the text. As Anaya clearly stated, he was impressed by "the continuing vibrancy of indigenous peoples and their communities and their resolve to maintain the defining characteristics of their diverse indigenous identities, under equitable conditions, […] and to maintain and transmit to future generations their material and cultural heritage".[94] The text was in fact conceived to recognize a wide range of collective indigenous rights including the right

[92] W.R. ECHO-HAWK, *In the Light of Justice*, 2013
[93] UN Doc. E/CN.4/Sub.2/1985/22 Annex II
[94] Human Rights Council, *The situation of Indigenous Peoples in the United States of America*, Report of the Special Rapporteur on the rights of indigenous peoples James Anaya, A/HRC/21/47/Add.1, 30 August, 2012

of self-determination, right to natural resources, recognition of self-government.[95]

In 1993 the WGIP members agreed on the final text of the draft Declaration.[96] After being adopted by the Sub-Commission in its 46th session in 1994[97] it went to the Commission Drafting Group were problematic issues arose. Eventually though, under the pressure of the UN, the Commission adopted the Declaration - almost a decade later – which eventually it shore up to the Human Rights Council.

Indigenous representatives pushed for equal rights with the States in the drafting working group and thank to their perseverance, they were given floor as much as States, and were given access to informal consultations with governments.[98] Several States were in fact willing to push for substantial changes of the draft, mainly because of the language used and the still-standing problem of interpretation of the right of self-determination. On the contrary, indigenous representatives were resisting to any objection towards the draft and its content. They repeatedly

---

[95] J. BURGER, *The Draft United Nations Declaration on the Rights of Indigenous Peoples*, International council on human rights and policy and international commission of jurists Workshop, 2005. He stated: "The draft declaration contains much that would be deemed difficult. It is essentially a collective rights instrument whose beneficiaries are the world's indigenous peoples. It recognizes the rights of indigenous peoples to self-determination in exactly the same terms of the two human rights covenants and will affirm, if adopted, indigenous peoples' right to control, use and develop their lands, territories and natural resources. Implicit throughout the draft declaration is the principle of self-determination and States and *non-State actors* would be required to obtain the free, prior and informed consent of indigenous communities before the realization of economic or other activities affecting their lands and lives. In areas such as health, education and the administration of justice, the draft declaration provides for complementary systems controlled by indigenous peoples in accordance with their traditions […]".

[96] UN Doc. E/CN.4/1993/29 Annex I, 15 January, 1993

[97] Technical Review UN Doc. E/CN.4/Sub.2/1994/2

[98] A. XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge, 2007

affirmed that the draft represented the "minimum aspirations" as clearly stated in Article 43 of the same Declaration.[99] One of the strength of the draft was the fact that its provisions were based on the established international norms, as Article 1 indicates: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law". [100]

Yet, there is no explicit reference to the ILO Convention No 169 in the draft: this can be easily explained that indigenous peoples have often suffered from definitions imposed on them by *others*,[101] and although the revolutionary aspects of the Convention 169, it made no exception: it was adopted without consultation of the parties concerned i.e. indigenous peoples. This was mainly conceived as a matter of principle more than merits. In fact, as in the ILO Convention 169, the criterion that defines indigenous peoples is still that of self-identification, as emerge from Article 8 of the Declaration.[102] One of the main concerns expressed by States was whether or not the provision 'implicitly safeguards the option (of an individual) not to identify as indigenous'.[103] We can probably say,

[99] UN Declaration on the Rights of Indigenous Peoples, Article 43: "The rights herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".
[100] UN Declaration on the Rights of Indigenous Peoples,
[101] E.I. DAES, «An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008
[102] UNIDRIP Article 8
[103] S. PRITCHARD, *Settling International Standards: An analysis of the United Nations Declaration on the Rights of Indigenous Peoples*, 1998

although the concerns are constructive and relevant, in legal terms, they are not consistent for two main reasons: 1) because the individual can protect from the group activating the rights included in Article 1 of the same Declaration and 2) because it has not happened yet.

5. Collective Rights and sui generis quality of Indigenous Rights Claims

It is self-evident, in light of the above, that the whole essence of the draft Declaration, and consequently of the final text of the Declaration itself, is the recognition of indigenous collective rights. This element emerges clearly from the use of the term "peoples". In fact, if it is true that the Declaration encompass both individual and collective rights, the recognition of the latters is essentially linked with the right of self-determination, exercised in its collective dimension. As a consequence, recognizing collective rights means fully recognizing the right of self-determination, land rights, right of living in freedom, peace, security as distinctive peoples and also to be consulted when legislative and administrative measures that affects indigenous peoples, are devised and implemented. [104]

Yet, collective rights appear to sit uneasily with the traditional human rights regime,[105] constructed around the protecting interests of individual

[104] UNIDRIP, Articles 9 and19

[105] S. WIESSNER, «The Cultural Rights of Indigenous Peoples: Achievements and continuing challenges», EJIL, 2011

human beings. This was true to the extent that the discussions on collective rights of the Commission Drafting Group were extremely tense and controversial. Several States delegations – headed by the United Kingdom - objected to the idea arguing that international human rights law does not recognize collective rights.[106] These objections were determined to be unfounded, as the Declaration is framed into a wider human rights system that functions as a 'check and balance', guiding the application of the Declaration itself. It evidently emerges from the Declaration that stresses the necessity of exercising the recognized rights always in conformity with international law. Therefore, the objections towards the recognition of the rights of indigenous peoples cannot be explained by the fear of nation-states of potential loss of sovereignty. As professor Lauren pointed out, "any international guarantees of human rights by their very nature would impinge on the claimed prerogatives of national sovereignty and domestic jurisdiction".[107] Yet, the recognition of collectivities and collective rights is one of the most contested issues in international law and politics. In fact, it is well known that the function of rights is to exclude the political, to follow the 'priority of the right over the good'.[108]

In an ideal world, rights should be universal, unhistorical and apolitical. However, in reality, they are particular, historically contingent

[106] UN Doc. E/CN.4/1997/102
[107] P.G.LAUREN, *The evolution of International Human rights: Visions Seen*, Philadelphia, 2011
[108] J. RAWLS, A theory of Justice, 1973; M. KOSKENNIEMI, *The Effect of Rights on Political Culture*; in P. ALSTON (ed.), *The EU and Human Rights,* Oxford, 1999

and political in nature.[109] There is no better example of the limitations of rights discourse that the contentious collective aspect inherent to the right of self-determination. And yet, the collective element is of pivotal importance for our discussion on indigenous rights and claims. This is expressed by indigenous leaders and representatives in many occasions, namely in a preparatory meeting back in 1989, when clearly stated:

> "The concept of indigenous peoples' collective rights is of paramount importance. It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the most important purposes of this Declaration (on the Rights of Indigenous peoples). Without this, the declaration cannot adequately protect our most basic interests. This must not be compromised".[110]

Indigenous statements often emphasize this collective element, not for mere stylistic weight, but rather because indigenous peoples cannot see themselves separate from their culture. This extremely hard attachment to the culture - as exhaustively explained in the first chapter of our dissertation – comes from history. Indigenous peoples are aware of the consequences of assimilationist tactics that had split their communities in the past.[111] This is probably no surprise if we agree to the idea that our

---

[109] S. ALLEN, «Limits of the International Legal project», in A. XANTHAKI, S. ALLEN (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples,* Oxford, 2011

[110] A. XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge, 2007

[111] H. ZINN, *A Peoples' history of The United States,* New York, 2005. It is important to recall the enforcement of the General Allotment Act (1887), which allowed reservation land to be divided into parcels owned by individual tribal members, which they could freely dispose and even sell. When the Act was repealed by the Indian Reorganization Act of 1934 the extension of the reservations were reduced to less than a third of the size they were before. The idea was in fact to

past, inevitably influence our present, especially considering the vulnerable position in which indigenous people are. Australian indigenous peoples for instance, declared that their traditional knowledge provided 'the same foundation of their personal identity and ancestral anchorage. It provides a distinctive would that outsiders can rarely grasp'. This argument can hardly be refuted.

On the contrary, we can actually say that it brings a universal truth, valid not only for indigenous peoples *per se*, but for the entire range of human cultures. UNESCO clearly declared, on several occasions, the importance of the "distinctive character of each culture". In this context though, distinctiveness – and more generally, multiculturalism – does not mean "otherness". History has proved that it is not with the promotion of one, undisputed culture that cultural differences could be overcome. It is rather through the contrary, i.e. embracing cultural differences, that justice can efficiently be provided.

Although controversial and extremely complicated issue, it can be necessary sometimes to overcome differences by providing special rights to members of groups that would not otherwise benefit from the same rights of the "majority culture". This is explained partially because of the intrinsic vulnerability of non-dominant groups that are, yet, different from minorities. A number of legal scholars supported the idea that collective rights are compatible with the 'Rawlsian and Dwarkian notion of justice, where justice removes or compensate for the undeserved or "morally

convert native peoples into farmers, in accordance with the American economic model. In reality though, this Act permitted to make easier for speculators to buy land.

arbitrary" disadvantages'.[112] We are aware of the slippery nature of this discussion but it can be argued that might be true when it comes to indigenous peoples which are, for different reasons, entitled to "group-differentiated rights[113] and are morally justified in having them". And yet, recognizing rights to indigenous peoples is not necessarily a moral duty but a question of justice and equality *tout court.*

In fact, "special treatment" does not guarantee justice by virtue. We could rather affirm the contrary. Most of the special treatments reserved to indigenous peoples are perceived by the public opinion as unfair benefits that in some cases attract more hostile attitudes towards them than the general treatment would do. And yet, we 'racial stratification' is not the answer to our questions. As Dworkin stated: "we have no reason to forbid affirmative action as a weapon against our deplorable racial stratification, except our indifference to that problem, or our petulant anger that it has not gone away on its own".[114]

Despite the evident reluctance of States, International law has been challenging the "monotheism" of the State for quite sometime now, recognizing various groups other than themselves (States). The so called "non-state Actors" in fact, play a major role in the international arena.[115]

---

[112] A.XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land,* Cambridge, 2007

[113] The term was coined by W. KYMLICKA, *Multicultural Citizenship*, Oxford, 1995

[114] R. DWORKIN, *Sovereign virtue: the theory and practice of Equality*, Cambridge Mass., 2000

[115] A. XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land,* Cambridge, 2007

6. The Right of Self-determination

The most significant result of the negotiations concerning the content of the UNDRIP was the dilemma of the recognition and consequent inclusion of the right of self-determination of indigenous peoples. Eventually, after opposing arguments and interpretations, this right was explicitly included in Article 3, which declares: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[116]

The proclamation of the right in the declaration did not prevent further discussions on its true meaning. One of the most contested issues was whether or not indigenous peoples were beneficiaries of the right in its "external" dimension or if instead, the right was confined in its "internal" dimension.[117] Some governmental observers indicated that it might have been necessary to qualify – at least – the application of the right in order to make the text acceptable for implementation. These observations were overcome in different occasions as follows. Indigenous representatives mostly justified the right in accordance with the meaning already attributed to the right under international law. This logic was also consistent with the opinions of the International Court of Justice and the UN studies on the issue of self-determination.[118] The principle of self-

[116] UNIDRIP, Article 3

[117] A. CASSESE, *Self-determination of peoples. A legal reappraisal*, Cambridge, 1995

[118] Western Sahara, Advisory Opinion, I.C.J. reports, 1975; Legal consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276; Advisory Opinion ICJ Reports 1971; A. CASSESE, *Self-determination of peoples. A legal reappraisal,* Cambridge, 1995

determination was recognized as 'a fundamental human right – the enjoyment of which was an essential precondition for the enjoyment of any other human right or fundamental freedom',[119] for that matter.

Other representatives also pointed out that the right to self-determination was an inalienable right of all nations and peoples, which existed independent of recognition from governments and international organizations. In this new context, self-determination was envisaged as embodying the right to make meaningful choices with regard to indigenous peoples' political status, self-governance and development of the mechanism of the Free, Prior and Informed Consent (FPIC).[120] Consequently, it was also foreseen as a right to resist territorial and structural encroachment.[121]

Given these varying interpretations, a firm understanding of the right was needed in order to make it realistically enforceable. In order to find a solution to this legal '*impasse*', the major interpretation provided was the one of "internal self-determination". While stating so, indigenous representatives pushed the fear of secessionist discourses away from negotiations and made it possible for the right to be included in the Declaration's text.

This was a win-win approach for different reasons. Firstly, indigenous representatives were aware of the still ongoing discussions about the juxtaposition between self-determination and secession/territorial

[119] E.I. DAES,«An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008
[120] J. ANAYA, *Indigenous peoples in International law*, Oxford, 2004
[121] UN Doc. E/CN.4/2005/ WG. 15/CRP

integrity. Secondly, they aimed to be included rather than excluded from States' and governments' dynamics. This conclusion is supported by reading Article 46, Paragraph 1 of the Declaration.[122] Thus, the right of self-determination of indigenous peoples should be normally interpreted as the right of these peoples to 'negotiate freely their political status and representation in the States in which they live'. As Daes states:

> "this process may be described as a kind of belated state-building, through which indigenous peoples are able to join with all the other peoples that comprise the State on mutually agreed-upon and just terms after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State on agreed terms. […]. This conclusion is reinforced by the fact that indigenous peoples themselves have overwhelmingly expressed their preference for constitutional reform within existing States as opposed to secession. […] It should be emphasized, once again, that it is not realistic to fear indigenous peoples' exercising of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples' right to self-determination will leave the most marginalized and excluded of all the world's peoples without legal, peaceful weapon to press for genuine democracy in the States in which they live".[123]

We can once again affirm, in accordance to what indigenous representatives have repeatedly stressed and in the light of the historical

[122] UNIDRIP, Article 46 states: "Nothing in this declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent Staes".

[123] Commission on human rights, sub-commission on prevention of discrimination and protection of minorities, E/CN.4/Sub.2/1993/26/ Add.1

contingencies we have described in previous chapters, that this right is the centerpiece of the Declaration that "promises to shape humanity (especially for indigenous peoples) in the post-colonial age".[124] The right to self-determination provided in Article 3 of the Declaration reflects all the aspirations and visions of the world's indigenous peoples. "It is a right of cardinal importance for them because it is a sacred right to which they have been entitle since time immemorial"[125], whose enjoyment has repeatedly been denied.

As addressed so far, the difficulties of interpreting the right of self-determination existed far before the emergence of the Declaration. The right of self-determination of peoples is "perhaps the most controversial and contested of the many controversial and contested terms in the vocabulary of international law".[126] And yet, we also demonstrated that this right indeed arouse from international law discourse and affected a great deal the dynamics of the international arena itself. And if the inclusion of the right into the UNDRIP makes no exception, we can also state that - in light of the above general consideration and followed path - although current international law is still silent on the weight given to the right of self-determination for indigenous peoples, it leaves the door open for positive conclusions. This is also why the decision of the WGIP to include in Article 3 of the declaration the right to self-determination was

[124] W.R. ECHO-HAWK, *In the light of justice: The rise of Human rights in Native America and the UN Declaration on the Rights of indigenous peoples*, Colorado, 2013
[125] E.I. DAES, «An overview of the history of indigenous peoples: self-determination and the United Nations*», Cambridge Review of International Affairs*, 2008
[126] J. CRAWFORD, *The rights of Peoples*, 1992

greeted with a standing ovation from indigenous participants and a conciliatory response for many of the governments.[127]

Legally, indigenous claims for self-determination are based on Article 1 of both Covenants[128] on human rights, which is binding for most States. The provision states that: "All peoples have the right to self-determination. By virtue of that right, they can freely determine their political status and freely pursue their economic, social and cultural development". During the drafting of the international covenants though, it was made clear that minorities were not to be included in the 'peoples' contained in the Article. And yet, it is widely accepted that indigenous peoples are not mere minorities[129] (despite repeated calls for the unification of minority and indigenous group identities from States such as the US).[130] As was stated above, indigenous peoples, mainly because of their past history, need a specific protection in international law which is justified by the particular characteristics that distinguish them from other minority groups. This is also why their human rights regime is unique and *sui generis* in nature.

[127] E/CN.4/Sub.2/1993/29
[128] ICCPR and the ICESCR of 1966
[129] T. THORNBERRY, *Indigenous peoples and human rights*, Manchester, 2002
[130] See the Report of Commission Working Group E/CN.4/1999/82

7. The Blue Water Thesis and the opposition to the right of Self-determination of Indigenous Peoples

Demonstrated the importance of the right to self-determination for indigenous peoples, it was nevertheless reluctantly accepted by certain States. In fact, early attempts to include indigenous peoples among the beneficiaries of the right were met with much objection. There were some ex-colonial powers (particularly Belgium), which supported the idea that the right of self-determination was to be recognized and implemented beyond colonialism (the so-called "Belgian Thesis"). As a consequence, these States were supportive of indigenous claims of self-determination. This support was based on the assumption that the condition of indigenous peoples was not different to the one in which the colonized experienced.[131]

Eventually though, another thesis prevailed: the so-called "Blue Water" (or "Salt Water") thesis.[132] This later thesis was developed in opposition to efforts of the abovementioned ex-colonial powers to expand the scope of the obligations and procedures of Chapter XI of the UN Charter - which concerns non-self-governing territories - to include enclave indigenous peoples.[133] The States supporters of this thesis perceived self-determination to be enforced strictly within the parameters

[131] T. THORNBERRY, «Self-determination, Minorities, Human Rights: a Review of International instruments», *International and Comparative Law Quarterly*, 1989
[132] J. ANAYA, *Indigenous peoples in international law*, Oxford, 2004; A. XANTHAKI*, Indigenous Rights and United Nations Standards: Self-determination, Culture and Land*, Cambridge, 2007
[133] G. BENNETT, *Aboriginal rights in international law,* 1978

of overseas colonies. Latin American States specifically opposed the expansive interpretation of Chapter XI and eventually prevailed in securing its more restrictive interpretation. The Blue Water thesis was eventually incorporated into General Assembly Resolution 1541 (XV) and linked with non self-governing territories only.[134]

So, despite the considerable efforts by indigenous representatives of demonstrating that the right of self-determination could have been granted without jeopardizing the other major principles of international law –i.e. territorial integrity and State sovereignty – the recognition of this right was still contested. The problem was related to the fact that the right, framed into the Declaration, was indeed much more powerful that the simple recognition of self-government. It also recognized negotiating powers to indigenous peoples that went beyond "internal self-determination". Such a scenario is clearly pictured when reading Articles 19, 38 and 40 of the UNIDRIP. When read together, those articles ultimately require States to truly cooperate with indigenous communities before "taking appropriate measures, including legislative measures, to achieve the ends of this Declaration".[135] If these rights can be problematic for States to assure, they nevertheless are non-secession based.

It has also been contested whether or not it is possible to apply this right universally or if it would have been preferable to ascribe it only to certain indigenous groups. It was argued that if fully recognized, this right would have represented a privileged right vis-à-vis other groups in the

[134] J.ANAYA*, Indigenous peoples in international law,* Oxford, 2004
[135] UNIDRIP, Article 38

society,[136]e.g. monitories. Finally, others objected the possibility of granting indigenous peoples the right to control sub-soil resources, withholding consent to their exploitation.[137]

In the light of the above, we can come to the conclusion that scholars and practitioners had very contradicting idea concerning the right to self-determination of indigenous peoples. According to some, the UNIDRIP seemed to have gone too far, for others it has not gone far enough. Some argued that this right would inevitably create inequalities, others, more radically, say that indigenous peoples lack the power to enforce the right in the first place.

In our opinion, none of those positions fully represents the real aim of the Declaration, underestimating its true meaning and falling outside of the scope. The moral argument of inequality is definitely questionable. The inclusion of self-determination in the Declaration is not an attempt to claim a right to which other peoples are not entitled to enjoy – as a matter of fact, self-determination is not an exclusive right. In the case of indigenous peoples, self-determination becomes also a non-discriminatory instrument and a perfect example of distributive justice.[138] Thank to the declaration in fact, the right is finally recognized to peoples that historically were not entitled to benefit from it.

---

[136] S. ALLEN, A. XANTHAKI, *Reflections on the UN declaration on the rights of indigenous peoples,* Oregon, 2011

[137] S.ERRICO, «The Draft UN declaration on the Rights of indigenous peoples: An overview», *Human Rights Law Review,* 2007

[138]J. ANAYA, *Indigenous peoples in International law*, Oxford, 2004

Moreover, its recognition would not come into conflict with other peoples' right to self-determination living within the State and more broadly, with the State itself. It aims to put indigenous peoples in a position of equality with the State rather than in a position of supremacy: the eventual aim is to guarantee equality and not *vice versa*. However, on a practical level, one of the biggest challenges that is likely to remain unsolved for indigenous peoples is how to conciliate their decision-making power - not only with the State but - vis-à-vis external actors with vested interests in resource-rich indigenous territories (which will be the object of our discussion in the next paragraph).

In conclusion, in commenting the importance of the UNIDRIP, we could probably distinguish between its symbolic and pragmatic impact. In symbolic terms, indigenous peoples deserved justice from the past. With the Declaration, this reconciliation can be achieved in a peaceful and constructive way as it represents another form of condemn of colonial subjugation or colonialism and neocolonialism *tout court*. In other words, it represents a new dawn for human history and international human rights law.

In pragmatic terms, it represents the emblem of internal self-determination as described by Cassese.[139] Self-determination manifested in the UNDRIP represents a radical transformation and expansion of the classical concept of international law and consequently of the right of self-determination, making it dynamic. The pessimistic analysis, which instead

[139] A.CASSESE, *Self-determination of Peoples,* Cambridge, 1995

affirms that the rights included in the UNIDRIP are unsustainable because incompatible with human rights law, cannot be taken into account *per se*. As Thornberry said "the human rights project are an unfinished project"[140] and indigenous peoples' rights are no exception.

8. Self-determination at work: People and Territory

As previously discussed, indigenous rights in international law have risen to prominence in the last three decades.[141] We also pointed out that paternalistic and assimilationist norms have been increasingly discarded in favor of a new legal framework that grants a greater control to indigenous peoples over their cultures, lands and modes of governance. The majority of indigenous legal scholars and practitioners have focused on international human rights discourse, trying to transplant communal principles of indigenous peoples into an "individualistic rights framework" (as the human rights system is purported to be.)[142] With the exception of the ICCPR, specific protections for group of peoples – e.g. minorities – are lacking in the international and regional human rights conventions. Despite these limitations, we proved that indigenous representatives

[140] S.ALLEN, A.XANTHAKI, *Reflections on the UN Declaration on the rights of indigenous peoples*, Oxford, 2011

[141] International Law Association, the Hague Conference of the rights of the indigenous peoples (ILA report); W. KYMLICKA, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, 2007; S. WEISSNER, «Rights and Status of Indigenous Peoples: a Global Comparative and International Legal Analysis», 12 Harvard HRJ, 1999; J.ANAYA, *Indigenous Peoples in International Law,* Oxford, 2004

[142] J. GILBERT, *Indigenous People's Land Rights under International Law: from Victims to Actors*, Ardsley, 2006 (according to which indigenous collective land ownership principles are in tension with an individualistic approach to property).

eventually achieved some victories while drafting the UNIDRIP, expanding the international human rights paradigm.

For some, indigenous peoples "have played a significant role in changing the legal landscape of human rights".[143]To a certain extent, we proved those statements to be valid, as demonstrated by the examples in the above-discussed ILO Conventions and UN texts, which contain provisions, although based on existing human rights norms *tout court*, moved beyond these existing right and "express specific aspirations and self-understanding of indigenous groups".[144]

We will also analyze how several regional and international human rights bodies have espoused jurisprudence in support of indigenous rights' claims. According to the former Special Rapporteur James Anaya, this jurisprudence lies on the right of self-determination, considered the "principle of highest order" among indigenous peoples,[145] as clearly emerged from the drafting of the UNIDRIP. As previously stressed, the attempts to limit the application of the right of self-determination to overseas colonies only[146], proved to be arbitrary.[147] Moreover Anaya openly resisted the internal/external dichotomy which animated numerous discussions during the drafting of the UNDRIP[148] and stressed

[143] L.A. MIRANDA, «Indigenous peoples as International Lawmakers», *University of Pennsylvania Journal of International Law*, 2010
[144] B. KINGSBURY, «Reconciling Five Competing Conceptual Structures of indigenous Peoples' claims in International and Comparative Law», NYU *Journal of International law and Politics*, 2001
[145] J. ANAYA, *Indigenous peoples in international law*, Oxford 2004
[146] See the "Blue Water" thesis.
[147] W. KYMLICKA, «Theorizing Indigenous Rights», *University of Toronto Law Journal*, 1999
[148] Anaya hastens to add that "the remedial regime developing in the context of indigenous peoples is not one that favours the formation of new States". See J.ANAYA, *Indigenous peoples in International Law*, Oxford, 2004; E.I. DAES, «Native People's Rights», *Les Cahiers de Droit*, 1986

the idea of the right of self-determination as a principle "grounded in the idea that all (men) are equally entitled to control their own destiny".[149] This phrasing is not casual. The use of the word "destiny" brings the duality of principles on which the US (and not only) is based on: celebration of democracy, liberty and equality as the pillars of the American identity and at the same time the exclusion of the Native Americans from this picture. With that statement, Anaya is recalling his country's constitutional commitments to a path towards "a more perfect Union" under the principles of justice and liberty. In his view, self-determination is not merely a matter of political rights but rather a composition of five different dimensions: "nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government".[150] We saw that all of those norms find support – more or less extensively – in both ILO Conventions (especially Convention No 169[151]) and the UNIDRIP[152]. Despite these international mechanisms, indigenous peoples' rights are still threatened by national legislation and the seemingly competing interest of a State's "right to develop". With regards to the latter issue, we will have to distinguish between: 1) governmental autonomy granted to the indigenous peoples at the community level and 2) effective

[149] J. ANAYA, *Indigenous peoples in International Law*, Oxford, 2004
[150] *ibid*
[151] D. SHELTON, «Self-determination in Regional Human Rights Law: from Kosovo to Cameroon», *American Journal of International law*, 2011: "ILO Convention advances several elements of internal self-determination without using the term".
[152] General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007, UN Doc. A/RES/61/195, October 2, 2007

participation of indigenous representatives within higher levels of state and national government.

The latter component of the right of self-government is inextricably linked with modern problems. In order for the right to self-determination to be effective and enforceable, as a right and not merely as a principle, we will need to focus on the intrinsic link that this right has to a certain territory. "Self-determination is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle, it can be expressed without reference to a specific context; as a right, it is operative only in a relative context; as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate".[153] For whatever perspective, there are inevitably two coexisting interrelated factors: *people and territory.*[154] If it true that in abstract, people can determine their "destiny" regardless of geographical limitations, it is more realistic to describe the right of self-determination in a more pragmatic way when actuated within a given territory, susceptible of acquiring the characteristics of sovereignty.[155]

[153] M.C. BASSIOUNI, «Self-determination and the Palestinians», AJIL, 1971

[154] *ibid*

[155] J. ANAYA, *Indigenous Peoples in International Law*, Oxford, 2004: "The classic sovereignty argument suffers fatal limitations while dealing with indigenous peoples' rights". In his view, this concept brings two intrinsic limitations: (1) its tendency to maintain the "status quo of political ordering; (2) its restrictions upon "international competency".

9.The right to free, prior and informed consent

In order to understand the true meaning of self-determination on a practical level, we need to analyze the so called "right to consultation" granted to indigenous communities, also known as the right to "free, prior and informed consent" (FPIC).[156] While examining the latter right, we will come to understand one of the effects that the right of self-determination can have for indigenous peoples, by focusing on one of its "dimensions"[157]: control over land and resources. Land rights appear to be at the heart of the claims of indigenous peoples on national and international law.

One of the major concepts of the right to self-determination for indigenous peoples have been to provide them with a range of alternatives to secession, including the right to participate in the governance of the State as well as the rights to various forms of autonomy and self-governance, among them the right to free prior and informed consent.[158] On a basic level, the concept of FPIC is self-explanatory in its phrasing: it is the right of indigenous peoples to make free and informed choices while dealing with the development of their lands and resources. It also ensures that the decisions made by indigenous peoples – if and whenever effectively consulted – are not coerced or intimidated and that their consent can be given freely and prior to the start of any activity affecting

[156] T.WARD, «The right to free, prior and informed consent: Indigenous Peoples' participation rights within International Law», *Northwestern Journal of International Human Rights*, 2011
[157] see *supra* Anaya
[158] E. DAES, UN Doc. E/CN.4/2004/30, 2004

their lands. It also encompasses the right of these groups to have full information about the scope and impacts of the proposed development projects and that their choices to give or withhold consent are respected.[159]

The requirement for indigenous peoples' FPIC can be traced from a range of collective rights that international law provides them. The Committee on Economic Social and Cultural Rights has clearly affirmed indigenous peoples' right to "own, develop, control and use their communal lands, territories and resources." The Human rights Committee (HRC), which monitors the implementation of the International Covenant on Civil and Political Rights by its States parties, has also supported this view, by holding that the requirement for consent emerges from the right of indigenous peoples to preserve their culture and way of life and to actively participate in decisions impacting on them. In the HRC's observations, the requirement is affirmed in light of the right of self-determination other than cultural rights, nondiscrimination and right to land.

According to De Schutter,[160] "indigenous peoples have been granted specific forms of protection of their rights on land under international law" so that States "shall consult and cooperate in *good faith* with the indigenous peoples concerned in order to obtain their free and informed consent *prior to the approval* (*las consultas se celebren antes de la adopcion de las*

[159] Commission on Human Rights, Legal Commentary on the concept of Free, Prior and Informed Consent, UN Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July, 2005:
See also, UN-REDD Programme, Guidelines on Free, Prior and Informed Consent, 2013, http://www.uncclearn.org/sites/default/files/inventory/un-redd05.pdf
[160] Special Rapporteur on the Right of Food.

decisiones) of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water and other resources".[161] He also added that principles and measures proposed are not simply relevant and consistent as human rights norms on which they are grounded, but are practical as well. In his view, a multilateral approach "would be preferable to unilateral action by the States concerned".[162]

This interpretation, as we will see later on in details, is also shared and accepted by the Inter-American Court of Human rights, which held that the right to give or withhold consent is premised on the nature of the impact to indigenous peoples' economic self-determination, inextricably linked with the right to property over their lands, territories and natural resources.[163] This clearly emerges in the case *Sarayaku v. Equador*, which addressed the oil exploration activities in the Sarayaky territory (within Ecuador). In that case, the court did not base its decision merely on the right to property, since the duty to consult was also derived from the right of cultural integrity. This ruling placed emphasis on one relevant aspect of the FPIC: the "prior" dimension of consultations. In order for the community to *really*[164] influence the decision-making process, both consultations and consent needed to occur at the initial stage of planning

[161] Human Rights Council, *Report of the* Special Rapporteur on the *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 20th session, UN Doc. A/HRC/12/31, 21 July 2009
[162] *ibid*
[163]Inter-American Court of Human Rights, *Saramaka People v. Suriname*, (Judgment of, interpretation of the judgment on preliminary objections, merits, reparations and costs), November 28, 2007, Series C No. 172
[164] Emphasis added

and not only at the point in time when community approval was sought. [165]

The right to self-determination and FPIC are clearly interrelated. The genuine choice of indigenous communities to consent to projects affecting their lands and resources – implicit in the notion of granting consent – is only possible if the peoples involved are really put in a condition to consider the options and eventually find alternatives that could benefit both the State's right to develop and indigenous peoples' rights to land and cultural integrity. On the contrary, the imposition of development projects would deny indigenous peoples the possibility to determine their own development priorities.[166] Although this objection might seem inconsistent with major State interests of land and resources exploitation, they are not. In the majority of cases, these communities are, in fact, irredeemably affected in their way of life. It is essential to respect indigenous rights and to grant them the real opportunity – provided by law – to participate in the decision-making of processes that will affect their lives.

The relevance of the right to self-determination, the bedrock of the UNIDRIP, is then evident, although it is not alone effective in the protection of indigenous rights whenever the traditional management of resources attributed to indigenous peoples is seen as challenging national

[165] Inter-American Court of Human Rights, *Pueblo Indigena Kichwa de Sarayaku v. Equador*, June 27, 2012, Series C, No. 245

[166] J. ANAYA, *Indigenous peoples in International law*, Oxford, 2004

interests.[167] In order to benefit from the right of self-determination then, indigenous peoples must be able to withhold consent. It is not about restricting State's authority, but rather recognizing rights to indigenous peoples that otherwise would have not be granted, like equal participation in the decision-making processes. In other words, the challenge is in trying to balance indigenous rights to land and culture against the State's right to develop, as representative of the will and self-determination of the national population. The notion of free, prior and informed consent, if indeed respected, might capture this difficult balance.

This also explains why one of the definitions that Special Rapporteur Anaya has given to the FPIC is "safeguard", which perfectly describes the aim of the right. This notion emerges in one of his reports on indigenous peoples and the issue of extractive industries operating in or near indigenous lands. Anaya states that "consultation and free, prior and informed consent are best conceptualized as safeguards against measures that may affect indigenous peoples' rights".[168] According to him, there is "the need to build the negotiating capacity of indigenous peoples in order for them to be able to overcome power disparities and *effectively* (emphasis added) engage in consultation procedures involving proposed extractive activities on or near their territories".[169] This necessity of stressing the idea of effective consultations comes from the fact that before the adoption of

[167] S. WRIGHT, *International human rights, Decolonization and Globalization: becoming Human,* London, 2001
[168] Human Rights Council, *Report of the Special Rapporteur James Anaya, on the Rights of indigenous peoples*, UN Doc. A/HCR/21/47, 6 July 2012
[169] *ibid.*

the Declaration, human rights treaties and especially the ILO Convention 169, which contains the notion of prior informed consent (articles 6 and 7), limited their recommendations to the requirement of "seek" consent, without explicitly referring to respect its outcome.[170] In fact, it requires States to establish means by which indigenous peoples can participate freely and meaningfully at all levels of government decision-making and policy formation and to consult them through appropriate procedures whenever administrative or legislative measures are being considered to effect them directly.

And yet, there is no explicit requirement that the State and the indigenous communities reach a consensus.[171] Over time, the jurisprudence of the Inter-American Court of Human Rights, together with the influence of the UNDRIP[172], has come to a different conclusion,

[170] Committee on Economic, Social, and Cultural Rights, Considerations on Reports submitted by States Parties under article 16 and 17 of the Covenant, *Suggestions and recommendations*, UN Doc. E/C.12/MEX/CO/4, 9 June 2006: "The Committee urges the State party to ensure that the indigenous and local communities affected by the La Parota hydroelectric dam project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is *sought*, in any decision-making processes related to these projects affecting their rights and interests under the Covenant, in line with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Committee also urges the State party to recognize the rights of ownership and possession of indigenous communities to the lands traditionally occupied by them, to ensure that adequate compensation and/or alternative accommodation and land for cultivation are provided to the indigenous communities and local farmers affected by the construction of the La Parota dam or other construction projects under the Plan Puebla Panama, and that their economic, social and cultural rights are safeguarded".

[171] International Labour Organization, *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention*, 1989 (No.169) made under article 24 of the ILO Constitution by Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), submitted 2000, para. 38,39

[172] General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/195, UN Doc. A/RES/61/195, September 13, 2007

stating that whenever "the rights (that) are implicated are essentials to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the right are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations".[173] States "have a firm obligation to undertake consultations with indigenous peoples before adopting measures that my directly affect their interests, and those consultations should be aimed at reaching a consensus concerning those measures […]".[174]

But what would happen if consensus was not reached after a good faith procedure in which the indigenous party had participated fully and adequately?[175] In general terms, in virtue of the principle of indigenous peoples' self-determination (*libre determinación de los pueblos indígenas*), as well as for practical reasons, the State should (*debería*) not proceed with a project that directly affects an indigenous community without their consent. However, "this does not imply an absolute veto power (*sin embargo esto no implica un derecho absoluto de veto*)".[176]

---

[173] Human Rights Council, *Observaciones del Relator Especial* James Anaya *sobre la situación de derechos humanos y libertades fundamentales de los indígenas acerca del proceso de revisión constitucional en Ecuado*r, UN Doc. A/HRC/9/9/Add.1 Annex 1., June 2008

[174] *ibid*

[175]Human Rights Council, *Report of the Special Rapporteur* James Anaya *on the situation of human rights and fundamental freedoms of indigenous people,* UN Doc. A/HRC/9/9/ Add.1, Annex 1. para. 37,38 ("los Estado tiene una obligación firme de realizar consultas con los pueblos indígenas antes de tomar medidas que puedan afectar directamente a sus intereses, y esas consultas deberán tener el objetivo de llegar al consenso acerca de dichas medidas.[…] Pero que ocurriría si no se llegara al consenso y al consentimiento indígena después de un proceso de Buena de en que la parte indígena hubiera podido participar plena y adecuadamente?")

[176]Human rights Council, UN Doc. A/HRC/9/9/ Add.1, Annex 1., August 15, 2008; Human Rights Council, A/HRC/ 12/34, July 15, 2009

Anaya also distinguishes between the intensity of the impact that the project will have on indigenous communities. Only in those situations in which the measure may have substantial impact on the physical and cultural well-being of the indigenous community concerned, as decided in the case *Saramaka v. Suriname*,[177] will the State then have the duty to include the consent of the community concerned.[178] Despite this classification, in reality, the "(FPIC) rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned" rather than opening a dispute about whether or not indigenous consensus has veto power. Erroneously though, "in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects".[179]

We can agree on the conclusion that focusing the debate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration. Rather, these principles were designed to build dialogue between both States and indigenous peoples called to work in "good faith towards consensus and try in earnest to arrive

[177]Inter-American Court of Human Rights, *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) judgment of November 28, 2007, Series C, No.172
[178] UN Doc. A/HRC/9/9/ Add.1, Annex 1.
[179] Human rights council, *Report of the Special rapporteur* James Anaya *on the situation of human rights and fundamental freedoms for indigenous peoples*, UN Doc. A/HRC/12/34, 15 July, 2009

at a mutually satisfactory agreement".[180] So the real difference from the previous content of the ILO Convention 169 is to be played by the right of self-determination. In light of this right, consultations should be meaningful and should aim not only to *seek* consent but rather, and most importantly, to *reach* consent. This element is really important for a better and full understanding of the importance of the role played by the right of self-determination.

While analyzing the right to consent under the aegis of the right of self-determination, we can more clearly understand the objections of many States – especially those that voted against the adoption of the Declaration[181] - towards the inclusion of the right in the text. In any event, the resolution of the problem of State's right to development and the right of self-determination of indigenous peoples living within the State could stem from examining various models of natural resource extraction or exploitation in which indigenous peoples have greater control and benefits than is typically the case under the standard corporate model, drawing on a review of the experiences of indigenous peoples in various locations.

[180] Human rights Council, UN Doc. A/HRC/ 12/34, 15 July, 2009. para. 46: "no debe considerarse que esta disposición (articulo 19) de la Declaración confiere a los pueblos indígenas un "poder de veto" con respecto a las decisiones que los pueden afectar sino, mas bien, que señala que el consentimiento es la finalidad de las consultas con los pueblos indígenas. A este respecto, el Convenio No 169 de la OIT dispone que la consultas deberán celebrarse "con la finalidad de llegar a un acuerdo o lograr el consentimiento acerca de las medias propuestas" (art.6 párr. 2). Los términos un poco diferentes de la declaración sugieren que se hace mas hincapié en que las consultas sean negociaciones en procura de acuerdos mutuamente aceptables y se celebren antes de la adopción de las decisiones sobre las medidas propuestas, y no consultas con el carácter de mecanismos para proporcionar a los pueblos indígenas información sobre decisiones que ya se han adoptado o están en proceso de adoptarse, sin permitirle influir verdaderamente en el proceso de adopción de decisiones".

[181] Australia, Canada, New Zealand and the United States.

Normally, in order to be reasonable, these models and projects must comply with standards of necessity and proportionality with regard to a valid public purpose, as generally required by international human rights law, whenever restrictions on human rights are permissible. And yet, if these perspectives and requirements are now considered "minimum standards" to follow, this has not always been, and, to a certain unfortunate extent, it is still not, always the case.

That is why we need to analyze some of the most relevant jurisprudence and some state practice on the matter to gain a better understanding of the problems linked with FPIC and more broadly with the right to self-determination. Arguably, the relationship between self-determination and active participation of indigenous peoples in the decision-making process is one of the most interesting, revolutionary, yet complex, aspects of the UNIDRIP. In fact, we know that the Declaration has not a legally binding effect on international or domestic law. In this regard, no one will be able to invoke the rights of the Declaration before a court. And yet, we can prove that the effects of the Declaration are indeed relevant as a vital source of guidance on the law. After been adopted by the Human Rights Council, the Declaration is part of an essential frame of reference that will guide the Council itself and will take a leading role in the discussions about future international law standards related to indigenous peoples.[182]

[182] Human rights council, *United Nations Special Rapporteur* Rodolfo Stavenhagen *on the situation of human rights and fundamental freedoms of indigenous peoples*, UN Doc. A/HRC/4/32, 27 February,2007

If we agree on the idea that the Declaration is considered customary law[183], we can also understand the effects that it has produced not only on UN bodies but also on regional tribunals. According to many scholars, although *opinio juris* is notoriously difficult to assess, there would be less doubts in considering the Declaration customary law for different reasons, one of which is "the fact that it was drafted in positive legal language rather than in a form of mere exhortation".[184]

Moving from these conclusions, we should consider the Declaration as something more than an exhortation and use it as a guide to interpreting already existing rights while dealing with indigenous peoples' claims. We already have examples of this practice from the Human Rights Council, which has recognized that the right of self-determination applies to indigenous peoples although not as extensively as for the populations of colonial territories or independent countries. The key element of this practice is linked with the extensive interpretation of Article 27 of the ICCPR, whenever self-determination was linked with land and resources rights. The HRC has been very concerned about the failure of States to recognize indigenous land and property rights. A prevalent concern of the HRC was to prevent abuses where indigenous peoples' land was affected by public or private developments projects that pushed the Committee to call on States to investigate and punish those responsible. The Committee used both the ILO Convention No 169 that effectively strips indigenous

[183] J.ANAYA, S. WIESSNER, «The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment», *Jurist*, 2007

[184] S.ALLEN, A.XANTHAKI (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

peoples of the rights afforded to peoples under international law. This assumption permitted to consider indigenous peoples as beneficiaries of article 27 of the ICCPR, which as a matter of fact, does not qualify the bearer of the right to self-determination. The adoption of the Declaration represented the perfect opportunity for the HRC to allow the right of self-determination to be litigated. The fact that the majority of States in the General Assembly recognized indigenous as "peoples" and consequently beneficiaries of the right to self-determination meant that the application of the latter right was to be considered in its broader interpretation. This was also possible thanks to the ICCPR that, with its binding nature, made it possible to strengthen jurisprudence and protection of the right to the extent we have discussed in this dissertation.

10. The Inter-american System

The American continent has played a leading role in the configuration of what we could call the 'modern international regime on the rights of indigenous peoples'.[185] The new (long awaited) wave of "multicultural constitutionalism" permitted to pass from ILO Conventions to UNDRIP producing a strong impact on the bodies of the Inter-American human rights system including: the American Convention on Human Rights ("American Convention") which provides a coherent framework for the promotion and protection of human rights in the continent; the Inter-American Court of Human rights ("Inter-American Court" or simply

[185] S.ALLEN, A.XANTHAKI (eds*), Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

"Court") and the Inter-American commission on Human Rights ("Inter-American commission" or "Commission"). All of them have used the Convention and the draft Declaration (and later the Declaration itself) to develop a significant body of jurisprudence concerning the rights of indigenous communities in the Americas.[186]

Over the course of the last decade, the Inter-American Human Rights System, the regional human rights system of the Organization of American States (OAS), has reinforced international and domestic developments concerning the rights of indigenous peoples in the region. The Inter-American system commonly refers to ILO Convention 169, other than the Human Rights Covenants. In monitoring States, the Inter-American Commission considered indigenous issues from 1970.[187] Over the years, the fairly advanced jurisprudence produced by this body was taken as a point of reference at the international and regional level, specifically in its elaboration of the minimum content of indigenous peoples' rights. The right to property/land, for instance, has been remarkably significant in Inter-American system.

Generally speaking, the Court provided a new clarification in respect of international standards, purifying them from their abstract, ambiguous and, to a certain extent, overly symbolic value.[188] Despite these eloquent attempts to reinterpret the law, there was a felt need for new common standards that could lawfully support indigenous peoples' claims. This is

[186]S.PICADO,«The evolution of Democracy and Human Rights in Latin America: a Ten years perspective», *Human rights Brief*, 2004
[187] B. SAUL, *Indigenous peoples and Human rights*, Oxford, 2016
[188] *ibid*

why the UNDRIP produced a consistent impact in the evolution and actions of the Inter-American human rights system. One of the prominent examples of this unprecedented practice is the endorsement of indigenous collective rights shown in the Inter-American Court first judgment on indigenous land rights in 2001: *Mayagna (Sumo) Awas Tingni v. Nicaragua.*[189] The court not only endorsed indigenous collective rights, but also the recognition of indigenous peoples' rights to the protection of their customary land and resource tenure.[190] This case was the first such dispute ever to be addressed by the Inter-American Court, also referred to as a "landmark case for the Inter-American System".[191]

The court's judgment in *Awas Tingni* case originated with the Nicaraguan Government's grant of logging concession to a transnational company to take timber from the forest lands traditionally occupied by the small, indigenous Awas Tingni community, without the group's consolation or approval. Under international law, governments must respect indigenous peoples' rights to their traditional land. But if a government does not demarcate indigenous peoples' land, their territorial rights remain uncertain. So despite provisions in Nicaraguan law that recognized communal properties to indigenous peoples on the Atlantic Coast, the Awas Tingni lacked official title to their territory. The Nicaraguan government used this *lacuna* and did not respect indigenous

[189] Inter-American Court of Human Rights, judgment *Awas Tingni Mayagna (Sumo) Community v.Nicaragua*, 31August 2001, Series C, No. 79

[190] J.ANAYA, C.GROSSMAN, «The case of Awas Tingni v. Nicaragua: A new step in the international law of indigenous peoples», *Arizona Journal of International and Comparative Law*, 2002

[191] C.GROSSMAN, «Awas Tingni v. Nicaragua: a Landmark case for the Inter-American system, Human rights Brief», *American University Washington College of Law*, 2001

peoples' rights.

The Awas Tingni Community fought for years in Nicaraguan courts to protect their lands and resources but while trying all remedies indigenous lands and resources remained unprotected.[192] Eventually, in 1995, the Indian Law Resource Center[193] filed a petition before the Inter-American Commission on Human Rights against the government of Nicaragua on behalf of the Community of Awas Tingni. The Commission is an independent body of the Organization of American States (OAS), located in Washington, DC. The petition denounced the Nicaraguan government's practice of granting logging licenses to foreign companies on indigenous communities' ancestral lands without consulting the communities. The Commission found in favor of the community, but the government ignored the Commission's requests for remedial action. So three years later, the Commission brought the case before the Inter-American Court. The court largely adopted the arguments of the Inter-American Commission and based its decisions on the Article 21 of the American Convention on the right to property. The court stated that:

> "ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and

[192] B. WALKER (ed.),«State of the World's Minorities and Indigenous peoples 2012», *Minority rights group international*, 2012

[193] Indian law Resource Center, *Nicaragua/ Awas Tingni Community*

understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival".[194]

The court consequently suggested that the "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition" of ownership. In the previous chapters, we saw that this conception of property was diametrically opposed to the establishment of the "European title" over the new world, which permitted the taking of land because the occupation of indigenous communities was not considered legally valid. This is one of the reasons why the judgment was considered and labeled as "unprecedented".

Moreover and probably most importantly, "it was the first legally binding decision by an international tribunal to uphold the collective land and resource right of indigenous peoples by an international body with formal adjudicatory powers".[195] It strengthened the contemporary trend in the processes of international law that permitted to empower indigenous peoples and their demands for self-determination "as distinct groups with secure territorial rights".[196] The other peculiar element at the time was also the procedure that has been followed by the Court "through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of

[194] Inter-American Court of Human Rights, judgment *Awas Tingni Mayagna (Sumo) Community v Nicaragua,* 31 August 2001, Series C, No. 79
[195]J. ANAYA, C. GROSSMAN, «The case of Awas Tingni v. Nicaragua: A new step in the international law of indigenous peoples», *Arizona Journal of International and Comparative Law*, 2002
[196] *ibid*

interpretation".[197] The Court implicitly developed a specific jurisprudence that could respond and provide protection for the rights of indigenous peoples by their evident cultural specificities. These decisions eventually paved the way for the elaboration of a specific body of jurisprudence to respond to indigenous peoples' necessities. This is true to the extent that prior to the adoption of the UNIDRIP, the Court ruled in three cases after Awas Tingni.[198] Yet, the right to property from Article 21 of the American Convention was not inviolable or safe from the public interests that were also guaranteed and recognized. Actually, this article was the center of contention during the negotiations of the American Convention with some suggesting the elimination of the right from the convention entirely.[199]

This made it clear for the Inter-American Court that some other text or source of jurisprudence on indigenous peoples was needed. This explains effectively why the draft of the UN Declaration on the Rights of Indigenous Peoples had, together with a renovated interpretation of ILO Convention 169, a very strong impact on the Inter-American jurisprudence. Although in the Awas Tingni decision there is no explicit reference to the UN draft declaration, the draft was evidently taken into

[197]Inter-American Court of Human Rights, judgment *Awas Tingni Mayagna (Sumo) Community v Nicaragua,* 31 August 2001, Series C, No. 79

[198] *Yakye Axa Indigenous Community v. Paraguay,* IACHR, judgement 17 June 2005 Series C, No. 125; *Sawhoyamaxa Indigenous Community v. Paraguay,* 29 March 2006, series C, No. 125; *Maiowana Community v Suriname*, 15 June 2005, Series C, No. 124

[199] T.M. ANTKOWAIK, «Right, resources and rhetoric: Indigenous peoples and the Inter-American Court», *Journal of International law*, 2013

account by the Court while elaborating its "evolutionary interpretation".[200] In the next section we will examine cases involving indigenous and tribal territories and how the Inter-American human right system tackled those issues.

11. Case study: Kichwa Indigenous People of Sarayaku v. Ecuador

Latin America is a unique continent in many aspects. Its colonial history and the later willingness of new born States - after the decolonization - to exploit natural resources for development has been the center of discussions for many decades. In fact, if development is considered a right, it is also a responsibility of national governments to all its citizens, including indigenous peoples. Many Latin American governments consider the exploitation of natural resources as the only escape from poverty and a center of development policies. This approach often collides with indigenous peoples' rights over land and resources so that reaching a balance between these two, sometimes opposite, interests is not always easy.[201] As stated earlier, the American Convention on Human Rights provides a coherent framework for the promotion and protection of human rights in the continent, together with the Inter-American system as a whole. In order to better understand how the jurisprudence evolved from *Awai Tingni* case and how the UNIDRIP

[200] S. ALLEN, A. XANTHAKI (eds.), *Reflections on the Un Declaration on the Rights of Indigenous Peoples*, Oxford, 2011
[201] E. GALEANO, *Las venas abiertas de America Latina*, New York, 1997

eventually affected the Inter-American system and the protection of indigenous peoples' rights we will now discuss the a specific case of Kichwa People of Sarayaku v. Ecuador.

In 2012, the Inter-American Court of human rights handed down *Kichwa Indigenous People of Sarayaku v. Ecuador,* now considered to be a crucial decision on indigenous rights. While examining the case, we will see that the Court connected a conspicuous number of indigenous peoples rights to the right of property under Article 21 of the American Convention on Human Rights.[202] Although efficient to some extents, the right to property could not serve as a conceptual haven for indigenous peoples' survival and development. This has proved to be true because domestic and international law also grants States wide latitude to interfere with property. For this reason, among others, the Court needed a stronger principle in order to effectively defend indigenous peoples' rights.

The dispute concerned the Kichwa indigenous community of Sarayaku living in the Ecuadorian Amazon rainforest. The Kichwa and their decision-making structures had been politically recognized by Ecuador since 1979 and they were awarded land title in 1992. They were granted a communal property title that included a certain number of rights including the right to subsurface natural resources. In fact, Ecuador

[202]American Convention on Human Rights, Article 21: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law".

recognized collective rights of indigenous peoples in its Constitution in 1998 and ratified the ILO Convention 169 that same year. Essentially, their right to communal property was undisputed.

Despite this, the State of Ecuador permitted a private company to initiate oil exploration in the traditional Amazon forest territories in which the Kichwa group resided. When the Kichwa resisted the intrusion of the company into their land, they claimed that they were not consulted and subsequently, they did not consent the explorations. The oil company, trying to divide Kichwa's leaders, stated offering jobs and payments. For several months, company staff, together with soldiers and private security guards, carried out detonations, cut down trees, dug wells, buried a great amount of high-grade explosives and otherwise polluted the environment.

Nevertheless, the Sarayaku people resisted and peacefully opposed the company's entry into its territory by taking various measures in and outside the community, including raised complaints both nationally and internationally, which eventually managed to get the company to drop the project.[203] During the public hearing to the Inter-American Court of Human Rights, Patricia Gualinga, international relations director for the Kichwa First people of Sarayaku,[204] stated that in Sarayaku, the plan was opposed because they "had seen all the problems that oil exploitation had

[203] «Ecuador: one year after decisive ruling, Sarayaku struggle goes on», *Amnesty International*, 2013
[204]to know more in details, see Patricia Gualinga, *The Huffington Post*, http://www.huffingtonpost.com/author/patricia-gualinga

caused in other areas; […] and apart from that, they knew that part of their subsistence depended on defending their living space and territory".[205]

Following its earlier jurisprudence, the Inter-American Court found that Ecuador had violated the Kichwa's communal right to property and natural resources through its own institutions, failing to accomplish with its own rules and treaties, on both a domestic and international level. Ecuador had also failed to consult with the community of Sarayaku, not complying with any of the five elements required in order for the right to consultation to be respected and fulfilled. These five elements state that the consultation must be: 1) carried out in advance; 2) in good faith and with the aim of reaching an agreement; 3) adequate and accessible; 4) accompanied by an environmental impact assessment; 5) informed.

Based on the judgment, none of these criteria where accomplished. Firstly, the community was not consulted in advance. Secondly, the consultations were not undertaken in good faith as required and definitely with no evident intent of reaching an agreement –if any. One of the factors that made this possible was the fact that the process was not directly conducted and monitored by the State but was, as aforementioned, delegated to the private company only. Another relevant element was the presence of the military and private security in the area.

In the judgment, it is clearly said that the violations of the right of prior consultation and cultural identity of the Sarayaku

[205] Testimony rendered by Patricia Gualinga before the court during the public hearing on July 6, 2011. Also affidavid prepared by Gloria Berta Gualinga Vargas on June 27, 2011 (evidence file, tome 19, folio 10037).

> "emerged also from the acts and omissions of different officials and institutions that failed to guarantee those rights. The State in fact, must implement within a reasonable time and with the corresponded budgetary allocation, mandatory courses or programs that includes modules on the domestic and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials as well as others whose functions involve relations with indigenous peoples". [206]

Thirdly, the consultation was not accessible as the negotiations between the company and the Kichwa were not made in respect of their political organization. Fourthly, the environmental impact plan was prepared neither with indigenous participation nor by State monitoring, as it was implemented by a private entity sub-contracted by the developer and did not take into account any social or cultural impacts that the explorations would have.

Finally, any consent was not informed as a consequence of what has been described in the above-mentioned four elements. There was no discussion on the advantages or disadvantages of the project, not only on a general environmental impact level but also on the impact that this project would have on the Kichwa culture and way of life, which is completely linked with the land and its resources.

In the light of the above, we can easily affirm that the baseline of effective participation of the indigenous community was not at all respected, nor was the State obligation to do so before the initiation of the

[206] Inter-American Court of Human rights, *Kichwa Indigenous people of Sarayaku v Ecuador,* Ser.C n. 245, June 27, 2012

project satisfied. This was even more evident in light of the Constitution of Ecuador, which provides comprehensively protection for the rights of indigenous communities. As Anaya indicated during the public hearing held at the Court's headquarters, the Ecuadoran Constitution was in fact, "one of the most advanced and exemplary in the world".[207] Thus, today the right to consultation is still fully recognized in Ecuador.

One of the very relevant aspects of this judgment was the effort to establish the right to consultation, not only as a norm protected on a national and level, but also as a "general principle" of international law. This effort was supported by the general acceptance of the ILO Convention 169 by a large number of States not only in the American continent, but also outside the region (for example, New Zealand.) This led to the conclusion that, beyond being a treaty-based provision, the right to consultation could be considered a general principle of international law.

Anaya also urges that broad consultation requirements in "all matters affecting indigenous peoples", concerned not only property rights (as provided in Article 21 of the American Convention), but a broader variety of considerations.[208] His reasoning is in line with the idea that consultation and active participation are not only essential components of the right of self-government, but more importantly are a corollary of the right of self-determination.[209]

---

[207] Expert opinion of James Anaya during the public hearing held at the seat of the Court on July 7, 2011

[208] J.ANAYA, *Indigenous Peoples in International Law*, Oxford, 2004

[209] *ibid*

The judgment concluded that the Kichwa community's lack of participation through their representative institutions was a "violation of the rights to consultation to indigenous communal property and cultural identity in the terms of Article 21 of the American Convention". The Court clearly affirmed that the duty to consult, interrelated with the objective to consent, is derived from the right to cultural integrity. The ruling also emphasized the "prior" dimension of the consultations congruently with the fact that, in order for the community to have any power in influencing the decision-making process, this had to occur at the initial stages of the planning itself (contrary to what happened in Sarayaku). The other notable element of the decision is that the Inter-American Commission derived the principle not only from the right to property and non-discrimination[210] but also addressed a broader "right to life, cultural identity, personal integrity and liberty".

Although there was no explicit reference in the decision to the right to self-determination, the reference to UNDRIP was included in the footnotes, underling the wide acceptance that the Declaration had among several States, including Ecuador. In other words, we can say that although in the decision there is no univocal interpretation of the standards for consent, the right to FPIC derived self-evidently, not only from property rights, but rather from a range of rights, including the right to self-determination. Seen as a whole, it is inevitable to come to the conclusion

[210] Inter-American Commission of Human Rights, Report N. 27/98 (Nicaragua), quoted in *Awas Tingni v Nicaragua*, 2001, para. 142, 25: *Mary and Carrie Dann v. United States*, 2002, report 75/02 para. 165

that the requirement for consent absorbs and includes several human rights, *inter alia* the right to self-determination. The organs of the system have been particularly careful to seek a balance between the right of indigenous communal property and States' legitimate interest in the sustainable exploitation of the natural resources of their property. In fact, both the American Convention and the American Declaration clearly visualize the right to property not as absolute one, but as a right that may be limited for reasons of public utility or social interest.[211] And yet, it is uncontested that *Sarayaku* expanded the right to consultation to include matters beyond land and resources as the denial of this broader interpretation would have impeded the protection of indigenous rights.

This result was probably for the best: in the last years, the FPIC found support not only among indigenous leaders, but also with a variety of other non-State actors around the globe which saw the necessity for States to "ensure that the legislation governing the granting of concessions includes provisions on consultation and FPIC, in line with international standards and which recognize the right of indigenous peoples" to dissent.[212] In other words, even international finance institutions and industry

---

[211] Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007, Series C No. 172: "Article 21 of the Convention in fact, "does not *per se* preclude the issuance of connections for the exploitation and exploration of natural resources in indigenous or tribal territories".[211] It should rather be interpreted in a way that prevents the State from granting any type of concession for the exploration or extraction of natural resources within indigenous or tribal territory. In conclusion, the right to property is not absolute but may be restricted by the states under very specific, exceptional circumstances".

[211] *ibid*

[212] Permanent Forum on Indigenous issues, Report of the international expert group meeting on extractive industries, indigenous peoples' rights and corporate social responsibility, UN Doc. E/C.19/2009/CRP.8, May 4, 2009

associations have adopted the FPIC.[213] These small achievements do not assure the total cessation of abuses on indigenous peoples and their lands, but perhaps optimistically we are drawing closer to that aim.

12. Indigenous People in the United States of America: Native American Rights and the Keystone XL Pipeline

Another case that illustrates the connection of the right to self-determination and the right to free, prior and informed consent is the one concerning the Keystone XL pipeline project has been surrounded with controversy since its initial conception. The project proposes the transport of crude oil from the Canadian border into the United States, expanding the existing Keystone pipeline system. This "black snake" (as it has been renamed) would cross both sovereign and treaty lands of the Great Sioux Nation, threatening not only sacred sites, but also the well-being of the environment, specifically fresh water resources.[214]

In order for a transnational project to start, it needs Presidential approval.[215] The TransCanada Company has been seeking it for the construction of the pipeline in two occasions, since 2008. Despite pressures and a "political saga of epic proportions", President Obama never granted the permit for the construction to start. Despite the favorable outcome, indigenous communities complained about the lack of

[213] International Council on Mining and Metals (ICMM), *position statement*: *Mining and Indigenous people*s, 2013
[214] C.WOODS, «The Great Sioux Nation v. The "Black Snake": Native American Rights and The Keystone XL Pipeline», *Buffalo Human Rights Law Review*, 2016
[215] *ibid*

meaningful consultations and the breach of respect for the right to free, prior and informed consent, granted by the UNDRIP and clearly endorsed by the jurisprudence of the Inter-American system.

Indigenous peoples' concerns were expressed in September 2011, when the Black Hills Sioux Treaty Council and nine member reservations, along with other native and non-native groups signed the Mother Earth Accord, in which the Sioux nations expressed their concern[216] about the Keystone Pipeline XL and its "impact on sacred sites […] and treaty rights throughout traditional territories, without adequate consultation on these impacts" also fearing that the eventual oil spills from the pipeline would have destroyed "life-sustaining water resources, including the Ogallala Aquifer".[217] The Mother Earth Accord also insisted that the United States had to provide "full consultation under the principle of 'free, prior and informed consent". Many Native American Tribes expressed disappointment in the consultation process as described them as "too large, too short and often inaccessible for too many".[218]

Besides environmental concerns around the project, indigenous groups also claimed that the pipeline developments were in violation of commitments – especially regarding the right to FPIC – made through various treaties and the adoption of the UNIDRIP.

---

[216] Human Rights Council, *Report of the Special Rapporteur* James Anaya *on the Rights of indigenous peoples*, The situation of Indigenous peoples in the United States of America, 30 August, 2012, UN Doc. A/HRC/21/47/Add.1/Appendix II, 2012

[217] THE MOTHER EARTH ACCORD, 11 November, 2011

[218] L. PEEPLES, *Keystone XL and Native America: South Dakota Tribes Fight the 'Black Snake'*, Huffington Post, April, 2013, http://ww.huffingtonpost.com/2013/04/17/keystone-xl-native-americans-tribes_n_3102454.html

13.The Evolution of Federal Indian Policy and Legislation

Federal legislative action in the United States has evolved over time along with historical circumstances that from the colonial period jurisprudence led to modern days legislation. After achieving independence in fact, the United States continued the practices already established under English colonization, including the practice of treaty making with Indian tribes residing in the continent. These treaties were the mechanisms through which the colonial power, and later on the United States itself, acquired land from indigenous peoples as well as the means by which the tribes retained rights over land and resources not ceded to the United States. Although this practice came to an end in 1871, many of the historical treaties are still considered valid federal law.

In the face of past federal programs of assimilation and acculturation,[219] Native Americans have continued to make clear their determination to hold onto their distinctive cultures and desire to pursue self-governance. This is evidenced in assisting legislation such as the Indian Self-determination and Education Assistance Act issued in 1975. In recent years, several agencies throughout the US government have been dedicated specifically to indigenous affairs,[220] most notably the Bureau of Indian Affairs. The government has made important efforts to appoint indigenous peoples to high-level government positions dealing with

[219] Dawes General Allotment Act 1887; Indian Reorganization Act 1934

[220] Human Rights Council, *Report of the Special Rapporteur* James Anaya *on the Rights of indigenous peoples*, *The situation of Indigenous Peoples in the United States of America*, UN Doc. A/HRC/21/47/Add.1, 30 August, 2012

indigenous affairs. Up until recently, in 2009, the position of Senior Policy Advisor for Native American Affairs was created to advise the president on issues related to indigenous peoples. Yet, much more is still to be done.

In fact, problems concerning the respect of old treaties and the land sovereignty of Native Americans are still object of dispute. One of the most emblematic cases, which is important to stress while dealing with the Keystone XL pipeline project, involved the Black Hills in South Dakota. This land was part of the ancestral territory of the Lakota people that under the Treaty of Fort Laramie of 1868 was reserved to the Lakota and other tribes known collectively as the Sioux Nation.[221] After the discovery of gold in the area after the treaty was signed, Congress passed an Act reversing its promises under the treaty and vesting ownership of the Black Hills in the government. The Lakota never accepted compensation for the taking of the treaty land and always asked the return of the Black Hills. At present, the Black Hills are national park lands, but they still hold a central meaning in the history of the tribes. In light of this past, when the Keystone XL pipeline plan was introduced, the Sioux Nation showed concern for the project that, along with potentially creating serious environmental harm, would plunder the integrity their sacred place for the second time in history.

The United Nations Declaration on the Rights of indigenous Peoples serves as an important impetus and guide for measures to address the concerns of indigenous peoples in the United States and to move towards

[221] H. ZINN, *Storia del popolo Americano dal 1942 ad oggi*, Milano, 2010

the (so-called) "reconciliation" process.[222] As previously emphasized, this instrument is considered extremely authoritative – even given its non-binding nature - because of the overwhelming support it received during its adoption process in the General Assembly. This was considered a clear expression of support for indigenous peoples all around the world.[223]

Although the United States was an active participant in the long negotiation process that led to the final draft of the declaration, it ultimately was among four countries – including Canada, Australia and New Zealand – to vote against the Declaration. In the following years after the adoption of the UNIDRIP, the other three countries that originally voted against the UNDRIP changed stance with formal statements released by their governments and endorsed the Declaration.[224] The mounting pressure that followed this change of course and the urging of indigenous leaders from throughout the country to do the same, led to the an announcement of President Obama in 2010,[225] declaring the United States' support for the Declaration.

By its very nature, the declaration is not legally binding, as the U.S. stressed repeatedly, nevertheless it does "express aspirations that the

[222] Human Rights Council, *Report of the Special Rapporteur James Anaya on the rights of indigenous peoples*, UN Doc. A/HRC/21/47/ Add.1, 30 August, 2012

[223] S.ALLEN, A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

[224] Canada's Statement of support on the UN Declaration on the Rights of Indigenous Peoples, 12 November 2010; New Zealand Parliament Ministerial Statements – UN Declaration on the Rights of Indigenous Peoples – Government Support, 20 April, 2010; Australia Statement on the UN Declaration on the Rights of Indigenous Peoples, Parliament House Canberra, 3 April, 2009

[225] The White House, Remarks by the President at the White House tribal Nations Conference, office of the press secretary, 2010 https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference

country seeks to achieve within the structure of the U.S. Constitution, laws, international obligations, while also seeking, where appropriate, to improve our laws and policies".[226] Its importance comes from other factors, including the promotion and respect of human rights norms in accordance with the UN Charter, customary international law,[227] together with multilateral human rights treaties to which the United States is committed to, primarily including the international covenant on civil and political rights (ICCPR) and the international covenant on the elimination of all forms of racial discrimination.[228]

One of the major impacts of the UNDRIP in the abovementioned context, is its firm focus on fundamental rights including the right of equity, property, cultural integrity and most importantly, the right to self-determination. The recognition of the latter right in the Declaration is considered one of the most important developments of the interpretation and employment of the right since the era of decolonization (although, again, it does not include the right of secession). Despite the ongoing dispute about the legal meaning of this right and its precise significance, the endorsement to the UNIDRIP by the United States, and the subsequent adoption of the Declaration, can be clarified while reading the

[226] U.S. DEPARTMENT OF STATE, «Announcement of the U.S. Support for the United Nations Declaration on the rights of indigenous peoples: initiatives to promote the government-to-government relationship and improve the lives f indigenous peoples, 2014» in C.WOODS, «The Great Sioux Nation v. The "Black Snake": Native American Rights and the Keystone XL Pipeline», *Buff Human rights Law Review*, 2016

[227] S. ALLEN, A. XANTHAKI, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011

[228] Human Rights Council, *Report of the Special Rapporteur* James Anaya *on the situation of human rights and fundamental freedoms of indigenous people,* UN Doc. A/HRC/9/9/ Add.1, Annex 1, 2008

announcement that was made by President Obama back in 2010:

> "So we're making progress. We're moving forward. And what I hope is that we are seeing a turning point in the relationship between our nations. The truth is, for a long time, Native Americans were implicitly told that they had a choice to make. By virtue of the longstanding failure to tackle wrenching problems in Indian Country, it seemed as though you had to either abandon your heritage or accept a lesser lot in life; that there was no way to be a successful part of America and a proud Native American. But we know this is a false choice. To accept it is to believe that we can't and won't do better. […] We know that, ultimately, this is not just a matter of legislation, not just a matter of policy. It's a matter of whether we're going to live up to our basic values. It's a matter of upholding an ideal that has always defined who we are as Americans. *E pluribus unum.* Out of many, one."[229]

Ultimately, in the light of the above premises, the Declaration should serve as a guiding light for executive, legislative and judicial decision-makers in relation to matters directly concerning indigenous peoples, aiming towards true, meaningful reconciliation with the country's indigenous peoples.[230]

One of the major concerns related with the recognition of the right to self-determination, right after the warded off secession, is the other corollary aspect of the right: the right to Free Prior and Informed Consent. Although the U.S. government endorsed the Declaration's aspiration on

[229] The White House, Remarks by the President at the White House tribal Nations Conference, Office of the Press Secretary, 2010

[230] Human Rights Council, *Report of the Special Rapporteur James Anaya on the rights of indigenous peoples*, UN Doc. A/HRC/21/47/ Add.1, 30 August, 2012

FPIC, it also tried to be vague on the meaning to attribute to it. One thing was certain: the consultations were to be conducted *before* the actions addressed in those consultations were taken.

On the other hand, it was still uncertain whether or not the indigenous peoples involved in consultations had veto powers. If in numerous occasions it was made clear that the result of those consultations would have not resulted in the power of veto, it is also true that the Declaration clearly use the term "obtain consent" in both Articles 19 and 32 (2) while dealing with the FPIC. The contrary official stance taken, in the light of we just said, is then misleading with regard to the content of the Declaration. Besides the diatribe, the discussed dichotomy 'veto/non-veto' effects of the consultations, was eventually not the main point of the right. Anaya, as a special Rapporteur, clearly explained that the FPIC was to be conceived as a guiding principle to follow while conducting the consultations in order to prevent the imposition of one will over another.[231] But in order to get to this point, real consultations were to be granted.

This interpretation is specifically endorsed in the Inter-American Court of Human rights, in the decision *Saramaka v. Suriname*, in which the court held a clear position on the weight that the consultations should have when: "regarding large-scale development or investment projects that would have a major impact within indigenous [Saramaka] territory,

[231] Human Rights Council, *Promotion and Protection of all human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur* James Anaya *on the situation of human rights and fundamental freedoms of indigenous peoples*, UN Doc. A/HRC/12/34, 15 July 2009

the State has a duty, not only to consult with the indigenous peoples [Saramakas], but also to obtain their free, prior and informed consent, according to their costumes and traditions".[232] Unfortunately though, only those member nations which ratified the American Convention are subject to the jurisdiction of the Court and since the U.S. has not ratified the Convention, it is consequently not subject to the Court's jurisdiction nor bound by its findings.[233]

Yet, the U.S. cannot hide behind the non-binding nature of the UNDRIP nor by the alleged non-customary nature of the content of the Declaration. In fact, The United States would still be compelled under the Inter-American system, to *obtain* (in this case) the Sioux Nation's consent before approving the [Keystone XL] project, which affects them directly. In fact, although the American Declaration of the Rights and Duties of Man (American Declaration) is not a legally binding document, both the Inter-American Commission of Human rights (IACHR) and the Inter-American Court on Human rights (IACtHR) have established that, despite having been adopted as a Declaration and not as a treaty, it nevertheless constitutes a "source of international legal obligations for member States of the Organization of American States (OAS)".[234] This is proved by the

[232] Inter-American Court of Human Rights, Case of *Saramaka People v. Suriname*. Preliminary objections, merits, reparations and costs, judgment of November 28, 2007, Series C, No.172

[233] American Convention on Human Rights "Pact of San Jose, Costa Rica", Organization of American States, 18 July, 1978

[234]IACHR, Resolution No. 3/87, Case 9647, James Terry Roach and Jay Pinkerton (United States), *Annual Report 1986-1987*, September 22, 1987, paras. 46-49; IACHR, Report No. 51/01, Case 9903, Rafael Ferrer-Mazorra (United States), *Annual Report 2000*, April 4, 2001; I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89, July 14, 1989. Series A No.

fact that there is relevant jurisprudence on the issue, established also by the Inter- American Commission, which is considered an arm of the OAS that evaluates human rights claims and can recommend such claims to the Inter-American Court. This jurisprudence was developed on the basis of the right to property under Article XXIII of the American Declaration. In different cases the Commission has showed its support for a broader interpretation of the right to property specifically dealing with indigenous peoples' claims. The Commission repeatedly proved to share and approve the interpretation of the right to consent, recognizing that any determination with regard to indigenous land rights "must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole, requiring as a minimum, that all members are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives".[235] It was also clearly stated that:

> "[…] where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed *only by mutual consent between the state and respective indigenous peoples*[236] when they have full knowledge and appreciation of the nature or attributes of such property. This also

10, paras. 35-45. See also Article 20 of the Statute of the IACHR.

[235] Inter-American Commission of Human Rights, *Mary and Carrie Dann v. United States*, case 11.140, Report No. 75/02 Doc. 7, 2002

[236] *ibid.* (Emphasis added)

implies the right to fair compensation in the event that such property and user rights are irrevocably lost".[237]

This concept and interpretation was even more enforced by the *Maya Indigenous Community of the Toledo District v. Belize,* in 2004. The commission continued to build up the concept of informed consent, not only in relation to property rights but also in the light of the new developments on indigenous rights, including the new accepted concept of collective rights. In that occasion the commission did not fail to remind that:

> "Accordingly, the organs of the Inter-American Human Rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by States or that are defined by domestic law, but rather that the right to property has *an autonomous meaning in international human rights law*. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition. Consistent with this approach, the Commission has held that the application of the American Declaration to the situation of indigenous peoples requires the taking of special measures[238] to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest

[237] *ibid*

[238] *Dann Case*, *supra* footnote 89. The Inter-American Court has similarly recognized that "indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration." *Awas Tingni Case*, *supra* foonote 357

except with fully informed consent, under conditions of equality, and with fair compensation".[239]

In the light of the above, there is enough evidence among the Inter-American Commission jurisprudence to conclude that United States is compelled to fully accomplish the right to FPIC, and to receive the Sioux Nation's consent before allowing the undertaking of any project on their land.[240] Despite the notorious aversion of the United States to accepting and considering international law in domestic issues – with the evident exception of the Discovery Doctrine – it has nevertheless committed to the Commission in several occasions.[241] Regardless of the position taken towards the UNDRIP, the United States is still engaged with the American Declaration and the Inter-American system so that the Commission's interpretation of the right to property must be followed as described while dealing with indigenous peoples. This inevitably leads to the conclusion that Native Americans deserve to be meaningfully consulted when a project might affect them and to participate actively in the decision-making process. Although the Pipeline project did not come to application by other means, the lack of respect of the right of FPIC is to be underlined. In other words, this description does not have to resolve in a vacuous juridical exercise but rather the perfect example of a felt need for providing indigenous peoples their rights which otherwise would just remain aspirations never to be achieved or empty words.

[239] *Maya Indigenous community v. Belize* (Merits), Case N. 12.053, Report N. 40/2004, 2004
[240] C.S. WOODS, «The Great Sioux Nation v. The "Black Snake": Native American Rights and the Keystone XL Pipeline», *Buffalo Human Rights Law Review*, 2016
[241] ibid

The importance of recognizing the jurisprudence of the Inter-American Commission is still relevant and not only for this specific case. According to Anaya, "consultation procedures are crucial to the search for a less harmful alternatives or in the definition of mitigation measures. Consultations should also be, ideally, mechanisms by which indigenous peoples can ensure that they are able to set their own priorities and strategies for development and advance the enjoyment of their human rights". [242]In other words, as David Archambault II, tribal Chairman of the Standing Rock Indian Reservation in North Dakota, recently (January 25, 2017) expressed in a letter addressed to President Trump following his executive order – which would allow the construction of the Keystone XL Pipeline and the Dakota Access Pipeline to more forward - he said: " […] as we are stated previously, we are not opposed to energy independence, national security, job creation, or economic development. The problem with the Dakota Access Pipeline is not that it involves development but rather that it was placed without proper consultation with tribal governments. […] In order to work together, we must be at the same table and hear both sides of the story".[243] The lack of participation and proper consultation denounced by Archambault was eventually confirmed

[242]Human Rights Council, *Report of the Special Rapporteur* James Anaya *on the Rights of indigenous peoples*, *The situation of Indigenous peoples in the United States of America*, August 30, 2012, UN Doc. A/HRC/21/47/Add.1

[243] Read full text in: T.L. DUNN, *Standing Rock Chairman Demands "Leader to Leader" Meeting with Trump*, Yes Magazine, 26 January, 2017 http://ww.yesmagazine.org/people-power/standing-rock-chairman-demands-leader-to-leader-meeting-with-trump-20170126

by the U.N. Special Rapporteur on the Rights of Indigenous peoples, Victoria Tauli-Corpuz, who shared her concerns on the issue.[244]

14.Conclusions

The right to self-determination for indigenous peoples is still very contested, as evidenced by the cases discussed above. We proved this to be true not only while dealing with the objections during the drafting of the UNIDRIP but also, after the adoption of the Declaration, on a practical level when dealing with some of the corollaries of the right, including the right to free, prior and informed consent. We furthermore addressed the dilemma on whether these rights are compatible with the right of States to develop and with particular rights of non-State Actors.[245]

We also proved that, despite the non-legally binding nature of the Declaration, it nevertheless had a significant impact on the decisions and jurisprudence of prominent international bodies, besides the UN-bodies like the Human Rights Committee, but also like the Inter-American Court

---

[244] OHCHR (Media Unit), «UN expert urges consistent policies for US on indigenous peoples' rights for projects like Dakota Access Pipeline, UN Special Rapporteur on the rights of indigenous peoples VICTORIA TAULI-CORPUZ», Washington DC -Geneva, 3 March, 2017. The Special Rapporteur said: "The legislative regime regulating consultation, while well intentioned, has failed to ensure effective and informed consultations with tribal governments. The breakdown of communication and lack of good faith in the review of federal projects leaves tribal governments unable to participate in dialogue with the United States on projects affecting their lands, territories, and resources"[…]. See more at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21290&LangID=E; See also

B. NICHOLSON, Standing Rock Sioux Tribe not properly heard in pipeline dispute, says UN Official, CBC news, 3 March, 2017 http://www.cbc.ca/beta/news/indigenous/standing-rock-tribe-not-properly-heard-says-un-official-1.4008851.

[245] «The double life of International Law: Indigenous peoples and Extractive industries», *Harvard law review*, 2016

of Human rights and the Inter-American Commission. Although we did not focus our attention on the African continent and its jurisprudence, we would see that the Declaration had, and is still having, a strong impact on the African Commission of Human and Peoples Rights as well.[246]

We also pointed out that the rights included in the Declaration were incorporated into a relevant number of domestic legislations, among them the Constitution of Bolivia and Ecuador. It has also informed judicial decisions in Latin American States such as Colombia, Belize and Peru. It was noted that the articles of the Declaration reflected "the growing consensus and the general principles of international law on indigenous peoples and their land and resources".[247] And yet, we also saw that there was a need to provide an efficient application of those laws in practice, preventing them from becoming empty words.

We demonstrated the impact that the Declaration had on States that – at first – voted against the Declaration and eventually changed course. The right of self-determination was one of the most contested right in the entire text, considered somehow 'dangerous' and misleading. And yet, even with the ongoing difficulties to enforce this right and its associated principles and treaties, we can still acknowledge the revolutionary aspects of Declaration and the included right of self-determination. It permitted the reopening of an argument that seemed to confined to the past: the still standing importance of self-determination, not only as a general principle

[246] B. SAUL, *Indigenous Peoples and Human Rights*, Oxford, 2016
[247] Belize Supreme Court, *Mayan village of Santa Cruz v. the Attorney General of Belize and the Minister of Natural Resources and Environment*, consolidated claims, claim Nos 171,172 (para. 131), 2007

or an utopist aspiration, but as a right on which claims for relief could be granted. If Rome was not built in a day, so too for the law.

We addressed the challenges implementation of the Declaration and the many hurdles of that effort. We can affirm that the efforts made and the results achieved are still not enough, but that some progress has been made. The idea that "uncivilized" peoples would just prevent the advent of modernization and development has given way to a burgeoning respect for other cultures and civilizations. This leads away from the notion of domination of majority different culture over a minority group and towards a right to stand in equality and the right to make choices together. The self-determination of indigenous peoples should be respected and balanced with the State's rights to self-determine and develop, as a duty towards all its citizens.

And yet, the particular position of indigenous peoples should not be conceived as a "special treatment", which does not acknowledge the struggle that indigenous peoples have endured in order to make their voices heard. It is a step in a direction of what we called a new era of "multicultural constitutionalism": an international legal pluralism that is inclusive and more universal than before. Acknowledgment of their rights also aims to provide the right basis for physical survival and a revival of cultural pride that will, in time, diminish the need for affirmative action and reduce the bases for negative discrimination.[248]

[248] J. CRAWFORD (ed.), *The rights of Peoples*, Oxford, 1988

Self-determination is the only policy that can help develop this holistic and systemic approach to undoing the effects of centuries of assimilative and destructive policies. The right emphasizes that indigenous peoples are entitled to equal partnership in the decision-making processes that for centuries saw them at the margins of the society. History cannot be erased but its course can be changed to ensure the present and future well-being, dignity and survival of indigenous peoples. In order to do that there must be a full and honest account of the past, in order to ensure that colonial doctrines do not continue to be perpetuated. A clear shift of paradigm is critical from colonial doctrines to a principled human rights framework, consisted with the United Nations Declaration on the Rights of Indigenous peoples and other human rights law.[249]

[249] Economic and Social Council, *Study on the Impacts of the Doctrine of Discovery on Indigenous peoples, including mechanisms, processes and instruments of redress*, UN Doc. E/C.19/2014/3, 20 February, 2014