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Course of International Law

The Protection of Indigenous Peoples under International Law

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Introduction

Indigenous peoples are the descendants of the aboriginal inhabitants of lands currently occupied by others. They have been emerging as a subject of international law, gaining a *locus standi* within the United Nations' system, and are addressed by many international normative instruments.

Their legal status is the result of a prolonged fight against the state of oppression and marginalization, to which they have been confined for centuries.

Indigenous peoples are among the most vulnerable segments of society, their history is marked by the horrors of colonization, which nullified their presence in international affairs, and deprived their communities of the ancestral lands they had been occupying since immemorial times. The fragility of their condition derives from the European encroachments to which they have been historically subjected, which have overpowered their traditional institutions, and disrupted their economies and cultures.¹

Despite their heterogeneity and geographical dispersion, they share the same history of segregation and discrimination, in light of which the international community has recognized the urgency of granting protection for their basic human rights.

Starting from the second half of the twentieth century, the human rights system of law has started to emerge, disrupting the traditional structure of international law, invading the legal spheres, which previously exclusively pertained to the sovereign State. Within this framework indigenous peoples started to participate in the international debate, as they asserted their claims for justice².

The longstanding fight for recognition and resistance has culminated in significant judicial achievements, which will be explored in this Thesis, together with the effects these have had over the legal standing of indigenous peoples, and their fundamental rights, such as that of self-determination and the right to land.

The aim of this work consists in analyzing how the condition of indigeneity has gained international recognition, and indigenous peoples have emerged as subjects of international law, obtaining legitimization and acknowledgment of their specific needs and claims.

¹ Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. Book, Whole. New York [etc.]: Oxford University press, 2004, 3. <https://go.exlibris.link/rgCjM9d5>.

² Lenzerini, Federico. 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction'. In *Reparations for Indigenous Peoples: International and Comparative Perspectives*. Oxford University Press, 2008, 4. <https://doi.org/10.1093/acprof:oso/9780199235605.003.0001>.

In particular, the first Chapter will focus on the origins of the indigenous question and the international status of native communities. The lack of an internationally shared definition of the term “indigenous peoples” has influenced the process of recognition of their specific rights. The first section will focus on the examination of the main criteria for the identification of the condition of indigeneity, as it is marked by specific elements which do distinguish it from other categories, such as that of tribal peoples or minorities. The progressive emergence of indigenous peoples within the framework of international law is fundamental to understand the uniqueness and distinctiveness of their status, from colonial times up to the development of human rights precepts of law. This development was accompanied by the growing international recognition of indigenous claims.

Starting with the *International Labour Organization* (ILO), which has produced two fundamental documents: *Convention No. 107* and *Convention No. 169*. Culminating with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2007.

The second Chapter will examine the emergence and affirmation of the right to self-determination, as it is considered a driving force of the international community, and a cornerstone of the indigenous question. As enshrined in the text of the UNDRIP and consolidated within national and regional legal and jurisprudential practices. The attribution of the right to self-determination to indigenous peoples breaks away from the State-centered notion, favoring an approach which reinforces the sub-State communities’ rights to participation and preservation of their cultures and diversity.³ The Inter-American system of human rights makes a significative effort to recognize the indigenous cultural identity, within the regional legal instruments, and mostly throughout the *Inter-American Court of Human Rights*’ landmark pronouncements.

From the proposed understanding of self-determination, which in its full sense does not require the creation of a separate State, derives the duty to ensure indigenous participation in decision-making, and to grant *Free, Prior and Informed Consent*.

Lastly, in the third Chapter, the right to ancestral lands is analyzed, as comprised under the international practice of Human Rights instruments and regional courts. Specific focus will be directed at the jurisprudence of the Inter-American and African systems of human rights, which have promoted an interpretation of indigenous rights as “collective”.

³ Marcelli, Fabio. *I diritti dei popoli indigeni*. Vol. 1;1.; Book, Whole. Roma: Aracne, 2009, 11. <https://go.exlibris.link/Hd7kRStc>.

The territorial rights of native peoples emerged as the necessary consequence of the long-standing occupation of the lands currently under State sovereignty. The originality and legitimacy of indigenous cultures, societies and ways of life, reinforces their rights to property of traditional territories, as the livelihood and development of these groups is drawn directly from their lands. Thus, the attachment to a traditionally inhabited territory and to its natural resources is a defining element of indigeneity, which also includes marine spaces and resources as well. Seas, oceans, and the seabed hold special significance for coastal indigenous communities, since their development and subsistence are dependent on them.

The examination of international dynamics involving indigenous peoples highlights how international law detains the capacity to change beyond the existing configurations of power, and exclusive State sovereignty. The evolutive jurisprudence of many international Courts has vastly contributed to the advancement of indigenous claims, as well as the implementation of their rights. The aim of this work is to contribute to the understanding of how indigenous peoples have progressively emerged as subjects of international law and analyze the implications deriving from this advancement.

1. Indigenous Peoples as Subjects of the International Legal System

Introduction

Indigenous peoples represent one of the most marginalized and vulnerable categories of communities. Their existence dates back to ancestral times, and amounts to an estimate of 370 million peoples within 70 countries⁴. The intrinsic diversity of those populations makes it impossible to categorize or define them from a geographical or ethnographic point of view. They emerged as subjects of law, both in national and international legal systems, which aim to protect their distinct characteristics and promote their political participation.

This chapter will explore the question of the identification of indigenous peoples as actors under the international legal system, beginning with the challenge of establishing a universal definition, hindered by their inherent heterogeneity. The recognition of indigenous peoples' rights under international law has been an evolving process, starting from the historical framework of colonialism in the 15th century, to the advent of human rights law. The legal development of the indigenous question culminated in the adoption of specific normative instruments, both at the international and regional level.

1.1 Definition of the Term “Indigenous Peoples” under International Law

There exists no clear and universally recognized definition of indigeneity, despite the centrality of the topic in discussions of international law, a lot of contention remains on the legal notion of the term, which is still fraught with conceptual ambiguity. Many legal instruments have been developed concerning the matter of indigenous peoples, which however do not provide a definition for it.

The *ILO Convention No. 169* of 1989 sets forth in Article 1 one of the most cited definitions of the term by the international community:

“1. This Convention applies to:

tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries

⁴ United Nations Permanent Forum on Indigenous Issues. ‘Who Are Indigenous Peoples?’ United Nations, 2006. https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”⁵

The first article of the ILO document of 1989 provides two alternative criteria for the identification of indigenous peoples, a subjective and an objective one. The first clause focuses on the definition of “tribal peoples”, as groups having existing conditions separate from those of their respective national communities and a status fully or partially disciplined autonomously by their laws. Point (b) of the first paragraph then defines indigenous peoples on the basis of the historical continuity, that they retain with respect to the populations that inhabited the State at the time of the establishment of its borders or its colonization.

The criterion of “distinctiveness” from the national institutions appears to be common to both tribal and indigenous peoples, but the latter are further characterized by their descent from native communities of the State they inhabit. The presence of this lineage becomes vital for the attribution of the indigenous status, as every condition, such as separateness of institutions and norms, is dependent on it.

The requirement of distinctiveness set in Article 1(1) for the identification of indigenous peoples is objective, however the ILO Convention in Article 1(2) introduces a subjective standard: *self-identification*.

The criterion of self-identification is also provided under Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which establishes that:

“Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.”⁶

⁵ International Labour Organization. ‘International Labour Organization. ‘*C169 - Indigenous and Tribal Peoples Convention*, 1989 (No. 169)’, Article 1. https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDdocument.

⁶ General Assembly of the United Nations. ‘*United Nations Declaration on the Rights of Indigenous Peoples*’. United Nations, 13 September 2007. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

In Article 1(3) it is further specified that the attribution of the term “peoples” to indigenous communities does in no way imply the same consequences it normally would under international law, moreover it does not allow for the attribution of an independent State. Subsequently, the ILO Convention does not represent an attempt to shape the right to self-determination of indigenous peoples, in order not to hinder the ratification of the text, yet it does not deny it either, thus avoiding incompatibility with any future instruments that may recognize it.

Despite the possible controversy arising from the use of the term “peoples”, such denomination is necessary and adequate for the characterization of the status of indigeneity, which appears to be different from that of minorities and other ethnic groups. It is clear that such attribution is preferred by indigenous communities themselves, as an Onondaga⁷ leader has stated: “we are not a minority within our own nations, within our own lands”⁸. This distinction is rooted in the United Nations practice, as minority rights are generally confined to individual rights; whereas indigenous peoples promote the recognition of their rights as “collective”⁹.

In spite of the introduction of the subjective and objective criteria, the ILO Convention No. 169 of 1989 failed to reach greater semantic clarity, but rather provided a merge of the definitions of indigenous and tribal peoples, which are further connected by the attribution of the same rights within the text. However, the lack of specificity on the condition of indigeneity is not damaging to the status of these populations, and the concept of “indigenous peoples” is not necessarily desirable to all communities. They advocate for the importance of *self-identification*, meaning the possibility to define themselves as indigenous and to be identified as such, with the sole requirement being, acceptance by the members of the community they claim to belong to.

The most exhaustive working definition provided for the term “indigenous peoples” remains the one put forward by the *Study on the discrimination against indigenous peoples* (Martínez Cobo study):

“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

⁷ Onondaga is a Native American tribe and one of the Six Nations of the Haudenosaunee Confederacy, traditionally located in central New York.

⁸ National Lawyers Guild. Committee on Native American Struggles. *Rethinking Indian Law*. New York, N.Y: Committee on Native / American Struggles, 1982.

⁹ Special Rapporteur, Miguel Alfonso Martínez. *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*. COMMISSION ON HUMAN RIGHTS Sub-Commission on Prevention of Discrimination and Protection of Minorities, 22 June 1999. [E/CN.4/Sub.2/1999/20](#).

parts of them. They form at present non-dominant sectors of 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 systems.”¹⁰

The Special Rapporteur Martínez Cobo published in 1987 a definition that accounts for the marginalization that characterizes the condition of indigenous peoples, other than the distinctiveness of their institutions and ways of living. This implies a condition of discrimination and subordination to the dominant society into which they have been incorporated.

In 1996 *The Working Group on Indigenous Populations* published the *Working Paper by the Chairperson-Rapporteur*, Mrs. Erica-Irene A. Daes, on the concept of “indigenous peoples”, which lists the following factors as guidance for the attribution of the status of indigeneity, for the sake of the execution of decision-making. However, this list is not an extensive and comprehensive one, as it would be impossible to summarize the diversity showcased by indigenous communities in a single formulation.

- “(a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.”¹¹

This definition reinforces the criteria provided by the Martínez Cobo study and ILO Convention No. 169, underpinning distinctiveness and separateness as discerning elements for the attribution of the status of indigeneity, and identifies subjugation as specific to the condition of indigenous communities. The criterion of vulnerability is also found in the definition provided by the World Bank in its 1991 *Implementation of Operational Directive 4.20 on Indigenous*

¹⁰ José R. Martínez Cobo, eds. *Study of the Problem of Discrimination against Indigenous Populations*. New York: United Nations, 1987, 279.

¹¹ Daes, Erica-Irene A., and UN Subcommission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations Chair. ‘*Working Paper on the Concept of Indigenous People; /: By the Chairperson/Rapporteur, Erica-Irene A. Daes.*’, 10 June 1996, 22. <https://digitallibrary.un.org/record/236429>.

Peoples, later replaced by the 2005 *Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10)*. The latter maintains vulnerability as a key element in the attribution of the status of indigenous peoples, yet does not put forward a formal working definition:

“The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" 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. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.”¹²

In light of the absence of an officially recognized notion of the term, the document *Guidelines on Indigenous Peoples' Issues*¹³, published in 2009 by *United Nations Sustainable Development Group*, lists the definitions provided by Cabo, the ILO Convention No. 169, and the *The Working Group on Indigenous Populations*, as the applicable standards in the implementation of international legal instruments.

From the definitions provided for the category of “indigenous peoples” we can identify three fundamental criteria, which are specific and necessary for the condition of indigeneity to be internationally recognized: distinctiveness, self-identification and vulnerability.

Furthermore, the *United Nations Permanent Forum on indigenous Issues* has listed, together with the previously stated standards, three additional elements: “Strong link to territories and surrounding natural resources, Distinct social, economic or political systems, Distinct language, culture and beliefs.”¹⁴ These conditions characterize the status of indigenous peoples, and often cause it to be erroneously associated with that of minorities.

In international law a minority has been defined by the *Special Rapporteur of the United Nations*, Francesco Capotorti in 1979 as:

“A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic

¹² World Bank. ‘*Operational Directive OD 4.20*’, September 1991, 1, <https://www.ifc.org/content/dam/ifc/doc/1990/od420-indigenouspeoples.pdf>.

¹³ United Nations Sustainable Development Group. ‘*Guidelines on Indigenous Peoples Issues*’, 2009. https://unsdg.un.org/sites/default/files/UNDG_guidelines_EN.pdf.

¹⁴ United Nations Permanent Forum on Indigenous Issues, *Who Are Indigenous Peoples?*, op. cit.

characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”¹⁵

The two criteria presented for the identification of a group as a minority are objective, being the *de facto* existence of a community within a given State, detaining a way of life significantly distant and different from that of the rest of the society. Furthermore, such group should be in a condition of numerical inferiority and in a vulnerable position for it to be officially recognized as a minority. From these objective standards derive subjective ones, being that the members of such community must display willingness to preserve their customs as substantially different from those socially diffused, and they must have pursued such distinctiveness for a long period of time.

Seemingly such definition would appear suitable to indigenous peoples, however, as indicated in the *Working Paper on the concept of indigenous peoples*, two elements which are exclusive to their condition are the priority in time, meaning the presence over a specific territory before the advent of colonialism, and the attachment to a particular territory.

The discerning criterion between minorities and indigenous peoples has been reinforced by the UNHCR¹⁶, which has provided definitions for the two terms, designating the condition of minorities as amounting to a mainly numerical status and shared identity, whereas that of indigenous peoples is characterized by the continuity displayed with the society that inhabited a specific territory before its invasion and colonization.

1.2 Historical Overview of the Recognition of Indigenous Peoples' Autonomy and Rights

The juridical thought on the issue of indigenous peoples first arose with the advent of Spanish colonialism, and the ideologies emerging from the century showcase how a “natural law” approach has shaped the relationship between aboriginal populations and the “conquistadores”. The philosophies of two Spanish jurists: Francisco de Vitoria and Bartolomé de las Casas constitute the “Spanish School”, and their relevance lies in the impact they have had over modern developments of human rights law. Despite having had little to no influence on the factual execution of colonization practices, they have contributed to the legitimization of contemporaneous claims of indigenous peoples. As J.L. Brierly observed, Vitoria’s philosophical thought “marks an important step in the expansion of international law into a

¹⁵ Caportorti, Francesco. ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities / by Francesco Caportorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.’ United Nations, 1979, 96. [E/CN.4/Sub.2/384/Rev.1](https://www.unhcr.org/refugees/4/384/Rev.1).

¹⁶ UNHCR. ‘Minorities and Indigenous Peoples’. <https://www.unhcr.org/what-we-do/protect-human-rights/safeguarding-individuals/minorities-and-indigenous-peoples>.

world system”¹⁷, the author further notes how his contribution significantly impacted the conception of law, which for the first time was conceived as universally valid and applying equally to all men.

Vitoria’s philosophical thought was characterized by a holistic and universalistic approach, based on the understanding of indigenous peoples as rational actors, as they showcased instances of civilization and enactment of effective policies and institutions. From this standpoint he argued against the colonial acquisition of American territories and their partitioning by Western powers. However, in his findings, despite having evaluated positively the rationality of indigenous actors, he questioned their capacity to meet the basic standards for self-governance and regarded them as still requiring submission to external domination. Moreover, the interpretations of his views have been extremely divided. The ambiguity of De Vitoria’s philosophy lies in a series of titles he has assigned to the relationship between Indians and Spanish colonizers¹⁸: he recognized natural law as a legitimate justification for war, furthermore he awarded Spaniards with the right to preach Christianity, to travel and engage in trade relations with native populations. These could represent a possible justification of Spanish hegemony, quickly undermining the independence theorized for indigenous populations.

Contrarily to Vitoria, Las Casas indianist approach was more radical and critical of the colonization system and the *Encomienda*¹⁹, promoting the freedom of colonized populations from Spanish rulers, whilst still maintaining support for the administration of the colonies by the Crown.

Despite the interpretations and theories put forward by the Spanish School, Nation states found a legitimization of colonial practices in the principles of *terra nullius*²⁰ and *uti possidetis*²¹.

Alberico Gentili sustained that indigenous sovereignty created a valid ground against the identification of land as *terra nullius*, he envisaged cultural and religious pluralism and rejected any form of violence on justificative grounds of colonization, such as evangelism, cultural diversity and any kind of persecution²².

¹⁷ Brierly, J. L. *The Law of Nations. An Introduction to the International Law of Peace*. 6 Reprint lithographically 1984. Book, Whole. Oxford, The Clarendon press, 1963, 26. <https://go.exlibris.link/Mx7vqYjW>.

¹⁸ Vitoria, Francisco de. *De Indis Noviter Inventis*, 1532. <https://warwick.ac.uk/fac/arts/history/students/modules/archive/hi3f9/timetable/spanishinventionofrightsandinternationallaw/on-the-american-indians.pdf>.

¹⁹ The Encomienda consisted in a delegation of rights to a colonist, conferring him the power to demand a tribute and force labour over a certain territory and the indigenous communities inhabiting it.

²⁰ In public international law “terra nullius” is a term used to define a territory that is not under the sovereignty of any State, thus it can be subject to occupation.

²¹ The principle of *Uti possidetis* in international law indicates that the administrative borders existing at the time of decolonization or of state dissolution, shall become the international boundaries of the newly independent states, with the aim of preventing territorial disputes.

²² Gentili, Alberico, and Carnegie Endowment for International Peace Division of International Law. *De Iure Belli Libri Tres* (1598). Clarendon Press, 1933, book 1, chap. 19, book 1, chap. 25.

Indigenous peoples assented to sign various treaties with colonial powers, in order to preserve their aboriginal rights and self-government, which in part did alleviate the harshness of colonial practices, but lacked grounds for legal enforcement of the rights they recognized.

These treaties generally sought to ensure protection and equal rights to minorities and specified groups. This special protection was granted to communities identified as distinguished from the respective majority, and manifesting instances of difference throughout religion, culture or language.

Despite the failures endured by many of these treaties, the legal tradition of colonial States inhabited by indigenous peoples has been shaped by this pluralism. Legal anthropologists have coined the term “inter-legality” to indicate the coexistence of various legal frameworks exposed to mutual influence.²³ In light of these shortcomings, international law has reaffirmed the rights and entitlements of indigenous communities, as the UNDRIP states that:

“The rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility, and character.”²⁴

In 1648 the *Treaty of Westfalia* marked the beginning of a new phase of the international law doctrine, as the modern conception of the State arose, and sovereignty began to come into relation with the individual and the civil society. The birth of the modern State resulted in the nullification of indigenous communities as formal entities, other than the physical destruction they had been subject to in the previous centuries. In the 19th century, international law came to be shaped by the conception of nation-states as the sole legitimate actors and holders of legal rights and duties, with exclusive powers over a defined territory.

With the rise of a Eurocentric system, the precepts of natural law started fading and, as statehood was denied to indigenous communities, they came to fall within the domestic jurisdiction of the State, which made them completely liable to their policies and institutions. This caused indigenous peoples to fall in a state of invisibility.

²³ Di Blase, Antonietta, and Valentina Vadi. 2020. *The Inherent Rights of Indigenous Peoples in International Law*. RomaTrePress, 101. [10.13134/978-88-32136-92-0](https://doi.org/10.13134/978-88-32136-92-0).

²⁴ General Assembly of the United Nations. 2007. ‘*United Nations Declaration on the Rights of Indigenous Peoples*’. United Nations, preamble. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

The conception of *trusteeship*²⁵ came to be reinforced towards the end of the 19th and beginning of the 20th century, which obviously strengthened the precepts of colonialism.

This doctrine was internationalized by the *General Act of the Berlin Conference* (1884–85), adopted to regulate the further colonization and partition of Africa by European States, it established that:

“All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.”²⁶

These developments consolidated the justifications behind colonial practices and undermined the assertions of equality of indigenous peoples.

However, in 1945 the adoption of the *Charter of the United Nations* marked a new switch in the direction of international law, that became increasingly oriented towards human rights.

The international legal system underwent a significant shift from the Westphalian State-centric model, taking upon a State-peoples binomial²⁷, especially in the field of natural resources distribution and governance. This new comprehensive approach allows for the conferral of powers to non-State actors and safeguarding of the interest of populations living within its territory.

This renewal has been marked by the birth of the principle of self-determination, and the end of the *terra nullius* doctrine.

For the first time the individual's wellbeing is considered to be of higher importance than that of the State, and human rights are conceived as belonging to any individual and stemming from the sole condition of being human, rather than being dependent on a legal status.

This was embodied in the Charter of the United Nations, which promoted the process of decolonization and self-determination, however such principles were extended solely to the

²⁵ The notion of trusteeship was used by European powers to justify their control over territories by claiming a "civilizing mission." It implied a duty to govern and develop indigenous populations, often serving as a pretext for imperial rule rather than genuine self-determination.

²⁶ ‘General Act of the Berlin Conference on West Africa’, 26 February 1885, Article 6. <https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf>.

²⁷ Nino, Michele. 2020. ‘The Evolution of the Concept of Territorial Sovereignty: From the Traditional Westphalian System to the State-Peoples Binomial’, 573.

whole colonial territory, and didn't account for the presence of smaller communities and their differences.

Despite the reluctance demonstrated by States in the complete recognition and incorporation of indigenous peoples, the human rights era and decolonization largely benefited colonial territories, especially with the dismantling of the *terra nullius* doctrine.

The *International Court of Justice* (ICJ) advisory opinion on the *Western Sahara case*²⁸ was the pivotal factor for the definitive abolition of the doctrine²⁹.

The Court ruled that territories occupied by tribal communities, which presented a social and political organization, were not to be considered as *terra nullius*, and could be annexed by another State only under the conditions agreed upon in treaties signed with local rulers.

This abolition was further reinforced by the landmark decision of the *High Court of Australia* on the *Mabo v. Queensland case (2)*³⁰, which legally overturned the doctrine and recognized the ancestral connection detained by indigenous peoples to their respective lands.

Throughout the ruling, the Court established that the land inhabited by the Meriam peoples could not be recognized as *nullius* because the inhabitants were "devote gardeners"³¹ and showcased a peaceful political organization and a pre-existing system of law.

²⁸ Western Sahara is a territory which has been colonized by Spain in the 19th century. As decolonization pressure grew, both Morocco and Mauritania claimed historical ties to the region. On the other hand, the Polisario Front led the indigenous Sahrawi population in their search for independence. In 1975 the UN deemed it necessary to request an advisory opinion from the International Court of Justice, and before the issuance of the ruling Spain signed the Madrid Accords, allowing for the transfer of administrative control to Morocco and Mauritania. This decision sparked a conflict between the Moroccan forces and the Polisario Front, whilst Mauritania withdrew its forces.

²⁹International Court of Justice. 1975. '*Western Sahara, Advisory Opinion, 1975 I.C.J. 12*', 39. <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>. "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "*terra nullius*" in the proper sense of these terms. On the contrary, such agreements with local ruler"

³⁰ The *Mabo v. Queensland case* of 1992, arose after a Torres Strait Islander, Eddie Mabo, challenged the British claims of territorial sovereignty over Australia, which were justified by the *terra nullius* doctrine. He argued that the Meriam community, of which he was part of, detained a traditional connection to the land, which they had been inhabiting for generations. He advocated for the recognition of such relationship under Australian Law.

³¹ High Court of Australia. 1992. *MABO AND OTHERS v. QUEENSLAND (No. 2)*, par. 33. <https://derechodelacultura.org/wp-content/uploads/2015/03/Mabo-vs-Queensland.pdf>.

As stated in the 2017 *Uluru Statement from the Heart*³², indigenous sovereignty is a “spiritual notion: the ancestral tie between the land, or mother nature”³³. This resonates with Article 1 of the United Nations Charter, affirming that all “peoples” are accorded the right of self-determination. In international law it is commonly understood as the right of any “self-differentiating”³⁴ people to rule themselves. However, indigenous claims towards State actors in the international system, do not amount to demands for the extension of the right of self-determination. These groups do not seek secession from their State of residence, but rather request greater control over territorial and natural resources and cultural preservation.

The issue of indigenous sovereignty has been and continues to be central in international and domestic law. Although the progression in their acknowledgment as subjects of law and holders of rights was slow, the advancements paved the way for their recognition in the international legal framework, especially through the adoption of specific normative instruments.

1.3 Development of Normative Instruments for the Protection of Indigenous Peoples

International Labour Organization Conventions

Indigenous concerns have been increasingly acknowledged internationally, notably the *International Labour Organization (ILO)* was the first major body to deal with this issue.

The ILO was created in 1919 and became the first specialized agency of the United Nations in 1946. Its mission is “promoting social justice and internationally recognized human and labour rights, pursuing its founding mission that social justice is essential to universal and lasting peace”³⁵.

Its involvement and interest with indigenous peoples’ conditions began in the 1920s, as it dealt with the issue of “native workers”³⁶, and in 1957 the International Labour Organization adopted *Convention No. 107 on Indigenous and Tribal Populations*, the first Convention within the UN framework to address exclusively the rights of indigenous peoples. The ILO Convention No. 107 and its accompanying Recommendation (No. 104) remained for thirty-two years the sole comprehensive international statements on the subject.

³² The Uluru Statement from the Heart is a landmark document issued in 2017 by a gathering of over 250 Aboriginal and Torres Strait Islander leaders at the First Nations National Constitutional Convention held in Uluru, Australia. It is a call for constitutional and structural reform, inviting Australians to recognize the sovereignty of Indigenous peoples as the First Nations of the Australian continent.

³³ ‘*ULURU STATEMENT FROM the HEART*’. 2017. <https://embed.documentcloud.org/documents/3755370-ULURU-STATEMENT-FROM-the-HEART/?embed=1>.

³⁴ Connor, Walker. *Ethnonationalism: The Quest for Understanding*. Princeton University Press, 1994, 38. <http://www.jstor.org/stable/j.ctv39x5s6>.

³⁵ ‘Mission and Impact of the ILO | International Labour Organization’, 28 January 2024. <https://www.ilo.org/about-ilo/mission-and-impact-ilo>.

³⁶ International Labour Organization. *Report VI (1), International Labour Conference, 75th Session*, January 1988.

In spite of containing vital protections of customary law and land rights of indigenous peoples, the document had a fundamentally assimilationist character. Furthermore, it often took upon a patronizing attitude towards the population groups as it reinforced and justified integrationist tendencies.

Nevertheless, the Convention has had impactful positive effects, as the ILO supervisory machine helped avoiding serious abuses towards the communities.

However, the approach it promoted was not aligned with indigenous sensibilities³⁷, and often criticized by academics as being inadequate to deal with indigenous and tribal peoples' issues. The need for new standards was expressed repeatedly and became apparent since the 1972 *Special Rapporteur on Discrimination against Indigenous Populations* published his work³⁸, which raised awareness on the limitations of the Convention and the minimal protection that it provided, as the sole international binding instrument safeguarding the issue of indigenous peoples.

Consequently, between 1987 and 1989 a revision process led to the adoption of *Indigenous and Tribal Peoples Convention No. 169*, which substituted the previous Convention No. 107, revised basic obligations and promoted preservation of cultural identity. With this Convention the ILO moved beyond the original concern of “native labour” and set out fundamental goals that governments must aim to achieve for the protection of indigenous peoples.

In order to comprehend the impact of the ILO Conventions on national systems, it is necessary to understand its structure and supervisory mechanisms.

The International Labour Organization is the only institution in the UN framework to present a tripartite structure, bringing together 187 Member States, it is composed of: the *International Labour Conference*, which sets out the broad policies of the organization, the *Governing Body*, which is the executive council of the institution and is composed of 28 government members, 14 employer members and 14 worker members, and the *International Labour Office*, which is the Organization's secretariat.

ILO Conventions are international treaties ratified by each Member State, which do not allow for the presentation of reservations. After the ratification process, throughout which the State accepts the Convention as a legally binding instrument, it is transposed into national legislation, and it usually comes into force after 12 months from the registration by the Member State.

³⁷ Oguamanam, Chidi. *Indigenous Peoples and International Law: The Making of a Regime*, 2004.

³⁸ José R. Martínez Cobo, eds. *Study of the Problem of Discrimination against Indigenous Populations*. New York: United Nations, 1987.

Each State after the ratification is subject to the regular supervisory mechanism, under which it is obliged to present periodical reports on the state of the treaty, and notify the organization of problems on the issues regulated by the Convention.

The ILO Convention No. 107 and the attached Recommendation No. 104 were the first international instruments exclusively targeting indigenous peoples' rights, and detained a binding character, meaning that they contained compulsory provisions. Despite its substitution by the Convention No. 169, it is still valid for 18 States.

Regardless of the important recognitions and protections provided by the Convention No. 107, immediately after its adoption it became evident that the text didn't ensure the principles of self-determination, cultural pluralism and indigenous peoples' autonomy, conversely it still enforced the paternalistic vision which had been adopted towards these communities.³⁹ This inadequacy led to the adoption in 1989 of the ILO Convention No. 169 as an international legally binding instrument, which has currently been ratified by 24 States.

The new Convention sets a radically distinct and innovative approach, expressed in the Preamble, promoting the respect for diverse indigenous cultures and institutions, distancing itself from the assimilationist tendencies of the previous document.

Recalling Article 1 of the Convention No. 107⁴⁰, the new document is addressed to *tribal* and *indigenous peoples*, yet it does not provide a definition for these two categories, but establishes the objective criteria for their recognition. However, the first element of innovation introduced is the subjective criterion of *self-identification*, as a fundamental standard for the status of indigeneity.

A novelty in the text is represented by the use of the term "peoples" instead of "populations", which doesn't have any implication for the right to self-determination under international law in its political sense, but better portrays the distinct identity of these communities within society and accounts for their cultural differentiation.

³⁹ Martínez Cobo, op. cit., par. 336.

⁴⁰ International Labour Organization. *Convention C107 - Indigenous and Tribal Populations Convention*, 1957 (No. 107)', Article 1.

Article 3 of the Convention sets out the principle of *non-discrimination*⁴¹, to be respected in the guarantee of fundamental human rights, which is further underpinned in Article 20, for the protection of indigenous workers⁴².

According to the text of the Convention the *principle of consultation*, set in Article 6(1)⁴³, must always be applied in relation to any provision disposed in the treaty. States are under the obligation to inform natives when taking decisions on matter which directly involve and affect their lands and lifestyles, and to grant their participation in policy making. This directly implies the question of representativeness, as the consultation procedure is required to be carried out in appropriate ways, meaning that for it to be recognized as valid it must be conducted together with indigenous representatives.

Another traversal concept enshrined in the text is the *principle of participation*, established by Article 7 of the Convention, which affirms that indigenous and tribal peoples: “have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”⁴⁴.

The Convention manifests the movement toward responsiveness to indigenous demands, and has represented a significant contribution to the condition of indigenous peoples internationally, influencing numerous political debates and decisions, as well as national legislation and policies. Despite the few ratifications, it has had a remarkable impact beyond the States parties and is considered indicative of customary international law⁴⁵.

United Nations and Indigenous Rights

After the ILO Convention No. 107 of 1957 a number of human rights instruments were adopted for the regulation of the condition and rights of indigenous peoples.

⁴¹ ILO Indigenous and Tribal Peoples Convention No. 169, op. cit., Article 3. “1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples. 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

⁴² Ibid., Article 20(1): “Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.”

⁴³ Ibid., Article 6(1): “1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”

⁴⁴ Ibid., Article 7.

⁴⁵ Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. Book, Whole. New York [etc.]: Oxford University press, 2004, p. 61. <https://go.exlibris.link/rgCjM9d5>.

The *International Covenant on Civil and Political Rights* (ICCPR) adopted in 1966 was the only universally applicable human rights treaty including a specific provision on minorities, despite not containing any reference or article on indigenous rights, its content does apply to indigenous issues.

The most relevant provisions of the ICCPR, together with Article 1⁴⁶, is Article 27 which reads:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁴⁷

The provision set forward in Article 1 contains the right to self-determination, intended in its broad sense as a universal right, not restricted in time nor to the context of decolonization. However, the “peoples” to whom the right is accorded are not specified.

The *UN Human Rights Committee* (HRC), which has been established to monitor State compliance with the Covenant, has often connected the provisions comprised in Article 1 to that of Article 27. It found that the fulfillment of the right to self-determinations is a necessary prerequisite for the enjoyment of the other rights inscribed in the document, especially in the case of indigenous peoples. The link between the two articles has been recognized notably in the *Apirana Mahuika et al v. New Zeland case*⁴⁸.

The precise aim of the provision is that to safeguard cultural diversity, granting to minorities the possibility to live accordingly to their parameters and identities. From this stems, not only a negative duty for States not to interfere and harm rights, but a positive duty to reserve special treatment for the enjoyment of minority culture.

⁴⁶ General Assembly resolution 2200A (XXI). ‘*International Covenant on Civil and Political Rights*’. United Nations, 16 December 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

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

⁴⁷ Ibid., Article 27

⁴⁸ The *Apirana Mahuika et al v. New Zeland case* concerned the claims of the Māori people regarding violations of their rights under the International Covenant on Civil and Political Rights (ICCPR), particularly in relation to their traditional fishing rights and the settlement process with the New Zealand government. The HRC stated: “Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.”

The other main UN instrument on human rights is the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), adopted in 1966, it shares the same first article with the ICCPR, recognizing to all peoples the right to self-determination. It applies to all persons, representing a valuable instrument for indigenous peoples, as they are among the categories mostly in need of economic, social and cultural rights.

The *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') of 1969 should also be considered as an essential document for the protection of minorities and individuals, specifically against racial discrimination. Despite not containing an article directly referencing indigenous peoples or minorities, in 1997 the *Committee on the Elimination of Racial Discrimination* (CERD) issued a specific recommendation, the *General Recommendation XXIII*, on the question. The CERD calls upon States to respect and promote the preservation of indigenous culture, history and ways of life, as they constitute an enrichment to the State's cultural identity⁴⁹. Furthermore, the Committee requested the States to include full information on the situation of indigenous peoples within their territory in the periodical reports they are required to submit⁵⁰.

The *Working Group on Indigenous Populations* (WGIP) was instituted in 1982 as a subsidiary body of the *Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, it is composed of 5 members of the Sub-Commission, each for every geographical area designated by the UN, and its procedural laws often allow for the participation of indigenous representatives and organizations. The WGIP has two main mandates: to review developments concerning indigenous peoples worldwide and focusing on standards relating to such freedom and rights. Subsequently its scope was expanded to include a review of treaties between indigenous peoples and States, and studies on indigenous cultural and intellectual property.

The most groundbreaking achievement of the WGIP has been drafting the initial project for the Declaration of Indigenous Peoples' Rights, as emanating from its standard-setting mandate.

The *United Nations Economic and Social Council* (ECOSOC) with *Resolution 2000/22* established the creation of the *Permanent Forum On Indigenous Issues*⁵¹. The Forum is constituted of 16 members, among which 8 are nominated by governments and the remaining 8 are appointed by the President of the ECOSOC, reporting directly to the institution. The principal purposes of the Forum are: to provide recommendations and advice on indigenous

⁴⁹ CERD. 'General Recommendation No. 23: Indigenous Peoples', 1997, par. 4. https://www.eods.eu/library/UN_International%20Convention%20on%20the%20Elimination%20of%20Racial%20Discrimination_General%20recommendation%2023_1997_EN.pdf.

⁵⁰ Ibid., par. 6

⁵¹ Economic and Social Council. 'Economic and Social Council Resolution 2000/22'. United Nations, 2000. <https://www.un.org/esa/socdev/unpfii/documents/about-us/E-RES-2000-22.pdf>.

issues to the ECOSOC and to UN agencies and programs. Furthermore, it creates awareness on such questions as to favor integration in the activities carried out within the UN framework, as well as share information on such matters.

The culmination of the elaboration process on the question of indigenous rights has been reached on the 13th September 2007 with the adoption by the UN General Assembly of the *Declaration on the Rights of Indigenous Peoples* (DRIP). This document constitutes a mean of legitimization for indigenous political advocacy, the text is non-binding and doesn't introduce any new rights, but the *bona fide* adoption of the Declaration requires all the signing States to take upon measures consistent with its content. Despite the formal absence of binding force, as the Declaration is included in a Resolution of the UN General Assembly, the value of the Document as a human rights instrument and as an authoritative statement on norms and practices regarding Indigenous peoples, is reinforced by its acceptance by a large number of States. The rights enshrined in the DRIP are of collective nature, comprising an array of general principles related to nationality, self-determination, equality, and freedom, as well as cultural, economic, territorial, and social rights. They also include participatory rights and outline States' obligations⁵².

Thornberry, referencing to the draft of the DRIP, has defined it as "the most 'radical' document in the field of international human rights"⁵³. Despite the lack of prescriptive character, the Declaration has contributed vastly to the innovation of the normative *corpus*, in fact throughout its implementation, States contribute to the application of standards, and with such continuous and uniformed behavior to the emergence of customary norms.

Regional instruments for the protection of indigenous peoples' rights

In the field of indigenous rights undoubtedly the most relevant jurisprudential practice has been adopted in the American context. Especially due to the jurisprudence established by the *Inter-American Human Rights System* (IAHRS), which consists of two human rights bodies: the *Inter-American Commission on Human Rights* (IACHR) and the *Inter-American Court of Human Rights* (IACHR Court). The Commission is composed of seven independent members and two independent special rapporteurs, whilst the Court is composed of seven judges.

The tendency showcased in the treatment of indigenous issues has abandoned the paternalistic approach, favoring the promotion of indigenous realities, their differences and specificities.

⁵² General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., 2007

⁵³ Thornberry, Patrick. *Indigenous Peoples and Human Rights*. Book, Whole. United Kingdom: Manchester University Press, 2013, 375. <https://go.exlibris.link/BwFMGkQx>.

The IACHR receives and investigates individual petitions on human right violations, formulates recommendations for members States of OAS⁵⁴ and publishes annual reports.

In 1990 the IACHR created the *Rapporteurship on the Rights of Indigenous Peoples* to intensify the work on indigenous peoples and the attention to their conditions. Furthermore in 2022 it approved the *2023-2027 Strategic Plan*, which constitutes the main institutional instrument in the management of human rights challenges in the Americas. The plan aims to achieve greater respect for the exercise of the right to self-determination of indigenous peoples as well as their economic development and political status.

Additionally, the IACHR Court has an innovative and evolutive jurisprudence, extensively interpreting the rights set by the American Convention of Human Rights, and issuing advisory opinions and judgments.

The OAS on June 15 2016 adopted the *American Declaration on the Rights of Indigenous Peoples*⁵⁵, constituting one of the most relevant instruments in the Inter-American Human Rights framework.

In the African continent, the discourse on indigeneity has had more complex developments, the *African Charter on Human and Peoples' Rights* (African Charter) came into force in 1986 and recognizes fundamental right to “peoples”, of which it does not provide a definition. In 2000 the *African Commission on Human and Peoples' Rights* (ACHPR) instituted the *Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa* (WGIP Africa), with the aim to examine the concept of indigenous peoples and their identification. The WGIP monitors their conditions in the Member State’s territories, as well as issuing recommendations and reports.

Within the European system for the protection of Human Rights the two principal instruments are *European Convention on Human Rights* (ECHR) and *Framework Convention for the Protection of National Minorities* (FCNM). The ECHR does not provide direct rights for indigenous peoples, but protects fundamental principles connected to indigenous issues. Nevertheless, Thornberry defines it to be the least advanced instrument in the field of indigenous peoples rights⁵⁶. The FCNM constitutes the first binding instrument for the

⁵⁴ The Organization of American States (OAS) was founded in 1948 and is a regional organization with the aim to promote peace, security, democracy, and cooperation among the countries of the Americas. It currently includes 35 independent states from North, Central, and South America, as well as the Caribbean.

⁵⁵ Organization of American States. ‘*AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*’, 15 June 2016. <https://narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf>.

⁵⁶ Thornberry, *Indigenous Peoples and Human Rights*, op. cit., 317.

protection of minority rights in the European system, its aim is to establish the measures member States will have to adopt in order to respect and protect national minority groups.

Conclusion

The evolution of international law, and the struggle to position indigenous peoples within the international legal framework has culminated in the creation of customary international norms on indigenous peoples. The incorporation of indigenous rights under international law has been a complex process, evolving from the initial denial of judicial status under doctrines such as *terra nullius*, to their gradual affirmation as legal subjects. Indigenous peoples have moved from a condition of marginalization to being holders of collective rights.

The challenge of defining “indigenous peoples” has been addressed throughout various legal instruments such as the ILO Conventions No. 107 and No. 169, a turning point has been marked by the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The legitimization of indigenous peoples’ claims has been strengthened by current State practice, together with international court decisions and statements by international organizations. At the regional level, landmark rulings and declarations, particularly within the Inter-American and African legal systems, have further advanced protections.

While International law has maintained its State-centered character, it is now increasingly concerned with the rights of individuals and groups. This evolutionary process is particularly evident in the recognition of the right to self-determination and land rights, which constitute central arguments in the struggles of indigenous peoples and will be examined in the following chapters.

2. Indigenous Peoples and the Right to Self-determination

Introduction

Self-determination is foundational to the question of indigenous peoples' rights, as it is one of the highest-order principles in the contemporary international system.

The principle first arose after the First World War, in association with elements of democracy and "nationalism". It gained prominence after the U.S. President Woodrow Wilson championed it as underlying Western democratic ideals, and was promoted by Lenin in connection to the precepts of class liberation. Self-determination has emerged as a standard against which the legitimacy of governmental institutions was measured, since human beings are its beneficiaries, it concerns the institutional frameworks under which they live.⁵⁷ It has progressively evolved to become widely recognized as part of customary international law and *jus cogens*⁵⁸, meaning it is a peremptory norm⁵⁹.

This chapter explores the principle in its application to indigenous peoples, analyzing its normative scope and content through the examination of key legal instruments and judicial interpretations. Furthermore, it explores its two dimensions: internal and external, and their respective implications, as well as discussing the complexities and contemporary challenges surrounding the realization of indigenous self-determination.

2.1 The Right to Self-determination and its Application to Indigenous Peoples

In order to analyze the principle of self-determination and its application to indigenous peoples it is necessary to clarify its scope.

Article 1(2) of the *Charter of the United Nations* states that:

"The Purposes of the United Nations are: (...) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."⁶⁰

⁵⁷ Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. Book, Whole. New York [etc.]: Oxford University press, 2004, 99. <https://go.exlibris.link/rgCjM9d5>.

⁵⁸ Jus cogens refers to peremptory norms of international law which are recognized as a fundamental principles and from which no derogation is permitted.

⁵⁹ Gros Espiell, Hector, Special Rapporteur. *Right of Peoples to Self-Determination – Special Rapporteur Study* ; 20 June 1978, para. 75. <https://www.un.org/unispal/document/auto-insert-186956/>.

⁶⁰ United Nations. *United Nations Charter* ; 1945, Article 1(2). <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

As indicated in the text, the principle is always attributed to the “peoples”, despite referring to all human beings. The right to self-determination is not granted to individuals considered autonomously, but rather understood as members of functioning communities. This interpretation undoubtedly includes indigenous groups as beneficiaries, however many have proposed a restricted conception of the principle. This approach has given rise to the controversial interpretation of indigenous communities as peoples entitled to self-determination.

Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) establishes that:

- “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”⁶¹

The ICCPR enunciates the right to self-determination in its broader sense, meaning as a universal value, not restricted in time and applicable beyond the context of decolonization.

Yet the text does not provide any definition of the “peoples” to whom the right is awarded. The ICCPR indeed does include *minority rights*, as set in Article 27⁶². This distinction gives rise to controversial interpretations, as the separation from minority rights may imply that the right to self-determination is solely reserved for the majority living in a specific territory, to be understood as the “peoples”.

⁶¹ General Assembly resolution 2200A (XXI). *International Covenant on Civil and Political Rights*. United Nations, 16 December 1966, Article 1. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁶² Ibid., Article 27. “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

However, this approach has been dismissed by the *Human Rights Committee* through the *Apirana Mahuika et al v. New Zealand*⁶³ case, in which it has connected Article 1 and Article 27, establishing that the right to one's own culture has to be understood within a context underlying a formal self-determination for the peoples in question. It then becomes an essential condition for the exercise of the other rights covered by the ICCPR.

In 1998 with the *Quebec Secession Case*⁶⁴ the Supreme Court of Canada established that multiple peoples can coexist within a single State⁶⁵. Following the landmark judgment of the Court, the Committee has maintained the same approach in relation to the application of Article 1:

“The Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.”⁶⁶

Despite the collective character of the principle, its scope has been interpreted restrictively by many, giving rise to three main dominant variants⁶⁷.

The first variant attributes the right to self-determination exclusively to populations living under territories subjected to instances of classical colonialism. This view erroneously equates the domain of the principle and that of decolonization, limiting it to exclude all other segments of humanity and undermining its human rights character. This approach is evident in India's reservation to Article 1 of the ICCPR, which was later reiterated, stating that:

⁶³ *Apirana Mahuika et al. v. New Zealand* case of 1993 was presented to the Human Rights Committee by the members of the Māori tribe. They argued that the Fisheries Settlement Act of 1992, violated their right to self-determination and to traditional livelihoods, and the ICCPR. The Committee held that New Zealand had adopted adequate measures for the participation of Māori peoples in the management of fisheries resources, thus rejecting the complaint.

⁶⁴ In the *Quebec Secession Case* of 1998, the Supreme Court of Canada ruled that Quebec does not have the right to unilaterally secede under either Canadian or international law. However, a clear democratic expression in favor of secession would create an obligation for all parties to negotiate, highlighting principles such as federalism, democracy, the rule of law, and the protection of minorities.

⁶⁵ Supreme Court of Canada. *Canada Secession of Quebec, N.217 (1998)*. <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do>.

⁶⁶ ‘UN Human Rights Committee: Concluding Observations: Canada’, 7 April 1999. <https://www.refworld.org/policy/polrec/hrc/1999/en/12308>.

⁶⁷ Anaya, *Indigenous Peoples in International Law*, op. cit., 100.

“The Government of the Republic of India declares that the words ‘the right of self-determination’ appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation-which is the essence of national integrity.”⁶⁸

Furthermore, the second interpretation on the application of the principle holds that self-determination is concerned with both the “peoples” living in independent States and those of colonial territories⁶⁹. Despite the inclusive character of this view, its substantive State-centered approach renders it inadequate. Indeed, it restricts the scope of the principle solely to the whole of the population, respectively of a State or colonial territory, ignoring substate groups of human aggregation which are not reflected in these two categories.

The third understanding of the principle proposes an interpretation of the term “peoples” which defines it on the basis of an alternative political geography, meaning that it attributes the right to self-determination to those entities that were once sovereign States, or are entitled to be one on account of ethnonationalist theories⁷⁰.

All of these variants proposed are flawed and limited in the misconception of a world necessarily divided into mutually exclusive sovereign territorial communities, ignoring the existence of overlapping patterns of human association and interdependence that exist beyond the organizational unit of the State. The correct interpretation of the scope of the principle includes the complex web of linkages that make up human society, beyond the sole territorial sovereign boundaries. Then the “peoples” to whom the right is awarded should refer to all those spheres of communities in which peoples live, tied by a collective identity and consciousness; such a definition is representative of indigenous peoples.

In order to analyze self-determination and its application to indigenous peoples it is necessary to understand the substantive normative content of the principle, as from it stem a variety of human rights precepts. Fundamentally self-determination in its constitutive aspect amounts to standards for the process of creating territorial authorities and institutions, setting that such procedure shall be guided by the will of the peoples. This does not necessarily envisage a specific outcome, but when it does it poses requirements of participation and consent.

⁶⁸ ‘Welcome to Permanent Mission of India in Geneva’, 1979. <https://pmindiaun.gov.in/pageinfo/ODY3>.

⁶⁹ Higgins, Rosalyn. ‘Self-Determination’. In *Problems and Process: International Law and How We Use It*, edited by Rosalyn Higgins. Oxford University Press, 1995, 124. <https://doi.org/10.1093/law/9780198764106.003.0007>.

⁷⁰ ‘Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations’. *Harvard Civil Rights-Civil Liberties Law Review* 22, no. 2 (1987): 507, 597-600.

As set in Article 1(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR):

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁷¹

The first part of the provision, which grants all peoples the right to “freely decide their political status”, makes up the constitutive aspect of self-determination. Furthermore, ongoing self-determination requires that peoples living within and enjoying the functioning of the governmental framework are able to make meaningful choices in matters affecting their lives. For culturally differentiated groups, such as indigenous communities, the recognition of self-determination implies living within a democratic political order under which they are able to maintain their distinct characteristics and to have it “reflected in the institution of government under which it lives”⁷².

The international debate on the principle of self-determination can be reduced to two substantial views: the *minimalist* and *maximalist* ones.

According to the minimalist approach, which arose from the experience of colonialism, the scope of the principle is limited to independence and the creation of a new State. The holders of such right, according to the *Declaration on the Granting of Independence to Colonial Countries and Peoples* are to be identified as all those peoples that are subject to external domination and exploitation⁷³. Nonetheless Article 6 and 7⁷⁴ of the document refer to the principle of territorial integrity, implicitly denying the possibility for indigenous peoples to be regarded as beneficiaries of such right, as they rarely constitute the majority of the population of the territory they inhabit. Furthermore the *Resolution 1541(XV)* specified that the peoples living in a territory geographically, ethnically and culturally separate from the State which

⁷¹ General Assembly resolution 2200A (XXI). ‘*International Covenant on Economic, Social and Cultural Rights*’. United Nations, 16 December 1966, Article 1(1). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

⁷² Brownlie, Ian. ‘The Rights of Peoples in Modern International Law’. In *The Rights of Peoples*, edited by James Crawford. Oxford University Press, 1992, 5. <https://doi.org/10.1093/oso/9780198258049.003.0001>.

⁷³ General Assembly resolution 1514 (XV). ‘*Declaration on the Granting of Independence to Colonial Countries and Peoples*’, 14 December 1960, Article 5. <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples>.

⁷⁴ Ibidem, Article 6, “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” And Article 7, “All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”

administers it⁷⁵ possess the right to self-determination. The association of the principle with that of territorial integrity under the minimalist doctrine renders its extension to indigenous peoples impossible.

On the other hand, the maximalist approach identifies self-determination as the basic prerequisite for the attribution of human rights and is founded on the idea that all peoples, including indigenous ones, are equally granted such right. However, the erroneous association of the principle to the process of decolonization has led to the idea that “self-determination in its fullest sense means a right to statehood”⁷⁶, whilst it only represents its remedial aspect.

Nevertheless, self-determination is the right of the peoples to determine their political status and to organize themselves institutionally and politically in ways corresponding to their will. According to Erica-Irene Daes, self-determination for indigenous peoples means to negotiate freely their political status in the States under which they live:

“This might best be described as a kind of “belated State-building”, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms”⁷⁷

Then the right to self-determination is not only concerned with the international status of the peoples, meaning the creation of an independent political entity or the right to secession, but rather with the coexistence within a single State of multiple communities, which despite having accepted to live under the same institutional framework, seek to maintain a certain degree of autonomy. The majority of indigenous groups does not seek to secede from the State in which they reside, but to achieve greater control over matters such as natural resources, environmental

⁷⁵ ‘General Assembly Resolution 1541 (XV)’, 1960, Principle IV, “*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”. and Principle V, Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.”

⁷⁶ Anaya, *Indigenous Peoples in International Law*, op. cit., 103.

⁷⁷ Daes, Erica-Irene A., and UN Subcommission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations Chair. ‘*Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*’, 19 July 1993, par. 28. <https://digitallibrary.un.org/record/170844>.

preservation, the protection of their homeland, autonomy, and the use of their language, as crucial elements for safeguarding the community's culture and identity⁷⁸.

Under the decolonization regime the remedial prescription and mechanism of self-determination arose, demonstrating how colonial rules could be judged retroactively in cases in which they legitimized the contemporary governmental authority or inequities. However, the model envisaged under decolonization did bypass spheres of communities existing beyond the colonial territorial unit.

With the International Court of Justice (ICJ) pronouncements in relation to the *Western Sahara* case, self-determination began to be recognized as a legal right in relation to decolonization. In the advisory opinion the Court found that self-determination required precedence for the aspirations of the peoples living within the territory, over the historical institutions and the political status detained prior to colonization⁷⁹.

The right has been further addressed by the ICJ in the *East Timor case*⁸⁰, which does not directly deal with indigenous matters, but provides a legal and moral precedence, as it acknowledges the right of non-state peoples to determine their political status, as well as recognizing the *erga omnes* character of the principle⁸¹.

Self-determination has been recognized outside of the contexts of decolonization starting from the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (UN Declaration on Friendly Relations) adopted by the General Assembly in 1970 with *Resolution 2625 (XXV)*. The Declaration extends self-determination to peoples living under “alien subjugation, domination and exploitation”⁸².

In relation to the issue of indigenous peoples the *International Labour Organization* (ILO) *Convention No. 169* of 1989 specifies that the use of the term peoples in the text does not have

⁷⁸ Primeau, Tomas Hopkins, and Jeff Corn tassel. ‘Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”’. *Human Rights Quarterly* 17, no. 2 (May 1995), 344. <https://doi.org/10.1353/hrq.1995.0015>.

⁷⁹ International Court of Justice. ‘*Western Sahara, Advisory Opinion, 1975 I.C.J. 12*’, 16 October 1975. <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>.

⁸⁰ In the East Timor case of 1995, Portugal challenged a treaty between Australia and Indonesia over oil exploration in the Timor Gap, arguing it violated the East Timorese people's right to self-determination. Indonesia had occupied East Timor since 1975, but was not a party to the case. The ICJ declined jurisdiction due to Indonesia’s absence but reaffirmed that the right to self-determination is a fundamental right binding on all states.

⁸¹ International Court of Justice. ‘*East Timor (Portugal v. Australia), ICJ, 1995*’, 30 June 1995, par. 29. <https://www.icj-cij.org/sites/default/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>. “In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”

⁸² General Assembly of the United Nations. ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.’, 1970, 10. <https://digitallibrary.un.org/record/202170>.

any implication with regard to the rights that would traditionally be attached to it under international law⁸³. Whereas the *United Nations Declaration on the Rights of Indigenous Peoples* does directly reference indigenous self-determination, as set in Article 3 and 4:

“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.”⁸⁴

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”⁸⁵

2.2 External and Internal Self-determination

The principle of self-determination usually encompasses two distinct domains: the “internal” and “external” ones. External self-determination is linked to the status of the “peoples”, involving the establishment of an independent State or the right to secession, whilst internal self-determination concerns the acknowledgment of specific social and political rights.

With regard to indigenous peoples, their claims of self-determination may address both the internal and external aspects of the right: either aiming to freely determine their international status, including the prospect of political independence, or asserting the possibility to define their form of government and participation in power processes.

This dichotomy has been theorized differently by S. James Anaya throughout his reconceptualization of the principle. He distinguishes between the “constitutive” and “ongoing” aspects of self-determination⁸⁶.

According to this view, in its constitutive side, self-determination establishes standards for the creation processes of institutions of government. Whereas the ongoing aspect requires the institutional framework, regardless of its formation, to allow people to live freely.

⁸³ International Labour Organization. ‘*C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*’, Article 1(3). https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDocument.

⁸⁴ General Assembly of the United Nations. ‘*United Nations Declaration on the Rights of Indigenous Peoples*’. United Nations, 13 September 2007, Article 3. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁸⁵ Ibidem, Article 4.

⁸⁶ Anaya, *Indigenous Peoples in International Law*, op. cit., 106.

Furthermore, he identifies the remedial dimension of self-determination, which arose from the process of decolonization, and did not always entail the formation of new States. Indeed, the right to secession “may be an appropriate remedial option in limited contexts where substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned.”⁸⁷

The case of indigenous peoples primarily relates to the internal dimension of self-determination, as they do not seek secession, but are instead concerned with “the nature and levels of interactions with the non-indigenous world.”⁸⁸ Indigenous peoples do not seek to compete with existing governments throughout the creation of independent States, but their self-determination is concerned with “the introduction of the right to autonomy or self-government in matters relating to internal and local affairs, including their financial aspect”⁸⁹.

Their condition, therefore, mostly relates to the dominion of internal self-determination, as set in Article 3 of the UNDRIP⁹⁰. Indeed, they mainly pursue their social, cultural and political interests.

The UN Declaration established indigenous sovereignty as being substantially different from the Westphalian conception, which is conceived as granting nation States control over external affairs and prohibits foreign intervention within domestic authority. Furthermore, it grants rights to indigenous communities functioning as a limitation to the power of the colonial State, on matters falling within the sphere of indigenous governance.⁹¹ This understanding is reinforced in Article 46(1) of the Declaration, which states that:

“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 the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”⁹²

⁸⁷ Ibidem, 109.

⁸⁸ Thornberry, Patrick. *Indigenous Peoples and Human Rights*. Book, Whole. United Kingdom: Manchester University Press, 2013, 9. <https://go.exlibris.link/BwFMGkQx>.

⁸⁹ Liechtenstein. ‘General Assembly 107th Plenary Meeting A/61/PV.107.’, 13 September 2007, 23.

⁹⁰ General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., Article 3.

⁹¹ Bauder, Harald, and Rebecca Mueller. 2023. ‘Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance’. *Geopolitics* 28 (1): 156–73. <https://doi.org/10.1080/14650045.2021.1920577>.

⁹² General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., Article 46(1).

This addresses some of the member States' concerns over the possibility that the Declaration may have instigated secession. Secessionist claims can be seen as constituting the extreme side of self-determination, leading to the dismantling of the State. As presented by Buchanan⁹³ there are two main normative theories on secession, either recognizing it as a remedial or primary right.

According to the *Remedial Right Only Theories* the right to secede is fundamentally similar to that of revolution, with the difference that it accrues solely to a part of the population residing within a territory. Secession may take place in situations of violation of fundamental rights and absence of any possibility to resort to more peaceful means. This understanding of secession in its remedial aspect envisages it as the right of the peoples to defend themselves from the injustices perpetrated by the political authority under which they live. According to this theory indigenous peoples have the right to secede when they are deprived of minimum self-determination.

Whereas according to the *Primary Right Theories* the grounds on which the right to secession can be resorted to are not restricted to instances of injustice. This interpretation recognizes the right beyond remedial circumstances, and attributes it either to groups whose membership is defined through ascriptive characteristics (Ascriptivist theories), meaning solely by virtue of their belonging; or to the majority of the population of a territory (Associative Group theories), which decides to establish its own State, without necessarily being united by shared characteristics.

Under international law secession is not explicitly forbidden, according to Kohen "If the secessionist forces were able to impose the existence of a new State, then the international legal system was to record the fact of the existence of this new entity."⁹⁴ However, Article 46(1) of the UNDRIP fundamentally prohibits it, reflecting the apprehensive attitude taken by States towards the idea of indigenous "sovereignty".

The principle of territorial integrity functions as a limitation to the scope of the right to self-determination, as it sets that the unity of the State of residence shall not be affected by the independence aspirations of a group living under it. Furthermore the doctrine of *uti possidetis juris* or "as you possess, so may you possess.", adopted from Roman law, has consecrated the administrative borders of ex-colonies, requiring that the newly formed independent States inherit such boundaries, even if they have been arbitrarily drawn during colonial times.

⁹³ Buchanan, Allen. 1997. 'Theories of Secession'. *Philosophy and Public Affairs* Volume 26 (No. 1). http://fs2.american.edu/dfagel/www/Philosophers/TOPICS/SelfDetermination/Theories%20of%20Secession_Buchanan.pdf.

⁹⁴ Kohen, Marcelo Gustavo. 2012. *Secession: International Law Perspectives*. 1st paperback. Book, Whole. Cambridge [etc.]: Cambridge University press, 5. <https://go.exlibris.link/5BP4LV15>.

Throughout this principle the administrative borders of colonial territories were crystallized as internationally recognized, and indigenous peoples were deprived of any aspiration to statehood, as *uti possidetis juris* is widely recognized as inviolable by the majority of States. Therefore, the recognition and legitimacy of remedial secession under international law remains a controversial topic, as highlighted by the Canadian Supreme Court in the Quebec case⁹⁵, and its relevance for indigenous peoples is generally confined to exceptional situations and conditions.⁹⁶

The first ground of justification views the resort to remedial secession as self-defense, indeed it refers to conditions of large-scale violations of basic human rights and the enactment of discriminatory practices leading to the fear or actual practice of genocide.

Secondly remedial secession can be exceptionally derived from the right to self-governance, as it may be resorted to in situations of deprivation of political autonomy and self-rule.

Thirdly indigenous secessionist claims can be evaluated on the basis of traditional standards of Statehood. Moreover, internationally recognized criteria require any State to detain actual control over a delineated territory and population, and a government capable of exerting control over them. Ideally such authority shall receive support from both indigenous and non-indigenous communities.

Nonetheless indigenous peoples generally do not seek to attain the international status of a sovereign State, but rather their objective is that of reaching a “desired arrangement for autonomy that is given constitutional status within a state and that enjoys international backing, including some international legal process that provides remedies”⁹⁷.

⁹⁵ Supreme Court of Canada, Reference re Secession of Quebec, op. cit., para. 151. “Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.”

⁹⁶ Shrinkhal, Rashwet. 2021. “Indigenous Sovereignty” and Right to Self-Determination in International Law: A Critical Appraisal’. *AlterNative* 17 (1), 79. <https://doi.org/10.1177/1177180121994681>.

⁹⁷ Falk, Richard A. 2000. *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*. Book, Whole. New York; London; Routledge, 129. https://luiss.summon.serialssolutions.com/2.0.0/link/0/eLvHCXMw1V1LT4NAEJ70cfHW1pr6ajhx0TYUaGVN GkPo02AbLfVKgCyVpEJCH0b_sf_C2RWqwXroiSyZZcjOY2dm99sFUOSm1Mj4BFXyfNltYYar-WrbJYQSR1MdtFLnhnY6DO_cI8YzebyX5085-EyhMctNwO5GWr46e9AODLfK9jm-pzdN3QXJAjurMynENOfj2Wxo2JgHW_8ImssUc-tuwIwXg21MD1QW6KBmXu9KhsFaXG09TmdYU3HTDBZhFFP2gtr8HxjVOt5QcYs8MqxvU7MXB1HsYS-uzLo-6hfNQ5GFbFoBKpletqFbu2oR2k07PXedt3EWacmdBGJPMEhR1J_jhHgbI_ryKnL4CCpkyZ8L79fkOShBgQE qypCjYQXypvNWgVKy7c5ZColzOYYqX08QeLVgJbxEcfcBFIEFedC3jFHjLxM7KT3Z2RGVT6AQRiGtga D4kuqrXttVKfL7BCmBpKreXKbupgknsLVAR8-O4j6HI6-EfWsknIBRS6JSyfyfvW9kqhDTTcfdHs-0VGjh5N-zx5Nzd54Mpx9AX3J3bc

The realization of such goal is not limited to the achievement of a sovereign status, as an autonomous enclave within a nation, they do benefit from the association with the higher political unit, as long as respect for traditional life, land and customs is ensured.

What they seek is the acknowledgment and preservation of the nationality they confer upon themselves, Article 33 of the UNDRIP provides that:

“1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.”⁹⁸

Therefore, the optimal approach for the exercise of indigenous internal self-determination involves negotiation and consultation for the enactment of favorable policies and reforms.

From the recognition of internal self-determination derives the right to participation in international lawmaking, which is effectively carried out through the processes of prior consultation and involvement in the preparation of programs and in elected bodies.

As it has been established in the *Apirana Mahuika et al. v. New Zealand case*⁹⁹ throughout the HRC decision, direct consultation carried out in meaningful ways represents the minimum threshold for the enablement of effective participation, the Committee set that:

“The Committee recalls its general comment on Article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.”¹⁰⁰

Self-determination has been interpreted as a right of internal realization, the UNDRIP has stipulated in Article 18 the right to participate in decision-making over matters affecting

⁹⁸ General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., Article 33.

⁹⁹ The case *Apirana Mahuika et al. v. New Zealand* (2000) involved a Māori group contesting a national fisheries settlement, claiming it violated their rights under the ICCPR. The Human Rights Committee found no violation, citing adequate consultation by the State, but reaffirmed the importance of indigenous participation in decision-making processes.

¹⁰⁰ Human Rights Committee. 2000. ‘*Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993’, par. 9(5). [U.N. Doc. CCPR/C/70/D/547/1993](https://www.unhcr.org/refugees/doc/547/1993/).

indigenous peoples through elected representatives and to develop their own decision-making institutions. Furthermore Article 19 establishes that:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹⁰¹

Moreover, the right to autonomy is often considered as a basic element of effective participation in democratic institutions and decision-making, as well as encompassing domains such as those of culture, livelihood, religion and economic structures. As set in Article 7(1) of the ILO Convention No. 169:

“The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”¹⁰²

The right to autonomy is not limited to the territorial dimension, meaning self-governance of certain areas, and does not jeopardize the territorial integrity of the State, but rather involves the authorization for indigenous peoples to enact their laws, make use of their lands according to their needs and customs as well as have their own courts.

Then autonomy is vital to the survival of indigenous peoples, as it ensures and protects their cultural, economic and political development.

One comprehensive example of the implementation of the right to self-determination as self-governance and autonomy is the Sámi Parliaments¹⁰³. Such institutions are present in Norway,

¹⁰¹ General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., Article 19.

¹⁰² ILO Convention No. 169, op. cit., Art. 7(1). https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDocument.

¹⁰³ The Sámi Parliaments in Norway (1989), Sweden (1993), and Finland (1996) are representative bodies for the Sámi people, established to promote their native language, culture, and political interests. While their legal status and powers vary, all function as consultative organs to their respective national governments on matters affecting them.

Sweden and Finland, according to the *Nordic Sámi Convention* the right to self-determination is affirmed in Article 3, which reads:

“As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.”¹⁰⁴

The establishment of the Sámi Parliament aimed at the enactment of self-governance, as it enabled indigenous institutions to be incorporated into participatory democracy and within the political framework of the respective States. Such integration of representative bodies has resulted in a higher degree of participation in decision-making processes affecting matters relevant to their communities, as well as participatory engagement throughout consultation with national governments.

2.3 Contemporary International Practice

The affirmation and acknowledgment of indigenous self-determination has been held back for a long time by the legacy of colonialist views on its recognition, as it is often perceived as an absolute grant of the right to an independent State.

However, more and more governments have shifted away from such oppositionist attitudes, and have come to accept the indigenous right to self-determination.

Canada has recognized the rights of Aboriginal peoples in 1982, throughout the adoption of the *Constitution Act*¹⁰⁵, which however did not provide a specific mention of the rights in question. Further clarification was later set out in the 1996 *Royal Commission on Aboriginal Peoples’ report*, which indicated that in section 35(1) a right of self-government was already implied, according to the text:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”¹⁰⁶

¹⁰⁴ The Governments of Finland, Norway and Sweden. 2017. ‘*Nordic Saami Convention*’, Article 3. [LEX-FAOC215314](#).

¹⁰⁵ UK. 1982. ‘*Canada Act, Schedule B to the Canada Act 1982*’. <https://canlii.ca/t/ldsx>.

¹⁰⁶ Ibid., par. 35(1)

The inherent right to self-government has been recognized by the federal institutions as an existing Aboriginal right, as set in the *Aboriginal Self-Government Federal Policy Guide*:

“Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.”¹⁰⁷

Despite this acknowledgment, the text does not include a right to sovereignty as it is understood under international law, meaning it does not allow for the creation of Aboriginal nation States, furthermore in 1996 Canada stated that it “accepts the right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states”¹⁰⁸.

Among the self-government agreements the *Nisga’a Agreement* of 1999 provides the most extensive recognitions, as it attributes constitutional status to the self-government powers of the Aboriginal community. In the *Campbell v. British Columbia case*¹⁰⁹ of 2000 the Nisga’a Final Agreement’s constitutionality was contested upon the basis that it bestowed legislative powers upon the Nisga’a First Nation which were inconsistent with the *Constitution Act of 1867*, and it restricted the voting rights of non-Nisga’a individuals living in or holding interests within indigenous territory.

Such claims were rejected by the British Columbia Supreme Court, as under Section 35(1) of the Constitution Act self-government is upheld as a constitutionally protected Aboriginal right. In 2023 the British Columbia Supreme Court issued a significant legal decision over the *Gitxaala v. Canada case*¹¹⁰, the ruling is particularly relevant as it centers around the duty to consult indigenous nations over any matter concerning them, especially in the context of land and resource development. Furthermore, the Court has declared the British Columbia mineral

¹⁰⁷ Minister of Indian Affairs and Northern Development. 1995. ‘*Aboriginal Self-Government Federal Policy Guide: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.*’, 3. <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AILR/1996/44.html>.

¹⁰⁸ ‘*Statement by Canada, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*’. 1996.

¹⁰⁹ The *Campbell v. British Columbia case* of 2000 challenged the Nisga’a Treaty. The petitioners argued it created an unconstitutional third level of government. The B.C. Supreme Court rejected the claim, ruling that Indigenous self-government under the treaty is protected by Section 35 of the Constitution and does not violate Canada’s constitutional structure.

¹¹⁰ In the *Gitxaala Nation v. Canada case*, the Gitxaala Nation argued that the provincial mineral claims system violated their constitutional right to consultation. The British Columbia Supreme Court ruled that the government’s failure to consult before allowing mineral claims to be staked on their territory was a breach of the duty to consult.

claim system in breach of the duty to consult, established under section 35 of the Constitution Act of 1982, and as previously set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* case¹¹¹. This landmark ruling recognized the inescapable constitutional duty to consult and accommodate indigenous peoples, in a meaningful way, which reflects the “*honour of the Crown*”¹¹².

In the United States, indigenous peoples have found extensive recognition. Since 1821 they have been described as “domestic dependent nations”¹¹³ by the Supreme Court in the *Cherokee Nation v. Georgia* case¹¹⁴. The right to self-determination of indigenous peoples has been notably accepted by the U.S. administration in 2001, providing that:

“Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.”¹¹⁵

The *Santa Clara Pueblo v. Martinez* case¹¹⁶ of 1978 has been central in the establishment and shaping of tribal sovereignty, as it set that tribes have the power to define their own membership criteria, even when they are deemed discriminatory:

¹¹¹ In the *Haida Nation v. British Columbia* case of 2004, the government's decision to allow logging on traditional lands without consultation was challenged by the Haida Nation. The Supreme Court ruled that the Crown must consult Indigenous peoples when their rights or lands are affected, even without formal title. The Court emphasized that consultation must be meaningful and accommodate Indigenous concerns.

¹¹² The “honour of the Crown” is a Canadian constitutional principle that underscores the Crown's obligation to act with integrity, good faith, and fairness in its dealings with Indigenous peoples.

¹¹³ U.S. Supreme Court. 1831. ‘*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)’, 17. <https://tile.loc.gov/storage-services/service/ll/usrep/usrep030/usrep030001/usrep030001.pdf>.

¹¹⁴ The *Cherokee Nation v. Georgia* case of 1831 arose from a delegation of Cherokee contesting the state of Georgia attempt to extend state laws and authority over their Nation. The Supreme Court declined review of the case, as it ruled that Cherokee Nation couldn't sue the government because as it was not sovereign nation. The Supreme Court defined a tribe as “domestic dependent nation,” and identified the relationship between the federal government and tribes as that of a “ward to his guardian.”

¹¹⁵ ‘U.S. National Security Council, Position on Indigenous Peoples’. 2001, par. 3. <http://hrlibrary.umn.edu/usdocs/indigenoudoc.html>.

¹¹⁶ In the *Santa Clara Pueblo v. Martinez* case of 1978, the Supreme Court of the United States upheld the authority of the Santa Clara Pueblo to determine membership and deny tribal benefits to certain individuals. The Court ruled

“Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” (...) As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”¹¹⁷

In 2020 the US Supreme Court issued a landmark decision on the *McGirt v. Oklahoma case*¹¹⁸ on indigenous sovereignty, marking a major affirmation of tribal self-determination and treaty rights. The Court established that the State of Oklahoma couldn’t take legal actions against Indians having committed crimes on tribal land. This ruling reinforced tribal nations’ legal and territorial authority as well as sovereignty, as it strengthens the recognition and legitimization of indigenous jurisdiction, especially under criminal justice.

Furthermore the *Inter-American Court of Human Rights* over the decades has produced important rulings on the rights of Indigenous peoples, primarily in light of Article 21 of the *American Convention on Human Rights*, according to which: “Everyone has the right to the use and enjoyment of his property (...) 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.”¹¹⁹ Recently the Court began addressing instances of indigenous internal and external self-determination, as recognized and protected under Article 26:

“The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit

that tribal sovereignty allows tribes to establish their own membership criteria, and federal courts cannot intervene in internal tribal matters.

¹¹⁷ U.S. Supreme Court. 1978. ‘*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)’, 56. <https://supreme.justia.com/cases/federal/us/436/49/>.

¹¹⁸ In the *McGirt v. Oklahoma* case of 2020, Jimcy McGirt, a Native American, argued that Oklahoma lacked jurisdiction to prosecute him because his crime occurred on Muscogee (Creek) reservation land. The Supreme Court agreed, ruling that the reservation still legally exists since Congress never disestablished it. This affirmed tribal sovereignty and limited state authority over crimes involving Native Americans on tribal land.

¹¹⁹ American Convention on Human Rights “*Pact of San Jose, Costa Rica*”. 1969, Article 21. <https://www.refworld.org/legal/agreements/oas/1969/en/20081>.

in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”¹²⁰

In view of the right to progressive development set out in the article, and the recognition it gained under the Inter-American jurisprudence, the standards on indigenous autonomy have gained higher acknowledgment, as it has been underpinned by the Court in two separate judgments.

The Court’s pronouncement on *The Rama and Kriol Peoples v. Nicaragua case*¹²¹, affirmed that under Article 26 the right to cultural identity of indigenous peoples is recognized and reinforces indigenous self-determination. The Tribunal ruled that Nicaragua had the duty to adopt “necessary measures to ensure that Indigenous peoples can elect their own authorities and representatives according to their own culture and organizational structures, as an expression of self-determination”¹²². The Court’s ruling marked an unprecedented recognition of indigenous self-determination as an independent right protected under the American Convention on Human Right.

Furthermore, the Court jurisprudence on indigenous self-determination was extended to the external domain of the right, through the judgment expressed in the *Huilcamán Paillama et al v. Chile case*¹²³, in which most relevantly the petitioners denounced discriminatory investigative practices against indigenous activists, which criminalized the exercise of the right to freedom of association and expression. The Court reaffirmed the application of Article 26, establishing that the external dimension of indigenous self-determination amounts to a guarantee to “Indigenous and tribal peoples to exteriorize their opinion and positions, as a prerequisite for their participation in decision-making processes on matters that affect them”¹²⁴. More recently, the Inter-American Court of Human Rights addressed its first case regarding indigenous peoples living under voluntary isolation. This condition is recognized as legally

¹²⁰ Ibid., Article 26

¹²¹ The Inter-American Court of Human Rights judgment on the Rama and Kriol Peoples v. Nicaragua case of 2023, established that the State of Nicaragua had not ensured proper land titling or consultation to the Rama and Kriol peoples, as it had had violated the communities’ rights by failing to protect their ancestral lands from illegal occupation and environmental harm. The Court ordered land protection, compensation, and environmental restoration.

¹²² Inter-American Court of Human Rights. 2024. ‘*Corte Interamericana de Derechos Humanos, Caso Pueblos Rama y Kriol, Comunidad Negra Creole Indígena de Bluefields y Otros vs. Nicaragua*’, para. 27. https://www.corteidh.or.cr/docs/casos/articulos/seriec_522_esp.pdf.

¹²³ The Huilcamán Paillama et al. v. Chile case of 2015 was initiated by Mapuche leaders claiming that Chile had violated their rights by prosecuting Indigenous activists under anti-terrorism laws for land-related protests. The Inter-American Commission on Human Rights found the state’s actions discriminatory and in breach of due process. It urged Chile to reform its legal framework and protect Indigenous rights to protest and cultural integrity.

¹²⁴ Inter-American Court of Human Rights. 2024. ‘*Caso Huilcamán Paillama y Otros vs. Chile*’, para.256. https://corteidh.or.cr/docs/casos/articulos/seriec_527_esp.pdf.

protected status as set in the *American Declaration on the Rights of Indigenous Peoples*: “Indigenous peoples in voluntary isolation or initial contact have the right to remain in that condition”¹²⁵. The Court’s decision addressing the case of *Pueblos Indígenas Tagaeri y Taromenane v. Ecuador*¹²⁶ constitutes a landmark ruling, which concerned the failure endured by the State of Ecuador to grant the territorial protections designated for some of the indigenous groups inhabiting the Western Ecuadorian Amazon. The Court set a legal precedent by recognizing the principle of “No Contact” as a basic prerequisite to the right of self-determination for indigenous peoples living in voluntary isolation.

Yet this ruling reveals a legal inconsistency, according to the principle of “Free, Prior and Informed Consent” set under Article 19 of the UNDRIP : “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their Free, Prior and Informed consent before adopting and implementing legislative or administrative measures that may affect them”¹²⁷.

This is substantially incompatible with the decision adopted by the Court underpinning the non-interference with voluntary isolation. However, it has enunciated that, despite representing the fundamental principle for the protection of indigenous peoples, the duty to ensure Free, Prior and Informed Consent is not the primary standard to be applied in cases of voluntary isolation, as the right to No-contact takes precedence.

Furthermore, the recognition of self-determination for indigenous peoples has been explicitly supported by several other States, as remarked by the Chairperson-Rapporteur in the 1999 session of the Commission on Human Rights working group: “participants in general agreed that the right to self-determination was the cornerstone of the draft declaration.”¹²⁸

The UN General Assembly's Third Committee during the 79th session of the General Assembly in November 2024 adopted the draft resolution “*Rights of Indigenous Peoples*”¹²⁹, which

¹²⁵ Organization of American States. 2016. ‘*American Declaration on the Rights of Indigenous Peoples*’, Article XXVI. <https://narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf>.

¹²⁶ The *Indígenas Tagaeri y Taromenane v. Ecuador* case of 2025 involved the Tagaeri and Taromenane Peoples, two indigenous groups living in the Western Ecuadorian Amazon. The Inter-American Court found Ecuador responsible for failing to protect Indigenous groups living in voluntary isolation from extractive activities and violence. The Court expanded its Indigenous rights jurisprudence by recognizing the principle of “No Contact” as essential to self-determination. It ordered stronger protections for these communities' territories and way of life.

¹²⁷ General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, op. cit., Article 19.

¹²⁸ Chairperson-Rapporteur Mr. Luis-Enrique Chávez. 1999. ‘*Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*’. United Nations Economic and Social Council, par. 82. [E/CN.4/2000/84](https://www.unhcr.org/refugees/4/2000/84).

¹²⁹ Third Committee. 2024. ‘*Rights of Indigenous Peoples*’. United Nations General Assembly. [A/C.3/79/L.21/Rev.1](https://www.unhcr.org/refugees/4/2000/84).

reaffirmed indigenous self-determination, as it emphasized the importance of inclusion and engagement in peace negotiations and policy-making.

Conclusion

This Chapter explores the right to self-determination in its application to indigenous peoples, identifying its scope and implementation in both the internal and external domains of the principle. The right to self-determination is instrumental for the recognition and protection of basic human rights, as well as the aspiration of self-governance. The interpretation of the principle under international law, in relation to the indigenous question, has often been associated with secessionist tendencies in opposition to the territorial sovereignty and integrity of the State. However, the affiliation of the right to the struggle for independence is erroneous and should be neutralized through the recognition of political and social autonomy to indigenous communities, as components of the State.

Indigenous self-determination should be considered as an *erga omnes* right, specifically in its application for the safeguard of traditional culture or in relation to the use of land, which will be explored in the following chapter. Contemporary legal developments and jurisprudence have demonstrated how the effective realization of indigenous self-determination requires a continued commitment from States to safeguard, protect, and promote indigenous rights within a framework of equality and mutual respect.

3. The Right to Land for Indigenous Peoples

Introduction

Under international law, the idea of Statehood relies on a fundamental assumption: the presence of a fixed and defined territory. Territoriality has been, and remains, a contested legal notion, and its implications are crucial for the survival of indigenous cultures and self-determination. Access to and ownership of ancestral territories is not only a distinctive feature of indigenous peoples, but also a necessary premise for their cultural and economic development and preservation.

Under international law, indigenous land tenure is recognized and articulated in various human rights instruments. However, despite the protection at the international level, indigenous territorial property is often violated, primarily due to a lack of recognition at the State level.

This chapter analyses the affirmation of land rights under international law, as the spiritual relationship to traditional territories is the defining element characterizing the condition of indigeneity. Indigenous property claims have gained legitimacy under international human rights instruments, which recognize the collective right to land. The present analysis focuses on the jurisprudence of the Inter-American and African human rights systems, throughout the examination of landmark cases, which shaped the legal understanding of Indigenous territorial and resource rights.

Furthermore, it explores the controversial topic of the right to marine spaces and resources, as a dimension of the recognition of indigenous territorial property, by examining provisions of human rights law, in conjunction with the law of the sea.

3.1 The Origins of the Indigenous Right to Land

In the realm of international and human rights law, the primary factor that creates space for groups such as indigenous communities is the determination and delimitation of a specific territorial unit, and the resulting connection between those territories and the populations that inhabit them.

Therefore, in order for the individual person or group to be recognized as a member of the international community, the principle of territoriality is vital.

According to the international legal system, the notion of State sovereignty rests upon four basic precepts: a permanent population, a defined territory, a government and the capacity to enter into relations with other States¹³⁰.

¹³⁰ ‘Montevideo Convention on the Rights and Duties of States’. 1934, Article 1. <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>.

Historically, under international law, the determination of a fixed territory made use of two fundamental principles borrowed from Roman Law: *terra nullius* and *uti possidetis*.

Terra nullius was used to refer to blank territories, devoid not only of any kind of population, but rather free of social and political organizations. Whereas the *uti possidetis* doctrine, sought to legitimize the geographical order established through the precepts of colonialism, freezing the borders of the territorial units that derived from it.

This doctrinal approach and its application over the centuries, originating in colonial practice, has shaped a series of geographical entities, crystallized within the framework of an Eurocentric view of the international community and its legal system.

Within colonial regimes, attempts to address indigenous land tenure often took the form of customary law frameworks designed to engage with the dominant authority. Yet this partial concession fell short of granting sovereignty or ownership, amounting instead to a “lesser” set of rights¹³¹. As noted by Anaya:

“Indigenous people not qualifying as States, could not participate in the shaping of international law, nor could they look to it to affirm the rights that had once been deemed to inhere in them by natural or divine law. States, on the other hand, both shaped the rules of international law and enjoyed rights under it largely independently of natural law considerations. It followed that states could create doctrine to affirm their claims over indigenous territories as a matter of international law and treat the indigenous inhabitants according to domestic policies, shielded from uninvited outside scrutiny by international law itself.”¹³²

The principles which have contributed to the establishment of an international order and the preservation of Western States’ interests, have now been dismantled. The ICJ pronouncement on the *Western Sahara case* has declared that the territories, which presented instances of political and social organizations, and which were acquired by European powers throughout the stipulation of treaties with local leaders, could not be deemed as *terra nullius*¹³³. Furthermore, in the judgment, the principle is radically criticized in light of the spiritual ties that link population groups to the land they inhabit¹³⁴.

¹³¹ Klug, Heinz. 1995. ‘Defining the Property Rights of Others: Political Power, Indigenous Tenure, and the Construction of Customary Land Law’. *SSRN Scholarly Paper*. Rochester, NY: Social Science Research Network, 124-126. <https://papers.ssrn.com/abstract=3523409>.

¹³² Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. Book, Whole. New York [etc.]: Oxford University press, 2004, 27. <https://go.exlibris.link/rgCjM9d5>.

¹³³ International Court of Justice. 1975. ‘*Western Sahara, Advisory Opinion*, 1975 *I.C.J.* 12’, par. 80. <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>.

¹³⁴ *Ibid.*, par. 90.

Nonetheless, over the centuries the annexation of said territories has been validated by the *intertemporal law*. According to this principle, actions committed in a previous era are exempt from current scrutiny. The illegitimate acquisition of territory through the Imperial States' politics of power has deprived native inhabitants of their lands.

Inevitably, the right to land of indigenous peoples has been connected to the self-determination provision, which affirms that: "In no case may a people be deprived of its own means of subsistence"¹³⁵. This prescription intersects with the notion of property, which sets that human beings detain rights over lands and chattels that they have reduced to their own control, by some measure of legitimacy.

Property has been affirmed as an international human right, as stated in Article 17 of the *Universal Declaration of Human Rights*:

- "1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property."¹³⁶

From the recognition of property as a human right derives its interconnection to the norm of nondiscrimination, which requires a respect for indigenous regimes deriving from traditional or customary land tenure, other than those traditionally recognized under the dominant society. According to the *Indigenous Peoples and their Relationship to Land* study, the lack of acknowledgment of native properties has historically been one of the main forms of discrimination against indigenous peoples. Furthermore, the document calls for the need of domestic reforms, aimed at the abolishment of the practices and doctrines hindering the recognition of indigenous land¹³⁷.

In contemporary international law, the notion of indigenous property has been increasingly connected to precepts such as self-determination, cultural preservation and nondiscrimination. However, in the international legal corpus, there exists no collective human right to land. This absence has given rise to the notion of "land property", in relation to the right of peoples to enjoy the basic necessary conditions for their development and survival.

¹³⁵ General Assembly resolution 2200A (XXI). 1966. '*International Covenant on Civil and Political Rights*'. United Nations., Article 1(2). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

¹³⁶ General Assembly resolution 217 A (III). 1948. '*Universal Declaration of Human Rights*', Article 17. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

¹³⁷ Daes, Erica-Irene A. 2001. '*PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES Indigenous Peoples and Their Relationship to Land Final Working Paper Prepared by the Special Rapporteur*'. United Nations Economic and Social Council, par. 40-48. E/CN.4/Sub.2/2001/21.

The *Human Rights Committee* has cited Article 27¹³⁸ of the *International Covenant on Civil and Political Rights*, in relation to instances of violations of the indigenous right to land. The Committee has reaffirmed the importance of the connection between indigenous traditional ways of life, mainly centered around the use of land, and the safeguard of cultural integrity. Furthermore, the *Committee on Economic, Social and Cultural Rights* has issued a *General Comment n. 14*, affirming that:

“The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.”¹³⁹

The indigenous identity is largely defined by the connection to the ancestral land, conditioning the community’s physical and cultural preservation:

“To separate the indigenous people from the land traditionally held by us is to pronounce certain death for we will either die physically, or our mind and bodies will be altered in such a way that we will mimic the foreigners' ways, adopt their language, accept their thoughts and build a foreign prison around our indigenous spirit which suffocates rather than allows for the flourishing of our spirit.”¹⁴⁰

The element of “ancestrality” is the discerning factor between a minority group and indigenous peoples, as it has been pointed out by the *International Labour Organization (ILO) Convention No. 169* in Article 1: “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical

¹³⁸ United Nations General Assembly, *International Covenant on Civil and Political Rights*, op. cit., Article 27. “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

¹³⁹ Committee on Economic, Social and Cultural Rights. 2000. ‘*General Comment No. 14 (2000)*’. United Nations Economic and Social Council, par. 27. [E/C.12/2000/4](#).

¹⁴⁰ ‘*Working Commission Reports: Second Conference of Indian Nations and Organizations of South America, Tiwanaku, Bolivia, March 6-13*’. 1984. South American Indian Information Center.

region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries”¹⁴¹.

In order to understand the indigenous territorial conception, Erica-Irene Daes has identified a series of elements which detain a substantial role in the definition of such connection:

- “(i) a profound relationship exists between indigenous peoples and their lands, territories and resources;
- (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities;
- (iii) the collective dimension of this relationship is significant;
- (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.”¹⁴²

Then indigeneity is characterized by the common heritage and descent a certain population group detains to its ancestors, which have lived since immemorial times in that same territory. The criterion of “historical continuity” is the standard upon which peoples within the community self-identify themselves as indigenous, and as being part of that very same group. Thus, Indigenous land ownership creates a collective right to traditional territories, including both surface and sub-surface resources.

There are two main issues arising from the recognition of land tenure, firstly whether the country recognizes it in the first place, secondly if, despite the acknowledgment land claims have gained within national and international legal systems, there exists a process of designation of said traditional territories.

Nonetheless, indigenous land tenure constitutes a corollary of the right to self-determination, these implications have rendered the international recognition of this aspect of the right troublesome, as stated by Cobo:

“It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples, the land is not merely a possession and a

¹⁴¹“ International Labour Organization. ‘*C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*’, Article 1. 1989
https://normlex.ilo.or/dyn/nrmlx_e/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDocument.

¹⁴² Daes, Erica-Irene A., op. cit., “Indigenous Peoples and Their Relationship to Land”, Final Working Paper prepared for the United Nations Economic and Social Council, par. 20.

mean of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely. Indigenous peoples have a natural and inalienable right to keep the territories they possess and to claim the land of which they have been deprived. In other words, they have the right to the natural cultural heritage contained in the territory and freely to determine the use to be made of it”¹⁴³

3.2 The Recognition of Land Rights under International Legal Instruments

International Labour Organization Convention No. 169

Under contemporary international human rights law, the affirmation of indigenous land and resource rights consists of property principles, as well as notions of cultural integrity, non-discrimination and self-determination.

The crucial starting point for the articulation of indigenous land rights is the ILO Convention No. 169 on Indigenous and Tribal Peoples, most importantly Articles 13 to 19, specifically Article 13 states that:

“1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”¹⁴⁴

This text highlights the collective dimension of the provision, specifying that Governments shall respect the “collective aspects” of the territorial relationship. The collective affirmation of the right is crucial: it protects indigenous communities from dismemberment and loss of customs, as it safeguards the spiritual, religious and cultural link to the land they inhabit.

Moreover, indigenous territorial rights are of a collective character, as Article 14 of the Convention recognizes the right to property and ownership of indigenous lands. The model established in the text for the identification and protection of indigenous lands is that of

¹⁴³ Martínez Cobo, José R., ed. 1987. *Study of the Problem of Discrimination against Indigenous Populations*. New York: United Nations, par. 196-198.

¹⁴⁴ ILO Convention No. 169, op. cit., Article 13. https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDocument.

traditional forms of occupation and use, referring to those territories that such communities have historically occupied, inhabited and utilized for their own survival. Other than the spatial element, the Convention does not provide a fixed time parameter for the acknowledgement of land property:

“1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.”¹⁴⁵

As set out under the second paragraph of the Article, the determination of identification procedures for the land to be attributed to indigenous peoples is left to national discretion. Moreover, international standards created for the recognition of indigenous rights, operate jointly with national practice in the regularization process of indigenous land. This provision requires States to adopt systematic measures for the identification of land tenure, in cooperation with indigenous representatives and communities, as the sole acknowledgment of territorial rights is deemed insufficient.

Paragraph three of the Article provides a response to the colonial and oppressive processes that have deprived indigenous peoples of their lands, trampling their culture and minimizing their property interests, resulting in consistent damage to their means of subsistence.

The acknowledgment of land rights under the ILO Convention No. 169 extends indigenous property to natural resources, as Article 15 affirms the need of participation in the use, administration, protection and conservation of the resources located on their lands. There are instances in which the State establishes ownership over underground resources, such as minerals and generally the subsoil, paragraph 2 of the Article specifies that:

¹⁴⁵ Ibid., Article 14.

“In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”¹⁴⁶

This norm creates an obligation for States to consult indigenous peoples when taking decisions over the natural resources pertaining to their territories, and relates to Article 6¹⁴⁷ and 7(3)¹⁴⁸ of the Convention No. 169, as it ensures their participation in decision-making directly affecting them. The procedural criteria for granting effective participation are not indicated in the text. However the ILO, in relation to the *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) vs. Arco Oriente c/ Amparo case*¹⁴⁹, has asserted the importance of the establishment of a “genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention”¹⁵⁰. The case concerned a contract signed by Ecuador together with an oil extraction company, which involved an area comprised of 70% of FIPSE’s possessions. In the claim brought before the ILO, Ecuador was denounced for its failure to implement the right to consultation established by the Convention. The government argued that the mechanisms foreseen under Article 6 were not valid at the time of the signing of the contract, citing the legal

¹⁴⁶ Ibid., Article 15(2).

¹⁴⁷ Ibid., Article 6: “1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

¹⁴⁸ Ibid., Article 7(3): “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”

¹⁴⁹ The FIPSE v. Arco Oriente s/ Amparo case involved the Shuar Indigenous Federation (FIPSE), which sued the oil company Arco Oriente for having entered their ancestral land without proper consultation. The Ecuadorian Constitutional Court ruled in favor of FIPSE, affirming Indigenous collective rights and requiring that any agreements receive prior approval from the community assembly.

¹⁵⁰ International Labour Organization. 2001 ‘Representation (Art. 24), 2001’, par. 37.

principle of *non-retroactivity*¹⁵¹, and, as the oil extraction operations were deemed necessary for the economic growth of the country, they detained priority over indigenous interests. The ILO pronounced that, despite the lack of retroactivity, the effects of the extraction were still present at that moment, and remarked the need for involvement of indigenous representatives in policymaking.

Under Article 16¹⁵², the Convention addresses forced relocation, in light of the massive violations of rights experienced by indigenous peoples historically. The first section of the article prohibits removal of the peoples concerned from the occupied lands, however the text does allow for this possibility under exceptional circumstances of necessity, which are not defined. Differently from the ILO Convention No. 107, this document includes a provision granting the “right to return”, along with regulations governing situations where such return is not possible.

International Covenant on Civil and Political Rights

Under the *International Covenant on Civil and Political Rights* (ICCPR), the most relevant provision addressing indigenous land rights is contained in Article 27, which imposes a negative obligation on States not to hinder the enjoyment of cultural, religious, and linguistic rights. Furthermore, despite the negative terms adopted, the text does recognize a right, and as a result creates a positive obligation for the State to protect its exercise. Article 27 does not include a direct mention of indigenous peoples, however, the *General Comment No. 23*, issued by the *Human Rights Committee* (HRC) in 1994, emphasized its applicability to the indigenous conditions of life, and highlighted the close correlation between indigenous lands and the integrity of their economies and cultures¹⁵³:

¹⁵¹ The non-retroactivity principle establishes that a law can be applied to an act which took place only after its entry into force.

¹⁵² Ibid., Article 16: “1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned. 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.”

¹⁵³ Scheinin, Martin. 2004. ‘Indigenous Peoples’ Land Rights Under the International Covenant on Civil and Political. *Aboriginal Policy Research Consortium International* (APRCi), par. 2. https://ir.lib.uwo.ca/aprci/195/?utm_source=ir.lib.uwo.ca%2Faprci%2F195&utm_medium=PDF&utm_campaign=PDFCoverPages.

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”¹⁵⁴

International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is a normative instrument promoting mainly economic rights. It does not directly address minority groups, but the *Committee on Economic, Social and Cultural Rights* (CESCR) has often issued observations on matters involving the status of indigenous human rights and lands. The CESCR exercises functions similar to that of the HRC, and has been instituted in order to monitor State implementation of the Covenant, through the publishing of General Comments and observations on periodic States reports.

Articles 1 and 2 of the ICESCR pertain to indigenous peoples as they recognize, respectively, the right to *self-determination*¹⁵⁵ and that to *non-discrimination*¹⁵⁶.

Additionally, Article 11 of the Covenant is of considerable interest to the question of indigenous land rights, as it states the *right to adequate housing and food*, in particular the first paragraph outlines that:

¹⁵⁴ UN Human Rights Committee (HRC). 1994. ‘CCPR General Comment No. 23: Article 27 (Rights of Minorities)’, par. 7. [CCPR/C/21/Rev.1/Add.5](https://www.unhcr.org/refugees/pdf/ccpr-c-21-rev-1-add-5.pdf).

¹⁵⁵ General Assembly resolution 2200A (XXI). 1966. ‘*International Covenant on Economic, Social and Cultural Rights*’. United Nations, Article 1 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>. “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

¹⁵⁶ Ibid., Article 2: “1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”¹⁵⁷

Furthermore, the CESCR’s commentary remarks that indigenous cultural integrity is dependent on the preservation of traditional lands, and to safeguard the social and economic life of these communities States must take upon measures acknowledging their distinctive status and needs.¹⁵⁸ As it was pointed out in relation to the condition of indigenous peoples of Colombia in 2002:

“The Committee notes with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem (...) The Committee urges the State party to ensure that indigenous peoples participate in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries.”¹⁵⁹

International Convention on the Elimination of All Forms of Racial Discrimination

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) was adopted by the UN General Assembly in 1965, and creates an obligation, for contracting States, to commit to the eradication of any form of discrimination based on race. The *Committee on the Elimination of Racial Discrimination* (CERD) monitors the implementation of the UN Convention, and in 1997 it produced the *General Recommendation No. 23*, specifically addressing the rights of indigenous peoples. The issue of indigenous peoples is particularly relevant to the text, as discrimination lies at the basis of the deprivation

¹⁵⁷ Ibid., Article 11.

¹⁵⁸ Huff, Andrew. 2005. ‘Indigenous Land Rights and the New Self-Determination’. *Colorado Journal of International Environmental Law and Policy* 16 (2): 327.

¹⁵⁹ UN Committee on Economic, Social and Cultural Rights (CESCR). 2002. ‘UN Committee on Economic, Social and Cultural Rights: Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions’. 6 June 2002, par. 761, 782. <https://www.refworld.org/reference/annualreport/cescr/2002/en/91896>.

of basic human rights and land dispossession. The General Recommendation issued by the Committee affirms the collective right to land:

“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”¹⁶⁰

United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) was adopted in 2007, and constitutes a cornerstone for the articulation of indigenous land rights. It proposes an interpretation of the right as a basic prerequisite for the enjoyment and realization of all the other provisions inscribed in the text.

Indigenous territorial property is granted upon the recognition of the ancestral and spiritual ties that link these groups to their lands, the nature of the norm often hinders States’ interests and causes political disputes. The territorial question was the last point to be agreed upon within the *Working Group on Indigenous Populations* (WGIP), and throughout the drafting process of the document no agreement was found on the matter until 2005.

The provisions on indigenous land rights have been developed in light of the outcomes of the colonial process, and the alienation of lands and their respective resources, which has hampered the natural development and economic growth for these populations.

Article 25¹⁶¹ recognizes the exceptional spiritual ties that indigenous communities have established with their lands historically, and grants the right to maintain such relationship.

Whereas Article 26 defines the right to lands in its direct form:

“1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

¹⁶⁰ Committee on the Elimination of Racial Discrimination. 1997. ‘General Recommendation No. 23: Indigenous Peoples’, par. 5. https://www.eods.eu/library/UN_International%20Convention%20on%20the%20Elimination%20of%20Racial%20Discrimination_General%20recommendation%2023_1997_EN.pdf.

¹⁶¹ General Assembly of the United Nations. 2007. ‘United Nations Declaration on the Rights of Indigenous Peoples’. United Nations, Article 25. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf. “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”¹⁶²

This article focuses on the right to use and control the lands and resources present on indigenous territories, in light of historical and aboriginal ownership.

The implementation of the second and third paragraphs is left to national procedures, as the text does not establish any monitoring mechanism for land demarcation.

In light of this principle, pursuant to Articles 27¹⁶³ and 28¹⁶⁴ of the Declaration, indigenous peoples hold the rights to open an internal process to address their claims and to be restored to their lands, and where it is not possible, to be eligible to just compensation.

Article 26(2) does encompass the question of resources located on indigenous territories, which is later outlined in Article 32¹⁶⁵, as it sets out the States’ obligation to cooperate and consult indigenous groups when discussing projects affecting their lands and natural resources. Indigenous peoples have the right to determine the use of their territories in light of their extraordinary necessities. The procedural modalities for the consultation processes are not accounted for in the text, as the line followed by the Document does attempt to reconcile the States’ views, which insists over territorial management, together with the indigenous claims for land tenure.

¹⁶² Ibid., Article 26.

¹⁶³ Ibid., Article 27: “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”

¹⁶⁴ Ibid., Article 28: “1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”

¹⁶⁵ Ibid., Article 32: “1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

Moreover, the *United Nations Development Programme (UNDP) Guidelines on Indigenous Peoples' Issues* remarks the material, cultural and spiritual dimension of the indigenous ties with ancestral lands. This renders the enjoyment and ownership of aboriginal territories a fundamental condition for their existence and identity, as they have evolved simultaneously with their ecosystems. The right to manage and utilize the natural resources present over their lands is thus reinforced by the ancestral knowledge and practices which indigenous peoples have developed¹⁶⁶.

The UNDRIP constitutes an innovative document for the protection of indigenous rights and tutelage for their ways of life. In relation to the matter of land tenure, it is evident that the text allocates considerable relevance to the relationship between indigenous peoples and their territories, with the aim to safeguard their identities, survival and development.

3.3 The Application of Normative Instruments in International Courts' Jurisprudence

Inter-American Human Rights System

The *Inter-American Court of Human Rights (IACtHR)* has produced a vast jurisprudence over the indigenous rights to traditional lands, most notably having established the notion of property in the *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua* case of 2001. The landmark judgement issued by the Court, recognized the community's property rights as protected under the *American Convention on Human Rights*, and their land tenure over the territories they currently inhabit within the *Región Atlántica Autónoma del Norte (RAAN)*.

This decision marks the first recognition of an indigenous community's land rights by an international tribunal. In the Court's opinion Nicaragua had violated the American Convention, as it had granted, on the 5th of May of 1995, a timber logging concession over the area to the multinational company Sol de Caribe (SOLCARSA).

The revolutionary judgment of the Court found that the State of Nicaragua had committed an overall violation of the obligation to ensure the rights enshrined in the Convention. Moreover, the State failed to provide adequate recognition of the community's land tenure. The central aspects of the decision are the acknowledgments of the right to land interpreted collectively, and of the consuetudinary rights of the indigenous peoples in question.

¹⁶⁶ United Nations Development Group. 2009. '*Guidelines on Indigenous Peoples' Issues*', 15-16. https://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf.

The Awas Tingni communal lands lacked governmental recognition, and the untitled areas were treated as State's possessions. The Tribunal found that that such negligence did violate Article 21¹⁶⁷ of the American Convention, which formulates the individualistic property concept.

The pronouncement of the Court over the Article linked it to Article 29(b)¹⁶⁸, stating that no provision within the Convention can be interpreted as limiting the exercise of any right or freedom, recognized by virtue of the State parties. In light of this analysis, as the Nicaraguan legal system recognized the communal property of the land traditionally belonging to the Communities of the Atlantic Coast, then the individual right to property established by the Convention couldn't be restricted, since under national legislation it is granted as communal¹⁶⁹. Although the individualistic concept of property was formulated in such a way to include Awas Tingni's communal property rights, the Court emphasized that the rights guaranteed by international human rights instruments have a different scope than those articulated in national legislation. Indigenous property rights exist in light of the historical occupation and use of territories, then communal land rights are defined by their own customs and traditions: "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."¹⁷⁰

Furthermore, the Court found that the indigenous community has the right to the delineation and identification of its lands, as established by Article 14(2) of the ILO Convention No. 169. Notably the pronouncement established an obligation, for the State of Nicaragua, to adopt legislative and administrative measures for the demarcation of indigenous territories, throughout the community's inclusion in the process.

The approach enacted by the Inter-American Court of Human Rights in this case, not only is of evolutionary nature, but takes upon an interpretative methodology, as it makes specific references to the UN Draft and OAS Declarations, as well as referencing the ILO Convention No. 169, to which Nicaragua is not a State party¹⁷¹.

¹⁶⁷ American Convention on Human Rights "Pact of San Jose, Costa Rica". 1969, Article 21. <https://www.refworld.org/legal/agreements/oas/1969/en/20081>. "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 enjoyment to the interest of society. 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."

¹⁶⁸ Ibid., Article 29(b): "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party"

¹⁶⁹ Inter-American Court of Human Rights. 2001. 'Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua', par. 148-150. https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

¹⁷⁰ Ibid., par. 151.

¹⁷¹ Anaya, Indigenous Peoples in International Law, x,146.

The same procedural and interpretative methodology applied by the IACtHR has been followed by the Commission in the *Mary and Carrie Dann v. United States* case, as it emphasized the recognition of the right to property, as set under the American Convention on Human Rights, within the *American Declaration of the Rights and Duties of Man*¹⁷². The case arose as the Dann sisters were faced with efforts by the U.S. government to stop their grazing activities over the Western Shoshone area, as they lacked an official permit. The Danns countered that such permit system breached ancestral land rights, which, according to the United States had been lost through a series of judicial determinations. The Commission found that the U.S. had failed to ensure the same conditions of equality to the Dann sisters, as they had not applied the same just compensation standard that was ordinarily valid for the deprivation of property interests. The relevance of the case arises from the reinforcement of the line of thought already maintained in the *Awas Tingni* case, which considered indigenous peoples' rights to traditional land as being a matter of customary international law¹⁷³.

The Inter-American Court of Human Rights has underpinned this innovative jurisprudence in the landmark judgment on the *Pueblo Saramaka v. Suriname* case, as it established the creation of a shared regional constitutional parameter, throughout the integration of the Inter-American jurisprudence into national systems of law. This ruling marked the adoption of a new legal framework within the Inter-American system, which takes upon an increasingly globalized stance, promoting inter-constitutionality and the tutelage of internationally recognized values¹⁷⁴.

The case concerned the Saramaka peoples, a tribal community which was formed during the 17th century by part of the native population and previous African slaves. They occupy the region of the Suriname river, which was, previously to their settlement, uninhabited. The lack of ancestral connections to their lands has been deemed a controversial factor, as the prerequisite of indigeneity was not met. During the 1990s the national government started to seize part of the territories for the exploitation of natural resources, particularly through the granting of mining concessions to foreign companies. The restitution claims of the Saramaka

¹⁷² Ninth International Conference of American States. 1948. '*American Declaration of the Rights and Duties of Man*', Article XXIII. <https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf>. "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."

¹⁷³ Inter-American Commission on Human Rights. 2002. '*Report N° 99/99 Case 11.140 Mary and Carrie Dann v. United States*', par. 130. <http://hrlibrary.umn.edu/cases/75-02a.html>.

¹⁷⁴ Nocera, Laura Alessandra. 2018. 'Il diritto alla terra ancestrale indigena: come il caso Pueblo Saramaka vs. Suriname ha cambiato la giurisprudenza della Corte interamericana'. *federalismi.it* Focus Human Rights n. 3, 9, 10.

peoples lacked legitimacy upon the fact that they couldn't be recognized as a native population to the inhabited territory.

The Court ruled against the national territorial claims, which identified such lands as public territory, as it stated that: "Tribunal declares that the members of the Saramaka people are to be considered a tribal community, and that the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories"¹⁷⁵.

Furthermore, the relationship which related the Saramaka community to their lands could be compared to that ancestrally detained by indigenous peoples, as their survival and ways of life are highly dependent on them.

Suriname was deemed responsible for violating Articles 26 and 3 of the UNDRIP, which respectively establish the right to ancestral lands and that of self-determination for indigenous peoples. Moreover, the Court set that its previous jurisprudence held validity in all the States part of the Inter-American region, and the inadequacy and lack of national legislation on the matter of indigenous peoples constituted a breach of the right to due process of law, as set under the American Convention.

Although Suriname is not part to the ILO Convention No. 169, it has ratified both the ICESCR and the ICCPR, subsequently adopting the UNDRIP. Therefore, the State is under the obligation to grant the right to land for indigenous peoples, as established by the Declaration.

African Human Rights System

The *African Commission on Human and Peoples' Rights* (ACHPR) has issued a significant decision on the matter of minority and indigenous rights in *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria case*.

The case involved the violation of the Ogoni population's right to dispose freely of their natural resources and wealth. Indeed, the Nigerian Military Government was denounced on the basis of the environmental and health impact of oil development activities in the area of the Niger delta, inhabited by the community, which had not been consulted prior to the operations carried out in their territory.

¹⁷⁵ Inter-American Court of Human Rights. 2007. 'Case of the Saramaka People v. Suriname', par. 86. https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

The Nigerian government's actions were considered in breach of Articles 16 and 24 of the *African Charter on Human and People's Rights*, which establish, respectively, the right to health and to a favorable environment for development.

Furthermore, Nigeria had violated the right of the Ogoni peoples to dispose freely of their wealth and natural resources¹⁷⁶, as set under Article 21 of the Charter. The scope of the provision was identified by the Commission as comprising property, health and the environment, in relation to the effects of the breach committed by the government, which affected the wellbeing of the population group¹⁷⁷.

This interpretation of the article echoes the IACtHR's judgment in the *Pueblo Saramaka v. Suriname* case, as it focuses on the exploitation of indigenous land, environmental destruction and lack of participation¹⁷⁸.

The reasoning proposed by the Commission was later strengthened and extended in scope throughout the negotiation process of the UNDRIP's draft, as the ACHPR set out that Article 21 of the Charter grants indigenous land rights, and is deemed compatible with the national constitutional frameworks of member States, as well as recognizes participatory requirements. Moreover in 2007 the Commission issued an *Advisory Opinion on The United Nations Declaration on the Rights of Indigenous Peoples*, which set out a corollary of rights stemming from the acceptance of indigenous self-determination, enshrined in the UNDRIP's draft:

"In consequence, the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting

¹⁷⁶ OAU. 1981. '*African Charter on Human and Peoples Rights (Banjul Charter)*', Article 21. http://www.oas.org/en/sla/dil/docs/African_Charter_Human_Peoples_Rights.pdf. "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

¹⁷⁷ African Commission on Human and Peoples' Rights. 2001. '*Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria - 155/96*', par. 58. <https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596>.

¹⁷⁸ Pentassuglia, Gaetano. 2011. 'Towards a Jurisprudential Articulation of Indigenous Land Rights'. *European Journal of International Law* 22 (1):186. <https://doi.org/10.1093/ejil/chr005>.

of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties.”¹⁷⁹

The *African Court on Human and Peoples' Rights* has issued its first judgment over a case concerning indigenous peoples throughout the *African Commission on Human and Peoples' Rights v. Republic of Kenya* case. The case involved the Ogiek community, which are an indigenous group of the Mau Forest in Kenya and have been often subject to forced evictions. In 2012 the ACHPR brought the matter before the Court, which issued the landmark ruling in 2017, finding that Kenya had violated the community's right to land and to disposing freely of their wealth and natural resources.

The Ogiek were denied the status of indigenous peoples by the Kenyan government, which argued against their distinct ethnic characteristics. The Court did recognize the indigeneity of the community, based upon the criteria set by the *Working Group on Indigenous Populations/Communities*, as it asserted that the Mau Forest represented an ancestral territory to them, and that their living conditions and continued discrimination rendered their status highly vulnerable and requiring special protection¹⁸⁰.

Kenya's failure to recognize the Ogiek community as indigenous “denied them the right to communal ownership of land as provided in Article 14 of the Charter”¹⁸¹.

Moreover, the Court held that the government had violated the right to property, as set under Article 14¹⁸², which it interpreted in light of the provision established by the UNDRIP¹⁸³, granting to indigenous peoples the right to occupy and control the land and resources they inhabit, by virtue of their traditional ownership¹⁸⁴. Furthermore, despite the possibility of restricting the right to land ownership under certain exceptional circumstances involving the

¹⁷⁹ African Commission on Human & Peoples' Rights. 2007. 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', par. 27. https://iwgia.org/images/publications/Advisory_Opinion_ENG.pdf.

¹⁸⁰ African Court on Human and Peoples' Rights. 2017. '*African Commission on Human and Peoples' Rights v. Republic of Kenya*', par. 112. <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a96676974302132.pdf>.

¹⁸¹ Ibid., par. 114.

¹⁸² African Charter on Human and Peoples' Rights (Banjul Charter)', op. cit., Article 14. “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”

¹⁸³ See supra, note 36.

¹⁸⁴ Claridge, Lucy. 2007. *Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights*. Minority Rights Group International, 6.

national public interest, these did not justify the Ogiek community's eviction without prior consultation.

The importance of the Court's ruling over the Ogiek case lies in the alignment it manifests to international and other regional bodies' jurisprudence, as it recognizes the communal ownership stemming from the right to property¹⁸⁵: "The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective."¹⁸⁶

Recently, in 2022, the Court has ruled on the reparations owed by Kenya to the Ogiek community. The government was ordered to pay compensations to the population group as a remedy for the inflicted moral and physical discomfort and discrimination they suffered. Furthermore, the Ogiek peoples must be granted full recognition as an indigenous group and collective property over their native lands, which must be identified and delimited.

In July 2024 the African Commission on Human and Peoples' Rights issued a landmark decision over the *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park) v. Democratic Republic of Congo* case. The ruling recognizes for the first time the role of indigenous peoples in the preservation of biodiversity, condemning the forceful eviction they have been subject to. The Batwa people are an indigenous community of the DCR and inhabitants the Kahuzi-Biega Forest, from which they were arbitrarily evicted, without being granted any kind of compensation, following the expansion of the area comprised within the National Park of Kahuzi-Biega. The complaint brought before the African Commission in 2015 denounced a violation of national and international legislation, particularly relying on Article 1 of the ICCPR and the ICESCR, and Article 21 of the African Charter. The Batwa community has been awarded the status of indigeneity, and as such it retains an ancestral connection to the lands it has inhabited since immemorial times. The eviction from such lands constitutes a violation of property rights set under Article 14 of the African Charter. The ACHPR has proposed an interpretation of this provision, recalling the approach adopted in the Ogiek v. Kenya decision. Indeed, according to the African Commission's judgment, the right to land does encompass customary property rights involving the ownership, use and control of the land¹⁸⁷.

¹⁸⁵ Di Blase, Antonietta, and Valentina Vadi. 2020. *The Inherent Rights of Indigenous Peoples in International Law*. ROMATRE-PRESS, 187. [10.13134/978-88-32136-92-0](https://doi.org/10.13134/978-88-32136-92-0).

¹⁸⁶ African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Republic of Kenya, op. cit., par. 123.

¹⁸⁷ Ade Ndasi, Samuel, and Stefania Carrer. 2024. *Justice Served: The Batwa of Kahuzi-Biega and the Failure of Fortress Conservation*. London: Minority Rights Group, 4-7.

The significance of the ruling lies in the dismissal of the “fortress conservation” method of environmental preservation, promoted by the Government of the DRC for the creation of the National Park, as the model requires removal of human inhabitants from the area concerned¹⁸⁸.

3.4 The Right to Marine Space and Resources

The indigenous lifestyle is fundamentally shaped by the strong attachment displayed to the ancestral territories and natural resources. The nature of this attachment is not solely spiritual or religious, but translates practically to the necessary condition for the economic, cultural and social survival of the community.

Coastal indigenous peoples rely heavily on seas and oceans, and have developed an intimate connection to them, instituting a “unique dependence” on maritime space¹⁸⁹. Uses of marine living resources (MLRs) have various implications for such communities, as a vital source of food and means of subsistence.

MLRs are an indispensable asset for the preservation and existence of indigenous culture as distinct, furthermore they serve as means of subsistence both economically and nutritionally.

The use of the sea, according to indigenous practices, serves a strong economic aim, such as harvesting marine resources for commercial purposes and making of indigenous products.

Coastal waters and marine spaces are an integral part to indigenous spirituality, their significance goes beyond practical uses and benefits, as it involves ancestral beliefs and customs.

Under international law the indigenous right to marine space and resources has often been neglected in light of the *freedom of the seas* doctrine, according to which no country can claim ownership or jurisdiction over high seas, as no single State detains exclusive sovereignty over them. With the development of human rights law indigenous rights have gained greater recognition and legitimacy, however there exists no express provision recognizing the rights to marine space and resources for indigenous peoples. Nonetheless they can be derived from the interpretation of existing rules on the law of the sea and human rights instruments.

¹⁸⁸ African Commission on Human and Peoples' Rights. 2022. ‘*Communication 588/15 Minority Rights Group International and Environnement Ressources Naturelles et Développement (on Behalf of the Batwa of Kahuzi-Biega National Park, DRC) v. Democratic Republic of Congo (DRC)*’, par. 230. <https://minorityrights.org/app/uploads/2024/07/communication-588-002-decision--english-version.pdf>.

¹⁸⁹ Permanent Forum on Indigenous Issues. 2016. ‘*Study on the Relationship between Indigenous Peoples and the Pacific Ocean*’. United Nations Economic and Social Council, par. 4. [E/C.19/2016/3](https://www.un.org/development/desa/pfi/2016/03/).

The indigenous right to self-determination in its economic sense, as expressed under Article 1(2)¹⁹⁰ of the ICCPR and ICESCR, has been increasingly interpreted to include the indigenous ownership and use of natural resources. The right equally applies to the use of MLRs, and entitles indigenous peoples to freely dispose of marine spaces, furthermore this interpretation of the provision creates an obligation to the inclusion in the processes of conservation and management of such resources¹⁹¹.

Under international human rights instruments, indigenous property rights have been expressively recognized, however the extension of the provisions to marine areas and MLRs remains a controversial topic. During the negotiation process of the ILO Convention No. 169, indigenous peoples' organizations have expressed their concern over the inclusion of saltwater areas within the property rights recognized under Article 14: "Nor, on a purely practical level, does the word "lands" cover elements such as sea ice for the northern peoples, which are parts of their territories but are not land. It also does not reflect other elements which are inherent in their concept of territory, such as the flora and fauna, waters and the environment as a whole."¹⁹² According to Article 13(2) of the ILO Convention No. 169:

"The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."¹⁹³

The wording of the provision broadens the concept of land to include water resources and the marine space¹⁹⁴. This understanding is strengthened under Article 25 of the UNDRIP¹⁹⁵, according to which indigenous peoples hold the right to maintain a distinctive spiritual relationship, not only with their lands, but to water and coastal areas too.

¹⁹⁰ UN General Assembly, International Covenant on Civil and Political Rights, op. cit, Article 1(2). "peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

¹⁹¹ Allen, Stephen, Nigel Bankes, and Øyvind Ravna. 2019. *The Rights of Indigenous Peoples in Marine Areas*. 1st ed. Hart Publishing, 50.

¹⁹² International Labour Organization. 1989. 'Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) Report IV(1), International Labour Conference, 76th Session', 4. https://webapps.ilo.org/public/libdoc/conventions/Technical_Conventions/Convention_no._169/169_English/88B09_291_engl.pdf.

¹⁹³ ILO Convention No. 169, op. cit., Article 13(2). https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE%2CP55_LANG%2CP55_DOCUMENT%2CP55_NODE:REV%2Cen%2CC169%2C%2FDocument.

¹⁹⁴ Xanthaki, Alexandra. 2007. *Indigenous Rights and United Nations Standards Self-Determination, Culture and Land*. Cambridge University Press, 81. <https://doi.org/10.1017/CBO9780511494468>.

¹⁹⁵ See supra, note 35.

The meaning of indigenous land has been widened to include marine space as part of indigenous property, in instances in which such maritime area has been traditionally used and occupied as part of ancestral territory.

This interpretation implies that the prohibition of forced removal from indigenous lands, as provided by Article 16 of the ILO Convention, extends in scope to the eviction from coastal areas and fishing grounds. Therefore, the cumulative aspect of this provision, together with Article 13(2), presupposes recognition, within the text of the Convention, of indigenous people's right to property over marine space and coastal areas.

The marine space and resources have thus been identified as the center of cultural, spiritual and economic development of indigenous coastal peoples. The right to culture is recognized and underpinned in various international legal instruments. Article 23 of the ILO Convention recognizes fishing and hunting practices as indispensable for the preservation of indigenous cultures. The Human Rights Committee has issued a *General Comment No. 23* regarding Article 27 of the ICCPR, which provides that "persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture"¹⁹⁶. The HRC noted that traditional activities involving the use of land, such as fishing, constitute fundamental cultural manifestations¹⁹⁷. Therefore, the provisions on the cultural rights of indigenous peoples are extended to marine space and resources, as confirmed by the HRC in the *Apirana Mahuika et al. v. New Zealand case*:

"It is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture."¹⁹⁸

International human rights law provided the recognition of the indigenous right to access and use marine spaces and MLRs, however the *United Nations Convention on the Law of the Sea* (UNCLOS) doesn't expressively reference this right. The nature of the Convention is substantially different from that of human rights instrument, which enshrine collective or individual rights, as the document primarily regulates relationships between States in the

¹⁹⁶ UN General Assembly, International Covenant on Civil and Political Rights, op. cit, Article 27.

¹⁹⁷ See supra, note 28.

¹⁹⁸ Human Rights Committee. 2000. '*Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993', par. 9.3. [U.N. Doc. CCPR/C/70/D/547/1993](#).

context of maritime governance. Under the UNCLOS the *Exclusive Economic Zone* is established as a maritime area which extends up to a maximum of 200 nautical miles from the baseline, and is situated beyond and adjacent to the territorial sea¹⁹⁹. According to Article 56(1) of the Convention:

“In the exclusive economic zone, the coastal State has: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil”²⁰⁰

This provision grants exclusive and plenary authority to the State with respects to MLRs, as a sovereign right to explore and exploit such resources, moreover the coastal State is under the obligation to manage and preserve them. The UNCLOS does not prescribe specific measures to be taken by coastal States, but gives them full discretionary powers to adopt them upon consideration of appropriate conservation and management of the maritime resources. Despite the specific obligation set in the Convention, according to Article 61, such measures must be designed taking into account “the economic needs of coastal fishing communities”²⁰¹. This may be interpreted as referencing indigenous peoples, in the broader sense that States have the discretion to accommodate their rights when determining measures to be taken.

The *UN Fish Stock Agreement* (UNFSA) makes a direct mention to indigenous peoples, specifically requiring coastal States to take “into account the interests of artisanal and subsistence fishers” and to “avoid adverse impacts on (...) indigenous people in developing States, particularly small island developing States”²⁰². These provisions specifically apply to the adoption of measures, or enactment of State cooperation, with regards to the conservation of straddling and highly migratory fish stock. However, they have been interpreted as referencing all MLRs, and not restricted in applicability solely to indigenous peoples in developing States, but rather extended to all countries presenting indigenous fishing communities. From these provisions derives a dual obligation for States, firstly not to introduce conservation measures impacting negatively indigenous peoples, and secondly to take positive actions to ensure that they detain access to fisheries²⁰³.

¹⁹⁹ United Nations. 1982. *United Nations Convention on the Law of the Sea*, Article 50, 57. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

²⁰⁰ Ibid., Article 56.

²⁰¹ Ibid., Article 61(3).

²⁰² Ibid., Article 24.

²⁰³ Enyew, Endalew Lijalem. 2024. *Indigenous Peoples, Marine Space and Resources, and International Law*. 1st ed. Routledge, 222.

The rules set by *Convention on Biological Diversity* (CBD), specifically under Article 8, impose on State parties the obligation to respect and preserve indigenous practices, which are relevant for the conservation and sustainable use of biological diversity, as well as the promotion of the application of indigenous knowledge²⁰⁴. As provided by Article 10, each contracting party shall “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”²⁰⁵.

In conclusion the recognition of the indigenous rights within waters, with respect to marine space and resources, is not hindered by the coastal States’ obligation to conserve and manage MLRs, as stipulated by the law of the sea rules. The wide margins of action and discretion envisaged by the UNLOCS and UNFSA, in relation to the measures to be enacted for marines living resources, allow for the protection of indigenous interests and practices in a non-conflictual way.

Conclusion

This final chapter explores the indigenous claims to territorial property, as reflected in basic human rights principles, such as the right of self-determination.

Land is a vital element of indigeneity, as it underpins the cultural, social, and economic life of indigenous communities. Therefore, the legal recognition of this relationship lies at the core of tribal existence under international law.

Effective international legal protection of indigenous land rights has been ensured through human rights instruments, particularly under Article 14 of the ILO Convention No. 169 and Article 25 of the UNDRIP. Furthermore, the jurisprudence of international courts has built a legal framework upon which States have developed a social compact of indigenous rights’ recognition²⁰⁶ and have shaped their legal personality.

A controversial aspect of indigenous property rights concerns the ownership and control over marine spaces and resources. The special connection of indigenous peoples to their lands extends, in the case of coastal communities, to the sea, which constitutes the core of their economic development and cultural and physical preservation. Provisions of human rights law do include marine areas and MLRs, which are traditionally regulated by the law of the sea, that is increasingly indigenizing itself²⁰⁷.

²⁰⁴ United Nations. 1992. ‘*Convention on Biological Diversity, Concluded at Rio de Janeiro on 5 June 1992 (CBD), 1760 UNTS 79 (Entered into Force 29 December 1993)*’, Article 8. <https://www.cbd.int/doc/legal/cbd-en.pdf>.

²⁰⁵ Ibid., Article 10.

²⁰⁶ Huff, Andrew, *Indigenous Land Rights and the New Self-Determination*, op. cit., 332.

²⁰⁷ Enyew, *Indigenous Peoples, Marine Space and Resources, and International Law*, op. cit., 345.

Conclusion

The international legal status of indigenous peoples, discussed in this Thesis, has been shaped by the development of the international human rights program, and their demands have been increasingly accommodated by States and other relevant actors.

The affirmation of indigenous peoples' rights, which has been met by the adoption of substantial measures for the preservation of their integrity and survival, is expected to continue, as their cause remains a pressing issue for many States.

The achievements reached by the indigenous movement have overcome the traditional doctrine of State sovereignty and the legal thought which originated from Western perspectives, as fundamentally contrary to the acceptance of indigenous peoples as distinct units of human interaction.

In the first Chapter the analysis of the recognition process for indigenous peoples under international law, starting from the problem of the identification of a definition, has been provided following a historical timeline and analyzing the relevant provisions. It has been demonstrated how the condition of indigeneity is characterized by specific criteria and elements that discern it from other minority groups. As underpinned by the *International Labour Organization (ILO) Convention No. 169* the distinctive status they hold from the national institutions under which they live, and the lineage of descent to the native communities of the land they inhabit. Furthermore, the criterion of self-identification is particularly relevant for indigenous communities, as it grants them the possibility to determine autonomously the membership in their group. Moreover, both the definitions provided by the *Study on the discrimination against indigenous peoples* (Martínez Cobo study) and the *Working Paper by the Chairperson-Rapporteur*, Mrs. Erica-Irene A. Daes, have identified the condition of vulnerability as distinctive of the status of indigeneity. The attribution of this criterion is the result of the discrimination and subjugation historically perpetrated by colonial States towards these populations. The evolution of international law has come to challenge the legacy of this colonial history, throughout the adoption of a body of customary and conventional norms concerning the question of indigenous rights, which have been presented and analyzed in the chapter.

The understanding of this universe of norms and procedures for the protection of indigenous rights accords with precepts of self-determination, as the foundational regulatory vehicle of the contemporary international system²⁰⁸.

The analysis of the application of the right to self-determination to indigenous peoples has been the focus of the second Chapter, encompassing both its broad significance and the specific implications and benefits it entails for this population group. The right is set in Articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)²⁰⁹. A series of precepts stem from the recognition of self-determination, such as non-discrimination, self-government, the right to participation and cultural integrity, as well as the right to land ownership and control. This prescription is fundamentally opposed to patterns of conquest and colonialism, and it undermines the conception of Westphalian sovereignty, however it encompasses two distinct domains, the internal and external ones. In relation to indigenous peoples' self-determination is mainly intended as the right to internal realization, furthermore it is not solely concerned with the international status of the peoples and their right to secession, but rather with the attribution of a certain degree of autonomy to the communities living under the State's institutional framework. This acknowledgment must involve procedures granting meaningful participation and negotiations, in order to achieve full implementation of the norm. One of the most relevant duties States have towards indigenous peoples is that of granting them the rights to their ancestral lands, which is the focus of Chapter three.

Lands and resources are of central importance to the survival of indigenous peoples and the full realization of their right to self-determination. The original rights to these territories arise from the historical precedence they hold in their occupation, and the ancestral relationship they have developed towards them. The subsistence and continuation of their cultures, economies and societies as a whole, is dependent upon the use and occupancy of such lands, which is recognized under Article 14 of the ILO Convention No. 169²¹⁰ and Article 26 of the UNDRIP²¹¹.

The analysis proposed in the Chapter is not solely limited to territorial property, but extends to the ownership and use of marine spaces and resources. Similarly to the relationship held by indigenous peoples to their ancestral lands, which is not only of historical relevance, but also vital for their development, coastal communities are highly dependent on seas and oceans, as well as the seabed. The understanding which extends the land rights provisions to include

²⁰⁸ Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. Book, Whole. New York [etc.]: Oxford University press, 2004, 289. <https://go.exlibris.link/rgCjM9d5>.

²⁰⁹ See supra, note 84 and 85.

²¹⁰ See supra, note 145.

²¹¹ See supra, note 162.

marine spaces is proposed under Article 25 of the UNDRIP and Article 13 of the ILO Convention No. 169. Traditional human rights legislation enters into relation with the specific norms over States' duties and rights in maritime environments, the *United Nations Convention on the Law of the Sea* (UNCLOS) being the most relevant one, and other specific instruments such as the *Convention on Biological Diversity* (CBD). The jurisprudential practice of international Courts has been particularly relevant for the implementation of the relevant customary norms. Among the regional human rights systems, the *Inter-American Court of Human Rights* has significantly contributed to the formulation of indigenous rights as collective. The Tribunal has established an evolutive jurisprudential practice in the recognition of the fundamental rights of indigenous peoples, especially in relation to land rights, most notably in the *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua* case of 2001.

International law has developed multi-layered levels of protection of indigenous peoples' rights²¹², which culminated in 2007 with the adoption of the UNDRIP. The document takes upon a substantially reparatory character, but lacks a fundamental binding force, however it has been adopted nationally as a source of standards on indigenous rights. The implementation of provisions and rights of indigenous peoples is intensively monitored by multiple United Nations instruments. This continued debate and ongoing recognition, have made evident how the re-interpretation of fundamental human rights, in light of the specific needs and claims of indigenous peoples, as well as the dismantling of existing principles, are the basic prerequisite for their affirmation as subjects of law. The evolution undergone by international law, throughout the development of specific norms and bodies, has come to challenge the historical legacy of oppression and discrimination experienced by indigenous peoples, which have been deprived of their lands, their economies have been impaired, and cultures undermined.

²¹² Xanthaki, Alexandra. 'INDIGENOUS RIGHTS IN INTERNATIONAL LAW OVER THE LAST 10 YEARS AND FUTURE DEVELOPMENTS'. *Melbourne Journal of International Law* 10 (2009), 8. https://law.unimelb.edu.au/_data/assets/pdf_file/0009/1686060/Xanthaki.pdf.

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