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Realizing the Rights of Indigenous Peoples

Challenges and Next Steps

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ACRONYMS INDEX

ASEAN	Association of Southeast Asian Countries
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
ECOSOC	Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EU	European Union
FPIC	Right to free, prior and informed consent
GC	General Comment
HR	Human Rights
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
MDGs	Millennium Development Goals
MMP	Mixed Member Proportional system
MP	Member of Parliament
OAS	Organization of American States
OHCHR	High Commissioner for Human Rights
PPG	Parliamentary Pastoralist Group
SDGs	Sustainable Development Goals
UN	United Nations
UNDP	UN Development Program
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNICEF	UN Children's Fund
UNIPP	UN Indigenous Peoples' Partnership
UNPFII	UN Permanent Forum on Indigenous Issues
WGIP	UN Working Group on Indigenous Peoples
WHO	World Health organization
WTO	World Trade Organization
Yatama	Yapti Tasba Masraka Nanih Asla Takanka

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1. MOTIVATION AND OBJECTIVES

This thesis aims to assess the current protection and respect of Indigenous Peoples' right to land and political participation in accordance with international laws by analyzing relevant legal frameworks and jurisprudence. This work analyzes these questions drawing on the experiences of Indigenous groups in different parts of the world in order to provide a macro analysis of the current situation involving the protection and respect of Indigenous rights. Specifically, this thesis considers the rights to land and political participation to be of great importance for they can either trigger multiple Human Rights violations when breached or can ensure the sustainable development of Indigenous Peoples all around the world when correctly upheld and respected. As of 2020, most of us live in the most democratic, peaceful and prosperous societies in History. Most population groups have advanced their rights and have been able to improve their socioeconomic and cultural situation, reaching unprecedented levels of development and well-being. However, Indigenous Peoples compose an extremely vulnerable group that is oftentimes left behind or is accessing these living standards more arduously and tardily, frequently while fighting against the unwillingness of their own State governments to improve their conditions. It is an unfair situation that is largely silenced as regularly it challenges large economic transnational interests. However, with the growing worry about climate change, we may have found ourselves in a very special momentum in which Indigenous Peoples can advance their rights not only because it is the right thing to do, but because the world as a whole benefits from it: greater respect for Indigenous Peoples rights impacts directly in the correct protection of our nature, enhancing therefore not only human development but also sustainability and prosperity for all. In order to make the most of this situation, I believe that the right to land and the right to political participation are especially vital, for they can serve as a firm base for Indigenous Peoples to develop to their full potential and well-being.

In this sense, it would be a mistake on my part to analyze the consequences of the respect of these rights (or lack of thereof) only in a given region of the world. While many of us think of Latin America when speaking about Indigenous Peoples, most of these population groups are located in areas of Asia and Africa, two continents that have been historically left out of studies like ours. Moreover, in a globalized world, challenges faced by Indigenous Peoples are shared, regardless of the area of the world they live in, and all have the same devastating consequences for humanity and the world. This is why I find

it relevant to conduct a global study on the right to land and the right to political participation: it helps to give visibility to all Indigenous Peoples and not only those traditionally considered as such, it highlights how the breach of these rights is a global trend based on economic interests, and it would set the right framework to implement policies that enhance sustainable development for all Indigenous Peoples, eliminating differences of legal status among them depending on the region of the world they live in.

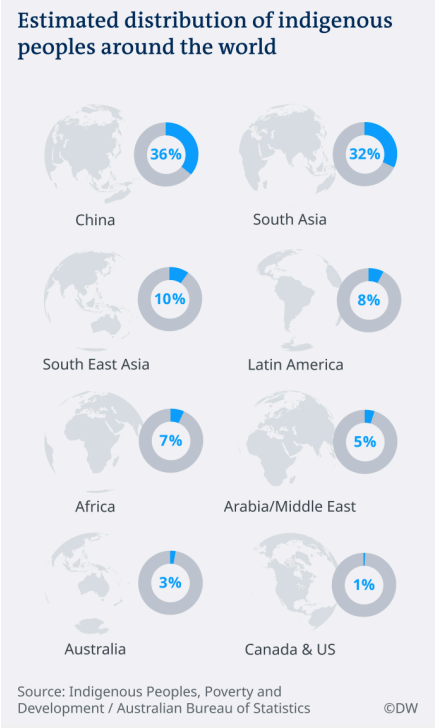
In order to analyze this matter, I will study the legal protections concerning the rights to land and political participation that are available to Indigenous Peoples, while exploring the challenges they face worldwide in relation with these two rights. To carry out this study, I will examine the legal rights frameworks and jurisprudence and consider the following questions: what is the legal status of these rights in international law? What steps should be taken in order to improve their protection? Are these rights shielded by an internationally binding document and, if not, is it necessary to improve Indigenous Peoples' lives? To answer these questions, I will first explore the general legal framework concerning Indigenous Rights, to then separately analyze the right to land and the right to political participation and their challenges, legal status and possible improvements, seeking to provide insightful recommendations that can help in the strengthening of these rights. In essence, this paper aspires to help to put a remedy to the historic wrong-doing Indigenous Peoples have been subject to, and stop, to a great extent, modern colonialization and the uprooting of these communities.

2. OVERVIEW

There are 370 million Indigenous People in the world, living in more than 90 counties (Amnesty International, n.d.), representing around 5% of the world's population and yet accounting for 15% of the extreme poor (The World Bank, n.d.) and about one third of the worlds' 900 million extremely poor rural people (Department of Economic and Social Affaris , 2009). Moreover, they globally suffer higher rates of landlessness, malnutrition and internal displacement than other groups (Amnesty International, n.d.). Indigenous Peoples are one of the most venerable human groups in the world, yet their claims have been met with little political and legal willingness to regulate and uphold their rights, being this a consequence of the invisibility of Indigenous communities during the decision-making processes. To symbolize the extent to which Indigenous Peoples worldwide have been invisible, it is worth noticing that before 1990, it was generally

understood that Indigenous Peoples only existed in the Americas, and, as matter of fact, the Martínez Cobo report, considered a turning point in the international fight for Indigenous rights, had only studied American peoples. During a discussion at the UN Working Group on Indigenous Peoples (WGIP), the identification criteria were broadened so that not only groups who had been subject to European colonialism were considered, but also other groups that had ways of life connected to land use and self-identification as Indigenous could be included as such (Charter & Stavenhagen, 2009). In this sense, the internationally agreed characteristics identifying Indigenous Peoples, being each characteristic more or less relevant depending on the situation, are: self-identify as Indigenous Peoples; having a historical link with those who inhabited a country or region at the time when people of different cultures or ethnic origins arrived; have a strong link to territories and surrounding natural resources; have a distinct social, economic or political systems; have a distinct language, culture and beliefs; are marginalized and discriminated against by the state; and they maintain and develop their ancestral environments and systems as distinct peoples (Amnesty International, n.d.).

Table 1. Distribution of Indigenous Peoples (Coulson-Drasner, 2018)



Although conventions and a UN Declaration exist and acknowledge their rights, the international enforcement and accountability of these is limited and presents deficiencies, as it will be explored. Human Rights are indivisible, interdependent and interrelated, which means that most times, when a HR violation occurs, the consequences involve the violation of many other Human Rights. In the case of Indigenous Peoples, the number of Human Rights-related issues is appalling, and so it would be naïve to try to explore all of them in this paper. Thus, I will analyze the current state of two selected rights showing that, even if spread all around the world, Indigenous Peoples face common challenges. In order to do so, the methodology of this paper will be based in jurisprudence, UN documents, independent reports from NGOs and international organizations, and academic articles and journals.

In order to center the topic of this dissertation and to understand the international situation of Indigenous Peoples, it is crucial to correctly identify the groups that are to be

analyzed and what general challenges they face, which I will briefly explore in the next subsections.

2.1. Identification

> "Names can have great power, and the power of naming is a great power. History and law, as well as literature and politics, are activities of naming."
>
> *Peter d'Errico, 1998.*

For a long time, since the arrival of the Castilian Crown in the American Continent, many have referred to Indigenous Peoples as "Indians", coming from the Spanish "*indios*", as a follow-up of Columbus' mistake that led him to believe he had arrived in the East Indies (Marks, 2018). This term is deeply problematic not only because it forces foreign naming onto Indigenous Peoples but also because it ties the concept of "Indigenous" to the American continent, thus preventing the existence of a universal identification of Indigenous Peoples. In this fashion, there are many other expressions that are bounded to certain countries or regions and which vary in accuracy and relevance, although most of them share a colonial origin like "Indian": "Adivasi" in India, "Basarwa" in Botswana, "Bushmen" in South Africa, etc. These labels clearly derive from the presence of colonizers, highlighting how Indigenous Peoples were named by outsiders, and not by themselves (d'Errico, 1998). It could be tempting to prefer, at this point, the use of the names the different peoples have given themselves, which most times use a word for "people" in their own language or the name of their homeland or a differentiating characteristic of the community as seen from its own standpoint (d'Errico, 1998). However, and notwithstanding the acknowledgement of the rich diversity of Indigenous Peoples, these terms can hinder the universal protection of Indigenous Peoples, as when drafting international conventions and declarations a universal label should be established so that all Indigenous Peoples could protect and claim their rights.

In an attempt to establish a universal label for Indigenous Peoples, the expression "native" was coined, turning out to be deeply problematic. Within the scope of this paper, the main problem around the word "native" is that it is too broad on its conception, as it can be tied to anybody anywhere (Marks, 2018). As a matter of fact, and despite this term was originally meant to differentiate Indigenous Peoples from early immigrants, it has been recently reclaimed by white supremacist groups and non-indigenous individuals born in America, and the same can happen in other States that may use this label. (Yellow Brid, 1999). Alternative labels have been proposed and have enjoyed different levels of success and acceptance around the world. Some of the most relevant of these new

expressions are “First Nations” and “Aboriginal Peoples”, both of them consciously coined to prevent colonial imposition and better represent the will of Indigenous Peoples. Even if both of these expressions are commonly used and understood by the general public -and, in many ways, are a great improvement from the previously examined expressions-, they are not universal. Both of these expressions are most commonly used in English-speaking countries, especially Australia, Canada, and New Zealand.

There are two other labels that are known to the general public and have not yet been analyzed: “Tribal” and “Indigenous”. Although they may come across as synonyms, the existing differences between them force us to be careful when using one or the other. “Indigenous Peoples” are descendants of those who were there before the groups that now compose the dominant society arrived. Generally, this term is used nowadays to describe a group that had the ultimate control of land before colonized by others and who are subject to discrimination, having political perception more importance than actual descent (Survival International, n.d.). Differently, “Tribal” describes “a distinct people, dependent on their land for their livelihood, largely self-sufficient, and not integrated into the national society” (Survival International, n.d.). This difference is more than a simple nuance: Indigenous Peoples are not considered tribal if they are integrated in larger society, like is the case of the Quechua and Aymara peoples of the Andes (Survival International, n.d.). Both these terms are used universally and are sensitive with the history and living conditions of Indigenous Peoples, being therefore both of them appropriate to use. However, being “Indigenous” the wider term, it has greater accuracy and therefore will be the one used in this dissertation in the expression “Indigenous Peoples”. The term “peoples”, in this context, makes reference to a distinct identifiable society -in cultural, linguistic or identity terms (Survival International, n.d.).

2.2. Challenges

Sharing these characteristic, Indigenous Peoples also share the same challenges worldwide. Although this work is focused on land and political rights, this section will briefly discuss some of the other challenges faced by Indigenous communities in order to highlight how this community remains marginalized and subjected to many different Human Rights abuses.

One of the struggles Indigenous Peoples face is land tenure, strongly connected to their shared history of foreign rule and colonization. This situation not only affects their traditional livelihoods but also poses an environmental problem, as Indigenous Peoples

"own, occupy, or use a quarter of the world's surface area, [and] they safeguard 80 percent of the world's remaining biodiversity" (The World Bank, n.d.). However, many governments recognize only a small fraction of Indigenous land tenure, being this a threat to stability, sustainability and human development (The World Bank, n.d.). Moreover, traditional Indigenous lands and territories account for 95 percent of the top 200 areas with the highest and most threatened biodiversity as listed by the World Wildlife Fund (Cultural Survival , n.d.). 11 percent of the planet's forests are under Indigenous tenure (Cultural Survival , n.d.) and hold great deposits of natural resources. These resources are extremely sought-after by both governments and extracting companies, intensifying pressure on Indigenous territories and erode or overrode previous legal protections enjoyed by Indigenous Peoples (Department of Economic and Social Affaris , 2009).

Other challenges Indigenous Peoples face worldwide are access to education and healthcare. In the case of education, usually "educational programs fail to offer Indigenous Peoples the possibility of participating in decision-making, the design of curricula, the selection of teachers and teaching methods and the definition of standards" (King & Schielmann, 2004, p. 19), which results in an education gap by which Indigenous students have lower enrolment rates and higher dropout rates, while their educational outcome is also poorer compared to non-Indigenous people in the same countries (Department of Economic and Social Affaris , 2009). An example of this is that the average schooling gap in years in Bolivia, Ecuador, Guatemala, Mexico and Peru among Indigenous and Non-Indigenous people is of 3.02 years (Hall & Patrinos, 2006). The poorer access to education, along with the fact that most of the times the available education system does not respect or place value on the Indigenous culture and language (Department of Economic and Social Affaris , 2009), accounts for higher poverty rates due to unemployment and lower-paying jobs in Indigenous communities, who have a greater hurdle than other population groups to take part in the mainstream society and, like that, access the decision-making processes. Moreover, the lack of attention to the Indigenous language and culture further erodes the community's identity and stripes them from their cultural rights.

Access to health services is also a common challenge among Indigenous Peoples. Health challenges include the geographical inaccessibility of their villages, their seasonal isolation and the distances from bigger towns or cities. As a result of these conditions, many countries do not invest in the creation of hospitals in these areas or send rural doctors who are responsible for more population than what they can actually handle,

which impoverishes the health services available for Indigenous Peoples. In addition, Indigenous Peoples already have their own traditional health systems, which creates a double-layer tension in the provision of health services. On the one hand, the complete disregard of their practices is a way or erasing their culture and can make them feel unwelcomed in clinics, which reduces their resort to modern health treatments that may be available (Department of Economic and Social Affaris , 2009); while on the other, some traditional health practices can be harmful for the individuals. Other health challenges that are a toll on Indigenous communities are related to or stem from the aforementioned extractive industries and forced migrations: this is the case of illnesses related to the use of pesticides, malnutrition, diabetes and HIV/AIDS coming from the uprooting of communities (Department of Economic and Social Affaris , 2009). Additionally, many mental health issues have been connected to colonization and dispossession processes, further fragmenting Indigenous social, cultural, economic and political institutions (Department of Economic and Social Affaris , 2009). Thus, it is no surprise that life expectancy can vary up to 20 years if Indigenous and non-indigenous peoples are compared (Department of Economic and Social Affaris, 2009).

A different challenge Indigenous Peoples face all around the world is the protection of their knowledge, understood as their remedies, disease prevention methods or medicines, among others. A problem appears especially when large pharmaceutical corporations copy their knowledge and register patents of medical advancements that are not rightfully theirs, but an illegitimate copy of Indigenous know-how (Davis, 2019). The same process occurs in the publication of papers based on copying Indigenous knowledge rather than having an original departure point (Barsh, 2001). These intellectual property thefts are problematic because they do not acknowledge their rightful developers, can lead to the massive exploitation of certain plant species and further disregard for the spiritual linkages that these may have with the Indigenous community that uses them, and deprive Indigenous communities from economic compensations and profits for their knowledge (Drahos & Frankel, 2012).

All these challenges are undoubtedly interconnected, and they all describe a rather common scenario of discrimination against Indigenous Peoples and that highlight how most governments do not truly respect or uphold international documents protecting Indigenous Peoples' rights. At the heart of all of these HR violations is the erosion of their cultures and livelihoods, which does not only impoverish Indigenous Peoples but humanity as a whole, for cultural richness lies in difference. Due to the multifaceted

nature of HR violations suffered by Indigenous Peoples, it would be impossible to address all of them in this paper. Therefore, it was deemed that two particular areas are, arguably, key to understand why Indigenous Peoples are subject to Human Rights violations so frequently. On the one hand, the right to political participation (including the right to self-determination) is crucial for the development of Indigenous Peoples and also to guarantee that their rights are being uphold from the governmental institutions: access to education and health services, fight against discrimination and overcome inequality. On the other hand, the right to land (including their right to free, prior and informed consent) is a cornerstone for it can trigger multiple other violations such as forced migration, landlessness, food insecurity or cultural loss. Moreover, land is an asset of political power: land owners are included in the political process and decision-making, while this inclusion has a positive impact on the overall economy and well-being of the community, and ultimately reflects on the stability of the country as a whole (Libecap, 2018). Of course, in this paper, when referring to the right to land I will be making a reference to the right to informed, free and prior consent, as well as the right to self-determination, the right to communal property, and rights alike as a whole.

An additional incentive to promote the respect for Indigenous Peoples rights is that all the challenges and Human Rights violations briefly described in this section frustrate the achievement of the Sustainable Development Goals (SDGs) and post-2015 Millennium Development Goals (MDGs) set by the international community. As long as Indigenous Peoples' rights are not respected, the SDGs and MDGs will not be attained, being this especially linked to their right to land and to political participation.

3. BACKGROUND

The development of the modern concept of Human Rights started in the 20th Century during the aftermath of the two deadliest wars ever seen. Most groups were immediately protected by international covenants on Human Rights, being the most important one the 1948 Universal Declaration of Human Rights promoted by the newly established United Nations, a document in line with its foundational Charter. Shortly after, specific sets of rights were protected via the development of two specialized covenants: the 1966 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Moreover, specific groups, who were deemed to be especially vulnerable to violence and underwent poorer living conditions, were protected through specific declarations (i.e. the 1959 Declaration

of the Rights of the Child, among others). In the midst of this international will to grant equal rights to all and provide vulnerable groups with the international legal tools to protect their rights by setting standards to be met by States all throughout the globe, the development of a coordinated international response to the special needs of Indigenous Peoples follows a different development as I will analyze in this chapter.

Since the conquest of the Americas and the arrival of European settlers to Asia and Australasia, Africa, and America, the local population groups were subjugated to foreign rule and almost in all regards repressed by the different metropoles. In general terms, it was soon established that societies in those regions were to be segregated or differentiated depending on the racial/ethnic origin of individuals, which most commonly developed into the establishment of a different legal status for the original inhabitants of those lands, who were striped from political power and rights, leading to the destruction of their traditional ways of living and understanding of power, and, to different extents, the annihilation of their culture and livelihoods; having its utmost and most brutal consequence in the enslavement of these populations. The development of European colonialism during the 18th and 19th Centuries legitimized this situation of injustice and locked these populations into poverty and isolated them from most social progresses. So-called philosophical and scientific trends of the time, such as eugenics or genetic determinism, deepened the mistreatment of these communities. With the development of modern left-wing political currents like Socialism or Anarchism, who pushed for better living conditions for vulnerable and impoverished groups, the situation of these communities did not improve either as white European workers kept general racism in their worldly conception and did not deem the repression of Indigenous Peoples under colonialism to be equal to theirs under capitalism, and thus did not include them in their early demands for rights (Talbot & Talbot, 2016). As an anecdote symbolizing this, Paris Commune leader Louise Michel, who was condemned to deportation in New Caledonia, faced great backlash after writing and publishing articles in favor of the liberation of the New Caledonian communities, comparing their situation of slavery to the poor conditions faced by workers in Europe and the United States (Michel, 1981). It is therefore quite clear that the fight in favor of Indigenous rights was a long, complicated one, and most States home to these populations were not eager to grant them equality and rights. The turning point of this situation was 1919.

In 1919, after the Treaty of Versailles was signed, the International Labour Organization (ILO) was established in Geneva. Founded upon the "belief that universal

and lasting peace can be accomplished only if it is based on social justice" (ILO, 2019), the ILO took interest in enhancing better living conditions for all, all throughout the globe. Finally, this time *better living conditions for all* actually included Indigenous groups: "the ILO's concern for Indigenous Peoples dates back to the 1920s and originated in the quest to overcome the discriminatory working conditions they live under" (International Labour Standards Department, 2013, p. xi). In this sense, Indigenous Peoples' living conditions were watched and, to an extent, looked after by the ILO, having even influenced and inspired new labor standards, as it can be seen namely on the 1930 ILO Forced Labour Convention (No. 29) (International Labour Standards Department, 2013). However, it soon became clear that these tools fell short when it came to tackling Indigenous Peoples' specific challenges, oftentimes liked to issues regarding identity, language, culture, customs and land (International Labour Standards Department, 2013). When this was acknowledged in the late 1940s, the ILO, which was by then a UN agency, worked along other UN bodies such as the UN Educational, Scientific and Cultural Organization (UNESCO) to draft and adopt a convention "outlining government obligations to the Indigenous Peoples under their jurisdictions" (University of British Columbia, n.d.). Moreover, in 1951 the ILO Committee of Experts on Indigenous Labour developed a plan to tackle some of the struggles shared by Indigenous Peoples, which led to the put into force of a 20-year program in the Americas in 1952 (Cooper, 2015). This program required the collaboration of many UN agencies (ILO, UNESCO, WHO, FAO) and settled the Andean Indian Program (1952-1972), which was conceived as an international assistance program designed to help the integration of Indigenous Peoples living in the Andean Mountains, namely in Bolivia, Ecuador and Peru (United Nations, 1973). Similar programs covered around 250,000 Indigenous people in Argentina, Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela and led to the publication of the report *Living Conditions of Aboriginal Populations in Independent Countries* (Cooper, 2015). Meanwhile, and after eleven years of discussion, in 1957 the ILO adopted the Indigenous and Tribal Populations Convention (No. 107), being the first convention ever to deal with Indigenous rights (University of British Columbia, n.d.) (International Labour Standards Department, 2013). At this point, the principal aim behind the ILO Convention No. 107 was to put an end to the exploitation of persons of Indigenous origin, focusing on integrating Indigenous Peoples into the labour market (Charter & Stavenhagen, 2009), thus having a rather assimilationist orientation. Indigenous leaders and activists challenged this convention as they rejected its assimilationist perspective

and demanded a space for Indigenous Peoples to administer themselves and their natural resources collectively while they longed for greater self-determination (Charter & Stavenhagen, 2009).

From this moment on, the Indigenous struggle gained international relevance and sparked a dialogue between international institutions and Indigenous Peoples. As I will explore in the next section, the international legal protection of Indigenous Peoples' Human Rights pivots in three treaties that have shaped and created the current international framework dealing with their protection worldwide.

4. LEGAL BACKGROUND

4.1. ILO Conventions and UN Declaration

As it has been discussed, international legal protection of Indigenous' Human Rights started in 1957 with the ILO Convention No.107, which aimed to tackle the specific problematics faced by Indigenous communities and that were not improved via other treaties or conventions. In this section I will explore the different documents that serve as international tools towards the protection of Indigenous Peoples: the two ILO Conventions on the matter and the UN Declaration on the Rights of Indigenous Peoples. In a way, it could be argued that the international protection of Indigenous communities' HR follows a parallel logic to that behind the signature of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). In the greater picture, women were already included in all international treaties and conventions on Human Rights, yet it was undeniable that they still faced discrimination -happening in a number of ways all around the world and affecting their physical and sexual integrity, and their economic and political independence- that was not stopped nor amended only via the application of those general treaties. The discrimination of women followed -and still does- a logic inherent to most societies by which the patriarchal conception of human relations places them in a vulnerable, and often times, unprotected, position. Due to this realization, the UN issued a number of conventions aiming to further protect women worldwide, which ultimately led to the drafting and signature of the CEDAW, which entered into force in 1981 (United Nations, 2000). A rather similar path led to the writing of these international conventions and declaration.

4.1.A. ILO Convention No.107

Indigenous communities lacked international legal tools to protect their rights and claim political measures in their home countries to have them respected. As it has been

pointed out, the 1930 ILO Forced Labour Convention (No. 29) was inspired by the labour conditions faced by Indigenous communities, which led to this international body to raise labour standards in an attempt to, among other things, improve the living standard of Indigenous Peoples. However, it was proved that the protection of Indigenous Peoples' HR by including them in general treaties and covenants did not tackle their specific struggles and did not acknowledge that Indigenous' discrimination was rooted in deeper causes: racism, economic interests, history, etc. Like in women's rights, it was impossible to tackle the reasons behind the discrimination of Indigenous Peoples' without setting a specific legal tool.

In this logic, the ILO issued in 1957 the first convention ever to deal exclusively with the Indigenous Peoples' situation: Indigenous and Tribal Populations Convention, 1957 (No. 107). This document should be praised for acknowledging the singular situation of these peoples worldwide, however, it should also be critically analyzed. On the one hand, it was written in an assimilationist manner, stating that to see their rights protected, Indigenous Peoples should adapt themselves to the general culture of the Stated they lived in. In this sense, it describes Indigenous populations as 'at a less advanced stage' than colonizers and implies that 'the process of losing their tribal characteristics' is inevitable (Indigenous Foundations, 2009, B). Moreover, it was criticized that this convention allowed States to develop Indigenous Peoples' territory for their own purposes, opening the door to uproot these peoples from their lands and lose control over their traditional livelihood. This was criticized by Indigenous leaders, who demanded greater self-determination for their peoples while the Convention No.107 argued the opposite of that (Charter & Stavenhagen, 2009). Although these points are highly problematic and further legitimize the oppression of Indigenous Peoples in a number of ways, this document should also be praised because it opened the door for international tools to appear in defense of Indigenous Peoples' rights and demands. It also had a positive impact on many Indigenous Peoples gaining political rights; for example, Canadian Indigenous Peoples were recognized as citizens and were franchised voting rights in 1960 thanks to ILO No. 107 (Indigenous Foundations, 2009). All in all, the ILO Convention No.107 is nowadays an outdated document whose assimilationist approach contravenes the current understanding of International Law regarding Indigenous Peoples. However, as for the two rights analyzed in this paper -right to land and to political participation, the Convention No. 107 is rather progressive. As for land rights, it includes articles 11 to 14, stating that Indigenous Peoples shall have their right to land

ownership (collective or individual) recognized (art. 11) and that their traditional methods of land tenure transmission should be respected and watched over as to prevent non-Indigenous peoples taking advantage from them (art. 13). However, the wording of article 12.1 in which matters of "national economic development" are included as a fair reason why Indigenous peoples could be removed without their free consent from their lands is highly problematic because the concept described is highly broad and justifies the uprooting of Indigenous communities, knowing that their lands treasure great natural resources, highly sought-after by mining companies and other extractive and invasive business models. In this sense, the protection of the Indigenous right to land is not really guaranteed in the Convention No.107. As for political rights, articles 3 and 5 of the Convention state that Indigenous peoples should enjoy the full rights of citizenship without discrimination (art. 3.3) and governments should promote civil liberties and political participation (art. 5.c). Although these political advancements were conceived in an assimilationist manner, they opened the door for voting rights, as previously mentioned.

4.1.B. ILO Convention No.169

The ILO finally reviewed the Convention No. 107 in 1986 and an expert committee concluded that the assimilationist approach of the Convention was obsolete and that it was doing more harm than good towards the respect of Indigenous Peoples' rights (International Labour Standards Department, 2013). As a matter of fact, this change of paradigm is acknowledged in the preamble of the Indigenous and Tribal Peoples Convention, 1989 (No. 169):

> "[…] the developments which have taken place in international law since 1957, as well as developments in the situation of Indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards […]"
>
> *Indigenous and Tribal Peoples Convention, 1989*

In the writing of Convention No.169, Indigenous Peoples were included in the text negotiation text, along with unions and governments (Swartz, 2019), which was unprecedented. The inclusion of Indigenous Peoples helped to include matters relevant to their struggle and stay away from paternalism. However, the ILO text negotiation system prevented certain matters like self-determination to be directly addressed in the final text even if Convention No.169 requires actions that go in line with self-determination principles (Swartz, 2019) and the right to consultation and participation -including the

right to free, prior and informed consent- are cornerstones of the Convention No.169 (Pro 169, n.d., A). Some examples of this pro self-determination spirit can be found on the defense of Indigenous Peoples' autonomy towards managing their own development needs (art. 7), access to health and education (art. 25 and 27), teaching Indigenous languages to their children (art. 28), among others. In this sense, the set of articles composing Convention No.169 has a paramount value as it sets out a legal framework by which signing countries cannot cut Indigenous Peoples from being politically involved in the decision-making processes affecting them. Since 1989, 23 countries have ratified the treaty - fewer than those who had ratified Convention No.107 (Indigenous Foundations, 2009), being the only legally binding convention on Indigenous Peoples rights in international law and countries cannot make any reservations (Cooper, 2015). It is established to give the signatory country a full year after ratifying the Convention in order to make the necessary changes to follow the provisions. Two years after ratification, the State must send a report on its implementation, and this report will be conducted on a five-year basis after that (Pro 169, n.d., B), and Indigenous Peoples participate in the monitoring system via trade unions. If a violation was found before the 5-year deadline, it is possible to submit a report to the UN Human Rights Council September Session so that a Committee of Experts takes action (Cooper, 2015). Due to all these characteristics, from the empowering attitude towards Indigenous Peoples, its respect for consultation and self-determination (support of land and political participation rights), and its legal binding, the ILO Convention No.169 is the most important document in the international law field to fight for the rights of Indigenous Peoples. 23 States are bound by Convention No.169, while 18 States are still bound by ILO Convention No.107 as they did not sign into Convention No.169 mostly because of their discomfort for its pro self-determination narrative. The Convention No.169 paved the way for the UN Declaration on the Rights of Indigenous Peoples, too.

4.1.C. UN Declaration on the Rights of Indigenous Peoples

While the ILO had been addressing the Indigenous Peoples' struggle from the 1950s – albeit its different levels of success and its evolution, the UN was not specifically dealing with Indigenous Peoples' challenges, as these were addressed at the UN Sub-Commission for Prevention of Discrimination and Protection of Minorities. Moreover, it seems as though the UN, as an international organization, was not especially interested in giving specific attention to Indigenous Peoples' issues. As an example of this, as early as 1948, Guatemala proposed to create a special sub-commission to deal with the social

problems of Indigenous Peoples in America (Charter & Stavenhagen, 2009). Even if the specifics of the proposal deny the existence of a common, universal problematic to all Indigenous Peoples, it was still a rather modern conception on how to deal with this matter. It was not until many years later, in the 1970s, when the UN Sub-Commission for Prevention of Discrimination and Protection of Minorities started to pay attention to Indigenous Peoples' requests, as the UN was involved in summits with Indigenous NGOs. After this exposure to the Indigenous struggle, ECOSOC's Resolution 589 (21 May 1971) authorized the Sub-Commission to draw a report on discrimination against Indigenous Peoples and the measures that would be needed at a national level to end this problem (Charter & Stavenhagen, 2009). It was like this that José Ricardo Martínez Cobo was appointed Special Rapporteur in 1971, who presented the first chapters of his study "Study of the Problem of Discrimination Against Indigenous Populations" in 1981 - which, as mentioned before, only considered American Indigenous Peoples. A year later, ECOSOC, in its Resolution 1982/34 of 7 May 1982, allowed for the establishment of an annual Working Group on Indigenous Populations (WGIP). Within UN hierarchy, the WGIP was a subsidiary organ of the Sub-Commission, meaning that all its recommendations, before being submitted to the General Assembly had to be accepted by the Sub-Commission and the ECOSOC (Department of Economic and Social Affairs, n.d.), highlighting the lack of interest in the Indigenous struggle.

Despite the apparent institutional disregard of the Indigenous Peoples' situation, the WGIP decided in 1985 that drafting a resolution on Indigenous' rights would be its main goal, which was fulfilled in 1993, coinciding with the International Year of the World's Indigenous People (Charter & Stavenhagen, 2009). In 1994 the Resolution 45/1994 of the Sub-Commission approved the text, which was then in hands of the Commission on Human Rights. The draft of the Declaration got stuck in many considerations, and only reached the UN General Assembly in 2006, where the Group of African States presented an amendment which slowed the process for another year. Finally, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UNGA on 13 September 2007.

Its content is in line with the ILO Convention No.169, although it is not legally binding, which makes it harder to effectively implement. However, the UNDRIP covers a wide array of rights, including important political and civil rights (like the right to political participation and consent). The UNDRIP, unlike the ILO Convention No.169, includes articles openly affirming Indigenous Peoples' right to self-determination (art. 3),

which was the conflict that laid at the heart of the slow acceptance of it at the UN. Some UN Member States did not want to accept the declaration in fear of it undermining their political autonomy, but Indigenous representatives stood in favor of their right to self-determination and it was finally included in the Declaration (Indigenous Foundations, n.d., C). In the end, the Declaration was passed with 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), being all these countries interesting because they are home to Indigenous communities. Moreover, it is worth mentioning how the four countries voting against are some of the most powerful countries in the world; all four sharing history of being part of the British Empire, and having a similar political, legal and cultural background, as well as a common past – and sometimes present, discriminating against Indigenous Peoples. Coincidentally, none of these countries signed any of the ILO Conventions. This position could be surprising to some, as these countries are some of the most important democracies in the world and yet they reject to bound themselves to international legal tools protecting the rights of Indigenous Peoples. As Asbjorn Eide puts it in *Making the Declaration Work*, these countries share a situation of "internal colonization", in which "the balance of power within the territory between those who had come in and those who had been there previously was such that the Indigenous Peoples had no possibility of fully-fledge decolonization" (2009, p. 41). In this sense, these countries fear the self-determination narrative, for it questions their current design and, as a result, they prefer to work with Indigenous Peoples in the Human Rights framework alone. However, most Indigenous communities do not seek secession, but rather internal control over their lands, culture and resources. This view is supported in General Comment No. 23, paragraph 3.2., that was surprisingly drafted years before the signature of the UNDRIP, where it is stated that the right to self-determination does not prejudice the sovereignty and territorial integrity of States (Office of the High Commissioner for Human Rights, 1994). Furthermore, it is crucial to mention that this fear of Indigenous self-determination is unfunded as Article 46(1) states the following:

> "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."

United Nations Declaration on the Rights of Indigenous Peoples, 2007

Moreover, State sovereignty over Indigenous lands is not disputed under the UNDRIP as Article 30, which was originally supposed to ban military activities on the lands and territories of Indigenous Peoples if these actions were not justified by a significant threat (Charter & Stavenhagen, 2009), finally was wording without including the term "significant threat", thus allowing military activities whenever these are relevant public interest. Additionally, a preambular paragraph reading "recognizing that Indigenous Peoples have the right to freely determine their relationship with States in a spirit of coexistence, mutual benefit and full respect" was deleted in the approved Declaration (Charter & Stavenhagen, 2009). In this light, the UNDRIP does not favor not promote a self-determination that could be the base for the secession from States or pose significant territorial and sovereign challenges. Subsequently, fear of the UNDRIP wording cannot be sustained on this claim, which could evidence the lack of interest of the four countries that voted against in the international promotion of Indigenous Peoples.

Internationally, therefore, three different documents coexist in the regulation of Indigenous Peoples' Rights, a situation creating a world at different paces. Firstly, there are countries still bound to the ILO Convention No.107, despite its assimilationist approach and its detachment from modern Human Rights developments, which places Indigenous Peoples in those countries in a more disadvantageous position when it comes to internationally having their rights recognized and upheld. As of 2020 countries should have passed past that and should be willing to promote and protect Indigenous Rights in a comprehensive, equality-based approach that is blatantly lacking Convention No.107. In parallel to that, other countries are bound by the ILO Convention No.169, and even if this document is the only one that grants the opportunity of regular screening and conflict resolution in the matter, it is still no more than a voluntary process that does not help towards the establishment of clear International Law principles around the subject. Finally, the UNDRIP was presented as an international landmark towards upholding Indigenous Peoples' Rights. However, both the fact that it is only a Declaration and that 4 of the most important democracies in the world -who happen to have large indigenous communities, voted against it lessens its power and proves that the international protection of Indigenous Rights is not strongly established. To see Indigenous Peoples' Rights protected under international law it is important to promote the drafting of a treaty that could legally bind Indigenous Peoples' Rights.

4.2. International bodies dealing with Indigenous People's Rights

Nowadays, there is a rather wide array of organizations promoting and defending Indigenous Peoples' rights all around the world. Some of these were settled as NGOs or Associations, highlighting the growth of a movement that was initially grassroot, local based towards the internationalization of it. Moreover, many States have included in the past years special institutions, watchdogs, councils and funds to develop better policies and monitor the protection of Indigenous Peoples' rights. However, at this point it will be relevant to analyze the international bodies promoting Indigenous Peoples' rights that have normative power. In this sense, these bodies exist both at the regional level as well as within the UN system. The aforementioned Committee of Experts in charge of monitoring alleged violations in the framework of ILO Convention No.169 will not be included as it is not a body promoting Indigenous Peoples' rights but rather a tool to examine respect for the articles set in the convention in the States where it is binding.

The first institutional body dealing internationally with the advancement of Indigenous Peoples' rights was the aforementioned Working Group on Indigenous Populations (WGIP), set in 1982 via an ECOSOC resolution, thus being integrated in the UN system even if, as it has already been exposed, its competences were rather constrained by the UN hierarchy. Nevertheless, the WGPI managed to draft the UNDRIP, making its work valuable for all Indigenous Peoples worldwide. The UNGA created in 1985 a Voluntary Fund for Indigenous Populations so that Indigenous representatives could attend the WGIP working sessions taking place in Geneva (Charter & Stavenhagen, 2009). This is an added value of the WGIP, as it was a center of discussion of Indigenous Peoples coming from all over the world, and who were met with the opportunity to work alongside other UN bodies, thus advancing their struggle in many different levels and areas of the United Nations. In this sense, Indigenous Peoples were present at the Rio Conference in 1992, the World Conference on Human Rights in 1993, the Copenhagen World Summit on Social Development in 1995, the Beijing 1996 Conference on Women or the 2001 International Conference against Racism (Charter & Stavenhagen, 2009). Like this, even if many times the WGIP found itself trapped in the UN machinery, where it was placed in the periphery of the decision-making process, it helped to open the doors to Indigenous groups to attend conferences and summits were their perspective was relevant and where they had not been welcomed before. The WGIP met for the last time in July 2007, as it was replaced by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) via the adoption of HRC Resolution 6/36 on 14 December 2007. The

EMRIP is a board composed of seven independent experts on the rights of Indigenous Peoples set to provide expertise and advice. UN Member States can request to be assisted in order to achieve the goals established in the UNDRIP. This Expert Mechanism meets annually and representatives from States, Indigenous Peoples and their organizations, civil society, intergovernmental organizations and academia all take part in the session.

The UN has another body dedicated to Indigenous Peoples' rights: the UN Permanent Forum on Indigenous Issues (UNPFII). It was established by resolution 2000/22 ECOSOC, and its mandate deals with matters related to economic and social development, culture, environment, education, health and human rights. The specific tasks the UNPFII is mandated with are: providing expert advice and recommendations on Indigenous issues to the Council, as well as to programs, funds and agencies of the United Nations, through ECOSOC; raising awareness and promoting the integration and coordination of activities related to Indigenous issues within the UN system; preparing and disseminating information on Indigenous issues; and promoting respect for and full application of the provisions of the UN Declaration on the Rights of Indigenous Peoples and follow up its effectiveness (Permanent Forum, n.d.). Its first meeting was held in May 2002 and since then, it holds 10-day sessions annually. These sessions not only focus on the main areas of the mandate, but also each annual meeting focuses on a specific issue. To support UNPFII's mission, there is a Trust Fund on Indigenous Issues, managed by the Indigenous Peoples and Development Branch-Secretariat of the Permanent Forum on Indigenous Issues (Permanent Forum, n.d.). This Fund facilitates the follow-up of UNPFII's recommendations and the participation of its members at international meeting relevant to their mandate, being therefore a rather similar mission as the Voluntary Fund for Indigenous Populations the WGIP had. Moreover, this fund supports the implementation of the UNDRIP.

There is a third UN body dealing with the promotion and protection of Indigenous Peoples' rights: the Special Rapporteur on the Rights of Indigenous Peoples, first appointed in 2001, this position has been renewed in 2004 and 2007. The Special Rapporteur submits an annual report to the Human Rights Council. The mandate of this body includes four major goals: promotion of good practices and constructive agreements between Indigenous Peoples and States, to implement international standards concerning the rights of Indigenous Peoples; reporting on the overall human rights situations of Indigenous Peoples in selected countries; addressing specific cases of alleged violations of the rights of Indigenous Peoples through communications with Governments and

others; and conducting or contributing to thematic studies on topics of special importance regarding the promotion and protection of the rights of Indigenous Peoples (Special Rapporteur on the Rights of Indigenous Peoples, n.d.).

Like this, the United Nations has three bodies dealing with the promotion and protection of Indigenous Peoples' rights. They are integrated in different areas of the UN hierarchy and agencies, covering each of them different areas but all aiming at the same result: the advancement of Indigenous Peoples' rights worldwide. However, as these bodies are disseminated within the UN machinery, their power is reduced as they cannot put in place effective policies or draft proposals in a coordinated manner. In this sense, the representation of Indigenous Peoples in the UN is more symbolic than effective for these three bodies are not designed to have a strong communication among them and are placed far from the decision-making core of the agencies they belong to. Even if the Special Rapporteur on the Rights of Indigenous Peoples delivers good analysis on the situation of Indigenous Peoples, and its documentation on the matter is remarkable and allows countries to improve their legal system and further uphold Indigenous Rights, it has no actual normative power, meaning that its recommendations can be ignored without much trouble on the State's side: "communications are not accusatory per se, cannot replace a judicial proceeding, and do not imply any kind of value judgement on the part of the special rapporteur; rather they are a means of requesting clarification on alleged violations with a view to trying to ensure, along with the Government concerned, the protection of human rights" (Special Procedures of the Commission on Human Rights, n.d.). This last part deceives the main goal of the Rapporteur's mission, for it is not normative and has weak tools towards consolidating the respect for Indigenous Peoples' Rights in International Law.

Lastly, there is an additional UN tool created during the UNPFII 10th session, on 20 May 2011: the United Nations Indigenous Peoples' Partnership (UNIPP). The UNIPP, through a multi-donor trust fund, is in charge of to support joint UN programs at the country level in partnership with Indigenous Peoples (United Nations Indigenous Peoples' Partnership, n.d.). It was funded upon Article 41 UNDRIP stating the need of establishing specialized agencies in order to contribute to the full realization of the provisions of the Declaration. As Indigenous Peoples' rights cover all aspects of life (political participation, health, education, culture, etc.), the UNIPP is an initiative that unites the ILO, the Office of the High Commissioner for Human Rights (OHCHR), the UN Development Program (UNDP), and the UN Children's Fund (UNICEF) and mains to

"facilitate the implementation of international standards on Indigenous Peoples, in particular the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)" (United Nations-Indigenous Peoples' Partnership, n.d.). In this sense, the UNIPP is set to act as the UN-ILO institutional enhancer so that both the Declaration on the Rights of Indigenous Peoples and ILO Convention No.169 can turn a reality. In order to do so, it respects the importance of Indigenous Peoples' right to self-determination and so it integrates them as its managing Policy Board is formed by members of the aforementioned UN bodies as well as Indigenous representatives and experts appointed in consultation with the EMRIP. The key areas of intervention of the UNIPP are: legislative review and reform, democratic governance and Indigenous Peoples' institutions, access to justice, access to land and ancestral territories, and natural resources and extractive industries (United Nations Indigenous Peoples' Partnership, n.d.). The goals of the UNIPP could advance Indigenous Peoples' Rights, however, it is hard to assess it effectivity as there is little information available on the results of its first phase (2011-2017). The lack of transparency on the projects developed under the UNIPP leads us to believe that its help was limited and thus, that it has been yet another symbolic UN gesture with little real impact on the matter.

Other bodies dealing with Indigenous rights can be found, too, but at the regional level. The Organization of American States (OAS) has a Rapporteurship on the Rights of Indigenous Peoples, part of the OAS' Inter-American Commission on Human Rights. It was created in 1990 with the mandate of guaranteeing Indigenous Peoples' access to the inter-American system, consolidate jurisprudence on the rights of Indigenous Peoples and protect them, analyze petitions and requests for precautionary measures, prepare thematic reports, support onsite visits to OAS member States to observe situations involving Indigenous Peoples', raise awareness at all levels, and, initially, to collaborate with the OAS Permanent Council's Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples and its chairmanship (Rapporteurship on the Rights of Indigenous Peoples, n.d.). The American Declaration on the Rights on Indigenous Peoples was passed on the OAS' GA 46th Regular Session in 2016. Even if the Rapporteurship's normative power is limited -just like in the UN case, its success is bigger as the Indigenous access to justice at the Inter-American Court of Human Rights has been granted since 1991, creating therefore a good amount of jurisprudence in the matter. Moreover, the rulings of the Inter-American Court of Human Rights are binding

(Hitters, 2008) and are enhanced by a mechanism of supervision, which combined establishes the possibility of Indigenous Peoples' Rights to be elevated into International Law within the OAS system.

Other regional organizations have also established specialized bodies dealing with Indigenous Peoples' rights: in the year 2000, the 28th Ordinary Session of the African Commission on Human and Peoples' Rights established the Working Group on Indigenous Populations/Communities in Africa. Its mandate is more limited, less ambitious and less effective than that of the OAS, even if it adopted in 2003 a report on the rights of Indigenous Peoples in Africa that is now the major framework on the matter in Africa (International Work Group for Indigenous Affairs, n.d.). In practical terms, African Union's efforts towards the defense of Indigenous Rights are very limited and do not represent any significant help towards the consolidation of International Law.

In this way, the OAS system seems to be the most effective of the three international bodies examined. It combines the role of the Rapporteur that is also present in the UN but with the added value that its cases can derive towards the Inter-American Human Rights Court, whose rulings are binding and help to build International Law within the OAS framework that supports Indigenous Peoples. In order to find such effectivity at the broader international level, it would be necessary to draft a UN Treaty that penalizes State violation of Indigenous Rights and sets clear rules that help to emancipate indigenous communities from internal colonization and grants them real power in the decision-making process worldwide.

4.3. Jurisprudence

Having examined both the ILO Conventions and the UN Declaration on the Rights of Indigenous Peoples, as well as having analyzed the bodies and international mechanisms of protection offered to uphold Indigenous rights, it is important to make a reference to the existing jurisprudence on the matter in order to understand why the consolidation of Indigenous Peoples' Rights in International Law is such a slow-paced process. It is striking to see that international jurisprudence is extremely limited and greatly linked to the work of the Inter-American Court of Human Rights. In the latest international compilation of jurisprudence available on the subject, 11 cases had been ruled by the Inter-American Court of Human Rights while the UN Human Rights Committee and the African Commission on Human and Peoples' Rights had ruled in 2 cases each (Bravo Valencia, 2014). Surely, this jurisprudence has developed since 2014,

yet it is undeniable that the OAS is the organization paying more attention to the subject. It should be kept in mind that rulings coming from the Inter-American Court of Human Rights are not based on the American Declaration on the Rights of Indigenous Peoples for it was passed in 2016, so this legal tool has not had the chance to prove its relevance. It is also worth noticing how no jurisprudential case comes from an Asian country, while Asia is home for almost 70% of the world's Indigenous population. Is the lack of jurisprudence another sign of the little international political, legal and institutional regard for Indigenous Peoples' Rights? Is it linked to the difficult access of these communities to the legal system in their home countries? The existing jurisprudence on Indigenous Peoples' Rights, focusing in the aforementioned two areas of interest -right to political participation and right to land, can be found in sections hereinafter.

5. RIGHT TO LAND

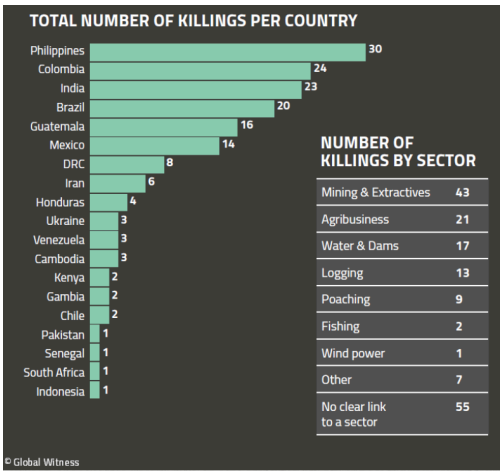
5.1. Challenges

As it has been introduced in the previous Methodology section, Indigenous Peoples worldwide face a common challenge resulting from their shared history of colonization and foreign rule: the recurrent violation of their right to land. This violation occurs as many States do not recognize Indigenous communities to have sufficient legal status as to hold collective ownership rights over their lands or *de facto* override those land tenure titles to grant exploitation rights to third parties without the permission of the Indigenous community living there. The consequence of this violation is two-fold: on the one hand, if their right to land is denied, Indigenous Peoples lose their identity and culture for they are connected to nature and land (IWGIA, n.d.). On the other hand, the violation of their right to land is a harm for the planet as a whole for the 80% of the world's remaining biodiversity is safeguarded in Indigenous land (The World Bank, n.d.), whose territories make up 95% of the top 200 areas with the highest and most threatened biodiversity as listed by the World Wildlife Fund (Cultural Survival , n.d.). 11% of the planet's forests are under Indigenous tenure (Cultural Survival , n.d.) and hold great deposits of natural resources, which means that when violating the right to land of Indigenous Peoples, States harm our planet's biodiversity and sustainability, too.

The richness in natural resources safeguarded in Indigenous territories has provoked that, from the 1980s especially, many States have liberalized their Mining Codes, permitting both States and large transnational enterprises profit off these lands (Department of Economic and Social Affaris , 2009). Additionally, the global demand for

natural resources skyrocketed, which led to the expansion of extractive industries in Indigenous lands (Harvard Law Review, 2016). These factors combined have led to a great phenomenon of land grabbing all around the world, by which State and non-State actors abuse their power and profit off Indigenous land, without respecting the right of these communities to free, prior and informed consent or without even compensating them for their loss, perpetuating a neo-colonial power structure and right to self-determination abuse that have negative impact on Indigenous Peoples (Assis, 2018). As a result of the predatory attitude of large transnational companies and States that have economic interests in exploiting Indigenous land against the will of the rightful owners of the land, the EU and the UN claim that Indigenous Peoples are facing greater violations of their rights than they did only 10 years ago (Assis, 2018). As an example, community leaders putting up a fight against the installment of extractive communities in their territories are being killed all around the world, many of these leaders being Indigenous. It is hard to find data accounting for a global record of these appaling assassinations and even more so to find it disclosed in the dychotomy Indigenous and non-Indigenous, but latest available data from the watchdog Global Witness estimates that 164 land-rights activists were killed in 2018, as the chart shows. Examining the countries listed, it is likely to say that most of these leaders were of Indigenous origin. However, these numbers are likely to skyrocket this year, as data shows that during 2019, in the Amazon region only, more than 130 Indigenous leaders were killed while defending their right to land (Antena 3 Noticias, 2019). Most of these deaths are linked to the settlement of agricultual industries, rather than extractive industries. As a matter of fact, many Indigenous territories are being turned into large monocrops or cattle lands. In this sense, the WTO Agreement on Agriculture

Table 2. Land rights activists killed in 2018. (Global Witness, 2019, p. 8)



> "has allowed the entry of cheap agricultural products into Indigenous Peoples' communities, thereby compromising their sustainable agricultural practices, food security, health and cultures. The view has been put forward that small-scale subsistence production, which characterizes many Indigenous economies, does not contribute to economic growth. […] Thus, small-scale farm production is giving way to commercial cash-crop plantations, further concentrating ancestral lands in the hands of a few agri-

> corporations and landlords. […] [This is] undermining national legislation and regulations protecting Indigenous rights and the environment."
>
> *Department of Economic and Social Affairs, 2009, p. 19*

But the right to land is also important community-wise as it provokes the violation of many other rights. By not having their right to land protected, Indigenous Peoples see violated as well their right to maintain their culture, a situation worsened by the often cultural, linguistic and geographic distance between Indigenous Peoples and the decision-making process and the financial resources to make their voices heard (Cultural Survival, n.d.). These situations provoke forced migrations (Coulson-Drasner, 2018) as well as the uprooting of rural Indigenous communities into urban areas (Department of Economic and Social Affaris , 2009), a flagrant violation of Indigenous' rights. These situations are harmful because they disconnect the uprooted community and condemns its members to poverty as many have problems when it comes to integrate themselves into the city social structure: they lack formal studies, employable skills, social security networks and oftentimes, linguistic abilities, too (IWGIA, n.d.) (Amnesty International, n.d.).

But forced migrations and dispossession of Indigenous territories do not only happen due to the establishment of industries, these processes can also be due to the creation of protected areas (Colchester, 2004): although the trend now tends to take into account the rights of Indigenous Peoples, often times it has also meant the eviction of Indigenous communities. The uprooting of Indigenous communities from their ancestral lands has a particular harmful component as oftentimes Indigenous Peoples are so connected with their territories that they identify themselves with it: "the notion of 'pertaining to the land' is embedded in Indigenous Peoples' cultural identities […] [T]he special and intimate attachment of Indigenous Peoples to their lands and territories and its fundamental importance for their collective physical and cultural survival as peoples" (Department of Economic and Social Affaris , 2009, p. 53). In this sense, to displace Indigenous communities from their homelands dismantles their identities, destroys their community and livelihood, and accentuates their defenseless; this is why international documents like the ILO Convention No.169 uphold Indigenous Peoples' right to land ownership in such an unswerving manner. Some of the most common harmful consequences for Indigenous Peoples when forced to migrate are: landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity and mortality, loss of access to common property -forests, water, wasteland, cultural sites,

and social disarticulation -disempowerment, disruption to social institutions (Department of Economic and Social Affaris , 2009).

As the respect for their right to land is crucial to allow for the normal development of Indigenous Peoples worldwide and it protects other Human Rights (access to education, protection of their cultural and religious practices, linguistic rights, adequate housing and livelihood, etc.), the right to land is of paramount importance and yet is systematically violated all around the world. Moreover, the respect of their right to land could be an empowering tool for Indigenous Peoples as it is an asset of political power, too. Land owners are included in the political process and decision-making, which has had a positive impact on the overall economy and well-being of the community, and ultimately reflects on the stability of the country as a whole (Libecap, 2018)

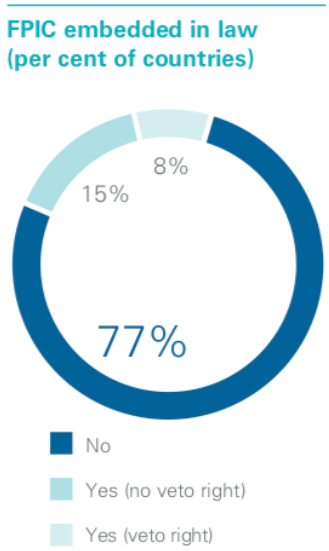
5.2. Legal status

The recognition of the right to land as a Human Right is a slow process that has not been yet accepted everywhere in the world: sometimes it is understood as a right per se, but oftentimes it is understood as a combination of other rights, including the right to self-determination, the right to collective ownership of land or even, in some cases, the right to adequate housing. Universally, the right to land is not part of the core Human Rights recognized in international law as it has not been included as such in any international treaty nor added to any UN resolution. In general terms, many argue that social movements are pressuring so that the right to land, just like the right to water has emerged and consolidated in the last twenty years, is universally recognized as a self-standing Human Right (Columbia Center On Sustainable Investment, 2017). However, even if this debate is still going on when talking in universal terms, law scholars agree that the right to land is clearly recognized as a Human Right for certain groups, including Indigenous Peoples (Columbia Center On Sustainable Investment, 2017): this right to land is acknowledged in both ILO Convention No.169 and the UNDRIP, being upheld in tribunals and courts. Jurisprudence on the right to land is rather rich and it is based on four pillars: right to self-determination, right to prior consultation, right to communal ownership and land claims procedures. This jurisprudence is especially relevant in the rulings of the Inter-American Court of Human Rights as it upholds customary law over land property and establishes that as a result of custom, “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” (Case of the

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001, p. 75, para. 151). In order to analyze this jurisprudence briefly I will analyze four cases that deal with these different legal pillars. International jurisprudence dealing with the right to land of Indigenous Peoples comes mainly from the Inter-American Court of Human Rights but also from a judgment from the African Commission on Human and People's Rights.

However, even if international law recognizes the right to land of Indigenous Peoples as a Human Right, many countries have not included it in their legislation. One of the pillars granting protection to the right to land at a national level is the respect of the right to free, prior and informed consent (FPIC), a right that is upheld by General Comment No. 21 *Right of everyone to take part in cultural life*, that outlines that the right to participate in cultural life includes the right of Indigenous Peoples to FPIC and to receive compensation, restitution or return of lands when it is not respected (Committee on Economic, Social and Cultural Rights, 2009). This right allows Indigenous Peoples to have a say in any project that may affect their land, and yet it has widely not been incorporated to law in most countries. As the chart shows, a major percentage of countries have not embedded the right to free, prior and informed consent in their law, which hinders the correct protection of the right to land of Indigenous Peoples. Moreover, the few countries that have incorporated this mechanism into their laws have disregarded the veto power that Indigenous Peoples should have when deciding the future of their land and therefore, of their own community. This is a challenge lawmakers should tackle in order to effectively respect Indigenous' rights. It is important to disclaim, in this sense, that veto power during FPIC proceedings does not undermine State power over the lands of Indigenous Peoples in the sense of sovereignty and territorial integrity of the country. FPIC with veto power is a mechanism that guarantees that Indigenous Peoples have the right to choose what projects to allow in their lands, and that their decisions will be protected with the utmost legal respect; but veto does not imply that, if the central State has a compelling reason to install a certain project against the will of Indigenous land tenants (compelling reasons include a greater good, like the protection of other rights that could be beneficial, like the right to education, health, security, etc.) is prevented to do so (Leyedet, 2019). This highlights the fact that international law recognizes State sovereignty and that State's disrespect for FPIC

Table 3. FPIC in law. (Inter-Parliamentary Union, 2014, p. 10)



processes is unfunded and a sign of their unwillingness to recognize Indigenous People's rights. It should be reminded at this point, that the UNFII, on a 2016 Study, reminded States that they cannot avert the respect of Indigenous Rights by commonly and collectively doing so (Permanent Forum on Indigenous Issues, 2016, Fiftheen Session).

5.2.A. Jurisprudence

In this section I will review four landmark cases concerning the right to land of Indigenous Peoples, ruled by the Inter-American Court of Human Rights and the African Commission on Human and People's Rights. By analyzing these judgements, I will try to conclude whether regional organizations uphold Indigenous Rights and if so, to what extent.

- Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of August 31, 2001.

During the 1990s, the Inter-American Commission on Human Rights noticed that Nicaragua had nor demarcated the communal lands of the Awas Tingni Community, nor it had adopted effective measures to ensure property rights of this community over their ancestral lands and natural resources. Additionally, it had granted a concession on community lands without the community's assent and when the community protested against these violations, the State did not ensure an effective remedy. The San Jose Court upheld the community's claims and ruled that Nicaragua had breached their right to property, and so it decided that Nicaragua had not only to put in place an effective law that delimits and titles land property of indigenous communities in light of their customary law, values, customs and mores, but also that it had to delimit, demarcate and title the corresponding lands of the Mayagna (Sumo) Awas Tingni Community and abstain from any acts that may lead to the acquiescence of these lands by the State or a third party (Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001) (Bravo Valencia, 2014). This judgement is relevant to the upholding of the right to land of Indigenous Peoples because it recognizes that for the right to land to be effective, the State must officially recognize the lands and territories of the community (by delimiting and giving title of ownership to the community), creating for that purpose the necessary laws that permit Indigenous Peoples to hold land tenure in accordance to their own customs and values. Moreover, this ruling highlights the importance of respecting the right to free, prior and informed consent when any project whatsoever, affecting the lands and natural resources of an Indigenous community are to be affected in any way, and if the Indigenous community were to oppose these projects, the State should ensure by all

means that this decision is respected, in light of the aforementioned GC No. 21. This further consolidates the right to land because it does not only recognize the need of giving ownership title to Indigenous Peoples as stated in both the ILO Convention No.169 and the UNDRIP, but also highlights the importance of respecting their decision-making ability when it comes to develop their lands in any way. It was not until 2008 that the government of Nicaragua completed the demarking process and recognized Indigenous full tenure as ruled by the Inter-American Court. On a global level, this ruling is especially relevant to the consolidation and protection of the FPIC, a fundamental mechanism for the respect of the right to land of Indigenous Peoples.

- Yakye Axa Indigenous Community v. Paraguay. Judgment of June 17, 2005.

The Yakye Axa Indigenous Community has around 300 members who originally inhabited lands in the Paraguayan Chaco. Towards the end of the XIX Century the Government sold their lands to British companies, who installed Anglican missions and farming industries in the area that employed the Indigenous peoples of the Yakye Axa Community. By the year 1986, members of the Yakye Axa Community moved to different lands seeking better living standards than those enjoyed while working for the livestock industry. However, their living standards did not improve and by 1993 they filed the first requirements to initiate a legal procedure to recover their traditional lands, which did not have a favorable ruling in Paraguayan Courts. The Inter-American Court found that Paraguay had to identify the traditional territory if the Yakye Axa Community and return it free of cost (including the possibility of expropriating the lands if they are in private hands within the democratic limits established for these procedures). If for a well-funded reason, it was found impossible to return these lands, Paraguay should start a consultation with the Yakye Axa Community to find alternative lands. Moreover, Paraguay should adapt its legislation to permit a more effective land claim procedure for indigenous peoples (Bravo Valencia, 2014). The full enforcement of this ruling is still taking place and is projected to end in 2012; however, it has not consolidated Indigenous rights in the country as similar cases have reached the San José court after 2005, which highlights how States home to Indigenous Peoples are unwilling to respect the principles reflected in the UNDRIP and ILO Convention No. 169. Still, this is a relevant ruling towards the consolidation of the right to land of Indigenous Peoples because it repairs historic wrong-doing (in this case, the sale of the lands to the British and the later industrial exploitation of the land) and upholds the recognition of land ownership even when the land had not been recently recognized as being owned by the Indigenous

Community which is its rightful owner. In this sense, this case helps to consolidate the right to land of dispossessed Indigenous Peoples and their right to reclaim their ancestral lands, which are pivotal rights that open International Law to historically mistreated and ignored communities, and managing them as put in articles 25, 26 and 27 of the UNDRIP.

- Case of the Saramaka People v. Suriname. Judgment of November 28, 2007.

The Saramaka People have their lands occupied since the XVIII Century, and prior to the filing of this procedure, the State of Suriname held property rights over the land even if it had given silent consent to the Saramaka People to administer their lands and natural resources. However, Suriname approved concessions so that third parties could carry logging and mining activities in these lands without the consensus of the Saramaka People. Said concessions harmed the environment and the quality of life of the Saramaka. The Sramaka People did not have a recognized legal status in Suriname and therefore it was not eligible to hold communal property rights over their own traditional land. Even if they filed a request to be recognized and granted property rights, Suriname did not act on the matter. After examining the facts, the Inter-American Court ruled that Suriname had to amend its legislation to protect the rights of the Saramaka People and comply with the American Human Rights Convention. Moreover, it was ruled that Suriname had to delimit, demarcate and title Saramaka People's land and hand it over to them in the form of communal property. Additionally, the State had to recognize the Saramaka People's legal status. Monetary compensations were also included in the ruling (Saramaka People v. Suriname, 2007). This case goes in the same line as the aforementioned two cases and consolidates their spirit, but its relevance to the upholding of the right to land lies in that it acknowledges the need for recognizing *de iure* -not only *de facto* as Suriname had done while there was no economic downside to it- the right to hold collective property rights over land. In this sense, this collective right to land (articles 3 and 26 of UNDRIP and article 13 of ILO No. 169) must be accompanied by a set of civil and political rights that ensure that the community is legally recognized with the necessary status to hold land tenure. The right to land cannot be hindered by placing limitations on legal recognition of the Indigenous Peoples, which is a strategy many States have tried to follow in order to override the right to land of these communities. This case is thus of great significance as it connects the right to land to the political rights granted to Indigenous Peoples in the General Comment No. 23 *The rights of minorities (Art. 27)* that prevent legal discrimination against these communities.

- Case of Endorois v. Kenya. Decision of November 25, 2009.

The Endorois People is a large indigenous community that had lived in lands surrounding Lake Bogoria until in the 1970s the Kenyan Government evicted them without proper prior consultations not adequate and effective compensation. The Endorois lands were attractive for their potential tourism development and so the government created two protected areas -the Lake Hannington Game Reserve in 1973 and the Lake Bogoria Game Reserve in 1978, that meant the eviction of this People from its traditional land, where the Endorois People developed their pastoralist activities. From 1978 on, the Kenyan government denied the Endorois access to their land. Despite the complaints filed before Kenyan Courts by the Endorois, all were overruled or unaccepted. The African Commission on Human and People's Rights found that "this eviction, with minimal compensation, violated the Endorois' right as an indigenous people to property, health, culture, religion, and natural resources. […] It is the first ruling to determine who are indigenous peoples in Africa, and what are their rights to land" (Human Rights Watch, 2010), which is what makes this case relevant to international jurisprudence. As a result, the Commission recommended Kenya to recognize rights of ownership to the Endorois and restitute their ancestral lands, as well as ensure Endorois access to Lake Bogoria and receive possible royalties from existing economic activities and employment at the Reserve (Bravo Valencia, 2014). The Kenyan government has not fully complied with this ruling yet. However, this is a landmark case for Indigenous Peoples worldwide because it crystalizes their right to FPIC as set by the General Comment No. 21 *Right of everyone to take part in cultural life* and the general legal framework on the right to land as set by both the ILO Convention No. 169 and the UNDRIP.

Through these rulings it is made clear that international courts uphold Indigenous right to land, even if this ownership can only be proven via custom and not legal title. The case of the Endorois People is especially relevant because it sets a precedent within the African system. Moreover, it should be noted how these cases deal with situations that have been examined at the beginning of this paper, where common challenges faced by Indigenous Peoples were presented. However, and as important as this jurisprudence is towards the international recognition of Indigenous Rights is, it is also worth noticing how none of the involved States was willing to recognize these land rights even after the rulings were made public. In this sense, if there is anything to conclude from these cases, is that these international judgments prove the necessity of having a supranational legal system that upholds Indigenous Rights, for it may be the only way of granting and protecting them.

5.3. Recommendations

It is made apparent that most States home to Indigenous Peoples override their right to land in many occasions and with aims always connected to economic gains. In this sense, I find that it is crucial that Indigenous Peoples can count on a binding court where they can have their rights uphold, just like the Inter-American Court of Human Rights does. I believe that the African Commission is going in the right direction and should aim to streamline their processes so that more Indigenous communities have access to justice and can recover their lands before these are lost to mining projects, dams, deforestation or any other activity that can make their lands unrecoverable. Following this logic, I firmly believe that Asian Indigenous Peoples are in a much more disadvantageous position as no regional court is available to them, and so their voices are hardly heard. This is especially critical because the region is home to 70% of Indigenous Peoples worldwide and seeing that there is little chance that Asian countries will create a normative supranational power, the protection of their right to land is reduced. Therefore, the ILO should create a specific protocol for Asian countries and put in place sufficient mechanisms so that more countries sign into the Convention No.169. I recommend adhering to the Convention No.169 rather than restore to the UNDRIP because the Convention is the only legally binding convention on Indigenous Peoples rights in international law and countries cannot make any reservations. As a result, I would recommend the establishment of an accessible court linked to its Committee of Experts to provide international protection on the right to land and therefore grant access to justice to those Indigenous Peoples lacking access to an international court. Additionally, I take on former Special Rapporteur James Anaya's recommendation to the Association of Southeast Asian Countries (ASEAN) by which he recommends the establishment of a working group with a mandate to address the implementation of Indigenous People's rights and serve as a communications center for States, Indigenous Peoples and agencies to examine the issues affecting the region's Indigenous Peoples (A/HRC/24/41/Add.3).

Moreover, I agree with other three recommendations made by experts on the matter and that I will expand. Firstly, I believe that Lucy Claridge's proposal of including companies into the due diligence process is crucial to protect the Indigenous right to land (Young, 2016). In this sense, I believe that transnational companies should be incentivized to respect and protect Indigenous Peoples' right to land when States are not willing to do so themselves. This incentive should be set at the World Trade Organization (WTO), as this organization holds the power of settling the rules of international trade

(going from the placement of tariffs and trade barriers to the regulation of the traffic of goods). The WTO measures should go in the line of blocking import and export operations of goods coming from grabbed land or where the land producing them has harmed the Indigenous community living there without compensation. The UN should provide a platform for this dialogue between Indigenous leaders and the WTO, just like it has sparked it in other areas as the defense of intellectual property rights over traditional Indigenous medicine (Saez, 2018). While acknowledging the hardships that may come in this negotiation and the adoption of these measures, especially as large economic interests are in place, I believe that the results could be way more impactful and normative than other steps taken from other international bodies. Moreover, to intertwine Human Rights and Commercial Law in this way could be extremely effective because companies and producing countries could face economic sanctions when violating the right to land of Indigenous Peoples, this being a very powerful motivation to ensure the respect for this right.

Secondly, I take on the recommendation that the 2017 International Conference on Indigenous Peoples' Rights to Cultural Heritage made to the UNESCO of establishing as a mandatory step into the nomination of sites to the World Heritage List the consent of Indigenous Peoples (International Conference on Indigenous Peoples' Rights to Cultural Heritage, 2017). It is true that the UNESCO claims that Indigenous Peoples are involved in all the steps of the process (UNESCO, n.d.), but there is no mechanism in place that prevents Indigenous communities from being pressured from the government against their will nor any real check on the due diligence of the right to free, prior and informed consent. In this globalized era where travel is getting more democratized by the day, countries being included into the World Heritage List profit a great chance of attracting visitors and boosting the economic possibilities of tourism. It seems of paramount importance, then, that Indigenous Peoples that could be affected by the inclusion of their lands into the list and the potential arrival of tourists to their lands should be heard and fundamental for the process to carry on. If well done, the Indigenous Community could profit from this inclusion too, but if done against its will could have the same uprooting consequences as the instalment of industries.

Thirdly, policies should be put in place to extend Indigenous Peoples' access to the right of free, prior and informed consent. As it has been proven, very few countries include this right in their legislation, and even fewer grant veto power. I firmly believe it is crucial that this right is recognized to ensure Indigenous Peoples have their right to land

respected. This recommendation goes in line with recommendations made by former Special Rapporteur James Anaya at the twenty-fourth session of the Human Rights Council on July 1 and 31, 2013. According to Mr. Anaya, States should ensure good-faith consultations and remain bound to respect the rights of Indigenous Peoples regardless of their decision, especially when these consultations, if skipped, could mean the installment of extractive industries or other activities that could potentially harm the environment and livelihood of Indigenous Peoples (A/HRC/24/41) (A/HRC/24/41/Add.3). Moreover, if any State were to act contrary to the result of these consultations, or already had, Indigenous Peoples affected by the development of projects without their approval should be rightfully compensated both in monetary terms as well as provided with new lands that allow their development (A/HRC/24/41/Add.3). I believe that these recommendations, even if they could sound basic to some, are of paramount importance because they lie at the core of the correct development and living of Indigenous Peoples all around the world, in line with what the SDGs and MDGs establish.

6. RIGHT TO POLITICAL PARTICIPATION

6.1. Challenges

Indigenous Peoples constitute a minority in most countries. As such, their impact on mainstream society can be limited, and oftentimes reduced by cultural disparities, discrimination and inequality. Resulting from this, Indigenous Peoples worldwide lack access to education, health services or basic infrastructure, which makes Human Rights violations a recurrent topic in their lives. Moreover, as it was explained in the previous section on the right to land, their dispossession from their lands obstruct their chances of meaningfully participating in any political exercise or structure (Carling, 2001). Additionally, most current national political systems working in countries home to Indigenous Peoples are greatly influenced by previous colonial power structures, under which an elite was created to rule over Indigenous Peoples even in territories where they represented the majority (Carling, 2001). In this sense, the access of Indigenous Peoples to national-level politics is still very limited and therefore it is hard for these Peoples to ensure the protection of their rights. An additional problem emerges when looking into State recognition of what Indigenous Peoples are. In many cases, States home to Indigenous Peoples do not legally recognize these communities as such even if these population groups fit the international criteria of Indigenous, like the Okinawan people in Japan; while on the opposite side, there are countries with such a broad definition of

Indigenous that they have over-identified their population as Indigenous, giving a false sense of accurate representation in politics, like it happens in India or Myanmar (Inter-Parliamentary Union, 2014). As a result of this problem, combined with the unwillingness of many countries to disclose data proving the little room for Indigenous Peoples in their national systems, it is hard to find reliable data of the political representation and participation of Indigenous Peoples worldwide. The Inter-Parliamentary Union conducted a survey in 2014 where only 24 parliaments participated, that shows that Indigenous Peoples are proportionally underrepresented in 13 parliaments and not represented at all in nine parliaments (25 parliamentary chambers combined) (Inter-Parliamentary Union, 2014). Even if this chart should be taken with a pinch of salt and take into account the aforementioned limitations regarding legal recognition of Indigenous Peoples, this data showcases the general trend of underrepresentation of Indigenous Peoples worldwide.

Another problem faced by Indigenous Peoples when it comes to participating in politics is the political system itself. The traditional party system and decision-making process can violate traditional systems of decision-making. Most Indigenous Peoples still organize their politics around their traditional decision-making process, which premiums the role of elders and gives consensus and unity a central role (Carling, 2001). As a result, the party system is hardly compatible with their worldview, especially as it causes competition among political leaders and potentially marginalizes and places a disadvantage on small groups (Carling, 2001). Furthermore, many experts have pointed out that Indigenous Peoples, as a marginalized group in most countries, can hardly compete with dominant political structures, which leads to a very limited capacity to establish wider support for elections (Carling, 2001) (Inter-Parliamentary Union, 2014), which could become easier to attain in the digital world we live in: many Indigenous Peoples are using the Internet as a tool to spread democracy (Woyames, 2017). However, State action is still needed to overcome these challenges that hamper Indigenous participation in politics. As a matter of fact, this action should be oriented to stop the marginalization of Indigenous Peoples in majority-based representative systems: although this data is not totally conclusive due to the limitations posed by the reduced participation of Parliaments in this survey, it looks like in electoral systems that include elements of proportional representation there is an 85% of Indigenous representatives in Parliament; while in countries that adopt single-member-district voting systems there is only a 58% of Indigenous Representatives (Inter-Parliamentary Union, 2014). The

preponderance of the latter system is a challenge for Indigenous Peoples to access national politics. Moreover, the little representation in national politics discourages Indigenous Peoples from actively participating in them: there is lower voter turnout (Carling, 2001), and this further aggravates the problem.

On top of these structural problems, Indigenous Peoples have it harder to access national politics due to the higher levels of illiteracy, lower economic means and harder access to media and information in general. At the end of the day, the little political involvement of Indigenous Peoples in national politics is a vicious circle: because there is little representation, there is little interest in nation-wide politics, because they do not get represented, they cannot make their voices heard, which makes it easier to Human Right violations to persist, causing further illiteracy and further problems that hamper their participation in politics. This is a major challenge because it denies Indigenous Peoples the sufficient empowerment to resolve the many Human Rights violations they are exposed to.

On a similar note, Indigenous Peoples have a reduced impact on world politics, which is the tool that could grant them greater respect for their Human Rights. Despite the international bodies that have been mentioned hereinbefore, Indigenous representatives do not have effective decision-making power in international organizations, and this lack of power allows powerful stakeholders to promote their agenda without having to confront Indigenous interests, furtherly minimizing Indigenous power and the importance of their claims (Masoni, 2019). This situation has been acknowledged by the UNPFII, as it noticed regressive actions against Indigenous Peoples in international organizations like the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, the Food and Agriculture Organization of the United Nations (FAO), the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Bank (Permanent Forum on Indigenous Issues, 2016, Fiftheen Session). These regressions have a direct impact over Indigenous Peoples' lives and rights, but also over the respect for the Sustainable Development Goals (SDGs) and Millennium Development Goals (MDGs).

6.2. Legal status

Political participation is a Human Right as recognized in Article 25 of the International Covenant on Civil and Political Rights, and Articles 5 and 18 of the

UNDRIP. Moreover, it is supported by similar provisions like Article 21 of the Universal Declaration of Human Rights; Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 5.C of the International Convention on the Elimination of All Forms of Racial Discrimination; Article of the 2.2 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and Article 8 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental. All of these apply to Indigenous Peoples worldwide, and are furthermore supported in Article 3 of the Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 23 of the American Convention on Human Rights; Article 23 of the American Declaration on the Rights of Indigenous Peoples; and Article 13 of the African Charter on Human and Peoples' Rights. Moreover, it is upheld in General Comment No. 23 *The rights of minorities (Art. 27)*, where it is stated that minorities -Indigenous Peoples included, should have their right to political participation protected and no discrimination whatsoever should prevent them from taking part in the political life of their home State.

The right to political participation, understood both directly and indirectly, is of paramount importance as it is one of the core elements of the Human Rights-based approach aimed at eliminating marginalization and discrimination (United Nations Human Rights, 2020). Due to its importance and presence in all major international treaties, the right to political participation is embedded in international law and should be properly protected by all countries, even if, as it was shown in the previous subsection, it is not always guaranteed for Indigenous Peoples.

6.2.A. Jurisprudence

Available jurisprudence on the right to political participation is based on three cases ruled by the Inter-American Court of Human Rights between the years 2005 and 2014. In this subsection I will briefly review them. None of these cases were judged following the American Declaration on the Rights of Indigenous Peoples as this document was not in existence by the time these rulings were made. In this sense, it is hard to assess the efficiency of this specific international legal tool as it has not been invoked yet.

- Case of Yatama (Yapti Tasba Masraka Nanih Asla Takanka) v. Nicaragua. Judgement of June 23, 2005.

The Yapti Tasba Masraka Nanih Asla Takanka (hereinafter "Yatama") was an indigenous regional political party participating in the municipal elections held on November 5, 2000, in the North Atlantic and the South Atlantic Autonomous Regions of Nicaragua. As of August 15, 2000, the Supreme Electoral Council issued a decision that excluded the candidates of this party from participating in the elections. Yatama filed several recourses against this decision and by October 25, 2000, the Supreme Court of Justice of Nicaragua deemed their recourses inadmissible. Following these events, the Commission "indicated that the State had not provided a recourse that would have protected the right of these candidates to participate and to be elected in the municipal elections of November 5, 2000, and it had not adopted the legislative or other measures necessary to make these rights effective" (Bravo Valencia, 2014). This was a violation of articles 23, 23, 1.1 and 2 of the American Convention, being especially relevant to this analysis Article 23 stating that every citizen has the right "a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage […]" (American Convention on Human Rights , 1969). The Court ruled that Nicaragua had violated the right of Indigenous communities to freely participate in elections and that this infringement had been discriminatory, especially as Indigenous communities could not participate in the decision-making process. In this sense, the Court failed that this had been a violation of the right to be elected as candidate but also of the right to vote, because the exclusion of Yatama had negatively impacted the choices available for Indigenous electors (Corte Interamericana de Derechos Humanos, 2018). However, even if the ruling was favorable in upholding Indigenous' Rights to political participation, the judgement fails to give concrete instructions as to how Nicaragua can amend this violation. The sentence only compelled the government to make four public announcements stating its wrongdoing when its decision prevented Yatama from concurring in the election, but no exact instruction was given as to actually improve the root problem. Therefore, I see that there is a philosophical or ideological upholding of Indigenous Rights, but concrete measures are lacking to improve this situation. Despite these deficiencies in the ruling, it looks like the political rights of Yatama were secured in Nicaragua for it has been documented that it participated in almost every election held after this ruling, which highlights how effective the Inter-American Court of Human Rights was in the defense of Indigenous political rights. Moreover, on a more general note, this ruling is especially important as it condemns one of the most common ways of preventing Indigenous

participation and involvement in politics, which is the suppression of their own political parties.

- Case of Chitay Nech et al. v. Guatemala. Judgment of May 25, 2010.

Chitay Nech was an indigenous political leader in the 1970s in Guatemala. Integrated in the Democratic Christian Party, he served as councilman and mayor at San Martín Jilotepeque, Chimaltenango, elevating Indigenous claims into the local government. On April 1, 1981 he was kidnapped and disappeared; his body has never been retrieved. The Guatemalan government is responsible for his disappearance as part of a strategy to get rid of political and social activists. His family was denied justice at the time of his disappearance taking advantage of his wife's illiteracy (Coronado, 2017). The Court ruled that this enforced disappearance not only violated Chitay Nech's personal rights but also hindered the right of political participation and representation of the community as a result of his disappearance (Corte Interamericana de Derechos Humanos, 2018). This judgement constitutes an important precedent because it protects the rights of Indigenous political leaders who are actively involved in politics, in light of articles 1, 2 and 7 of the UNDRIP and the general protection granted to every human in the International Covenant on Civil and Political Rights, namely articles 2, 3, 6.1, 19 and 26. As most Indigenous politicians raise matters that may be uncomfortable for central non-Indigenous governments, their right to freely express their concerns and work for a better future of their communities should be protected by the State, and should never constitute a threat to their personal security and right to life as it was to Chitay Nech. Moreover, by protecting Indigenous leaders, Indigenous Peoples as a whole a protected too, because it helps to stop the vicious circle by which they tend to participate less in politics.

- Case Norín Catrimán et al. V Chile. Judgement of May 29, 2014.

Between the years 2001 and 2002, in a context of political turmoil, several cases of arson affected regional government property, some mining offices and mining machinery including trucks and excavators; cases for which Mapuche community leaders were condemned, Norín Catrimán among them. The defendants were judged under the Counterterrorism Act, in virtue of which their sentences included accessory punishments, including the withdrawal of their right to vote, participation in public affairs and access to public service, punishments that varied in length, going from lifetime sentences to a minimum of 15 years (Corte Interamericana de Derechos Humanos, 2018). According to the Court, these punishments are contrary to the principle of proportionality, being especially serious as they hindered the Mapuche community rights to be represented by

some of their most respected leaders, and thus considered that Chile had violated the political rights of these individuals and the Mapuche community as a whole (Corte Interamericana de Derechos Humanos, 2018). Therefore, the Court sentenced that Chile should reverse these sentences, clear the defendants' criminal records, eliminate these accessory punishments and grant liberty to those defendants still in prison or in parole (Noel Leoni, 2019). Chile did grant liberty to the defendants and cleared their records, however, in April 26, 2019, the Chilean Supreme Court issued a judgement by which it will not complete its sentence at the Inter-American Court and will not revise the legality of its Counterterrorism Act and declared void the Inter-American Court sentence (Poder Judicial República de Chile - Dirección de Estudios Corte Suprema, 2019). Law scholars in Chile concluded that this mechanism is unconstitutional and goes against International Law, while the Supreme Court judgement only contributes to legal uncertainty (Alduante, Núñez, et al., 2019). The importance of this judgement, despite Chile's unwillingness to fulfil it completely, lies on the fact that it prevents States from placing an aggravated burden on Indigenous leaders with the aim of maintaining them far from the political system, based on marginalization of these Indigenous members and by racially profiling them, as prohibited in the UNDRIP, ILO Convention No. 169 and International Covenant on Civil and Political Rights. It is important to grant Indigenous peoples the same political rights than non-Indigenous peoples that are judged less roughly, creating a system that tends to push away Indigenous peoples by using one-off cases to legally take from them their right to political participation, as set in ICCPR articles 14.1, 26, 27.

There is a strong trend within the Inter-American legal system to uphold Indigenous rights when these cases make it to the San Jose Court. It is worth noticing how in all these three rulings judges have referred to the fact that, when violating a political right of a single individual, the whole Indigenous community is affected negatively too, be it because the community is deprived of its political leaders, be it because it averted the political process further from the Indigenous standpoint. This is really something that stands out when examining jurisprudence and that is consistent with the respect of Indigenous sense of community as set in the UNDRIP and ILO Convention No. 169.

6.3. Recommendations

After having examined the challenges and legal status of Indigenous Peoples right to political participation, I would like to raise some recommendations to improve their

access to politics, both at the national and international level, as former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has recommended. According to Mr. Anaya, States should facilitate the political participation of Indigenous Peoples both at the national and local level (A/HRC/24/41/Add.3). I believe that action at the national level is more urgent as the development of Indigenous participation in national politics will irremediably reflect on international organizations and bodies: if Indigenous Peoples are present and have a voice in their national decision-making organisms, their views and perspectives are more likely to arrive to international organizations and be supported and respected. However, even if the focal point is to improve political participation of Indigenous Peoples at the national level, I support UNPFII's recommendation to international organizations that urges specialized agencies and other international bodies to reform their procedural rules in order to pay greater respect for Indigenous Peoples and prevent States from proposing and passing any agreement that could violate the UNDRIP in any way, incorporating for that matter special rules that allow Indigenous governments to participate in the sessions as governments and not as non-governmental organizations (Permanent Forum on Indigenous Issues, 2016, Fiftheen Session).

At the local level, I recommend States to implement policies that have been introduced in countries home to Indigenous Peoples and that have proven to be of great effectivity when it comes to their inclusion and active role in politics. These recommendations are based in the experiences of three different countries. Firstly, New Zealand provides a great example on how to improve Indigenous representation, and even surpass indigenous representation in society. I am aware that the Parliament reserves seven seats for Maori representatives in acknowledgement of their right to self-government (Inter-Parliamentary Union, 2014); however, this is not the recommendation I believe other countries should follow -even if it can be an effective way of ensuring some minimum Indigenous representation in politics, especially in countries with less developed democratic institutions or habits. New Zealand's MMP voting system (Mixed Member Proportional system) has proven to be of great help to increase Maori representatives in parliament. Since it was put in place in 1993, the MMP system has allowed the Maoris to occupy 15 seats in Parliament, in addition to the seven reserved seats. The MMP system grants two votes: one is a party vote and the other is an electorate vote. In this system, the party vote decides the total seats each party gets from a 5% threshold, while the electorate vote decides the candidate with most votes becomes an

MP (New Zealand Electoral Commission, 2020). This system offers a better chance for Indigenous leaders to get elected and find accommodation within the general party system, thus incentivizing Indigenous participation in politics. Indeed, as of 2014, only three out of the 22 Maori representatives belonged to the self-styled Maori Party, the 19 left being part pf the mainstream political parties (Inter-Parliamentary Union, 2014). This system has proven to be of great efficiency when it comes to include Indigenous representatives and it also encourages greater participation and overall respect for Indigenous rights.

Secondly, I would like to get behind another recommendation made by former Special Rapporteur James Anaya, by which he recommended Governments to put in place permanent mechanisms to follow up the respect for Indigenous Rights and the implementation of the recommendations of the Special Rapporteur (A/HRC/4/32/Add.4). Additionally, I find relevant the recommendation of the Permanent Forum on Indigenous Issues in which it is recommended to States that they establish mechanisms and processes that enhance dialogue and consultations with Indigenous Peoples in order to enable them to fully exercise their rights (UNPFII Recommendations Database, 2014). In line with these, I believe that countries could learn from States that have already created Indigenous monitoring committees in Parliaments. For example, Bolivia counts with a Commission on Indigenous Peoples, tasked with the draft of legislation and representation of Indigenous' interests in parliamentary processes. This body is also a watchdog so that the important Indigenous political gains in the country cannot be reversed: in the end, Bolivia has had Indigenous presidents and ministers, and its constitution recognizes the Indigenous right to self-government within the unity of the State (Vargas Gamboa & Gamboa Alba, 2014). An alike system, where the Parliament has a process of checks and balances regarding the Indigenous will can be of great use in guaranteeing Indigenous political participation and ensuring that their voices are heard, and their problems addressed. Likewise, Kenya has a Parliamentary Pastoralist Group (PPG) that has proven of great value in securing Indigenous rights and spreading a positive visibility and recognition of the country's Indigenous pastoralist groups (Inter-Parliamentary Union, 2014). As an example of PPG's positive impact in Kenya's policies, it promoted the recognition of pastoralists as a marginalized group in the country's constitution (Inter-Parliamentary Union, 2014), while it has also lobbied for the Community Land Act of 2016, that recognizes pastoralist's collective right to land (Mokku, 2018) and has had

therefore a positive impact in improving Indigenous political participation and overall respect for their rights.

7. CONCLUSIONS

In the making of this paper I have analyzed the current state of international respect for two key Indigenous rights: the right to land and the right to political participation. Both of these rights, as it has been argued, are key to the safe development of Indigenous Peoples worldwide and can act as a shield against other types of Human Rights violations. Moreover, a better respect for these rights would make the world a better place not only on legal and human terms, but also on ecological and natural ones: important biodiversity reserves would be preserved if these rights were respected, a crucial protection as we peak towards climate change being irreparable. Additionally, respect for these rights can ensure a much easier achievement of the SDGs and post-2015 MDGs, increasing the overall standard of living of all.

However, despite all the positive impact that the respect for these rights could bring, it has been proven that most States home to Indigenous Peoples do not take any legal or administrative steps to protect them, contrary to their international obligations. One of the main issues that I have found hindering State compliance with these rights is that, even if some Indigenous Rights have crystalized into international law, like it is the case of the right to land, States are not internationally bounded to respect them: the only binding international document on the matter is the ILO Convention No. 169, whose signing is voluntary, and therefore does not bound all States with Indigenous Peoples. The United Nations Declaration on the Rights of Indigenous Peoples is an ambitious document, especially relevant because it is the only one expressively affirming Indigenous Peoples' right to self-determination, which has important consequences on their rights to land and political participation. However, the UNDRIP is not binding, and therefore has little normative power and States do not feel pressured or compelled to comply with it, especially because it cannot spark any type of sanction at the international level. For this very reason, I believe that international organizations have to play their role in the promotion of Indigenous Peoples rights, especially because they can offer incentives to comply and have normative power to shield these rights all over the world. In this sense, I would like to bring their attention to prior recommendations, and additionally, I would like to address the need for a binding convention protecting the positive rights of Indigenous Peoples to public life and political empowerment: as it has

been argued in this paper, the correct protection of rights like the right to land and to political participation can bring an unprecedented change in the development of Indigenous Peoples worldwide, and this can only be granted via a binding Convention. Therefore, I find it necessary to elevate the current content of the UNDRIP to a Convention so that Indigenous Peoples worldwide are protected with the highest instances of International Law as fostered in the United Nations, this being the only way of crystalizing Indigenous Rights at the international level while also putting pressure on non-compliant States to amend their wrongs and stop Human Rights violations against Indigenous Peoples. I would recommend to also put in place a monitoring mechanism, dependent on the Convention, with binding powers to receive Indigenous Peoples' complaints so that their problems shall be heard, and solutions may be offered, paired with a follow-up process to assess how States correct these unjust situations. I believe the necessary consensus to elevate the UNDRIP to a Convention should be based on the empowerment of Indigenous grassroot movements and a greater focus on Indigenous civil society, so that they can have a say on the drafting of their rights. Moreover, regional organizations like the OAS of the African Union should push their members towards the promotion of this Convention, using their normative and coercive power so that member countries promote and defend the passing of the Convention vis-à-vis other UN Member States that may not be as willing to do so. I believe these strategies should have enough power to create the consensus that a Convention like this must have.

Given the current limitations of international texts dealing with Indigenous Rights and the delay that drafting a convention brings, I find that, currently, regional organizations are the best protectors of Indigenous Rights, just like jurisprudence has shown. It is nonetheless worth mentioning that jurisprudence is not rich, proving either that Indigenous Peoples have little access to justice or that the international political, legal and institutional regard for Indigenous Peoples' rights is not a priority, or a combination of both. I find here an interesting research item that could be developed by others in the future and that can potentially help Indigenous Peoples to better protect their rights. Despite these deficiencies, the availability of international courts upholding Indigenous rights within regional organizations -especially in the OAS, along with their monitoring and sanctioning capabilities make them the best international defenders of Indigenous Peoples' rights, and their judgements help to consolidate these within their common legal systems. However, this leaves great parts of the world uncovered, meaning that many

Indigenous Peoples, especially in Asian countries, cannot access any courts and are in a much vulnerable position. These insufficiencies can only be overcome by State action.

I encourage countries home to Indigenous Peoples to follow the recommendations in sections hereinbefore, as the strategies exposed can help them develop effective mechanisms of protection of the right to land and political participation, which can enhance their Human Development Index, consequently strengthening their political institutions, better integrating their population groups and enhancing GDP growth. By respecting the right to land and the right to political participation of Indigenous Peoples, countries worldwide will become more stable a safe for everyone, and historical debts to these peoples will be repaired.

The protection of Indigenous Peoples' rights can only be guaranteed by the coordinated action of States, regional and international organizations, having the United Nations a paramount role. Indigenous Peoples have suffered -and still do, appalling injustices and violations of their rights in almost every aspect of their lives. In order to fix this situation, I have proven that the respect for their right to land and right to political participation are fundamental and can help amend other deficiencies and violations. I hope that all the actors involved take the necessary steps to protect and uphold these rights in the near future, and that the recommendations included in this paper help in this vital task. A better respect for the rights of Indigenous Peoples can only make our world a better place: fairer, more understanding, and richer. When striving to build a better tomorrow, Indigenous Peoples cannot be left behind.

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