Locating Novel Protections for the Traditional Knowledge of Indigenous Communities in Customary International Law

Bharath Gururagavendran

Abstract

The international community is currently in the process of establishing multiple frameworks for protecting the traditional knowledge (TK) of indigenous peoples including through initiatives such as the Nagoya Protocol (under the Convention on Biological Diversity (CBD)), and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGCIPGRTKF) under the World Intellectual Property Rights Organizations (WIPO). However, this Article conceptualizes alternate pathways to recognize and protect the right to TK within customary international law (CIL). As a starting point of analysis, the Article uses Third World Approaches to International Law (TWAIL) to investigate the reasons for the inadequate protection of indigenous peoples' traditional knowledge. Specifically, it explores how postcolonial states, often at the behest of the First World, have perpetuated colonial epistemologies that have contributed to the creation of deficient standards of protection for indigenous and tribal communities. As a rule, CIL is ascertained through inductive reasoning. That is, to establish the existence of a novel customary rule, it is necessary to show that there is widespread, representative, and uniform state practice, coupled with the belief that the rule constitutes a legal obligation. However, this Article explores whether a deductively implied propositional rule derived from the relationship between two interrelated customary norms ought to be deemed a novel precept of CIL in the context of human rights protections for indigenous peoples. In doing so, this Article will investigate the two related norms: the right to culture for indigenous communities, and

the inclusion of traditional knowledge within its scope. To explore the legal basis of these norm developments in international law, this Article will delve into their pronouncements in international treaties such as the International Covenant on Civil and Political Rights (ICCPR) the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Indigenous and Tribal Peoples Convention (ILO-169), as well as relevant holdings by international courts that help clarify the customary character of the norms in question.

Keywords: *Traditional Knowledge, Indigenous Peoples, Nagoya Protocol, Customary International Law*

Table of Contents

Introduction

> The rights to development, self-determination and lands, territories and resources must be ensured in order for indigenous peoples to manage these times of crisis and to advance the worldwide goals of sustained development and environmental protection. The pandemic is teaching us that we need to change: we need to value the collective over the individual and build inclusive societies that respect and protect everyone. It is not only about protecting our health"[1]
>
> —Mr. Jose Francisco Cali Tzay,
> Special Rapporteur on the Rights of Indigenous Peoples

The natives of Madagascar who originally identified the medicinal qualities of the rosy periwinkle, (i.e., its use as an anti-diabetic) have not received their share of profits from pharmaceutical giant Eli Lily, whose researchers extracted two alkaloids from the plant: Vinblastine, and Vincristine.[2] The company's research was aimed at discovering new drugs to treat diabetes, but during the process, they discovered that these compounds had potential in treating certain forms of cancer.[3] The large-scale misappropriation of TK by transnational corporations largely situated in the First World is not an uncommon occurrence. In fact, instances of biopiracy like this have been responsible for the widespread deprivation of indigenous communities' rights to hold, own, and maintain their TK.[4]

The international community's responses have largely been twofold. First, the Nagoya Protocol, established under the framework of the Convention on Biological Diversity (CBD),[5] empowers the cre-

1. Press Release, U.N. Off. Hum. Rights Comm'r, COVID-19 Is Devastating Indigenous Communities Worldwide, and It's Not Only About Health—UN Expert Warns, U.N. Press Release (May 18, 2020), https://www.ohchr.org/en/press-releases/2020/05/covid-19-devastating-indigenous-communities-worldwide-and-its-not-only-about?LangID=E&NewsID=25893 [https://perma.cc/H8TM-8MJL].

2. Rosy Periwinkle (Madagascar), *Authorship Collaborative - Rosy Periwinkle*, Case Western Reserve University (Spring 2004), https://case.edu/affil/sce/authorship-spring2004/rosy.html (last visited Mar. 20, 2023).

3. *Id.*, *see also* Michael F. Brown, *Who Owns Native Culture?* (Harvard University Press, 2003) 135–138 (stating that the literature available to scientists at Eli Lilly identified the rosy periwinkle as a folk treatment for diabetes, not as a cancer medicine; the first specimens used by Lilly were collected in India; Robert Noble obtained his first specimens from a physician in Jamaica who believed the periwinkle would revolutionize diabetes treatment; at the time, no compounds that affected blood sugar could be isolated from the plant, and scientists later discovered alkaloids that proved effective as agents for treating cancer).

4. *See*, Shambu Prasad Chakrabarty et al., *A Primer to Traditional Knowledge Protection in India: The Road Ahead*, 42 Liverpool Law Rev, 407, (2021)

5. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity,

ation of access and benefit sharing mechanisms (ABS). Second, the global community is striving to provide better protections for the TK of indigenous and tribal communities through the work of the WIPO IGCIPGRTKF.[6] These initiatives treat TK as a distinct category deserving of protection and aim to establish legal obligations through treaty law. However, this Article demonstrates that alternate pathways for protection can be constructed through CIL In doing so, this Article explores whether deductively implied propositional rules derived from the relationship between two interrelated customary norms ought to be deemed a novel customary norm in the context of human rights protections for indigenous peoples. The norms in question are the right to culture for indigenous communities, and the inclusion of TK within its scope.

Part II of this Article conducts a TWAIL analysis of the structural factors responsible for the deficient TK protections available to indigenous peoples.[7] It is important to contextualize the positionality of indigenous communities that reside in postcolonial states, as they're intersectionally disempowered. Colonialism and its legacies have had a lasting impact on the ability of the Third World[8] to shape its own future, often resulting in coercive regulatory choices that compromise their decisional sovereignty.[9] Indigenous communities residing in the Third

UNEP/CBD/COP/DEC/X/1 of 29 October 2010, [Hereafter Nagoya Protocol]. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 [Hereafter CBD].

6. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organization, https://www.wipo.int/tk/en/igc (last visited March 10, 2023).

7. For an exhaustive review of TWAIL'S origins, and its development, *see generally* James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 Trade L. & Dev. 26 (2011).

8. It is commonly argued that the category, "third world" is an anachronistic label, seen as a tattered remnant of the Cold-War era, with each of the countries that constitute the category, having distinct cultural heritages, historical experiences, and economic frameworks. However, too much attention is made of the variations and differences in the face of structures and processes of global capitalism that continue to bind and unite. B.S Chimni argues that it is these structures that produced colonialism and have now spawned neo-colonialism, and that the common history of subjection to colonialism and the continuing underdevelopment and marginalization of the countries of Asia, Africa, and Latin America, imbue the "Third World" category with life. For a thorough discussion on whether it's still meaningful to talk about a "third world", *see* Chimni, Bhupinder S. "Third world approaches to international law: a manifesto." In *The Third World and International Order*, (Brill Nijhoff, 2003) 47–73. The use of the term "Third World" in this paper, is rooted in the context of the term's usage in the larger intellectual traditional of TWAIL. For an analysis of category's continued relevance as a "counter-hegemonic force designed to rupture received patterns of thinking"[hereafter Third World Manifesto]; *see also*, Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15, Third World Legal Stud, 1, 3–7, (1998–99).

9. *See generally* James T. Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 Leiden J. Int'l L. 317 (2008).

World then are doubly impacted both by ongoing neocolonial practices that emanate from the First World, and due to the strained dynamics of their relationship with a state system (in the Third World) that near universally engages in exploitative practices for commercial considerations. Indigenous peoples today are still systematically marginalized and significantly overrepresented among the poor.[10]

Identifying the underlying structures responsible for the loss of rights among indigenous communities (especially those communities living in the Third World) is important as it can facilitate the development of novel approaches to reconfigure systems of knowledge and rights protection. It is certainly important to recognize the intersectional positionality of indigenous communities in the Third World (emphasizing the ways in which indigenous and tribal peoples are affected by Third World states). However, it is also important to take due cognizance of the fact that Western neoliberal institutional frameworks have been imposed on both indigenous communities and the Third World, resulting in the forced assimilation of their distinct socio-political contexts.[11] Part I of this Article will unpack the various reasons for the widespread degradation of the rights of indigenous communities (specifically, the right to TK) and the geopolitical factors that explain how Third World states are at times, compelled to behave in ways that undermine indigenous personhood.

Part II of this Article examines the legitimacy of the interrelated norms referenced above, i.e., the right to culture for indigenous communities, and the inclusion of TK within its scope. To that effect, this section shall consider whether a novel customary principle can justify the expansion of cultural safeguards under CIL to include the TK of indigenous communities. This Part also critically reviews the international community's incentives in steadfastly pursuing the treaty model to protect TK, to the exclusion of alternate pathways in CIL. Finally, in Part III, this Article concludes by placing the unconscionable treatment of indigenous communities in the context of a common superstructure: the colonially constituted sovereignty doctrine. Accordingly, this Article asserts that indigenous communities are entitled to due redress for the violation of their rights.

10. Gilette Hall et al., *Poverty and exclusion among Indigenous Peoples: The global evidence*, World Bank Blogs, (Aug 09, 2016), https://blogs.worldbank.org/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence.

11. Section I.B titled, "Critical Analysis of Postcolonial Relations with Indigenous Communities" addresses the imposition of Western neoliberal developmental logics through institutions such as the World Bank and the IMF. *See also*, *Infra* Note 50.

I. TWAIL Analysis of the Structural Factors Responsible for Deficient Rights Protections for Indigenous People

The sovereignty doctrine's construction has been to the detriment of self-determination claims of indigenous peoples in two broad ways. First, their treatment at the hands of colonizing powers represents a dehumanization of their political and cultural identities through the application of the reprehensible *terra nullius* doctrine,[12] and the projection of narratives of savagery, and primitivism.[13] The legal doctrine of terra nullius was used to justify the occupation of indigenous lands. It is a Latin term that translates to, "nobody's land", and was used by colonizing powers to claim large tracts of land if they found that no one was living there, or if the inhabitants (typically indigenous peoples) were deemed to be "primitive" or "uncivilized".[14]

Second, the disentanglement of newly independent states in the Third World from their colonizers produced a settler-colonial governmentality, broadly stemming from inherited colonial epistemologies, that subsists in the disparate treatment of indigenous communities in a post-colonial context.[15]In order to address both axes of the assault on indigenous rights, this Part first describes the colonial foundations that undergird the framework of international law Secondly, it explores post-colonial ascriptions of colonial epistemologies. Thirdly, it investigates the narratives of tension embedded in the Third World's engagement with indigenous communities, as a consequence of the colonial logic of the law of state succession. And finally, this Part considers the effect of these developments on the TK protections of indigenous communities.

A. The Colonial Foundations of The Framework of International Law

The concept of the State in international law is not based on a stable philosophically conceived doctrine that has been logically elaborated. Instead, it has emerged as a response to the problems created by the colonial order, and not the product of the logical elaborations of a

12. *See* Mabo v Queensland [No 2] (1992) 175 CLR 1 ("If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country").

13. *See* Uditi Sen, *Developing Terra Nullius: Colonialism, Nationalism, and Indigeneity in the Andaman Islands*, 59 Compar. Stud. in Soc'y & Hist. 944, 945 (2017).

14. *Infra* note 44.

15. *Supra* note 13.

stable, philosophically conceived sovereignty doctrine.[16] TWAIL scholars have explored in great detail how the colonial origins of sovereignty have been obscured by legal prescriptions that seek to justify their assessments of sovereign equality and self-determination (in a particularly myopic form) as a universal and epistemically valid worldview.[17] A historiography of Western constructions of sovereignty demonstrates the existence of colonial norms that underpin the framework of international law.

One of the primary sources of international law is custom.[18] International legal bodies such as the International Court of Justice have clarified that custom (i.e., CIL) requires two elements: state practice and opinio juris. State practice refers to the conduct of states which constitutes the customary norm under consideration, and opinio juris, which is the subjective belief of states that the conduct (i.e., the customary norm) is legally obligatory.[19] The prevailing Eurocentric view that international law is a linear derivation from the state practice (post the 16th century) of solely European and American states[20] is both historically inaccurate and is itself a reprehensibly self-enforcing factor in the normalization of international law's colonial origins. These fabricated foundations deeply obscure the violence, oppression, and subjugation of the legal, cultural, political, and social structures of indigenous peoples all over the world.[21] Francisco De Vitoria's analysis of the rationale for Spanish invasion while considering the question of Indigenous personhood and its implications for their legal relationship with the Spaniards

16. Antony Anghie, Imperialism, Sovereignty and the Making of International Law 6 (1st ed. 2007).

17. *See generally* James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 Trade L. & Dev. 26 (2011).

18. Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018, ILC Report, 70th Session, Supp. No. 10 (A/73/10), 122–23; United Nations, Statute of the International Court of Justice, 18 April 1946, art. 38 para 1(b) ("Customary international law is an important source of public international law, and among the sources listed in Article 38 para 1(b) of the Statute of the International Court of Justice which states, "international custom, as evidence of a general practice accepted as law").

19. Military and Paramilitary Activities in and against Nicaragua (Nicar v U.S), Merits, 1986 I.C.J. 14 (June 27) ¶ 186.

20. *See* C.F. Amerasinghe, *The Historical Development of International Law—Universal Aspects*, 39 Archiv des Völkerrechts 367, 368 (2001) ("Modern international law is linearly derived from earlier developments in the European world and adjacent areas and earlier international relations in other parts of the world, such as China and South Asia, have had little influence in shaping this law.").

21. Bardo Fassbender & Anne Peters, *Introduction: Towards a Global History of International Law*, *in* The Oxford Handbook of the History of International Law 1–24, (2012).

is an excellent case to explore the colonial and unjust dimensions of the origins of international law.

On first inspection, de Vitoria's reconceptualization of authority, from finding root in papal power to the more stable footing offered by natural law, seems legitimate.[22] Furthermore, he recognized the legal personhood of Indians, and in fact argues that they are possessed of reason. This represents a crucial shift in European writings, which until then, characterized Indians as all manner of slaves, animals, and lunatics.[23] "Bestowing'" on them the capacity to self-govern, Vitoria concluded that the law of nations, i.e., *jus gentium* would apply.[24] This effectively allowed the Spanish to engage in acts of retaliation against any effort by South American Indigenous people to resist Spanish invasion. In this manner, the ostensibly innocent rights of *travel* and *sojourn* would legitimize and enable the countless violent incursions of the Spaniards into indigenous territory.[25]

The dominant view of state sovereignty under international law is that it bestows upon states the right to exclude non-nationals, with only limited exceptions (e.g., international refugee law).[26] It is important to contextualize the current system's denial of the right to free movement across national borders for economic migrants from the Third World, against the backdrop of the colonial migration system that recognized the right of European migrants to travel to, and sojourn or permanently reside in, any of the colonized territories in the non-European world. In

22. *See supra* note 16, at18–31 (Vitoria, in the course of vehemently refuting the conventional basis for Spanish title, creates a new system of international law, essentially replacing divine law and its administrator, the Pope, with natural law administered by a secular sovereign.).

23. Francisco De Vitoria, *De Indis et de Ivre Belli Relectiones*, *reprinted in* The Classics of International Law, 115, 127 (James Brown Scott & Ernest Nys eds., John Pawley Bate trans., 1917), [https://perma.cc/JQ3D-338L]. *See generally*, Anthony Pagden, The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology (Cambricge Univ. Press 1986).

24. Jus gentium encompasses both natural and positive law, as it is based on universal principles of reason and justice and has been molded by the customary practices of different nations over time. According to Black's Law Dictionary, jus gentium is "the body of customary law that has developed among nations". *See*, Black's Law Dictionary (11th ed. 2019), "jus gentium" entry, p. 980.

25. By recognizing the right of men to travel and sojourn where they please, and to be entitled to a kind reception, the rights of travel and sojourn helped legitimize the movement of Spaniards into indigenous territory. In the face of any resistance to the Spanish invasion, their 'retaliatory' measures are consequently 'justified' under the law of nations. *See*, Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 Third World Q. 739, 743 (2006).

26. *See* Sara Amighetti & Alasia Nuti, *A Nation's Right to Exclude and the Colonies*, 44 Pol. Theory 541, 545 (2016); *see also* E. Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1523, 1530 (2019) [hereafter Achiume]

fact, their movement was perceived by colonial administrations as being beneficial to the economic well-being of metropoles.[27]These inequities typify the enduring legacy of colonialism in the modern world.[28]

The role of property rights, and the detrimental assumptions that it generated about indigenous communities, and the "development" of their lands, cannot be understated while examining the colonial encounter with indigeneity. For instance, most writings and survey reports by the British about the Andamanese encapsulate their (i.e., the British) belief that cultivation was the first stage of civilizational development.[29] The British humanitarian movement recognized the unjust nature of the *terra nullius* doctrine, especially in the aboriginal context in Australia.[30] It is important to underscore the global context within which these developments were unfolding. This era witnessed significant opposition to Britain's slave trade, particularly with respect to the transportation of slave laboring populations to Fiji and Mauritius .[31]

In the Australian context, there was a *de jure* recognition that conquest over the indigenous people would not give rise to just title.[32] However, the *de facto* practice of colonizers often entailed claims that the Indigenous inhabitants did not deserve to exercise dominion over large tracts of land. For instance, the Royal Society's instructions to James Cook, who had embarked on a journey to seek lands to colonize, were superficially cognizant of natives' rights to ownership over their

27. The features of British colonial migration (its scale and consequences) explain much about the modern world. *See* Marjory Harper & Stephen Constantine, Migration and Empire 5–6 (2012).

28. *Supra* Note 26, *see generally* Achiume: Prof. Achiume argues for a different theory of sovereignty that demonstrates why economic migrants of a certain kind have compelling claims to national admission and inclusion in countries that today unethically insist on a right to exclude them. Arguing for the reconceptualization of structures of migration, her work explores the distributive justice claims and the remedial implications of the failures of formal decolonization for Third World peoples. To that effect, she calls for a migration system that treats economic migrants as political agents exercising equality rights when they engage in 'decolonial' migration.

29. *See* Höpfl, Harro M., *From Savage to Scotsman: Conjectural History in the Scottish Enlightenment*, 17 J. of Brit. Stud. 19, 24 (1978).

30. *See generally* Henry Reynolds, This Whispering in Our Hearts 1–90, <Xth ed.> 1998.

31. Rajashree Mazumder, Constructing the Indian Immigrant to Colonial Burma, 1885–1948 11 (2013) (Ph.D. dissertation, University of California, Los Angeles (ProQuest) [https://escholarship.org/uc/item/24c1m8gj].

32. No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent. Conquest over such people can give rise to no just title. *See* Endeavour Voyage Important Advice, National Museum Australia, https://www.nma.gov.au/exhibitions/endeavour-voyage/important-advice. *See also*, *Supra* Note 12, for a discussion by the High Court of Australia which decided the validity of the terra nullius doctrine, and whether conquest over indigenous lands can give rise to just title.

lands.[33] However, Cook received secret instructions: "*with the consent of the natives, take possession of the convenient situations in the country in the name of the King of Great Britain.*"[34]

The common feature connecting these different colonial encounters is the mutability of legal doctrine—*when it serves colonial interests*. In the context of the rights of travel and sojourn, an entirely different set of standards that disadvantage economic migrants from the Third World is enforced through the global migration system.[35] The very system that provided for the unfettered right of First World migrants to settle in colonized territories across the world, presently recognizes the right of states to exclude non-nationals, barring specific circumstances, such as when refugees are involved.[36] Similarly, property rights have been selectively protected in the colonial age, to the substantial detriment of the rights of indigenous communities over their lands and natural resources.[37] Modifications to rights: both its normative content, and its application, represent an intrinsic feature of coloniality.[38]

This camouflaging of colonial and commercial mandates by appeals to sovereign equality and property rights has resulted in the formation of a terribly unjust global system that, to this day, does not redress the grievances of indigenous peoples. The rhetoric of appeals

33. "There are many ways to convince them of the superiority of Europeans, without slaying any of those poor people—For example—By shooting some of the Birds or other Animals that are near them; Showing them that a Bird upon wing may be brought down by a Shot – Such an appearance would strike them with amazement and awe." *See id.*

34. A Source Book on Australian Legal History 253–54 (J.M. Bennett & Alex C. Castles eds., 1979).

35. *Supra* Note 26, *see* 1523–28 of Achiume.

36. Id, *see* 1516.

37. Julia McClure, *Conquest by Contract: Property Rights and the Commercial Logic of Imperialism in the Isthmus of Tehuantepec (Southern Mexico)*, 41 Bulletin of Latin American Research, 563–64 (2022). While the Spanish Crown formerly opposed the enslavement of indigenous peoples, the encomienda system, which leased contracts of Amerindian labour to conquistadors, was often little different to slavery. Within this system of encomienda contracts, Amerindian labour was appropriated while they were recognized as free subjects.

38. The processes by which legal doctrines are selectively transformed and engineered in ways that serve colonial interests have been enforced across the colonial age. For instance, the British Empire constructed the narrative that the migrant was 'free' through creating a decentralized architecture of labour recruitment. The British delegated the responsibility of labour mobilization to a system of predominantly upper caste men, onto whom responsibility nominally developed. The British appointed a Government Office to engender intentionally superficial assessments of their status as economic migrants. They would procedurally authenticate these 'migratory movements' as free from accusations of forced labour, when in reality, they were not meaningfully dissimilar to the slave trace. *See*, Federated Malay States, 'Report on Indian immigration and emigration for the year 1907', (1912) at pp. 27–28; *See also, Supra* Note 31.

to sovereign equality, and sovereignty itself (in its multifaceted forms, i.e., political, cultural, and economic) is premised on the false view that fair and representative inter-civilizational development was responsible for the creation of *universal* norms.[39] However, these views are ahistorical, and fail to capture the experiences of Third World people and their countries who were compelled (without consent) to become the subject of international law.[40] Moreover, these views help downplay the colonial origins of international law, and this has helped create the illusion that Third World states are active participants in the creation of international legal norms.[41] However, this narrative vastly overstates the role of Third World states and neglects the reality that international law has historically been a system that has primarily served to legitimize, reproduce, and perpetuate Western plunder and subordination of the Third World.[42]

These colonial doctrines were situated within a broader socio-political milieu that was underpinned by Enlightenment era property rights.[43] In particular, the belief that it is arbitrary and unjust to allow a small group of people to possess large territories was quite prevalent. And it was echoed by the likes of Emer De Vattel, whose work, *Law of Nations*, underlaid the foundations of international law.[44] The assumption that "unused land" ought to be improved finds root directly in Enlightenment thought, forming a constitutive component of colonial justifications for conquest.[45] These colonial assumptions are unfortunately reproduced by the Third World in their engagement with indigenous communities.[46] In this manner, colonial norms undergirded the processes within which the framework of international law emerged. This is the historical context within which the eventual degradation of

39. Gathii, *supra* note 7, at 39.; *see* Makau Mutua, Africa: Mapping New Boundaries in International Law 533, (Jeremy Levitt ed., 2010), stating that historically, international law has been made largely by states – specific territorial political societies governed by central authorities. Traditional international law, largely a "civilized" European creation, claimed the right to determine which other entities qualified as "states".

40. Brian-Vincent Ikejiaku, International Law is Western Made Global Law: The Perception of Third World Category, 6 *Afr. J. Legal Stud.* 337, 343 (2013).

41. Id, *see generally*

42. M. Mutua, What is TWAIL?, 94 *Am. Soc'y Int'L. Proc. (2000)*. *see also*, Gathii, *supra* note 2

43. *Infra* Note 47

44. Stuart Banner, *Why Terra Nullus? Anthropology and Property Law in Early Australia*, 23 L. & Hist. Rev. 95, 99–100 (2005).

45. John Locke, Two Treatises of Government 45 (Peter Laslett ed., Cambridge Univ. Press 1988).

46. The next section will explore how colonial epistemologies have been reproduced by Third World states.

indigenous rights, and specifically their right to TK, occurred. The next Part shall critically review the positionality of indigenous communities in postcolonial societies.

B. A Critical Analysis of Post-Colonial Relations with Indigenous Communities

Governments both democratic and authoritarian, across the First and Third World have been culpable for the degradation of the lives of indigenous people.[47] However, postcolonial states have to contend with their relative economic weakness and limited bargaining power, when contrasted against exploitative colonial empires.[48] Using its unjustly acquired position of strength, the First World has constructed a framework for the functioning of international financial institutions (IFI) that actively infringes the decisional sovereignty of Third World states (e.g., The International Monetary Fund (IMF) and the World Bank).[49] The persistence of colonial continuities in the postcolonial period is exemplified by the loss of decisional sovereignty among nations. To comprehend the contemporary degradation of the TK of indigenous peoples, it is imperative to examine the underlying assumptions of developmental models instituted by the First World.

Schlars Trubek and Santos, have delineated the post-World War II period into three major moments to detail the evolution of global law and development doctrine.[50] The First Moment emphasized

47. Indigenous peoples continue to be left behind and suffer disproportionately from climate change, environmental degradation, high levels of poverty, poor access to education, health, and broader human rights violations. Globally, there is a lack of disaggregated data on indigenous peoples. *Where data exists, the situation is concerning.* See, Office of the High Commissioner for Human Rights, About Indigenous Peoples and Human Rights, OHCHR https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-humanrights#:~:text=The%20rights%20of%20indigenous%20peoples'%20have%20been%20progressively%20given%20more,and%20broader%20human%20rights%20violations, (last visited Mar. 20, 2023).

48. Matthew Lange et al., *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 Am. J. of Soc. 1412, 1438, 1454 (2006).

49. African countries constitute 25 percent of the World Bank's membership, and yet only possess five and a half percent of the World Bank's membership. These vote-share discrepancies continue to deny African nations the agency to participate and impact economic decision making within IFIs. *See* The African Sovereign Debt Justice Network, *African Sovereign Debt Justice Network's Statement on the Occasion of the 2022 Spring Meetings of the IMF and the World Bank*, Afronomics Law (Apr. 18, 2022), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/african-sovereign-debt-justice-networks [https://perma.cc/Q3KB-HBBV].

50. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment In Law and Development Theory and The Emergence of A New Critical Practice*, *in* The New Law and Economic Development: A Critical Appraisal 1, 1–2, Alvaro Santos & David M. Trubek, eds., 2006) https://scholarship.law.georgetown.edu/facpub/2105 [https://perma.cc/

conceptualizing laws as instruments for state intervention in the economy, often through transplanting regulatory laws from First World States.[51] The Second Moment, contrastingly represented a neoliberal shift towards circumscribing state intervention and empowering private law.[52] During this period, the IMF and World Bank helped herald a market-oriented paradigm of development post the 1980s, instituting structural adjustment programs in developing countries as the price of entry to generate cashflow through IFIs.[53] Neoliberal discourses have been legitimized and institutionalized in coercive ways, bringing about significant institutional redesigns in large parts of the Third World, orienting these states in ways that are antithetical to the interests of indigenous communities.[54]

The set of policies that colonizing powers have mainstreamed typically entail a market-oriented paradigm of development that is produced through the imposition of structural adjustment programs (SAP). These programs require states to implement a range of measures in order to secure development loans. Some of these measures include budget cuts to social sector spending, privatization, and other measures aimed at increasing the available fiscal space required for debt servicing costs.[55] Additionally, the pressure to service debt often induces the institution of austerity programs that pose direct risks to vulnerable demographics.[56] Such a development agenda is, for this reason, at odds with both the right to health among other economic and social rights,[57]

K8P4-FAQQ].

51. Id

52. Id at 5.

53. Brian F. Crish & Michael J. Kelley, *The Socio-Economic Impacts of Structural Adjustment*, 43, Int'l Stud. Q. 533, 542–49 (1999).

54. *Supra* Note 8, *see* 53–61 of *; see also* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) section [hereinafter TRIPS Agreement] Article 1, ("The TRIPS Agreement specifies that WTO member states shall give effect to the provisions of the Agreement").

55. The imposition of SAPs by IFIs and high debt servicing costs have created devastating consequences for the African continent in particular. For example, the share of health in the national budget declined greatly from 7.23 percent in 1997–98, to 4.62 percent in 1989–90. For a systematic review of the effects of SAPs on the health sector (and women and children's health in particular), see Joe L. P. Lugalla, *The Impact of Structural Adjustment Policies on Women's and Children's Health in Tanzania*, 22 Rev. Afr. Pol. Econ. 43, 47–51 (1995).

56. Thomson et al. offer a systematic review of the effects of structural adjustment programs on child and maternal health, impacting social determinants of health, i.e., income and food availability. *See generally* Michael Thomson et al., *Structural Adjustment Programmes Adversely Affect Vulnerable Populations: A Systematic-Narrative Review of Their Effect on Child and Maternal Health*, 38 Pub. Health Revs. 1 (2017).

57. The profit-motivating incentives of the private sector steer them away from less

and environmental rights, including the ownership and access rights of indigenous communities over natural lands and resources.

The insistence by the First World and IFIs that neoliberal economic restructuration is necessary for economic development carries with it racialized archetypes of the Third World's inability to articulate a vision for its own destiny, and a complete disregard for the economic and social rights of Third World citizens.[58] To that effect, treaty bodies such as the Committee on Economic, Social, and Cultural Rights (CESCR[59]) have been cognizant of the issue linkages between human rights concerns and the mandate of IFIs, and the IMF has itself internalized certain commitments towards the protection of human rights goals.[60] The Chair of the CESCR has even urged states to use their voting powers in IFIs to alleviate the financial burden of developing countries through debt relief.[61]

Despite the identification of these issue linkages between development and human freedom, the number of structural conditions imposed by the IMF and World Bank on the borrowing country as part of the loan agreement have only risen in the period between 2011 and the

profitable but essential services, as the focus of private hospitals is likely to be areas and patients with the most resources. Reducing the available fiscal space for socio-economic development hurts historically underserved communities that are often reliant on state support for the realization of important rights. See, *Wrong Prescription: The Impact of Privatizing Healthcare in Kenya*, Center for Hum. Rights and Glob. Just. & Econ. and Soc. Rights Centre–Hakijamii § 6 (2021) https://chrgj.org/wp-content/uploads/2021/11/Report_Wrong-Prescription_Eng_.pdf [https://perma.cc/6PQ7-QJ4Z].

58. *Supra* Note 53, *see also*, Jodi Melamed, Racial Capitalism, 1, Critical Ethnic Stud. 76, 78–83, (2015).

59. Different General Comments have emphasized that actions taken by States in the spheres of international trade and investment, including unilateral or collective coercive measures, as well as the imposition of economic sanctions, should take full account of States Parties' obligations under the Covenant of Economic, Social, and Cultural Rights, particularly the impact of such measures on disadvantaged and marginalized individuals and groups in affected countries. *See*, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, 12 December 1997, E/c.12/1997/8, available at: https://www.refworld.org/docid/47a7079e0.html, (last visited 28 March, 2023); *See also*, Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January, 2003, U.N. Doc. E/C.12/2002/11, paras. 30–36, available at: https://www.refworld.org/pdfid/4538838d11.pdf, (last visited 11 April, 2023).

60. François Gianviti, *Economic, Social and Cultural Rights, and the International Monetary Fund*, IMF (2005), https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf.

61. Human Rights Treaties Branch, *Compilation of Statements by Human Rights Treaty Bodies in the Context of COVID-19*, Off. High Comm'r Hum. Rts. 54 (2020), https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf [https://perma.cc/8Q44-HRJ5].

end of 2017.[62] And the conditions of hardship afflicting vulnerable communities are only liable to worsen due to the pandemic.[63] Indigenous and tribal communities often bear the brunt of these policies, as the presumed linkage between industrialization and economic development is a crucial driver that influences states to prioritize the growth of manufacturing and allied sectors.[64] Unfortunately, this pits state business incentives markedly against environmental objectives, as these large-scale projects often entail environmentally deleterious impacts that disproportionately affect the lives of indigenous and tribal communities who are displaced from cleared forest lands.[65] Independent of the empirical significance of these processes, it is important to recognize that they are principally inconsistent with important international legal instruments such as the Charter of Economic Rights and Duties of States. Art. 1 of the Charter provides, "Every State has the sovereign and inalienable right to choose its economic system, as well as its political, social, and cultural systems in accordance with the will of its people, without outside interference, coercion, or threat in any form whatsoever".[66]

This loss of decisional sovereignty from the Third World at large, is most strongly evidenced in international law's attempt to directly regulate property rights. Scholar B.S Chimni has mapped out the series of legal developments through which property rights have become internationalized: a) The international specification and regulation of intellectual property rights, b) the privatization of State owned property (the Second Moment), c) the adoption of a network of international laws that facilitate the increased mobility of the transnational corporate sector, and d) the metamorphosis of the common heritage of humankind (in the domain of traditional knowledge, and the environment)

62. International Monetary Fund, Strategy, Policy & Review Department, 2018 Review of Program Design and Conditionality, Policy Paper No. 19/102, 2 (May 20, 2019) https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/05/20/2018-Review-of-Program-Design-and-Conditionality-46910

63. Daniel Gurara, Stefania Fabrizio, and Johannes Wiegand, *IMF COVID-19: Without Help, Low-Income Developing Countries Risk a Lost Decade*, IMF (August 27, 2020), https://www.imf.org/en/Blogs/Articles/2020/08/27/blog-covid-19-without-help-low-income-developing-countries-risk-a-lost-decade (last visited Mar. 27, 2023).

64. Matleena Kniivila, *Industrial development and economic growth: Implications for poverty reduction and income inequality*, in Industrial Development for the 21st Century: i Sustainable Development Perspectives 297–300 (2007).

65. C. Doyle & A. Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, 58, 69, 184 (Tebtebba, PIPLinks & Middlesex Univ. 2014)

66. Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 23, U.N. Doc. A/9631 (Dec. 12, 1974), art. 1.

into a system of corporate property rights.[67] The fundamental principles underlying the TRIPS Agreement (expressed in its preamble) reflect a legal framework that elevates intellectual property rights to the status of private rights.[68] Such an approach stands in stark contrast to indigenous understandings of rights, which are rooted in the notion of collective ownership and recognize collective rights over TK.[69] The misalignment of conceptual frameworks serves not only to engender tension between the international legal regime and indigenous communities' ways of life, but also raises pressing questions regarding the legitimacy and efficacy of current global mechanisms for protecting TK.

Independent of this in principle incompatibility between global standards constructed within a colonial and neo-colonial framework, and indigenous frameworks of knowledge, there have been tangible harms for indigenous and tribal communities globally. The resultant effect of mainstreaming hegemonic neoliberal discourses has had devastating consequences for indigenous communities' right to hold, own, and maintain their TK. The Sardar Sarovar Project (SSP) presents a valuable case study for exploring the multifaceted and intersectional dimensions of the human rights violations experienced by Adivasi communities in India. The SSP was a vast undertaking involving the construction of more than 3000 dams along the Narmada River in Western India.[70] To oversee the project, the Indian Central Government established the Narmada Water Disputes Tribunal (NWDT), which provided the framework for the project's implementation.[71] Financing for

67. *Supra* Note 8, *see* 52 of Third World Manifesto

68. TRIPS Agreement, pmbl. ¶ 4

69. N.Z. Law Comm'n, *Maori Custom and Values in New Zealand Law*, Study Paper No. 9, (2001) https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20SP9.pdf, 31, (last visited Apr 15, 2023).p. 31, ("In traditional Māori society, the individual was important as a member of a collective. The individual identity was defined through that individual's relationships with others"); *See also*, S. James Anaya, Indigenous Peoples in International Law, 48, (Oxford University Press, 2000), ("Indigenous peoples have demanded recognition of rights that are of a collective character, rights among whose beneficiaries are historically grounded communities rather than simply individuals or (inchoate) states").

70. Sardar Sarovar Narmada Nigam Limited, *Sardar Sarovar Dam Project*, https://www.sardarsarovardam.org/project.aspx (last visited Apr. 10, 2023).

71. Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, *Narmada Water Disputes Tribunal* (October 1969), https://jalshakti-dowr.gov.in/narmada-water-disputes-tribunal-october-1969/#:~:text=Under%20Section%2D4%20of%20the,Ramaswami (last visited April 01, 2023) ("Under Section 4 of the Inter-State Water Disputes Act, 1946, the Central Government constituted the Narmada Water Disputes Tribunal (NWDT) on 6th Oct. 1969 to adjudicate upon the sharing of Narmada waters and Narmada River Valley Development under the Chairmanship of Justice V. Ramaswami. The Tribunal gave its Award on 7th Dec. 1979. The NWDT Award was

the project was provided by the World Bank, which extended a loan of 450 million dollars.[72] The people of the Narmada Valley (including many indigenous peoples) protested both the rehabilitation and resettlement, and the project itself.[73] In response to the concerns raised by the affected communities, the World Bank commissioned an independent review of the project.

The resulting assessment (i.e., the Morse Report) concluded that the project as it stood was flawed, and that resettlement and rehabilitation of all those displaced was not feasible. The report also attributed shared responsibility to the World Bank for the situation that had arisen.[74] The World Bank Environment Department estimates that approximately 10 million people are displaced yearly due to dam construction alone.[75] This number is likely an underrepresentation, given that while it includes the direct displacement of individuals, the indirect consequences that befall communities reliant on natural ecosystems in the region affected by these projects are liable to be overlooked. These communities are under risk of several pernicious social harms: landlessness, joblessness, decrease in health levels, and community disarticulation.[76] It is important to contextualize the impact of such actions, as indigenous peoples share an integral relationship with their natural environment.[77] Unfortunately, the creation of a developmental agenda concerning lands and natural resources, in line with neoliberal frameworks and the principle of permanent sovereignty over natural

notified by the Government of India on 12th December, 1979, whereupon it became final and binding on the parties to the dispute").

72. Philippe Cullet, *Human Rights and Displacement: The Indian Supreme Court Decision on Sardar Sarovar in International Perspective*, 50 Int'l & Comp. L. Q. 973, 974 (2001).

73. *Id.* at 975.

74. Bradford Morse & Thomas R. Berger, Sardar Sarovar - Report of the Independent Review (Ottawa: Resource Futures International, 1992). at p. 1. ("We think the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the Projects is not possible under prevailing circumstances, and that the environmental impacts of the Projects have not been properly considered or adequately addressed. Moreover, we believe that the Bank shares responsibility with the borrower for the situation that has developed").

75. Michael M. Cernea, *Hydropower Dams and Social Impacts: A Sociological Perspective*, Env't Dep't Papers, No. 16, World Bank, 6 (Jan. 1997).

76. *Id.* at 5.

77. One of the important cases before Human Rights institutions that establish the cultural connotations of environmental damage is Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/11.122, doc. 5 rev. (Oct. 12, 2004).

resources[78] that post-colonial developing states fought to recognize, has adversely affected the rights of indigenous communities.

The Supreme Court of India in the case of Narmada Bachao Andolan v Union of India and Others,[79] explored the constitutionality of the SSP, and examined the project's impact on the human rights of indigenous and tribal communities residing across the Narmada River. The judicial analysis in this case offers a good case study to understand how postcolonial states balance developmental interests with the rights of indigenous communities. The Court held that the displacement of persons alone does not necessarily result in the violation of indigenous communities' human rights.[80] They argued that insofar as rehabilitation efforts result in an improvement of the displaced communities' overall conditions, the project ought to continue.[81] Further, they strongly endorsed the positive benefits of the dams by highlighting the critical role they play in providing food and energy security.[82] While this position may appear to be well-reasoned, the Supreme Court held that the rehabilitation sites offer better amenities than the tribal hamlets where indigenous communities originally reside, and additionally held that the gradual assimilation of tribal peoples into mainstream society is beneficial.[83] These views are in stark contrast to indigenous frameworks of knowledge which emphasize the necessity to maintain long-lasting ties that their communities share with their natural environments.[84]

The deleterious effect of postcolonial states' prioritization of developmental interests over indigenous interests are evident in the deterioration of living conditions and erosion of intergenerational knowledge within indigenous communities. The Green Revolution in India, which was initiated in the 1960s, introduced high-yield crops such as rice and wheat, resulting in an increase in the per capita net availability of food grains.[85] However, this shift in consumption and production

78. *See* G.A. Res. 3171 (XXVIII), Permanent Sovereignty Over Natural Resources (Dec. 17, 1973) (preamble paragraphs 1, 2, and 7).

79. *Narmada Bachao Andolan v. Union of India*, Writ Petition (Civil) No. 319 of 1994, Supreme Court of India Judgment of 18 Oct, 2000.

80. Id at p. 47

81. Id at p. 48.

82. Id at p.46.

83. Id at p. 48.

84. Resolutions Adopted by the Conference, *Report of the United Nations Conference on Environment and Development*, Rio De Janeiro, 3–14 June 1992, Vol. 1, Annex II, Agenda 21, Chapter 26, p. 395, A/CONF.151/26/Rev.1 ("Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands").

85. Ann Raeboline, *The Impact of the Green Revolution on Indigenous Crops of India*, 6, J. Ethnic Foods, 4, (2019) ("The per capita net availability of food grains increased

patterns has negatively impacted the availability of indigenous crops such as millets, including sikiya, a millet consumed by the Baiga tribal community, residing along the Narmada River.[86] Notably, the Indian government's policies have exacerbated these negative effects. Whereas the government procures paddy with a minimum support price, millets do not receive the same support, leading to the neglect of TK, as ancient farming methods such as Bewar, (natural farming methods to produce millets) are virtually on the verge of disappearance.[87]

It is important to recognize however, that duties requiring respect for the rights to development of all, *including* indigenous peoples, was read into the principle.[88] These duties have led to the evolution of obligations mandating consultation and participation of indigenous peoples in decision-making processes that pertain to their natural resources prescribed within the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[89] Despite these developments, indigenous peoples' rights and self-determination claims are still narrowly construed. Article 46(1) of the UNDRIP recognizes the pre-eminent role of *state* sovereignty, and Articles 3 and 4 constrain the full ambit of self-determination, subsuming it under the broader framework of the State.[90] When States in the Third World assert their right to permanent sovereignty over natural resources, they're supported by neocolonial logics that deprioritize indigenous ownership in the interests of

over the years. The per capita net availability of rice increased from 58.0 kg/year in 1951 to 69.3 kg/year in 2017. Similarly, the per capita net availability of wheat increased from 24.0 kg/year in 1951 to 70.1 kg/year in 2017. However, the per capita net availability of other cereal grains such as millets and pulses decreased over the years. This led to a change in consumption patterns over the years.").

86. Shantanu Menon, et. al, Community Development Centre: A Covenant with the Baiga (Tribe), Case Study, Talent Management in the Indian Social Sector (ISDM Case Centre, 2022), 7 ("Additionally, 15 or 20 years ago, the millets that they traditionally used to eat started to be referred to by other people in a derogatory way, as "Adivasi food". As a result of that, they slowly stopped cultivating those crops, and now those seeds are no longer there. So, their seed pattern, food pattern, we have completely changed it, and now we are giving them ration (Public Distribution System) foods like rice, while millets are completely out of their meals").

87. M T Saju, *How Narmada project erased tribal cultures and food habits*, The Times of India, (July 12, 2019), https://timesofindia.indiatimes.com/india/how-narmada-project-erased-tribal-cultures-and-food-habits/articleshow/70196278.cms; *see also Id.*

88. *See* N.J. Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties 306–44 (1997).

89. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (Sept. 13, 2007), Arts. 10, 18, 27, 39.

90. Id, *see* Art. 3, 4, and 46(1).

national development.[91] This inhibits indigenous peoples from exercising resource sovereignty over their natural environments.

Another relevant factor that contributes to the marginalization of indigenous peoples is the outward migratory forces (displacing indigenous communities from their traditional lands) generated by growing urbanization.[92] The movement of these communities to city centers is a human rights violation, given the unique relationship indigenous peoples share with their lands and natural environment. Since several indigenous communities possess largely oral histories,[93] their ability to preserve these records is deeply compromised as they become internally displaced and landless in many cases.[94] Removing access to their lands deprives these communities of their cultural productions. Perniciously, these migratory movements are themselves the result of capital-driven investments by Western states under a globalized framework.[95]

However, despite both the colonial origins from which the State system emerged, and the ways in which these structural adjustments have been imposed in the Third World, Third World states share a significant responsibility for the devastating policies that are inflicted on indigenous peoples. For instance, the Indian Government has attempted to systematically undermine protections for indigenous and tribal communities. The government has weakened environmental protections through the introduction of post-fact clearances for ecologically

91. *Supra* Note 50, 53.

92. In the 2000s in Mexico 1 in every 3 indigenous people lived in a city, and on several socio-economic indicators, (e.g., literacy, housing rats of income, and health conditions) they performed poorer than their non-indigenous citizens. *See* U.N. Permanent Forum on Indigenous Issues, *Urban Indigenous Peoples and Migration: Challenges and Opportunities Factsheet* (May 21, 2007) [https://perma.cc/5GSQ-WZDJ].

93. Margaret Bruachac, *Indigenous Knowledge and Traditional Knowledge, in* Encyclopedia of Glob. Anthropology 3814, 3814–3815 (Claire Smith, ed. 2014) [https://perma.cc/B7JA-HPBD].

94. For instance, in the case of the Sardar Sarovar Project, several indigenous and tribal communities residing in the Narmada Valley have had their agricultural land captured. *See,* Isha Tyagi, *Gujarat: Sardar Sarovar Dam, Statue of Unity Made Tadvi Adivasis Encroachers on their Own Lands*, The Wire, (September 12, 2020), https://thewire.in/rights/gujarat-sardar-sarovar-dam-statue-of-unity-made-tadvi-adivasis-encroachers-on-their-own-lands, ("If the Tadvi Adivasis living in the Navagam village were to step onto their village farmland, they could be charged with criminal trespassing. That's because on their land now stands a board that says the plot belongs to the Sardar Sarovar Narmada Nigam Limited (SSNNL").

95. M.R. Narayana, *Impact of Economic Globalization on Urbanization: A Comparative Analysis of Indian and Select Global Experiences*, 66 India Q. 92, 93, 99 (2010). ("As internationalization of production, capital and services have higher concentration in several urban areas, the benefits and risks of globalization are more centred in relatively small number of large cities and towns. One of these impacts is internal migration").

sensitive projects,[96] proposed a National Register of citizens (whereby Indigenous people are at risk of being rendered stateless)[97], and issued judicial orders to evict millions of indigenous people.[98] Similarly, in Brazil, Bill 490/2007 would allow mining and hydroelectric projects to be undertaken on protected lands, and would prevent indigenous people from claiming rights to their land and resources.[99] These policies constitute several violations of international human rights law, given the failure of these initiatives to respect the rights indigenous communities possess over their lands, territories, resources, cultural practices, livelihood, and their right to prior and informed consent (PIC).[100]

The Indian Government's engagement with the Andamanese people, who are the indigenous inhabitants of the Andaman and Nicobar Islands, exemplifies the reproduction of colonial epistemologies.[101] The inheritance of narratives of backwardness about tribal communities has fueled, at a discursive and policy level, measures to "develop" these lands[102] to the unfortunate exclusion of the communities that have

96. Manju Menon & Kanchi Kohli, *EIA Legitimized Environmental Destruction. Now, Govt 'Renovates' it for the Worst*, The Wire Science (June 24, 2020), https://science.thewire.in/environment/eia-2020-environmental-degradation-draft [https://perma.cc/8L3B-PNTE].

97. Roluahpuia, *Peripheral Protests: CAA, NRC and Tribal Politics in Northeast India*, University of Oxford Faculty of Law Blogs: Border Criminologies (Feb. 20, 2020) https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centrebordercriminologies/blog/2020/02/peripheral [https://perma.cc/ANR9-L927].

98. Nitin Sethi, *SC orders forced eviction of more than 1 million tribals, forest dwellers,* Business Standard, (February 21, 2019), https://www.business-standard.com/article/current-affairs/sc-orders-forced-eviction-of-more-than-1-million-tribals-forest-dwellers-119022000855_1.html *see also*, Krishnadas Rajagopal, *SC orders States' chief secretaries to evict rejected claimants under Forest Rights Act*, The Hindu, (February 21, 2019), https://www.thehindu.com/news/national/sc-orders-states-chief-secretaries-to-evict-rejected-claimants-under-forest-rights-act/article26329407.ece

99. *Brazil: Reject Anti-Indigenous Rights Bill*, Human Rights Watch (Aug. 24, 2021, 3:33PM), https://www.hrw.org/news/2021/08/24/brazil-reject-anti-indigenous-rights-bill [https://perma.cc/SRF3-TLWZ].

100. *Supra* Note 89, *See* Arts. 8(a)(b)(d), 10, 25, 26, 27, 11

101. Scholars such as Walter Mignolo and Enrique Dussel have identified the hierarchical patterns of epistemic judgment under colonial systems. This hierarchization was produced through the colonial encounter during which the identity, rationality, and very humanity of the peoples of the New World were put on trial and judged by the jury of its conquerors. At a more foundational level, epistemology (i.e., the branch of philosophy concerned with the theory of knowledge) is embedded in languages and in particular genealogies, and through processes of territorial and cultural imperialism, colonizing powers have hegemonically mainstreamed specific epistemic judgments, such as the belief that, "unused land ought to be improved". *See*, Linda Martín Alcoff, *Mignolo's Epistemology of Coloniality*, 7 CR: The New Centennial Review 79, 81 (2007); Walter D. Mignolo, *I Am Where I Think: Epistemology and the Colonial Difference*, 8 J. Latin. Am. Cultural Stud. 236–37 (1999).

102. Lara Dominguez et al., *Decolonizing Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of*

long inhabited them. This process of internalizing and popularizing colonial epistemologies[103] within Third World nations has transpired in three distinct ways. First, the phenomenon of neo-colonial integration is manifested through the imposition of neoliberal developmental paradigms by First World actors on the economic frameworks of Third World nations.[104] The structural adjustments, previously mentioned in this section, have been enforced as a precondition for inclusion into the global financial system. These policy modifications are characterized as a necessary sacrifice in order to attain access to the benefits offered by the international financial architecture (e.g., the option to secure developmental loans). Second, the legitimization of State authority through the characterization of sovereignty in ways that inhibit indigenous communities from accessing their resources, and benefitting from the use of their traditional knowledge, and traditional cultural expressions.[105] And finally, through colonial power, the creation of categories such as "barbarians", "primitives", and "underdeveloped people" all established epistemic dependencies under different global designs like, the civilizing mission, modernization, and development.

C. The Colonial Imposition of Narratives of Tension Embedded in the Third World's Engagement with Indigenous Communities – The Doctrine of Uti Possidetis and Self-Determination

The doctrine of *uti possidetis* demonstrates the direct influence that colonial powers had on the formation of international arrangements. This doctrine prescribes that "new States will come to independence

the Environment, 9 Land, 13, (2020) ("Exploitation of the forests have continued in the postcolonial era. Industrial and infrastructure projects have multiplied across resource-rich Adivasi territories. These territories are increasingly exploited by the Government or contracted to private corporations to extract valuable forest resources.").

103. The linkages between the expansionary processes of the colonial Empire and the development of Western epistemologies have been discussed extensively by Walter Mignolo, *see*, Walter D. Mignolo, *The Geopolitics of Knowledge and the Colonial Difference*, 101, The S Atlantic Q, 59, (2002) ("The history of capitalism as conceived by Wallerstein and Arrighi, and the history of Western epistemology as it has been constructed since the European renaissance run parallel to and complement each other, since the expansion of Western capitalism implied the expansion of Western epistemology in all its ramifications, from the instrumental reason that went along with capitalism, and the industrial revolution, to the theories of the state").

104. *Id*. at 84, ("The coloniality of power worked at all levels of the two macronarratives, Western civilization and the modern world-system. The colonized areas of the world were targets of Christianization and the civilizing mission as the project of the narrative of Western civilization, and they became the target of development, modernization, and the new marketplace as the project of the modern-world system.

105. The prioritization of State interests over those of indigenous communities shall be extensively discussed in the next Part.

with the same borders that they had when they were administrative units within the territory . . . . of [a] colonial power."[106] Derived from Roman private law, "*uti possidetis ita possidetis*", which translates to, "as you possess, so may you possess", the doctrine was originally used in land disputes when two parties claimed ownership over the same property.[107] The praetor would typically grant provisional possession to the possessor while the dispute was still pending.[108] However, it was never intended to have final dispositive value, and was merely intended to shift the burden of proof to the party not holding the land.[109]

Early scholars of international law modified the doctrine in two critical ways. Firstly, the doctrine was extended beyond private land disputes to determine claims over the state's territorial sovereignty. Secondly, what was intended to only be a provisional measure during litigation over property matters, (advantaging the possessor, provided that the possession was not manifested through the use of force, or in a form that is revocable by the other party) developed a permanent character.[110] These modifications to the doctrine of uti possidetis made by these early scholars (of international law), were instrumentalized by colonial powers to further their own interests. The First World's use of this doctrine in matters of state secession post decolonization, have led to large parts of the world having had their borders determined by colonial powers.[111] The International Court of Justice in the Frontier Dispute (Burkina Faso/Mali) Case held that *uti possidetis* (which helped establish boundary regimes during decolonization) is a general principle of international law.[112]

106. Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today* 67 Brit. Y.B. Int'l L. 97 (1996).

107. Steven R. Ratner, *Drawing a Better Line: UTI Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590 (1996).

108. Id, at 593

109. *Id.*

110. John Bassett Moore, Memo on the Applicability of Uti Possidetis of 1913 in the Costa Rica-Panama Arbitration (The Commonwealth Co., Printers 1913) pp. 8–11.

111. Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris and the Borders of Israel*, 58 Ariz. L. Rev. 633 (2016) p. 641.

112. Frontier Dispute (Burk. Faco v. Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22) ("Uti Possidetis is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored.").

While this transition from colonialism to postcolonial statehood empowered Third World states from being able to amass the power and authority enjoyed by their predecessor regimes (i.e., colonizing nations), marginalized people residing in the Third World have effectively been denied the agency to freely constitute their own political arrangements. Moreover, the elevation of uti possidetis into CIL, enabled through the doctrine's uniform application across Latin America and Africa,[113] occurred without meaningful participation or input from the Third World (as this process took place when Third World states were not formally independent). This further entrenches the asymmetrical power relations not just between colonial powers in the First World, and the Third World states they colonized, but also between Third World states themselves and marginalized communities residing in them.

Colonizing nations attempted to justify its implementation on the grounds that reliance on pre-established boundaries would reduce the incidence of inter-state violence.[114] This is however an empirical view that remains hotly contested among scholars. But prior to delving into the veracity of this proposition, it must be noted that the doctrine of uti possidetis in principle severely undermines the decisional sovereignty of the people residing in Third World states. While some scholars maintain that the doctrine's usage led to the prevention of conflict in Africa,[115] other scholars highlight the doctrine's contributory role in shaping conflicts in Somalia, Morocco, and Namibia.[116] The same is true for the Latin American context, with some scholars affirming the doctrine's value in preventing conflicts, while others arguing that it played a role in conflicts in Peru and Ecuador.[117]

But more perniciously, these assessments by scholars of the implications for the uti possidetis doctrine preclude any discussion of intra-state violence caused by ethnically and culturally fractured

113. *Supra* Note 111 ("In time, uti possidetis juris became the dominant doctrine for determining post-colonial borders. After being adopted in numerous agreements establishing borders in Latin America, the principle was adopted in Africa in the Organization of African Unity's Resolution on Border Disputes among African States").

114. For instance, academics have argued that it has reduced the incidence of violence in Latin America. *See generally* Jorge I. Dominguez, *Boundary Disputes in Latin America*, USIP Peaceworks (2003).

115. Ali A. Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, 7 International Journal of Refugee Law 21 (1995) p. 31. ("It is one of Africa's glories that in spite of artificial borders which have split ethnic groups, there have been very few border clashes or military confrontation between African countries").

116. Vanshaj Jain, *Broken Boundaries: Border and Identity Formation in Post-Colonial Punjab*, 10 Asian J. Int'l. L. 9 (2020).

117. Tomas Bartos, *Uti Possidetis. Quo Vadis?*, 18 Aust. YBIL 37 (1997).

communities that have been deprived of the ability to freely determine their own political boundaries.[118] Vanshaj Jain's identification of the use of *uti possidetis* (specifically the Radcliffe line that was relied upon used in the partition of Punjab) in the South Asian context substantiates the doctrine's causal connection to intrastate violence and identity-alteration.[119] This is important, as it demonstrates just how universally this doctrine's application has engendered an assault on indigenous rights by virtue of denying colonized people the freedom to constitute their own political arrangements. It is patently clear that the doctrine's reliance on demarcations drawn up by colonial administrations is diagonally opposed to the norm of self-determination. The grounding of this doctrine in CIL represents a further entrenchment of the global power inequities in the international-norm-creating process.

The International Law Commission's commentary,[120] the International Law Association's general resolution,[121] and Special Rapporteur reports[122] confirm that boundary regimes set up during decolonization constitute CIL. The contingency of indigenous peoples' political representation on arbitrary lines drawn by colonizers is morally reprehensible.[123] Despite the fact that indigenous peoples today have represented themselves in international fora, they suffer due to their inability to secede from a state apparatus that is often hostile or apathetic to their needs. Charles De Visscher's analysis of the formation of CIL offers compelling evidence that CIL is structurally the product of power inequities that disadvantage Third World states. He analogized the formulation of international law to the construction of a road over an empty plot of land. After initial confusion about how to progress down the path and *whether* to progress on the path at all, most people would converge upon a common pathway down the road.[124] However, the

118. *See* Jagdish N. Saxena, *Self-Determination: From Biafra to Bangla Desh*, 73 Am. J. Int'l. L. 537 (1978).

119. *Supra* Note 116 at 26–31

120. *Draft Articles on Succession of States in Respect of Treaties with Commentaries* (1974), *reprinted in* [1974] 2 Y.B. Int'l L. Comm'n 174.

121. Comm. on Aspects of the Law on State Succession Res. 3/2008 (2008).

122. Humphrey Waldock (Special Rapporteur), *Fifth Rep. on Succession in Respect of Treaties*, U.N. Doc. A/CN.4/256 (Apr. 10, 1972).

123. These arbitrary lines were largely the product of centuries of colonial conquest. Today, the international community generally accepts that the terra nullius concept in the acquisition of inhabited land is racist, as reflected in paragraph 4 of the Preamble of the 2007 UNDRIP. *See*, Siegfried Wiessner, *Indigenous sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41, Vand. J.Transnat'l L., 1154; *Supra* Note 89, *see* pmbl ¶ 4.

124. *See* Charles De Visscher, Theory and Reality in Public International Law 149 (P. E. Corbett trans., 1957).

contribution of all actors is not equivalent, and some are predisposed to exert a more pronounced footprint on the pathway due to their inherent advantages. Likewise, international law has been significantly shaped by a Eurocentric Western construction that exerts a comparatively greater influence on the development of norms, than Third World states.[125]

To that effect, the mechanism for the normalization of such legal regimes, i.e., CIL, is itself proof of the power differentials subsisting at the heart of the international system.[126] Entire tranches of customary law have been constructed without the involvement of vast parts of the world. The influence of the US and the USSR on the law of outer space, is an example of this exclusionary feature.[127] Another example is Britain's overwhelming influence on the creation of international customary rules relating to the law of the seas.[128] While these test cases represent the degree to which former colonizing powers dominate the processes by which international law and institutions come into fruition, they are by no means outliers; rather, they constitute an instrumental feature of the international system.[129] The next section shall specifically explore how First World states have exploited these features (defects) of the international system to serve colonial and neocolonial interests.

D. Analysis of the Underlying Narrative Forces Responsible for Deficient TK Protections

The protection of the TK has been deficient for two core reasons: first, the international community's derecognition of political

125. International law is fundamentally animated by the civilizing mission that is an inherent aspect of imperial expansion which, from time immemorial, has presented itself as improving the lives of conquered peoples. *See* Antony Anghie, 'On Critique and the Other', in Anne Orford, International Law and its Others (Cambridge University Press, 2008), 394.

126. Michael Byers, *Custom, Power, and the Power of Rules*, 17 Mich. J. Int'l L. 112–16 (1995).

127. Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory 513, 532 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

128. *See* D.H Anderson, *British Accession to the UN Convention on the Law of the Sea*, 46 Int. & Comp. L. Q. 761–86 (Oct. 1997).

129. B.S Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15, Euro J Int'l Law, 3–6, (2004) ("The class which exercises the greatest influence in international institutions today, and consequently on the emerging global state, is that of the transnational fractions of the national capitalist class in advanced capitalist countries with the now ascendant transnational fractions in the Third World playing the role of junior partners. Together, they constitute a transnational capitalist class (TCC) which is in the process of congealing and establishing a global state composed of diverse international institutions that help actualize and legitimize its worldview. This TCC culture is lived and produced in the First World.").

self-determination in the case of indigenous peoples, and second, the consolidation of power by postcolonial states, which has marginalized indigenous communities. Both these factors have significant implications for the protection of TK, and this section of the paper will explore them in detail. These reasons were both enabled (and facilitated greatly) through three interrelated processes that have been discussed across the earlier sections.[130] The first was the colonial encounter, where European powers imposed Western legal and political frameworks on indigenous and tribal communities to legitimize their conquest of traditional lands in the Third world. This colonial legacy has underpinned the evolution of early international law and continues to shape contemporary international legal norms.

The second process was the preeminence of the nation-state entity in international law,[131] which has had a significant impact on the formation of allied legal concepts that support the sovereignty doctrine. Permanent sovereignty over natural resources, for instance, has been characterized as an integral aspect of sovereignty.[132] As a result, the "state-system" has become the dominant mode of institutional configurations, and becoming a state that is recognized to have sovereignty in the international political economy, is the price of entry into the international system.[133] This has translated colonial authority and power to postcolonial states in the Third World, with devastatingly adverse impacts on indigenous communities. The third process was the mainstreaming of neoliberal developmental logics enforced through structural adjustments in the economic frameworks of Third World states by international financial institutions as a precondition to receiving financial assistance from them (i.e., IFIs such as the IMF and World Bank).[134] Together these processes have contributed to the marginalization of indigenous peoples and their TK.

130. While all three interrelated processes have contributed to both the derecognition of political self-determination of indigenous peoples, only the second and third have contributed to the consolidation of power by postcolonial states in ways that are symmetric to colonial engagement with indigenous communities.

131. Samantha Besson, 'Sovereignty', (Max Planck Encyclopedias of International Law – OPIL, April 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472, (last visited 19 March, 2023).

132. Nicolaas Schrijver, *Self-Determination of Peoples and Sovereignty Over Natural Wealth and Resources*, in Realizing the Right to Development, 97, (2013).

133. In the case of Palestine, statehood has been viewed as a path to increased participation in and engagement with the international system. See, John Cerone, *The UN and the Status of Palestine – Disentangling the Legal Issues*, (ASIL, 2011) https://www.asil.org/insights/volume/15/issue/26/un-and-status-palestine-%E2%80%93-disentangling-legal-issues (last visited Apr 21, 2023).

134. *Supra* Note 50.

To understand the implications of both these factors on the protection regimes for TK that have emerged both nationally and internationally, it is first necessary to conceptualize what TK is, and what it means for indigenous and tribal communities. According to the WIPO, TK is "a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.[135] TK encompasses the innovations, know-how, and skills reflected in the cultural practices of indigenous communities. While characterizing TK, it is necessary to recognize traditional cultural expressions (TCEs), like music, folklore, literature, etc.[136] At an international level, two core pathways have emerged to regulate TK: The Nagoya Protocol, established under the framework of the CBD, and second, the negotiations currently underway before the WIPO IGCGRTKF. The Nagoya Protocol specifically governs access to genetic resources, and the fair and equitable sharing of benefits arising from their utilization (including TK). While negotiations at the WIPO have been stalled, formal sui generis regimes for the protection of TK are on the rise globally.[137] This demonstrates a global recognition of the importance of protecting TK and TCEs.

The rise of such sui generis legal regimes also reveals the reality that respecting and integrating inputs from the customary laws of indigenous communities is perhaps the appropriate way to address the problems that indigenous communities face. Customary law is a body of unwritten norms, rules, and practices established by long usage and which are recognized and enforced within a particular social setting.[138] Indigenous communities like the Māori tribes have robust governance arrangements, social structures, customs, and norms, that predate European settlement.[139] In the context of regulating TK, it is important to

135. World Intellectual Property Organization, Traditional Knowledge and Intellectual Property, No. 1, at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf, 1 (last visited 15 April 2023).

136. Ruth L. Okediji, *Grafting Traditional Knowledge onto a Common Law System*, 110 Geo. L.J. 75 (2021), 76–77. ("TCEs are an extension of TK that exist in communicative forms such as music, folklore, dance, language, and literature").

137. Id

138. World Intellectual Property Organization, Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues (2013), https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf (last visited Apr 15, 2023). ("custom" is a "rule of conduct, obligatory on those within its scope, established by long usage. established patterns of behaviour that can be objectively verified within a particular social setting").

139. Law Library of Congress, Legal Research Guide: Maori Customary Law (2019), https://tile.loc.gov/storage-services/service/ll/llglrd/2019670441/2019670441.pdf (last visited Apr 15, 2023).

recognize the interconnections between TK and the sustainable use of biodiversity. For example, Kaitiakitanga, which is grounded in Māori cultural values, practices, and knowledge, is an indigenous approach to guardianship and management of natural resources.[140]

While the cultural dimensions of TK have long been recognized in customary law (which is of considerably more value to indigenous communities),[141] and more accurately reflect the nuances of indigenous life, it is unclear whether treaty-based models are equally suited to protecting the claims of indigenous communities. This is especially problematic as these treaty models often highlight and prioritize the sovereignty doctrine to the detriment of indigenous peoples' political self-determination claims.[142] Furthermore, at a conceptual level, international approaches such as the Nagoya Protocol and the WIPO IGCGRTKF incorporate either rationalizations derived from IP law, or utilitarian justifications grounded in the logic of development and innovation.[143] Both of these approaches present some difficulties. The former represents a disconnect between private rights (that are typically conferred on the creator of the knowledge in question) and community-based ownership systems for indigenous communities. And there is also the risk that utilitarian justifications underlying these regimes may prioritize scientific development at the expense of indigenous interest particularly in the context of the widespread adoption of neoliberal developmental logics that have historically devalued indigenous peoples' rights.[144]

The second core reason for deficient TK protections, i.e., consolidation of power by postcolonial states, has been produced through the material processes (laid out at the beginning of this section). However,

140. *Supra* Note 69, at 40.

141. World Intellectual Property Organization [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 7th Sess., WIPO/GRTKF/IC/7/15 (Nov. 1–5, 2004).

142. Nagoya Protocol, pmbl ¶ 3 *See also*, Kristen A. Carpenter and Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 Calif. L. Rev. 188 (2014) ("states continued to resist indigenous self-determination, fearing that this might cause political destabilizations and trigger movements toward secession").

143. Id, *see* pmbl ¶ 5. *See* also *Supra* Note 136, at 83, ("familiar rationalizations derived from IP law, can only be awkwardly applied to TK. Likewise, a utilitarian rationale of the need to incentivize innovation offers a poor fit").

144. *Supra* Note 50; See also, contemporary Western discourse around the lack of vaccine access to the Global South being framed as a fight for the legitimately enshrined rights of pharmaceutical companies under the TRIIPS regime, Human Rights Watch, Seven Reasons the EU is Wrong to Oppose the TRIPS Waiver (June 3, 2021, 3:00 AM EDT), https://www.hrw.org/news/2021/06/03/seven-reasons-eu-wrong-oppose-trips-waiver#,%20Accessed%20on%201st%20April%202022.

at a more fundamental level, the fight for independence against colonial dominion necessitated consolidated power, for both political representation and systemic reform. However, the mechanics of this consolidation have perpetuated colonial developmental discourses that continue to undermine the rights of indigenous communities, including their right to TK. The colonizing powers developed policies aimed at creating hostility between people belonging to different identity groups across racial, ethnic, caste, linguistic, and religious lines, and the forced design of these divisions resulted in the stripping away of power. These policies are evidenced in Britain's policy of divide and rule,[145] (found in Major-General H.T. Tucker's memorandum, the Peel Report on army organization, and supplementary papers[146]).

Grassroots leaders fighting against these structures consequently gravitated towards political, cultural, and legal consolidation, but this came at a cost. The subsuming of significantly distinct cultures and societies under a common banner was (and is) an affront to the material and intellectual diversity of these traditions and cultures. The Indian National Congress, which led the fight for independence against British rule, played a crucial role in uniting various nationalist groups.[147] However, the INC's membership primarily comprising of upper-caste Hindus, adopted views that contributed to the marginalization of the specific interests of minorities,[148] particularly indigenous and tribal communities.

More conceptually, at the level of narratives, colonial assumptions of indigenous communities' separateness and the need to integrate and "develop" them to overcome their perceived backwardness and savagery are reflected in the discourses prevalent in the Indian Independence Movement, and consequently, the Constituent Assembly debates about the question of tribal rights and protections.[149] For instance, Prime Min-

145. Neil Stewart, *Divide and Rule: British Policy in Indian History*, 15(1) Sci. & Soc'y 49 (1951).

146. The Reorganization of the Army in India, 1859, Sess. II, Vol. 8 (UK).

147. Adnan Farooqui & E. Sridharan, *Can umbrella parties survive? The decline of the Indian National Congress*, 54, Commonwealth & Comparative Politics, 335, 2016 ("It emerged over six decades from 1885 to 1947 as an encompassing party in a very heterogeneous country because of its role as a mass party of the independence movement that sought to unite all Indians against British colonial rule, setting aside all other differences of class, ethnicity, religion, caste, language and region").

148. Sagarika Ghose, *The Dalit in India*, 70, Social Research, 95, (2003) ("B.R Ambedkar the leader of the Dalit movement in India provided a searing critique of the "enlightened high caste social reformers who did not have the courage to agitate against caste" Ambedkar believed that membership in the Congress would further enslave the Dalits)

149. Virginius Xaxa, *Tribes and Indian National Identity: Location of Exclusion and Marginality*, 23 The Brown Journal of World Affairs, 231, (2016), ("Greater India had

ister Jawaharlal Nehru in his letters to the Chief Ministers of newly independent India described tribal communities as having "never experienced a sense of being in a country called India", and "hardly being influenced by the struggle for freedom or other movements in India".[150] Even Gandhian approaches to the tribal question was to bring them into the fold of Hinduism.[151] The Advisory Committee on Fundamental Rights, Minorities, and Tribal and Excluded Areas went so far as to stipulate that the policy of having excluded areas/partially excluded areas for indigenous and tribal communities had little practical value in terms of development and suggested that the "strongest measures are now necessary, if hill tribes are to be brought up to the level of the rest of the population".[152]

As stated earlier, while sui generis systems to protect the TK of indigenous communities have been on the rise, the structural historical and political factors discussed herein have impeded the realization of their rights claims. Within international law, approaches have largely been treaty oriented and the two core pathways, i.e., both the Nagoya Protocol (established under the framework of the CBD) and the WIPO IGCIP-GRTKF negotiations currently underway bolster the sovereignty doctrine to the detriment of indigenous communities' self-determination claims.[153] By prioritizing rights of ownership that are ultimately subordinated to the state's sovereignty claims, the needs of indigenous communities such as demanding meaningful self-determination are not realized. In the case of the WIPO IGCIPGRTKF, there is even an express emphasis on the necessity for western neoliberal intellectual property rights regimes via attempts to provide patent protections to TK claims.[154]

---

come to perceive tribes as primitive, uncivilized, lazy, and hedonistic. Despite constitutional protection from exploitation and land alienation, in the dominant national discourse tribal issues have primarily been couched in terms of backwardness. Underdevelopment was routinely tied to the isolation of tribal communities, and hence their integration was viewed as a panacea for the problem").

150. Jawaharlal Nehru, *Letters to Chief Ministers, 1947–1964: 1952–1954*, Vol. 3, (Oxford University Press, 1987), 150.

151. Sanjukta Das Gupta, *Imagining the 'Tribe' in Colonial and Post-Independence India*, Politeja 107 (2019), 115 ("The idea of assimilation was propagated by all ranks of nationalist writers, from those espousing the cause of the Hindu cause to the Gandhians").

152. Id

153. S*ee* Nagoya Protocol pmbl ¶ 3; *see also* World Intellectual Property Organization [WIPO], *The Protection of Traditional Knowledge: Draft Articles - Rev.*, art. 4 (June 19, 2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tk.pdf [https://perma.cc/D5U8-NWJW] (national law can designate states as beneficiaries of the TK of indigenous and tribal communities).

154. *See* World Intellectual Property Organization [WIPO], *supra* note 153, at pmbl. ¶ 11.

II. Is There a Right to TK for Indigenous Communities – Customary International Law Approach

Through numerous soft-law instruments, such as the UN General Assembly Resolutions and Declarations, it is possible to establish a pattern of state and judicial practice, that supports the recognition of the right to culture. This Part shall demonstrate that the right to TK for indigenous communities can also be recognized within custom, via the principle of deduction.

A. Configuring the Right to Culture of Indigenous Communities within International Law

There are typically two different sources to establish the cultural rights of indigenous communities in the international human rights system. First, their right to culture is an aspect of their right to self-determination as contained in CIL and in common Article 1 of the International Covenants on Civil and Political Rights (ICCPR)[155] and the International Covenants on Economic, Social, and Cultural Rights (ICESCR).[156] Second, the right to cultural life in particular is recognized in treaties such as Article 15(1)(a) of the ICESCR[157] and Article 27 of the ICCPR (minority rights).[158]

1. Cultural Dimensions of Self-Determination Claims – Indigenous Communities

The Charter of the United Nations, the ICESCR, the ICCPR, and the Vienna Declaration and Programme of Action, all highlight the right to self-determination.[159] This includes the right to freely determine their political status, and pursue economic, social, and *cultural development* on their own terms. Additionally, the Human Rights Committee in General Comment 12 recognizes that the right to cultural development can be inferred from the inalienable right to self-determination provided for in common Article 1.[160]

155. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S, p. 171 Art. 1;

156. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3.

157. Id, *see* Art. 15(1)(a).

158. *Supra* Note 155, *see* Art. 27

159. U.N. Gen. Assembly, Vienna Declaration and Programme of Action, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993); Charter of the United Nations, ¶ 1(2), 55 Oct. 24 ,1945, 1 U.N.T.S. XVI (1945); *Supra* Note I55, I56.

160. U.N. HRC, 21st Sess., CCPR General Comment No. 12, (1984), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 12 ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

The International Court of Justice in *Nicaragua v. United States* has outlined the standard of proof required to deduce the existence of customary rules and has deemed it sufficient that the conduct of states should in general be consistent with such rules.[161] On the related question of what particular conduct constitutes state practice, the Court in *Congo v. Belgium* held that it can be inferred from examining material sources such as administrative acts, courts and activities on the international stage, and legislation.[162] The voting record of states then, at international fora, indicates that there is abundant state practice in favor of the right to culture as evidenced by near universal ratifications of the ICCPR and ICESCR.[163] However, even independent of the extensive support for these rights in treaty bodies, the International Court of Justice has clarified in the Case Concerning East Timor (Portugal v Australia) that the right to self-determination is certainly a precept of CIL.[164]

While the cultural aspects of the right to self-determination have been quite clearly laid out, the Human Rights Committee has stressed the distinction between Art. 1 of the ICCPR, and Art. 27 which recognizes the cultural rights of minorities in its 23rd General Comment.[165] However, in clarifying the scope and bounds of culture, the Committee emphasized that it can include activities that constitute a way of life, which emerge from the special relationship that indigenous communities share with their land resources.[166] The recognition of the special positionality of resource use by indigenous communities impliedly constitutes a realization of the necessity to protect TK given the use of TK in natural resource management. This reading is supported by the report of Special Rapporteur James S. Anaya which stresses the importance of cultural properties and goods to indigenous communities in furtherance of their right to a culturally specific way of life.[167]

161. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 186 (June 27).

162. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J Rep. 3, 24–25 (Feb. 14).

163. OHCHR Dashboard, https://indicators.ohchr.org (last visited Apr 22, 2023). 173 and 171 ratifications for the ICCPR, and ICESCR.

164. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 29 (June 30).

165. General Comment No. 23: Article 27 (Rights of Minorities), CCPR, CCPR/C/21/Rev.1/Add.5 (1994).

166. Id, *see* ¶ 7

167. James Anaya et al., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J., 11 (2001).

2. Particular Formulations of Cultural Rights – ICESCR & ICCPR

Both the ICCPR, and the ICESCR, in Articles 27 and 15(1)(a), while providing for cultural rights, conceive(d) of distinct forms of culture. While the former stresses both an identarian and anthropological way of life, with special emphasis on minorities and indigenous communities,[168] the latter was aimed at conceiving of culture in a more material sense for everyone (regardless of their status as a minority/indigenous person).[169] However, the normative content of culture as understood by both these treaties, has undergone a progressive arc to become more representative of the practical realities of people.[170] While earlier conceptions of cultural rights sought to defend cultural products of a more classically highbrow mold, trends have shifted considerably towards the adoption of more egalitarian definitions of culture.[171]

To that effect, treaty bodies (i.e., the Human Rights Committee the Committee on Economic, Social, and Cultural Rights) and legal scholars alike have adopted anthropological conceptions of culture, which emphasize the importance of protecting the way of life of communities (particularly minorities and indigenous communities).[172] Support for conceiving culture as a way of life (i.e., the anthropological approach to culture) was documented in strong terms. T he CESCR unequivocally declared that culture is, "a world view representing the totality of a person's encounter with the external forces affecting his life, and that of his community".[173] It is worthwhile to note that the committees have articulated the obligations of States parties to the ICESCR quite exten-

168. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehlam. Rhein, Arlington, Engle Publishers, 2005)

169. General Assembly, *General Assembly Official Records*, 12th Session, 3rd Committee, 796th Meeting, (UN Doc. A/C.3/sr.795) New York: United Nations, 1957b

170. UNESCO, Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, 1976 Doc. 19 C/Resolutions, Annex 1, https://en.unesco.org/about-us/legal-affairs/recommendation-participation-people-large-cultural-life-and-their, (last visited March 31, 2023).

171. Id

172. A commonly found definition of culture as conceived of by Art. 27 of the ICCPR, and Art. 15 of the ICESCR, recognizes 15 of the ICESCR, recognizes that culture can include, "a coherent self-contained system of values and symbols that a specific cultural group reproduces over time, and which provides individuals with the required signposts and meanings for behavior and social relationship in everyday life". *See*, Marcella Ferri, *The Recognition of the Right to Cultural Identity Under and Beyond International Human Rights Law*, 22, The Journal of Law, Social Justice & Global Development, 2–7 (2018).

173. CESCR, General Discussion on the Right to Take Part in Cultural Life as Recognized in Art. 15 of the Covenant (UN Doc. E/C/12/1992/SR.17), Geneva: United Nations.

sively. General Comment No. 21 recognizes that access to these ways of life that are crucial to the preservation of the cultural rights of indigenous communities is a fundamental condition to assure effective and active participation in cultural life. The CESCR has issued guidelines to states requiring them to take measures to protect the cultural diversity of minorities and indigenous communities.

In the context of the ICESCR, it is important to construct the cultural dimensions of indigenous communities' self-determination claims by interpreting common Article 1 conjunctively with Article 15(1)(a), as it specifically provides for the right to culture.[174] Article 15(1)(a) of the ICESCR recognizes the right of everyone to take part in cultural life.[175] The Committee on Economic, Social, and Cultural Rights noted that Article 15(1)(a) is closely connected to other aspects of cultural rights in the ICESCR including, specifically, the right to enjoy the benefits of scientific progress and its application.[176] The Committee also recognizes the interconnectedness between Article 15(1)(a) of the ICESCR, Article 27(1) of the Universal Declaration of Human Rights, and common Article 1 of the ICESCR.[177] In the context of indigenous communities, the 21st General Comment recognizes that their cultural values and rights are deeply associated with their ancestral lands, resources, and their relationship with nature.[178]

In the context of the ICCPR, Article 27 stipulates that the cultural and religious rights of ethnic, religious, or linguistic minorities shall not be denied.[179] Many of the important cases before the Human Rights Committee recognizing the collective rights of indigenous communities concern the application of Article 27 of the ICCPR in the context of indigenous and tribal peoples.[180] General Comment No. 23, in that regard, clarifies that the scope and effect of Article 27 differs from that of common Article 1, to the extent that the latter expresses rights belonging to a people, whereas the former relates to rights conferred on

174. U.N. CESCR, 43rd Sess., General comment No. 21, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

175. *Supra* Note 156, *see* Art. 15(1)(a).

176. *Supra* Note 174, *see* ¶ 2

177. Id, *See* ¶ 3

178. *Id.* ¶ 36

179. *Supra* Note 155, *see* Art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language").

180. *Infra* Note 190, *see Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, 149 (Aug. 31, 2001)*

individuals.[181] However, in paragraph 6.2, it does stipulate that while the rights protected under Article 27 are individual in nature, they are wholly dependent on the ability of the group to maintain its cultural practices.[182]

However, the group's ability to preserve and maintain its cultural practices is contingent on states enacting positive measures that facilitate the creation of an environment that allows the minority community to protect its culture and religion.[183] Moreover, in paragraph 3.2, the Committee even notes that for members of indigenous communities constituting a minority, the right to participate in cultural life is closely associated with their territory and use of its resources.[184]

The Human Rights Committee demonstrated an unwillingness to consider allegations of the denial of the right to self-determination in part due to the political character of such claims.[185] While it did reinforce the importance of self-determination in Mikmaq and other cases such as *Ominayak v. Canada*, the Committee relied on the argument that collective claims of a people are connected to Article 1, which is a collectively-asserted right that persons using the largely individual petition mechanisms are unsuited to address.[186] However, while refusing to address Article 1 violations, the Committee did not wholly exclude the possibility of collective claims under the individual complaint structures set up pursuant to the ICCPR (specifically, potential issues raised under Art. 27).[187] It held that it could consider collective human rights violations insofar as they were "class action" complaints representing similarly situated individuals.[188]

In a global landscape increasingly marked by cases of biopiracy, indigenous communities are increasingly at risk of community disarticulation, landlessness, and resource theft.[189] To that effect, it is necessary to construct collective protections for these communities, particularly those in the Global South, as has been recognized by regional human

181. *Supra* Note 165

182. *Id.* ¶ 6.2.

183. *Id.*

184. *Id.* ¶ 3.2, n. 2.

185. Mary Ellen Turpel, *Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 Cornell Int'l L.J. 579 (1992).

186. Human Rights Comm. Dec. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984, ¶ 13.3(Mar. 28, 1990).

187. Id, *see* 13.4

188. *Supra* note 185; note 64

189. John Reid, *Biopiracy: The Struggle for Traditional Knowledge Rights*, 34 Am. Indian L. Rev. 77, 78 (2009).

rights courts. Both the Inter-American Court and the Inter-American Commission of Human Rights have held on numerous occasions that indigenous peoples possess a collective right of ownership over their land, property, and resources.[190] The underlying global neoliberal and neocolonial currents of power emanating from the First World that were discussed in the previous section are in fact responsible for the large-scale degradation of the economic, social, and cultural rights. Cold-war era politics and the unequal geographical distributions of power produced the bifurcation of an indivisible and interdependent human rights framework, into two branches, namely civil and political rights, and ESCRs.[191] A unified normative vision was cleaved into two treaty-based frameworks that largely represent the political, cultural, and ideological imprint of two powerful nation-states (the United States, and the USSR). This stratification has been responsible for the reduction of ESCRs to second-generation rights.

The inadequate global acknowledgement of and commitment to ESCRs is evident in the low-ratification record for the Optional Protocol, which would make available individual communications procedures under the ICESCR, through which complaints against the State can be made.[192] The ICESCR, unlike the ICCPR, expressly recognizes the role of international assistance and cooperation in realizing ESCRs. This is because the former grew largely out of a Global South-USSR recognition that equality would demand a far greater redistribution of resources.[193] This, however, did not materialize, and while the ICE-

190. Courts held such in *Yanomami v. Brazil, Mary and Carrie Dann v. United States*, and perhaps most prominently, the *Awas Tingni*, and *Lansman, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, 149 (Aug. 31, 2001); Lansman et al. v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994); Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, ¶ 128 (2002); Yanomami Community v. Brazil, Case 7615, Inter-Am. Comm'n H.R., Res. No. 12/85, ¶ ¶ 3, 7 (1985).*

191. Sally-Anne Way, *The "Myth" and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 "United States Suggestions for Articles to be Incorporated in an International Bill of Rights"*, 36, Hum. Rts. Q., (2014), 869–70 ("many scholars writing on international human rights have long contended, for very different reasons, that economic, social, and cultural rights were only included in the 1948 Universal Declaration of Human Rights because Third World countries insisted on, and achieved in collaboration with socialist countries at the time, recognition of individual economic, social, and cultural rights").

192. *Supra* Note 163

193. Natsu Taylor Saito, *Considering "Third Generation" International Human Rights Law in the United States*, 28, U. Miami Inter-Am. L. Rev., (1997), 395 ("Advocates of second generation rights argue that, by themselves, freedom of speech or the right to vote matter little to people who are starving. Their view is that those who control wealth and power do not want to acknowledge the right to adequate food, shelter, medical care, or jobs because

SCR does not encode for reparations, its commitment to its conception of international cooperation is nevertheless transformative. This commitment has been crystallized during an era of shifting global currents towards neoliberal institutional transformations which have occurred at the First World's insistence during the Second Moment. There is overwhelming consensus that the neoliberal wave has weakened important ESCRs, such as the right to water and sanitation.[194] The First world's successful efforts at coercive institutional redesign both in the First and Second Moment have consequently entailed a prioritization of CPRs, due to their compatibility with market-oriented reforms that neoliberal policies required.[195]

B. Transnational Corporations and Extraterritoriality of Human Rights Obligations

The pre-eminence of the nation-state entity in international law has greatly impacted the formation of allied legal concepts that collectively serve to support the sovereignty doctrine. First, the constraining of jurisdictional authority territorially helped ossify narratives that states owe a duty of care only to acts committed within their borders.[196] Second, jurisdictional authority has been largely sequestered to those cases where states possess effective control over the area, or other individual respectively.[197] It is important to contextualize the extraterritorial character of the obligations contained in both the ICCPR and ICESCR in light of the actions of transnational corporations situated disproportionately in the Global North. With regards specifically to the ICCPR, the Human Rights Committee has consistently upheld its extraterritorial

such acknowledgement could entail a redistribution of resources, either within a nation or between nations").

194. Third Committee, General Assembly, World Altered by Neoliberal Outsourcing of Public Services to Private Sector, Third Committee Experts Stress, amid Calls for Better Rights Protection, GA/SHC/4239, 19th October 2018, Seventy-Third Session, 25th and 25th Meeting, *The United Nations*, Available at: https://www.un.org/press/en/2018/gashc4239.doc.htm, (last visited, 28 March 2023)

195. In fact, the devastating manner in which ESCRs are systematically violated (and the disconnect between civil and political rights, and economic, social, and cultural rights) was noted in quite powerful terms by the CESCR at the Vienna World Conference in 1993, "*The shocking reality . . . that States and the international community as a whole continue to tolerate all too often, breaches of economic, social, and cultural rights, which – if they occurred in relation to civil and political rights would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action" See*, Committee on Economic, Social, and Cultural Rights, Report on the Seventh Session, Supp No. 2 E/1993/22, Annex III, para 5 and 7,

196. *Supra* Note 131

197. Tilmann Altwicker, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, EJIL, 29, 581–606, (2018).

basis arguing that the state's jurisdictional ambit extends its territorial limits. In *Burgos/Lopes v. Uruguay*, the Committee reasoned that, "it would be unconscionable to interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[198] Notably, the United States differs on this interpretation and contrarily holds that the affected person ought to be both within the territory of the state and subject to its jurisdiction.[199]

However, it is important to recognize that the International Court has concurred with the Committee in its Advisory Opinion on *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*.[200] The International Court of Justice took note of the view of the Committee's concluding observations, where it held that the "provisions of the Covenant apply to the benefit of the population of the Occupied Territories insofar as the State party's [Israel's] conduct in those territories affects the enjoyment of rights enshrined in the Covenant."[201] The Committee cemented this position in General Comment 31, where it held that a State Party ought to respect Covenant rights in respect of all peoples (and not merely citizens of States Parties) regardless of whether they find themselves situated within the State's territorial limits.[202] This position is qualified by the requirement that the affected parties ought to be under the effective control of the State Party.[203]

Therefore, in the context of cultural rights of indigenous communities, it is important to explore the linkage between transnational corporations that violate cultural rights extraterritorially and the First World States in which they are typically incorporated. In the case of the ICESCR, the argument for extraterritoriality is stronger given that, unlike the ICCPR, there is no mention of territory and jurisdiction in

198. Burgos/Delia Sadias de Lopez v. Uruguay, Communication No. 52/1979 U.N. Doc. CCPR/C/OP/1 at 88 (1984).

199. Beth Van Schaak, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90, Int'l L. Stud. 20, 60, (2014).

200. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109–112

201. *Id.* at 110 (citing UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Israel*, 21 August 2003, ¶ 11, U.N. Doc. CCPR/CO/78/ISR).

202. *See* UN Human Rights Comm. (HRC), General comment no. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004).

203. Id

provisions laying out the scope and application of the treaty.[204] Additionally, the preamble references Articles 55 and 56 of the UN Charter, using language such as "to promote universal respect for, and observance of, human rights and freedoms." Given the formulation of Article 2(1), it is clear the international community as a whole is possessed of the duty to cooperate in the realization of ICESCR rights.[205] Further, the obligation to respect has an extraterritorial character as supported by the observations of the ICESCR in General Comment No. 24.[206]

The interpretations of responsibility under regional human rights courts like the European Court of Human Rights, and the Inter-American Court of Human Rights provide valuable insights in conceiving of extraterritorial responsibility. The European Court has articulated a helpful doctrine: the spatial model of jurisdiction (de facto effective control) in the Loizidou case.[207] In fact, the ICJ applied the doctrine in its judgment in the Armed Activities on the Territory of the Congo case.[208] The approach is such that if a state exercises control over the territory of another state in ways that it replicates the extent of control it possesses over its own territory, it is necessary for human rights obligations to flow towards the host-state territory's jurisdiction as well.[209] To that effect, the jurisprudence of the Inter-American Court is also helpful, as the Court held that a State could be in infringement of its duty to prevent such violations from occurring even if there is no causally attributable link to the state's commission of the violation.[210]

204. *See* G.A. Res. 2200A (XXI), at ¶ 1 (Dec. 16, 1966) (entered into force Jan. 3, 1976).

205. *Supra* Note 156, *See* Art. 2(1), "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".

206. U.N. Comm. On Econ., Soc. and Cultural Rights, General Comment No. 24, on Its Sixty-First Session, U.N. Doc. E/C.12/GC/24 (2017).

207. Loizidou v. Turkey, 1996–1 (Merits) Eur. Ct. H.R (1995), 221, para 52 ("the responsibility of a Contracting Party could also arise when as a consequence of a military action – whether lawful or unlawful – if it exercises effective control of an area outside of its territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, or through a subordinate local administration")

208. Marko Milanovic, Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age, 56 HARV. INT'L L.J. 81, 111–18 (2015) ("The ICJ likewise found the ICCPR to apply during occupation in the Wall and Congo v Uganda cases").

209. Id

210. *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988, para 174, 175, 177

Several prominent medical developments that have been patented in the western world have originated from the stewardship and knowledge of indigenous communities.[211] Approximately forty per cent of pharmaceutical products in use, are derived from natural substances, which Neem leaves and seeds, for instance, have been used historically by indigenous farmers in India to treat skin disorders and as natural insecticides.[212] And despite such established customary usage, patents have been granted by the United States for products derived from neem trees with identical end-uses.[213] Treatment for malaria, certain cancers, and schistosomiasis are just a few instances of the traditional-medicine of indigenous communities being appropriated by predominantly Global North actors.[214] In a world characterized by strong globalizing flows, the conferral of intellectual property rights to transnational corporations that have appropriated the TK of indigenous communities creates devastating consequences by virtue of the theft that it legitimizes the IP rights of corporations via both global and national legal processes, but also by virtue of the fact that this presents a financial incentive for corporations to seek scientific advancement at the cost of the rights of indigenous communities over their TK. Therefore, the mere fact of the First World States not being directly responsible for the degradation of the TK of indigenous communities, and the outsourcing of these harms to transnational corporations ought not inhibit the ascription of liability, especially in light of the relaxed standards of establishing responsibility for internationally wrongful acts that judicial bodies have interpreted.

211. *WHO establishes the Global Centre for Traditional Medicine in India*, https://www.who.int/news/item/25–03–2022-who-establishes-the-global-centre-for-traditional-medicine-in-india (last visited Apr 15, 2023). (" the discovery of aspirin drew on traditional medicine formulations using the bark of the willow tree, the contraceptive pill was developed from the roots of wild yam plants and child cancer treatments have been based on the rosy periwinkle. Nobel-prize winning research on artemisinin for malaria control started with a review of ancient Chinese medicine texts").

212. Sandy Tolan, *Against the Grain: Multinational Corporations Peddling Patented Seeds and Chemical Pesticides Are Poised to Revolutionize India's Ancient Agricultural System But At What Cost?*, L.A. Times (July 10, 1994), https://www.latimes.com/archives/la-xpm-1994–07–10-tm-14043-story.html [https://perma.cc/6PPS-994V].

213. Gurdial Singh Nijar, Traditional Knowledge And Intellectual Property: Options for Developing Countries, 6–7, (AIPPI Malaysia, 2006).

214. Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 Michigan J. Int'l L. 919, 921–26 (1996).

C. Deriving Traditional Knowledge Protections from the Right to Culture

1. The Connection between the Right to Culture and TK-Protections

The Committee on Economic, Social, and Cultural Rights has observed in General Comment No. 21 that the right to participate in cultural life is composed of certain necessary elements and that it was incumbent on states parties to respect the cultural productions of people.[215] To that effect, there are several instruments in international law that highlight the connection between the right to culture and TK. For instance, the inclusion of TK under the broader umbrella of cultural goods has been confirmed by the Conference of Parties[216] to the Convention on Biological Diversity in decision X/42, that adopted The Tkarihwaie:ri Code of Ethical Conduct.[217] The Tkarihwaie:ri Code is a set of guidelines created by the Mohawk community in Canada to govern the collection, use, and dissemination of their TK.[218] Both the Tkarihwaie:ri Code and other key instruments like the Akwé:Kon Guidelines[219] emerged from the CBD processes: deliberations by the Conferences of the Parties meetings, and the Subsidiary Body on Technical and Technological Advice, established under the framework of the CBD.[220] The Tkarihwaie:ri Code is directly relevant to the central question of this paper, i.e., to develop approaches that protect the TK of indigenous peoples. The Code prescribes ethical principles that both governments, and the private sector (including research institutions, and educational institutions) should follow while working with indigenous communities and their natural resources while they conduct scientific research.[221]

215. *Supra* Note 174.

216. The Conference of Parties (COP) is the governing body of the CBD. It is composed of representatives from all countries that have ratified the CBD and meets every two years to review the implementation of the Convention, and make decisions on its future work. It has the power to adopt protocols, guidelines, and decisions that aim to achieve the objectives of the CBD.

217. *See* U.N. Conference of the Parties to the Convention on Biological Diversity, *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting*, U.N. Doc. UNEP/CBD/COP/DEC/X/42 (Oct. 29, 2010).

218. Nicole Schabus, "Traditional knowledge," in Elgar Encyclopedia of Environmental Law, 268. (Edward Elgar Publishing 2017),

219. Secretariat of the Convention on Biological Diversity, Akwé: Kon Guidelines, at https://www.cbd.int/doc/publications/akwe-brochure-en.pdf (last visited Apr 15, 2023).

220. *Supra* Note 218, at 269, 270.

221. *Supra* Note 217, see ¶ 3, and ¶ 5.

The Akwé:Kon Guidelines have been a transformative tool for the protection of traditional knowledge, the promotion of the right to Free, Prior, and Informed Consent of indigenous communities, and reshaping impact assessments.[222] The Guidelines represent a proactive approach to ensure knowledge and concerns of indigenous peoples are considered from the earliest stage of scoping a proposed development to the final decision-making stages, institutionalizing the FPIC concept.[223] The Guidelines offer a robust conception of impact assessments conducted in conjunction with developmental projects, and emphasize the need to integrate cultural, environmental, and social impact assessment processes, expanding their overall scope. And in that regard, para 43 of the Guidelines clarifies the elements that are required to conduct social impact assessments in meaningful ways, highlighting important factors such as baseline studies that establish the community's way of life, generational considerations, effects on social cohesion, and the possible impact on access to biological resources for livelihoods.[224] These voluntary guidelines have been adopted by the Conference of Parties to the CBD. Additionally, the Akwé:Kon Guidelines and the Tkarihwaie:ri Code have had a significant impact on the international community's approach to traditional knowledge protection, as certain key principles and recommendations have been reflected in important international agreements such as the Nagoya Protocol.[225] This reflects a growing recognition of the importance of indigenous perspectives and approaches to TK protection.

After a series of drawn-out negotiations, the General Assembly adopted the United Nations Declaration on Indigenous Peoples, which is a comprehensive articulation of the rights of indigenous peoples.[226] Particularly, by holding that indigenous peoples have the right to maintain, control, protect, and develop intellectual property over their cultural heritage, TK, and traditional cultural expressions, Article 31 is a strong endorsement of the cultural rights of indigenous communi-

222. *Supra* Note 219, see guideline 17, 29, 52

223. *Supra* Note 218, see guideline 53, ("Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities").

224. *Supra* Note 219, see guideline 43

225. *Supra* Note 5, see Art. 7 of the Nagoya Protocol: Each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

226. *See* U.N. Human Rights Off. of High Comm'r, Realizing the Right to Development, at 95–102, HR/PUB/12/4, U.N. Sales No. E.12.XIV.1 (2013).

ties.[227] In light of the fact that upwards of 140 nations have adopted the UNDRIP it is reasonable to deem TK as being a constitutive component of the culture of indigenous and tribal communities.[228] In configuring the normative content of TK, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is useful. Its eighth preambular paragraph recognizes the importance of TK as a source of intangible and material wealth, through contributions to both the knowledge systems of indigenous peoples and to sustainable development[229] Additionally, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage establishes the superset-subset relationship between culture and TK. Article 2 expressly outlines the spheres in which intangible cultural legacy is found and includes "knowledge and practices related to nature and the universe."[230] Therefore, it is clear that TK protections *can* be normatively subsumed under the cultural rights of indigenous communities.

2. Using the Principle of Deduction

CIL refers to the unwritten and non-codified norms and practices that have emerged over time through consistent and widespread state practice and are understood to be legally binding obligations by the international community.[231] The core aspects of the definition of custom in public international law can be found in Article 38 of the Statute of the ICJ.[232] The criteria for a norm governing a specific practice, to evolve to the status of CIL are two-fold: a) material facts, i.e., the actual state practice that constitutes the content of the customary rule in question, and b) the subjective belief of states that the practice is legally obligatory (i.e., what is referred to as opinio juris).[233] There are largely two approaches to establish custom, i.e., the principles of induction and deduction. The ICJ offers some guidance in the Case Concerning the Continental Shelf (Libya/Malta), on how to interpret

227. *Supra* Note 89, see Art. 31.

228. United Nations Digital Library, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, https://digitallibrary.un.org/record/609197?ln=en, (last visited March 31, 2023).

229. The General Conference of the U.N. Educational, Scientific and Cultural Org., *Convention on Protection and Promotion of Diversity of Cultural Expressions* (Oct. 20, 2005).

230. U.N. Media Kit, 2003 Convention for Safeguarding of Intangible Cultural Heritage, Sixth Session of Intergovernmental Committee for Safeguarding of Intangible Cultural Heritage, at 7 (Nov. 2011).

231. *Supra* Note 18, see 125–29

232. Id

233. Malcolm N. Shaw, International Law (6th ed., Cambridge University Press, 2008), 74.

its own methodology in determining whether a norm is elevated to the status of CIL. In para 27 of the judgment, the Court holds that, "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[234]

The ICJ's view demonstrates a hierarchy of methodologies, through its clear preference for approaches that examine the empirical record of state behaviour (i.e., inductive approaches), over the use of legal reasoning to derive or develop rules of CIL. This stance of the court in the Libya/Malta case is no outlier and the general practice tends towards tests of induction.[235] In *Gulf of Maine*, the Chamber of the Court held that customary rules *can be* tested by induction based on recourse to state practice, and not by deduction from preconceived ideas.[236] Talmon, who analyzed the methodology of the ICJ, notes however, that the use of the words, "can be," as opposed to "is," indicates that it is possible to establish customary rules through deduction.[237] This interpretation is consistent with the ICJ's practice: In the Jurisdictional Immunities of the State case, the court held that State immunity could be derived from the principle of the sovereign equality of States. He has also identified four situations where deductive reasoning is better suited than induction,[238] of which one particular context, (i.e., when there is a discrepancy between state practice and opinio juris) is potentially applicable in the context of indigenous peoples and their rights to TK.

To that effect, in the *Nicaragua* case, the Court demonstrated that the principle of non-intervention was custom, not by recourse to state practice (given the overwhelming evidence in favour of state interventions), but by deduction from the principle of sovereign equality of states.[239] The common factor across both the above cases, is

234. Case Concerning the Continental Shelf (Libyan Arab Jamahriya/Malta), 1985 I.C.J. Reports, 13, ¶ 27.

235. Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 The Eur. J. of Int'l Law, 417, 421 (2015).

236. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S..), Judgment, 1984 I.C.J. 246, ¶ 111 (Oct. 12).

237. *Supra* Note 235, *see* 418

238. Id, *see* 422

239. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27) https://www.icj-cij.org/public/files/case-related/70/070–19860627-JUD-01–00-EN.pdf

that these new rules have been derived from axiomatic principles such as sovereignty, and sovereign equality. As the previous section demonstrates, self-determination and its cultural dimensions especially for indigenous communities has similarly acquired a significant positionality that is worth preserving in international law. Similarly, there are plenty of examples of corporations (including across transnational lines of engagement) appropriating the TK of indigenous communities.[240]States then are co-contributors to the extent that they engender an ecosystem conducive to such rights violations in both positive and negative respects.

Positively, First World States reward such conduct through the conferral of patent rights to such corporations[241] and actively dilute the procedural rights and requirements for free, prior, and informed consent.[242] Negatively, they actively refrain from creating robust structures that recognize the communities as collective right-bearers of the intellectual property derivable from their traditional knowledge.[243] As such, the inability to establish a consistent stream of state practice in favour of free, prior, and informed consent, or collective IP rights for the TK claims of indigenous communities, ought not inhibit the development of custom. From the above discussion, it is possible to deduce that traditional knowledge claims of indigenous peoples ought to be protected under CIL:

P1: The right to culture is recognized within treaty & customary law, in the context of indigenous peoples.

P2: The right to culture includes the right to access TK for indigenous communities and has been recognized as such in treaty law, and custom.

C1: The TK of indigenous communities is protected under CIL.

D. Evaluating the Limitations of Treaty-Based Approaches in Safeguarding the Rights of Indigenous Peoples.

This Part shall consider different reasons for the international community's pursual of treaty-based protections within the COP-CBD, and at the WIPO. Investigating the prescriptions of the Nagoya Protocol, and its limitations in particular, offers deeper insights into the

240. *Supra* Note

241. *See supra* note 214

242. *See generally* Martin Papillon, et. al., *Free Prior and Informed Consent: Between Legal Ambiguity and Political Agency*, Int'l J. on Minority and Group Rights (Mar. 15, 2020).

243. The Nagoya Protocol does offer a framework through which access and benefit sharing mechanisms can be constructed. The next section shall describe the ways in which the legal framework is an insufficient safeguard against the threat of appropriation of TK.

preference of nations to enter into treaties, and help contextualize bases for the lack of recognition in CIL. The design features of treaty regimes can offer states a greater degree of flexibility in the construction of obligations. While not all states can exert the same degree of influence in the treaty making process, countries can register their reservation to the specific provision and it will not apply to the reserving nation.[244] And in some contexts where reservations are not permitted (as is the case with the Nagoya Protocol), treaty provisions are often diluted with hortatory language to incentivize a great majority of states to co-opt into such frameworks.[245]

While the operative provisions of the Nagoya Protocol certainly do use binding language, it is useful to recognize that the Nagoya Protocol is an additional protocol to the CBD and builds upon it.[246] While the CBD provides the overarching legal framework for the conservation and sustainable use of biodiversity, the Nagoya Protocol focuses specifically on access and benefit-sharing related to genetic resources, specifically, TK. Article 7 of the Nagoya Protocol provides that States Parties have the obligation to take measures, as appropriate with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with their prior and informed consent or approval and involvement, on mutually agreed terms. Prior to assessing some of its deficits that render several of its substantive protections recommendatory, it is worthwhile examining the ways in which it can be instrumentalized to offer remedies to indigenous communities.

In that regard, the obligation to obtain prior informed consent, or approval and involvement are significant developments, given the presence of these terms in the CBD,[247] other related international agreements,[248] the UNDRIP,[249] and their elaborations in important judicial decisions that specifically address their usage in an environmental context.[250] As such, there is credible support in favour of free prior and informed consent (FPIC) being a part of the corpus of international

244. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S., 331, Article 19.

245. Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27 The Eur. J. of Int'l Law 353, 363 (2016).

246. *Supra* Note Nagoya Protocol, pmbl para 2

247. *Supra* Note CBD, see Art. 15(5) However, here the PIC requirements are with the Contracting Party

248. Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 6 (2)

249. *Supra* Note UNDRIP, Art. 10

250. *Supra* Note Saramaka People v Suriname, see 137

law, given that its normative framework consists of several international legal instruments such as the UNDRIP, ILO 169, CBD, and other important human rights treaties such as the ICCPR, and the ICESCR.[251] In fact, the Human Rights Committee and the Committee on Economic, social and Cultural rights that monitor the compliance of States Parties to the ICCPR, and ICESCR, have interpreted these covenants as requiring FPIC as an expression of self-determination.[252] These interconnections are evident given the use of FPIC as a precondition to the meaningful exercise of self-determination, as the right to self-determination necessarily requires the ability (of indigenous peoples) to freely pursue their economic, social, and cultural development. Their agency is severely constrained when actions that displace their genetic resources, and the TK emanating from their relationship with the same are undertaken without the consent and approval of indigenous communities.

Article 4 of the Nagoya Protocol expressly affirms that it does not intend to create a hierarchy between itself and other international instruments.[253] In fact, it specifies that its implementation shall be in a mutually supportive manner with other international instruments that are relevant to the Protocol, and even affirms the need to be attentive to the practice and work under other relevant international instruments (insofar as they are not in conflict with the objectives of the CBD and Protocol).[254] This poses many problems for the TK that has been appropriated unjustly by corporations due to the complementary recognition of intellectual property agreements (such as extant patent rights) over TK (especially traditional medicine) and TCE. To that effect, it is important to acknowledge the ways in which the Nagoya Protocol relates to the features of intellectual property rights systems. Article 7 of the Protocol read in conjunction with Article 4, seems to suggest that the Protocol does not impact existing intellectual property rights agreements.[255] There is good reason to consider these agreements as being inconsistent with TK claims, as the Agreement prescribes that novelty, non-obviousness, and the capability of industrial application, are what

251. Food and Agriculture Organization of the United Nations, Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities, at https://www.fao.org/3/i6190e/i6190e.pdf (last visited Apr 15, 2023), 11.

252. *Id.*

253. *Supra* Note 5, *see* Art. 4 of Nagoya Protocol.

254. *Id.*

255. Thomas Greiber, An Explanatory Guide to the Nagoya Protocol on Access and Benefit sharing (IUCN 2012), https://portals.iucn.org/library/efiles/documents/eplp-083.pdf, 114.

determine the patentability of inventions. This is so, given that TK can be publicly available, and the knowledge in question may be old and non-novel in that sense.[256]

Additionally, while TK claims do not have a stipulated term limit upon whose completion, the rights of the community are extinguished, intellectual property rights typically relinquish their claims once the time period of protection elapses. The WIPO IGCGRTKF is engaged in the process of drafting an instrument containing intellectual property rights that are specifically designed to address TK claim, and it may very well be consistent with the Nagoya Protocol in many ways. However, the caveats provided for in Article 4(1) and 4(2), i.e., "causes serious damage or threat to biological diversity", and "not run counter to the Objectives of the CBD, and the Protocol"[257] quite clearly subordinate the intrinsic cultural and religious value of TK, and purely focus on TK as an integral aspect of protecting the biodiversity of regions populated by indigenous and local communities. Therefore, if patent protections have been or are accorded to drugs that were produced through the appropriation of TK, but in a manner that does not threaten the region's biodiversity, or the CBD and Protocol's objectives, the state in the interests of prioritizing scientific advancement[258] may recognize and legitimize such intellectual property arrangements. The State's decisional sovereignty to determine its own approaches to these issues is made possible through the use of specific qualifiers in Art. 7 that shall be discussed below.

While the use of binding terminology such as 'shall' certainly does offer hope for the creation of access and benefit sharing mechanisms that benefit and affirm the special relationship that indigenous peoples share with both genetic resources and the TK that emanates from their usage, the inclusion of qualifiers such as, "as appropriate", "with the aim of ensuring", and "in accordance with domestic law" severely limit the applicability of the Convention in meaningful ways. First, the fact that States shall only take measures "as appropriate" implies that

256. *Id*., *see* 115.

257. *Supra* Note 5, see Art. 4 of Nagoya Protocol.

258. Ranjan Gupta, Bjarne Gabrielsen & Steven M. Ferguson, *Nature's Medicines: Traditional Knowledge and Intellectual Property Management. Case Studies from the National Institutes of Health (NIH), USA*, 2 Curr Drug Discov Technol 203 (2005). ("Despite the fact that several drugs are plant-derived compounds, for a number of years there had been a decline in the use of natural products as starting materials for drug discovery. The lack of interest in utilizing natural resources can be partly attributed to access (concerns) to natural/genetic resources and intellectual property (IP) issues while working across nations and cultures").

States are under no general obligation to take measures.[259] Additionally, this phrasing (i.e., "as appropriate") in conjunction with the caveat, "in accordance with domestic law" clarifies that the State is free to determine what sorts of measures are most suited to satisfy the identified needs of indigenous and local communities.[260]

Contrastingly, the Protocol treats the voluntary codes of conduct and guidelines such as the Tkarihwaie:ri Code and the Akwé:Kon Guidelines, at a relegated position, by requiring States to merely encourage the use and development of guidelines, best practices, standards and codes of conduct.[261] Additionally, they conceive of these precepts derived from the customary legal practices of indigenous communities as merely modes of raising awareness[262] and sharing information.[263] This subordinates the decisional sovereignty of indigenous communities to the broader legal framework of the state i.e., "in accordance with domestic law"[264] through making the substantive provisions of the Protocol contingent not on the customary law of indigenous peoples, but rather on the laws devised by the state. Moreover, the inclusion of prescriptions such as "*aim to* ensure that the TK associated with genetic resources is accessed with PIC, or the approval and involvement of indigenous communities based on mutually agreed upon terms, renders the obligation hortatory despite the presence of binding terms, i.e., "shall take measures".

The Protocol's tenuous balancing act between scientific and commercial objectives on the one hand, and the rights of indigenous communities represents an in-principle de-prioritization of their historical claims to ownership over their lands and natural resources. As several soft-law instruments (UNESCO Conventions and Declarations) discussed in the above section indicate,[265] indigenous communities perceive their TK claims as being inextricably connected to their cultural and religious rights. However, the Nagoya Protocol makes no mention of this relationship, and principally reduces the scope of such discussions to the ownership rights of indigenous communities over their natural environment (genetic resources in particular). In contrast, the Protocol's preambulatory provisions recognize the contribution of ABS

259. *Supra* Note 255, p. 112
260. Id
261. *Supra* Note 5, *see* Art. 20 of Nagoya Protocol
262. Id, See Art. 21 of Nagoya Protocol
263. Id, Art. 14 of Nagoya Protocol
264. Id, Art. 7 of Nagoya Protocol
265. See *supra* notes 229, 230.

to environmental sustainability.[266] Considering this recognition in light of the close relationship between the Protocol and the CBD, it is clear that the drafters of the treaty have intentionally emphasized the importance of resource sovereignty.

This emphasis is evidenced by the fact that the foundational principle articulated in Article 3 of the CBD recognizes the sovereign right of states to exploit their own resources pursuant to their own environmental policies, qualified only by the requirement that transboundary harm ought not to be caused by states.[267] The focus on linking TK rights to the environmental rights of indigenous communities necessarily deemphasizes the cultural and religious dimensions of their claims. Resource sovereignty was also conceptualized against the larger backdrop of international institutional structures, as is evident from both the passage of General Assembly Resolution 1803,[268] and the simultaneous lack of a forum for indigenous peoples in which to advance self-determination claims. Given the exclusive availability of formal processes to states through the decolonization and trusteeship process, it is easy to recognize the deeply inequitable post-colonial construction of the rights of indigenous communities.[269]

The cumulative effect of both the caveats that render the obligations of States Parties hortatory, and the Protocol's narrow vision of merely regulating the TK associated with GRs against the larger backdrop of the absence of the cultural and religious dimensions of the TK of indigenous peoples, has adverse impacts for the construction of applicable legal doctrine such as PIC. Their usage in these limited contexts relegates the obligations of States Parties to a mere duty to consult; this is consistent with the position of FPIC in CIL as well.[270] This is because the Protocol could have entailed stronger formulations that require the obtaining of FPIC, or the approval and involvement of indigenous communities in more concrete terms (i.e., without the

266. *Supra* Note 5, *see* pmbl. ¶ 8.

267. Id, *see* art. 5 of CBD

268. G.A. Res. 3171 (XXVIII), Permanent Sovereignty Over Natural Resources (Dec. 17, 1973). It was also recognized by the ICJ in Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgement, 2005 I.C.J. Rep 168 ¶ 244 (Dec. 19).

269. Francesca Panzironi, Indigenous Peoples' Right to Self-Determination and Development Policy, 82–87 (2006), (PhD. Faculty of Law, University of Sydney) https://core.ac.uk/download/pdf/41230579.pdf.

270. Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10, Nw. J. Int'l Hum Rts. (2011), 84 ("Although there does not appear to be an existing customary international legal principle of the right of indigenous peoples to FPIC, there does appear to be a minimal norm developing that requires consultation in good faith").

presence of language such as "as appropriate", or "in accordance with domestic law", and "aim to take measures") that imbue the substantive provisions with hortatory colour. However, it is important to recognize that even this relegated view of a duty to cooperate and consult, occupies an important positionality in international law.[271] For instance, the International Court in the case of Georgia v Russian Federation, has held that cooperation must entail a genuine attempt to come to consensus and resolve differences.[272] There are also relevant international agreements such as ILO-169, which prescribe that the duty to consult for indigenous peoples, is a general obligation.[273]

A critical examination of the reasons behind the international community's persistent reliance on treaty-based rights as a means of safeguarding the TK of indigenous communities can provide valuable insights into the underlying structural factors that influence state practice when formulating the (abovementioned) limitations in the Nagoya Protocol. Consulting the travaux préparatoires (i.e., the negotiating and drafting history) can provide further clarity on the intentions of States and the ways in which their interests are ultimately represented within substantive treaty provisions.[274] The issue of whether only state parties or also indigenous representatives could make proposals for the wording of recommendations within the Article 8(j) and ABS Working Groups resulted in a compromise that allowed indigenous representatives to propose wording as long as their proposals were endorsed by states.[275]

Examining the state practice in the context of the UNDRIP offers similar insights. It is particularly telling that the four states which initially voted against the UNDRIP were countries with colonial histories and ongoing neocolonial relationships with indigenous peoples: the United States, Canada, New Zealand, and Australia.[276] Their opposition to the UNDRIP appears to be part of a broader effort to preserve the supremacy of the state over its territorial boundaries, and the resources contained therein. This effort is reflected in the objections they raised to the UNDRIP's provisions on self-determination and indigenous consent requirements.[277] This resistance to recognizing the ethos of self-deter-

271. *Supra* Note 248, *see* Arts. 6, 15, and 17

272. *Georgia v. Russian Federation*, 2011 ICJ Rep 70, ¶ 132.

273. *Supra* Note 248, *see* Art. 4(2), 6(2).

274. *Supra* Note, 244, *see* Art. 32

275. *Supra* Note 218, *see* 268

276. *Supra* Note 123, *see* 1162.

277. Kirsty Gover, *Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples*, 26, EJIL, (2015), 346. ("The resistance of Canada, Australia, New Zealand, and the United States to parts of the UNDRIP expresses a

mination in meaningful ways and affirming indigenous ownership and control over their resources and traditional knowledge is similarly evident in the watered-down provisions of the Nagoya Protocol that were discussed earlier in this section.

Concluding Observations – Constructing Pathways to Redress Human Rights Violations of Indigenous Communities

Researchers have found a correlation between TK of medical use and the sale of the base-compound when surveying the top 150 plant-derived prescription drugs.[278] To put that number into perspective, approximately 40 per cent of the pharmaceutical drugs utilized in the Western world are derived from plants.[279] In the face of centuries of 'legitimized' theft of the cultivated knowledge systems of indigenous communities, it is clear that the material substrate of the modern medical system is greatly supported by the uncredited contributions of indigenous peoples. The 'legitimization' process has been enabled against the backdrop of colonial and neocolonial institutions and norms that comprise the international system. The marginalization and exclusion of indigenous communities to the fringes of their own territories during both colonization and subsequently to the peripheries of newly constructed nations during decolonization, severely disabled these communities from accessing important developmental interests. Colonial epistemologies undergird discussions of the ownership of indigenous lands and resources (including their TK) and engender racial developmental logics through the projection of narratives of backwardness, primitivism, and savagery onto indigenous peoples. The manipulated application of legal doctrine such as *uti possidetis* adversely impacted their ability to gain political self-determination. Competing claims of self-determination create narratives of tension between Third World nations and indigenous communities. This was exacerbated by economic stressors caused by globalization, and the imposition of neoliberal developmental logics, all of which severely undermined indigenous communities' rights. The actions of transnational corporations amount not just to intellectual property theft (which as a category is likely an

distinctive 'Western settler-state' view of the relationship between liberal principles of equality and historical indigenous rights to self-governance and property,")

278. Daniel S. Fabricant et al., The Value of Plants Used in Traditional Medicine for Drug Discovery, 109 Envtl. Health Perspectives 1, 69 (2001).

279. U.S. Forest Service, *Medicinal Botany: How Long have people been using medicinal plants?*, https://www.fs.usda.gov/wildflowers/ethnobotany/medicinal/index.shtml (last visited Oct. 21, 2022).

ill-fitting description of the legal claims of indigenous communities), but also constitutes an assault on the cultural sovereignty and right to self-determination of these communities. It is therefore necessary to expand the way we conceive of the of research and developmental projects that undermine the TK and genetic resources of indigenous peoples. While the Nagoya Protocol (in conjunction with the CBD) principally reduces the scope of these relations to the domain of environmental or biodiversity concerns, a richer more comprehensive legal vocabulary that is responsive to the ways indigenous communities develop relations with their TK (i.e., the cultural and religious dimensions of their TK) ought to be developed. To that effect, it may be worthwhile to consider CIL as an additional legal basis to protect the TK of indigenous communities, by axiomatically deducing TK rights from cultural rights (and connectedly, the right to self-determination). Relying on Stefan Talmon's methodological observations of the ICJ's practice, this Article attempts to establish that TK can be deductively inferred from the right to culture.