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Abstract

This essay explores how international law shaped the relationship between the states of Latin America and the indigenous peoples living within their territories. After independence, international law became part of the nation-building project of the new Republics. Latin American statemen engaged with international legal arguments to sustain the recognition of the Republics as sovereign states. They also advanced a legal fiction: sovereignty of the new Republics extended to the entire territory that had been claimed by colonial Spain, regardless of effective occupation. Lands inhabited by indigenous peoples became part of the territory of the post-independence state. Latin Americans proposed a particular doctrine, *uti possidetis*, to support this legal fiction. Indigenous lands were enclosed, and indigenous individuals became citizens, not only enjoying formal legal equality, but also acquiring the obligation to observe the law of the new nation-state. The 19th century legal fiction of indigenous land enclosure and assimilation was slowly made real by 'expanding the law's empire,' through land registration, law enforcement violence and war. We argue that the 19th century patterns of assimilation and land dispossession by way of inclusion of the indigenous continued structuring relations between Latin American states and indigenous peoples in the 20th century. However, if in the 19th century Latin Americans developed international law doctrine to sustain the nation-building framework, in the 20th century, international lawyers from the region rejected the rise of international legal norms, doctrines and institutions that challenged the nation-building project by potentially conferring international rights to indigenous peoples. We show that Latin Americans resisted ILO supervision of native labor. They also resisted the extension of minority protections to indigenous groups and ultimately refused considering indigenous peoples as one of the peoples enjoying the right to self-determination. It was not European international lawyers, but Latin Americans, who turned international law against indigenous peoples.

Keywords

Indigenous dispossession, uti possidetis, self-determination, saltwater doctrine

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I. Introduction

How has international law shaped the fortunes of the indigenous peoples of Latin America? Have international law rules, doctrines and institutions protected their interests? What has been the role of international law in the dispossession of their lands?

There are good reasons to answer the question about international law's contribution to the welfare of indigenous peoples affirmatively, remembering that the law of peoples was in part born during the Spanish-Amerindian encounter, as an answer to the abuses suffered by indigenous populations. Thanks to the teachings of Salamanca theologians like Francisco Vitoria and thanks to the advocacy of friars like Bartolome de Las Casas, indigenous peoples were recognized as right-holders under the law of peoples.[1] Although the actual impact of legal inclusion on the protection of indigenous peoples' interests remains under dispute, Salamanca arguments about legal inclusion have been enlisted to identify an international legal tradition that from colonial to more recent times, has not only recognized indigenous peoples' rights but also enabled indigenous activism.[2]

The adoption of Convention No. 169 on Indigenous and Tribal Peoples by the International Labor Organization (ILO) in 1989[3] and the passing of the Declaration on the Rights of Indigenous Peoples by the General Assembly of the United Nations in 2007[4] culminated decades of indigenous activism, which in the words of James Anaya, a renowned scholar and UN Rapporteur, marked a new era where 'indigenous peoples have ceased to be mere objects of the discussion of their rights … and have become real participants in an extensive multilateral dialogue …'[5] This trend that has seen indigenous peoples become influential political actors at the national and international plane has been particularly strong in Latin America.

Historian José Bengoa characterized this trend as the 'indigenous irruption' in Latin America.[6] One of the peculiarities of the irruption is that an ethnic discourse demanding new spaces of cultural and political autonomy has been pursued through the means of law. Bengoa sees the indigenous cause as having merged with the struggle over the recognition of rights in a sort of 'legal reconquest.' 'The matter is clear,' Bengoa affirms, 'indigenous peoples exist in Latin America and have rights. Rather, they are acquiring or conquering them little by little. We are

[1] The literature is enormous. Just to give one example of the 20th century Spanish scholarship reproducing the idea that Salamanca stood up for the rights of indigenous, see Luciano Pereña, *1920-2007. La idea de justicia en la conquista de América,* (Madrid: Editorial MAPFRE, 1992).

[2] José Bengoa, *La emergencia indígena en América Latina* (Santiago: Fondo de Cultura Económica, 2000).

[3] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, C169, 27 June 1989.

[4] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, General Assembly*, A/RES/61/295, 2 October 2007.

[5] S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004), p. 56.

[6] Bengoa, *La emergencia indígena*.

witnessing today a sort of conquest in reverse.'[7] Thus Bengoa, although a historian, studies the norms and institutions of international law that would materialize the transition towards indigenous autonomy, including the mentioned ILO and UN documents as well as the Inter-American Human Rights System. With the passing of the American Declaration of Indigenous Rights in 2016[8], this regional trend has only strengthened.

What about the question regarding indigenous dispossession? If international law has historically been on the side of indigenous peoples, how to explain the dispossession of indigenous land? And more generally, how to explain Latin American states' violence against indigenous peoples and in some countries, state policies against indigenous language and culture? Did dispossession, violence and hostile polices result from law's frailty? When faced with the hard realities of political and economic interest, it is tempting to exculpate the law that granted inclusion to indigenous peoples recognizing their rights, and therefore think that dispossession and violence happened outside or against the law and the international community.

Reassessing traditional answers to these questions we challenge conventional wisdom. If some have understood that international law has protected indigenous peoples' interests, we will examine the opposite trend. We show that dispossession and violence occurred not against but with the support of the law.

Some indigenous rights advocates understand the late 20th century recognition of indigenous rights to have brought international law back to its natural law origins, to the times of the Spanish-Amerindian encounter, when the law of peoples defended indigenous from the abuses by *conquistadores*. That is, even advocates seem to recognize that before the 1990s, before the 'indigenous irruption,' international law was implicated in the dispossession of indigenous peoples. Advocates as well as scholars understand that during the 19th century, a law of peoples based on natural law mutated into a law governing a community of civilized nations. As the law of nations that emerged recognized legal subjectivity according to a standard of civilization, indigenous peoples were excluded from the international community. This may indicate that as a matter of legal doctrine, exclusion was articulated not locally, but internationally. Or more specifically, exclusion was articulated from Europe, where 19th century international legal thought –and the standard of civilization– originated. This essay shows something different. It shows Latin American lawyers and publicists themselves 'turning international against indigenous peoples.'

1. Latin Americans turning international law against indigenous peoples

Latin American elites not only appropriated and reinterpreted international law doctrines to effect indigenous dispossession, invoking, for example, civilizational differences to define

[7] Bengoa, *La emergencia indígena*, p. 11

[8] American Declaration on the Rights of Indigenous Peoples. AG/RES.2888 (XLVI-O/16) Third Plenary Session, June 15, 2016.

indigenous land vacant and thus open to occupation.[9] They also invented legal doctrine to dispossess indigenous peoples by way of inclusion in the law of the newly independent states. *Uti possidetis* is usually remembered as the international legal doctrine that emerged in the region to prevent conflicts between the new Republics by recognizing colonial administrative boundaries as the boundaries between the new states.[10]

However, *uti possidetis* also introduced a legal fiction that proved central to indigenous dispossession. The fiction implied that the new republics of Spanish America occupied the whole extension of the territories inherited from colonial Spain, transforming indigenous lands into state territory, and indigenous peoples into individuals entitled to citizenship, subjects of the laws of the Republic and subject to its enforcement.[11]

We argue that the 19th century pattern of dispossession by way of inclusion of the indigenous as part of a nation-building framework has continued structuring relations between Latin American states and indigenous peoples until today. If including indigenous peoples within domestic law, thus excluding them as international legal subjects, defines the 19th century legal framework, in the 20th century (until before the 1990s), Latin American international lawyers prevented potential change emerging from new international legal doctrines and institutions that could bestow rights to indigenous peoples. We show that during the interwar period, the potential definition of indigenous peoples as minorities subject to minority-treaty protections was considered by the League of Nations and strongly rejected by Latin American delegates. Similarly, during the interwar, efforts by the ILO to extend protections and supervision of indigenous work within colonies to indigenous in independent countries, were met with fierce opposition from Latin American representatives. Then, we show that in the post-1945 international order, as the right to self-determination crystalized, the potential inclusion of indigenous peoples as peoples entitled to external self-determination was considered and ruled out by Latin Americans.

We show how international law structured and justified indigenous dispossession in Latin America. But this is not so much the international law found in the treatises that inaugurated the Latin American legal tradition in the 19th century. Neither the treatise by Andres Bello, nor the one by Carlos Calvo explicitly justified dispossession of indigenous peoples as savages.[12] Instead, the 19th century international law we uncover is one where Bello and Calvo as well as Europeans like the renowned Swiss diplomat Emer Vattel, are invoked by local politicians and publicists during debates about the treatment of indigenous peoples. Let us consider an

[9] However, civilizational differences were carefully made not to weaken the new Republic's sovereignty. See below section II.2 Treading carefully with indigenous peoples.

[10] V.-L. Gutiérrez-Castillo, Fundamentos epistemológicos del principio «uti possideti iuris» y analisis crítico de su evolución en la sociedad internacional. *Anuario Español De Derecho Internacional*, 39 (2023), pp. 407-442.

[11] Marta Lorente Sariñena, "Uti possidetis, ita domini eritis. International Law and the Historiography of the Territory," in *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries*, vol. 6, edited by Massimo Meccarelli and María Julia Solla Sastre (Frankfurt am Main: Max Planck Institute for Legal History and Legal Theory, 2016), pp. 131-172.

[12] See below section II.2.

example from the Southern Cone of the Americas to grasp the role played by legal doctrines like the standard of civilization and *uti possidetis*.

In August 1868, the Chilean Chamber of Deputies discussed a new bill submitted by the Executive, authorizing the President of the Republic, José Joaquín Pérez, to increase by 1500 men, the forces deployed by the army in *Arauco*.[13] More than a decade before, the Chilean government had created the province of *Arauco*.[14] This province, however, continued to be under control of the *Mapuche* people as part of their ancestral territory.[15] *Arauco*, or *Gulumapu*, as this region of the *Mapuche* territory, the *Wallmapu*, was known to its indigenous inhabitants, lay south of the Bio-Bio river, the border that since colonial times had separated *Mapuche* controlled territories from the territories to the north, under Spanish and after independence, Chilean rule.[16]

In addition to the proposed increase of armed forces, the bill would finance new forts and other military works in Araucanian territory necessary to 'repel the onslaught of barbarism,' 'punish rebellious tribes' and 're-establish trust and peace so badly needed by the inhabitants who today are being decimated by the captivity and spear of the savage.'[17] In long sessions, Chilean deputies debated the bill resorting not only to political and economic reasons, but also to legal arguments. That the debate carried over many sessions reflected the complexity of the problem. On the one hand, following *uti possidetis*, Chile inherited its territory from the colonial administrative divisions established by the Spanish Crown. The constitution of 1833, consequently affirmed in its first article that the territory of Chile extends from the Atacama Desert to the Cape of Horn, that is, from the natural border in the north to the southern tip of the continent; thus, enclosing indigenous land, the *Araucanía*, within its territory. The Constitution also declared those born within Chilean territory to be Chileans, granting equality

[13] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868* (Santiago: Congreso Nacional de Chile Library, august 1868), p. 537.

[14] Province created by Law of July 2nd, 1852, *Crea la provincia de Arauco, y autoriza al Presidente de la República, para reglamentar el gobierno de las fronteras y la protección de los indígenas.* Available in: https://bcn.cl/2oq8m.

[15] Leonardo León, "Ngulan Mapu (Araucanía): La 'pacificación' y su relato historiográfico, 1900-1973," *Revista de Historia Social y de las Mentalidades* 11, no. 2, (2007): 137-170; Pablo Marimán, "Los mapuche antes de la conquista militar chileno-argentina," in *Escucha, winka*, edited by Pablo Mariman, Sergio Caniuqueo, José Millalén and Rodrigo Levil (Santiago: LOM Ediciones, 2006): 53-126.

[16] In 1864, the boundary was moved from the Bio-Bio to the Malleco river. On the boundary, see Patricia Cerda-Hegerl, *Fronteras del sur: la región del Bío Bío y la Araucanía chilena, 1604-1883*, 1st ed. (Temuco: Ediciones Universidad de la Frontera, Freie Universität Berlin Lateinamerika-Institut, 1994). On Mapuche-Spanish treaty relations see Jörg Fisch, "Völkerrechtliche Verträge zwischen Spaniern und Indianern," *Jahrbuch für Geschichte Lateinamerikas* 16, no.1, (1979): 205-244; and José Manuel Zavala, "Origin of the Spanish–Mapuche Parlamentos: The European Treaty Tradition and Mapuche Institutions of Negotiation," in *The Hispanic-Mapuche Parlamentos: Interethnic Geo-Politics and Concessionary Spaces in Colonial America*, edited by José Manuel Zavala, Tom D. Dillehay and Gertrudis Payás (Cham: Springer, 2020): 11-30.

[17] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 537.

before the law to all inhabitants; thus, making of indigenous individuals, Chilean citizens subject to Chilean law.[18]

On the other hand, the new Republic inherited the internal military boundary that had separated *Mapuche* from the Spanish-controlled territory, dividing de facto the country's territory and its inhabitants. Did the Republic inherit also a de jure division? Namely, did Chile succeed to the obligations Spain had acquired with the *Mapuche* –including the military boundary itself, established in treaties concluded in countless diplomatic conferences – *parlamentos*– between Spanish and *Mapuche* representatives?[19] If *Araucanos* –as *Mapuche* were called by the Spaniards– constituted a polity under Spanish colonial law –*derecho indiano*– if they had rights recognized by treaty under the law of nations, did independence change this inter-polity regime? Moreover, exercising control over their territory until 1883, did the *Mapuche* possess land and own property according to the law of nations? Did they also have sovereignty? Or, as Chilean nationals under Chilean rule of law, did *Mapuche* individuals' property claims depend on recognition by the Chilean state?

This example in one country, Chile, in relation to the *Mapuche*, only one of that country's many indigenous peoples, echoes a predicament faced across Spanish America.[20] How to conceive the transition –continuities and changes– between colonial and post-colonial legal and institutional structures regarding statehood, and more specifically regarding territorial control of lands inhabited by indigenous peoples? Even in places where unlike the *Mapuche*, indigenous peoples had been living under Spanish rule in *pueblo de indios* –towns– or *reducciones* –reservations, the fate of these colonial institutions was at issue after independence. Should *pueblos* be dismantled, replaced by individual or collective property arrangements, and should remaining land be considered vacant and thus owned by the new Republics, to be then sold or given away to national or foreign *colonos* –settlers?

As these questions were answered resorting to international legal doctrines, a Latin American nation-building framework emerged. We explore the 19th century rise of this framework focusing on '*la cuestión de Arauco*' –the Araucanian Question– the debate on the justification of indigenous dispossession in Chile and in relation to the *Mapuche*. Then, we will see 20th century Latin American international lawyers and diplomats defending the 19th century nation-building framework, arguing away the potential recognition of indigenous peoples' rights as minority rights or as self-determination. Did the 'indigenous irruption in Latin America' during the 1990s break the historical continuities suggested in this essay, the continuities of local publicists turning against indigenous peoples?

[18] *Constitución Política de la República de Chile*, (1833), sections 6 and 12, https://bcn.cl/2fdvd. Before the Constitution, see *Bando Supremo S/N ciudadanía chilena a favor de los naturales del país,* (March 4th 1819), https://bcn.cl/3fey1.

[19] "Parlamento de Quillin de 1641," in *Los Parlamentos Hispano-Mapuches, 1593-1803: textos fundamentales,* edited by José Manuel Zavala, 1st. ed. (Temuco: Ediciones Universidad Católica de Temuco, 2015): 107-120.

[20] An account of the fate of every indigenous people of the continent since Spanish-American independence is beyond the scope of one paper, one book or even one researcher, but calls for collective work across countries and disciplines.

We do not know. However, we know that indigenous dispossession and subordination has been in part a (by)product of the Latin-American international law tradition. Then, there is no other way than confronting our regional tradition in order to understand how our predecessors turned international law against indigenous peoples.[21] This essay only begins this larger task.

II. The Latin American nation-building framework and the indigenous question

What is *la cuestión de Arauco*? –asked liberal congressman Benjamín Vicuña Mackenna in the 1868 parliamentary debates in Chile. It is a 'great ghost, a bloody ghost' that has deceived us for generations –Vicuña Mackenna answered.[22] Araucanians –the congressman continued– are not the 'imaginary race of mythological heroes' depicted in *La Araucana*, Alonso de Ercilla's 16th century epic poem, where *Araucanos* resisted and never surrendered to the Spaniards.[23] Rather, 'the Indians for whom the law and laws –*el derecho* y *la ley*– are so much invoked here are nothing... but bandits and highwaymen –*bandidos y salteadores de caminos*.'[24] If they were never defeated it is because of Spaniards' 'shameful mistake' not to continue the military offensive against them, when, influenced by a 'delusional Jesuit's' idea to establish missions, Spain decided to pursue only a defensive war. It is time to change this three-centuries-long-mistake, waging war against the barbarians –Vicuña Mackenna argued famously crying out: '*delenda Arauco*.'[25]

Erecting himself as the Chilean Cato the Elder, Vicuña Mackenna evoked the Roman soldier and senator who repeatedly, after the end of each session of the Roman Senate, exhorted not just to invade, but to conquer and annihilate the Carthaginian enemy, shouting: '*Carthago delenda est'* –Carthage must be destroyed.[26] The borrowing of this expression reflects Vicuña Mackenna's effort to elevate the *Arauco* question beyond local particularities, combining

[21] Another way to confront these darker legacies of our tradition is examining indigenous resistance through international legal discourse throughout the periods explored here. We have engaged in that type of work elsewhere. See for example Arnulf Becker Lorca, "The Legal Mechanics of Spanish Conquest: War and Peace in Early Colonial Peru," in *The Justification of War and International Order. Past and Present,* edited by Lothar Brock and Simon Hendrik (Oxford: Oxford University Press, 2021).

[22] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 560.

[23] Alonso de Ercilla, *La Araucana*, (Santiago: Pehuén Editores, 2001).

[24] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 563. The use of this expression was not innocent, as *saltadearoes de caminos* became synonym of political enemies, when the laws criminalizing highwaymen were used to tackle constitutional emergencies in the absence of constitutional exceptions in the 19th century liberal constitutions of Spain and Mexico. See José Antonio Aguilar, *En pos de la quimera: reflexiones sobre el experimento constitucional atlántico*, 1st ed. (Ciudad de México: Fondo De Cultura Económica, 2000), p. 40.

[25] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 584.

[26] On the appropriation of Cato's phrase by Vicuña Mackenna see Alejandra Bottinelli Wolleter, "El oro y la sangre que vamos a prodigar. Benjamin Vicuna Mackenna, la ocupación de la Araucaníaa y la inscripcion del imperativo civilizador en el discurso público chileno," in *Historias de Racismo y discriminación en Chile,* edited by Rafael Gaune and Martin Lara, (Santiago: Uqbar Editores, 2009), pp. 105-122.

cultural stereotypes and anti-indigenous attitudes of the second half of the 19th century with legal arguments belonging to the law of peoples.

Taking sides with Rome, Vicuña Mackenna could cling to the Western tradition and inscribe the military campaign against the *Mapuche* in what was perceived as the larger conflict between civilization and barbarism.[27] Perceiving the Araucanian question as not a uniquely Chilean problem explains in part the relevance that the law of peoples acquired during parliamentary debates. 'The problem of how to occupy territories inhabited by savages exists in all the countries of the Americas' –Marcial Martínez, another liberal congressman remarked.[28] Defining the *Arauco* question in these broader terms, Martínez advises not to follow the solution adopted in North America, where 'invading on fire and blood … the indigenous race disappears.'[29] For Vicuña Mackenna, in contrast, war waged against the indigenous peoples in the United States offered a paradigmatic example: 'the conquest of the Indian is essentially, as it has been in the United States, the conquest of civilization'.[30] For Vicuña Mackenna, fighting for civilization is not only a moral but also a legal imperative: 'according to the law of nations, the conquest of barbarous, idle and vagabond peoples is perfectly legitimate.' [31]

Invoking the law of nations may have seemed to Vicuña Mackenna, and others across the region, a safe bet to justify conquest of indigenous land. Throughout the 19th century, not just in Spanish America, but globally, international law was reinterpreted to become the law of an international community of civilized nations. Under this emerging positive international legal order, some peoples and nations were understood as incapable of forming a state, because failing to meet a purported standard of civilization. Peoples falling short of the standard were progressively excluded from international law.[32] International lawyers used different markers –religious, cultural, racial– to sustain the distinction between civilized and non-civilized nations, and developed a number of legal doctrines to translate the distinction into legal regimes. According to the *terra nullius* doctrine, lands inhabited by indigenous peoples were understood to be vacant, therefore open to legal acquisition by an occupying state.[33] According to the *uti*

[27] For the classical Latin American statement of this perspective see Domingo Faustino Sarmiento, *Civilización y barbarie* (Buenos Aires: Biblioteca del Congreso de la Nación, 2018 [1896]). For contemporary analysis of this perspective in the construction of the region see Carsten-Andreas Schulz, "Civilisation, Barbarism and the Making of Latin America's place in 19th-century international society," *Millennium* 42, no. 3 (august 2014): 837-859.

[28] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 557.

[29] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 557.

[30] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 565.

[31] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 610.

[32] See regarding Chile Gabriel Cid, "De la Araucanía a Lima: los usos del concepto civilización en la expansión territorial del Estado chileno 1855-1884," *Estudios Ibero-Americanos* 38, no. 2 (2012): 265-283. And see in general Robert A. Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1992).

[33] See, Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014). As we will see *terra nullius* was rarely invoked to justify indigenous dispossession.

possidetis doctrine, the new Republics could lay claim to the whole of the territories inherited from Spain, regardless of actual occupation.[34] *Terra nullius*, *uti possidetis* and the standard of civilization enabled Spanish-American countries like Chile to dispossess indigenous peoples, like the *Mapuche*, by the force of law.

However, if the standard of civilization reflected 19th century prejudices and preconceptions as well as valid international law, why was it necessary to defend, in long parliamentary sessions, a bill that merely sought to increase military forces in *Arauco*?

The historiography of international law, for a couple of decades now, has offered various accounts of international law's implication in Western colonialism, accounts in which positivism, the standard of civilization, *terra nullius* and *uti possidetis* marshalled dispossession by excluding indigenous peoples from international law.[35] There is much about this in Vicuña Mackenna's statement, his anti-indigenous prejudices not being exceptional, but a commonly held view among liberal elites. But in the Chilean parliamentary debates a different account of the relationship between international law and indigenous peoples emerges. Elites were divided on the *Arauco* question, some advocating for conquest, most supporting gradual occupation, but all enlisting the law to back their positions. The law of nations that Spanish-American lawyers enlisted reflected their ambiguity regarding the place of indigenous peoples in the new Republics. They had to tread carefully with doctrines excluding 'savages' that could undermine the claim to sovereignty of their Republics.

1. Extending law's empire into 'savage territory'

> The indigenous territory is undoubtedly under the eminent dominion of the nation, but truth be told, this fact is more a legal fiction than a reality. The authorities of the Republic do not rule in that territory and they serve only as intermediaries between the savages and the civilized nation.[36]

[34] See Marcelo G. Kohen, *Possession contestée et souveraineté territorial* (Genève: Graduate Institute Publications, 1997). Kohen notes that the *uti possidetis* principle arose not only from the political challenge of consolidating and stabilizing the power of the new Republics, but also in response to problems of a legal nature, i.e., according to what rule should boundaries between the new states drawn, and should occupation be a requirement for the acquisition of territorial sovereignty (p. 430). At the time of independence, there was no doubt that possession was required as a condition for establishing territorial title. There was less clarity regarding the type of state activity required to constitute effective possession in territories where the new states had inherited titles from the Spanish and Portuguese crowns, but territories that occupied by indigenous peoples, could be conceived as unoccupied, that is, as terra nullius (p. 432). Kohen points out that in times when vast territories were considered unoccupied, *uti possidetis* operated as a legal title that, referring to the old colonial titles –discovery and conquest– ensured the continuity of these original titles in the absence of effective possession (p. 439).

[35] In the Latin American context, Liliana Obregón's pioneering work has shown the project of civilization by Creole elites as part of the project of becoming members of the international community. See Liliana Obregón, "Creole consciousness and international law in nineteenth-century Latin America," in *International Law and Its Others*, edited by Anne Orford (Cambridge: Cambridge University Press, 2006), pp. 247–264; Liliana Obregón, "Carlos Calvo y la profesionalización del Derecho Internacional," *Revista Latinoamericana de Derecho Internacional* 3, (2015): pp. 1–23.

[36] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 557.

With these words Marcial Martínez rephrases the *Arauco* question as the question about how to bring a legal fiction closer to reality. The legal fiction –*uti possidetis*– is the one affirming that the new Republics inherited the administrative boundaries of colonial Spain. What type of power was exercised by the Republic within inherited territories? Here disagreement begins. Some, such as Martínez, argued that the state had direct or eminent dominion, *dominium directum* over inherited territories, while recognizing that indigenous peoples had indirect dominion, *dominium utile*, or merely possession over inhabited lands. Others, such as Vicuña Mackenna, assumed inherited territory to be just one seamless territory, regardless of the presence of indigenous people, who neither having property nor occupying land, inhabited something like a *terra nullius*.

How to breach the gap between reality and fiction was another source of contention. For some, conquest by force was the only way to subdue the "barbarians." For most, however, the question was about the best way to occupy indigenous territories, not just legally, but respecting 'humanity and civilization.'[37] That is, the notion of a standard of civilization both enabled and limited indigenous dispossession. Gradual occupation, by commerce, missionary education and land registration, was understood to be both a peaceful and humane way to bring about civilization. It did not implicate waging war, but it did not exclude state violence to enforce the law, to protect settlers and punish crimes committed by indigenous inhabitants as well as legalized force in the process of land registration, as in the case of expropriation of land deemed vacant. Controversy over indigenous land was wide-ranging. Here we trace only the international legal dimension, identifying three positions adopted in the parliamentary debates regarding how to justify expansion in the *Araucanía*: conquest, status quo and occupation.

A. Conquest: no more *cuestión de Arauco*

Responding to criticism, Vicuña Mackenna explicitly calls for the end of the status quo, of defensive war and the boundaries separating indigenous territories: '… there are timid souls who are afraid to pronounce the real word that is the wide solution to this question: the word conquest!' '…no more barbarism, no more *Arauco* question!'[38]

How was this position justified? Defining indigenous as 'bandits and highwaymen,' was a way to define them as political enemies.[39] Distinguishing between civilized and uncivilized territories undermined indigenous' land claims. As an 'enemy of civilization,' the *Mapuche* was excluded from international law:

> the Indian (not Ercilla's Indian, but the one who has come to slit the throats of our farmers of Malleco and to mutilate our soldiers with horrible infamy) is nothing but an indomitable brute, an enemy of civilization because he only adores all the vices in which he lives

[37] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 557.

[38] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 584.

[39] See note 19 supra.

> immersed, idleness, drunkenness, lies, treachery and all the abominations that constitute the life of the savage.[40]

'I have here at hand Vattel and other publicists' –Vicuña Mackenna remarked to support his view. Invoking Emer Vattel, the renowned Swiss diplomat and author of the most influential treatise in post-independence Spanish America, made sense. Vattel was an unavoidable reference not only to politicians like Vicuña Mackenna, but also to lettered men like Andres Bello.[41] A Venezuelan emigree, Bello, had not only drafted the Chilean Civil Code, but also published one of the first manuals of international law in Spanish America, becoming an authority in matters related to foreign policy and the law of nations.[42] Bringing Vattel to the parliamentary debates made also sense because his treatise argued that 'more industrious nations' may take possession of territories from tribes who do not cultivate land, for still pursuing an idle mode of life they do not really inhabit their territory.[43]

To defend himself from attacks by his fellow deputies, Vicuña Mackenna invoked the Swiss eminence. We will see below how Bello, engaging with Vattel, offered in his international law textbook a legal framework that did not rely on conquest. And we will also see a different Bello, who as essayist called for more 'radical' and 'efficient ways' to deal with the indigenous. This second Bello is echoed in parliamentary debates, where he is quoted in order to support war as reprisal for indigenous belligerency.

While calls for conquest were shared in the liberal press, conquest was not the purpose of the Executive's 1868 bill. Cornelio Saavedra, the deputy and military ideologist of the occupation, defended the bill based on the need to secure the border and its inhabitants. Saavedra, however, came later closer to Vicuña Mackenna arguing to place *Araucanos* in reservations, so that they would be assimilated into '*la raza civilizada'* –the civilized race.[44]

Yet another group of deputies opposed the bill. Liberals such as José Victorino Lastarria and Marcial Martínez, and members of the radical party, such as Pedro León Gallo and the brothers Guillermo and Manuel Antonio Matta, finding the increase of troops unnecessary, challenged the bill and Vicuña Mackenna's support of conquest. [45]

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[40] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 565.

[41] Nina Keller-Kemmerer, "Die Mimikry des Völkerrechts," *Studien zur Geschichte des Völkerrechts* 38 (Frankfurt am Main: Nomos, 2017).

[42] Nina Keller-Kemmerer, "Die Mimikry des Völkerrechts".

[43] Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns,* Book I, Chapter VII, §81.

[44] Cornelio Saavedra, *Documentos relativos a la ocupación de Arauco que contienen los trabajos practicados desde 1861 hasta la fecha* (Santiago: Imprenta La Libertad, 1870), p. 15.

[45] Outside Congress, conservatives close to the Church vehemently opposed conquest. See Rodrigo Andreucci Aguilera, "La incorporación de las tierras de Arauco al Estado de Chile y la posición iusnaturalista de la Revista Católica," *Revista de estudios histórico-jurídicos* 20 (1998): pp. 37-84.

B. Status quo: a gradual and civilized occupation

What is the purpose of the bill, to submit –*reducir*– indigenous to peace as the preamble states, or despoil them –*despojarlos*– waging an offensive war, as the text of the bill announces? Manuel Antonio Matta posed this question during the Parliamentary debate, pointing at the bill's contradiction in order to condemn what he saw as conquest. The problem we face is not simply a military problem, but a question of 'justice and civilization' –Matta affirmed.[46] Defending what Vicuña Mackenna condemned as the status quo, Matta argued that keeping the boundary between areas controlled by the Republic and the *Mapuche*, would enable a gradual advance of civilization, respecting the rights of indigenous and the dignity of Chile.[47]

Matta did not dispute that civilization was a criterion justifying the Republic's authority over indigenous land, nor did he dispute that Chile had direct, or eminent dominion over its territory. However, civilization and direct dominion not only enabled but also structured –and to some extent limited– the gradual advance over *Mapuche* territory. Thus, Matta questions whether Chileans were the civilized party in interactions with Araucanians:

> … no matter how much it is said that we are civilized, and that they are barbarians, I do not believe we have reason to do what is intended with the Araucanians. And I base this not only on abstract theories of law that set the standard of conduct to which individuals and peoples should be subjected, and that prevent expropriation from being a fair means of acquisition, but also on facts.[48]

Matta disputes that *Mapuches* could be conquered, their property simply expropriated, citing looting, arson, pillaging and violence by the Chilean army, as the relevant facts.[49] Matta then concludes: 'there have been times in which Chileans living on the boundary have shown to be more barbarous than the Araucanians, and the army exceeding them.'[50] Neither international law nor Andres Bello's treatise authorizes punishment with arson and pillage, Matta responded to the Congressmen who had argued so. For –according to Matta– when talking about reprisals, Bello alludes to these as means to achieve a legitimate war objective, to promptly obtain peace. Thus, reprisals are not legitimate if the objective is not obtaining peace, but punishing savage tribes.[51]

Matta shared with Vicuña Mackenna the use of the language of civilization, both articulating ideas in line with the classical international law emerging during the second half of the 19th century. However, if we think about the standard of civilization as a doctrine with one concrete meaning, Matta and Vicuña Mackenna were in disagreement. On the one hand, Matta

[46] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 548.

[47] "Honour and dignity require justice in the imposition of our law to the Araucanians, punishing them if they comit crimes, but not treating them a enemies, destroying their lands and houses". Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 554.

[48] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 548.

[49] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 554-555.

[50] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 555.

[51] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 555.

constructed civilization as a standard that both enabled and regulated the occupation of indigenous territory. Preserving the distinction between civilization and barbarism as the difference between Chileans and indigenous, required placing the latter under the protection of Chilean laws and justice. Thus, if indigenous revolts resulted from provocations by Chilean settlers,[52] the Republic could enforce the law, punishing crime, but not waging war against them as enemies.[53] At the same time, we see in Matta continuities with the pre-independence colonial law and pre-classical law of nations. If the colonial boundaries were inherited with the transfer of sovereignty from the Crown to the new Republics, under (pre-classical) law of nations, also the old distinction between *dominium directum* and *dominium utile* was inherited.

Martínez and Matta invoked this distinction reassuring that occupation of indigenous land was only an exercise of *dominium directum*, bringing the legal fiction of *uti possidetis* closer to reality, but so that indigenous peoples' property, that is, indirect dominium or *dominium utile* was not affected. Respecting the requirements of 'humanity and civilization,' indigenous property and life, radical party (as opposed to liberal) representatives advocated for a gradual and civilized occupation of *Arauco*.

C. Occupation with the force of the law

Errázuriz, the War Minister, defended the bill in similar terms in relation to *Mapuche* property. The talk about occupation –Errázuriz clarified– extends only to the state's 'eminent domain,' not to property occupied by Araucanians. Expanding the boundary southwards, from the Bío Bío to the Malleco rivers, according to a law passed in 1864, the State took control over indigenous territory. Errázuriz explained that in the new territories, valuable land not occupied by the indigenous, vacant land –*terrenos baldios*– had been acquired.[54] As indigenous property owners have mingled with new owners, with civilized Chileans, civilization was brought to these new territories –Errázuriz concluded.[55]

Progress is under threat by indigenous resistance –Errázuriz warns citing Bello: against indigenous harassment, pillage and assassination, war against the savage is legal.[56] If according to Bello reprisals are legitimate measures between civilized states –Errázuriz asks–

[52] " (…) the resistance of the Indians has been nothing more than a legitimate act against the abuse of force." Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 555.

[53] " (…) not because the assailants wear epaulets [a military uniform's ornamental shoulder piece], do they stop herding Indians", cows, horses and rams without finding ourselves in the case of international law to which the Minister was referring [as justified]. Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 555.

[54] Errázuriz was making reference to a law passed in 1845 granting vacant land to foreigner settlers. See Myléne Valenzuela and Sergio Oliva, *Recopilación de legislación indígena 1813-2017*, Tomo I (Santiago: Editorial Librotecnia, 2018), p. 37.

[55] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 552.

[56] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 553.

why can't they also justify punishment against savages, who rob and kill our citizens and take captive their spouses and children?[57]

These views of the Executive were further supported by Congressman Saavedra, who as military officer had been in charge of the occupation plan. The Republic had the duty to protect Chilean inhabitants. But there was also another duty, to secure the territory of the state, for indigenous uprisings could be used by foreign powers as opportunities to attack the country.[58] And this is what happened during the war against Spain –Saavedra reminds his colleagues. At that time, we did not have problems to convince the Araucanians that our intentions were to only occupy the territory peacefully, as we had helped them before during dire times, as the state would do with any other Chilean family –Saavedra notes, though warning that: 'we must never forget that the indigenous is always our enemy, that we will not defeat him easily, but through force.'[59]

The bill passed. However, neither this, nor other laws sanctioned conquest. Instead, submission, the so-called pacification –*pacificación de la araucanía*– came about after a series of punitive campaigns based on the power to enforce the law within Chilean territory –which, one should not forget, as the Chilean authorities admitted, included arson and destruction of *Mapuche* land, pillage, killing of those resisting, but also rape and assassination of children.[60] Indigenous dispossession resulted from these punitive campaigns to subdue rebellious indigenous and from the transfer of land defined as vacant land to settlers as well as transfer of property owned by indigenous to settlers-buyers. The point here is not to draw moral lessons, understanding indigenous dispossession as morally better as it was not justified as conquest of the savage, but as enforcing the law to bring civilization gradually, respecting property of indigenous individuals, and to then highlight dispossession and suffering as problems of implementation.

The point, instead, is excavating the legal framework enabling the process of indigenous peoples' dispossession. Rather than a European international law imposing indigenous dispossession by means of the standard of civilization, we see local elites, politicians and lawyers constructing a national legal discourse, a framework of nation-building, which regarding indigenous peoples resulted into a framework of subjugation. International law was only one of the pillars of this legal discourse, the others being constitutional law and private law. For example, *uti possidetis*, domestically, recognized in the constitutions of the new Republics, created the fiction of a people exercising sovereignty over a delimitated territory; internationally, as a doctrine recognized in Latin American international law, it extended a fiction of colonial law into post-independence law, the fiction that from the Crown to the Republics, the sovereign exercised eminent or direct dominium over its entire territory, regardless of the indirect dominium of individuals possessing or owning land, including indigenous peoples' lands. International law arguments in conjunction with newly enacted post-independence

[57] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 553.

[58] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 540-550.

[59] Congreso Nacional de Chile, *Cámara de Diputados, Décimoquinto período legislativo, 1868,* p. 540-550.

[60] Joanna Crow, "Histories of Conquest: The Occupation of Araucanía and Its Consequences, 1862–1910," in Joanna Crow, *The Mapuche in Modern Chile* (Florida: University Press of Florida, 2013), pp. 19-50.

private law –including typically a civil code with an absolute notion of property and a system of land registration– transformed indigenous lands held under indirect dominium into individual private property, through another fiction that lands not under possession or ownership (under indirect dominium) were 'vacant land,' in consequence, lands not only under direct dominium of the state, but also under indirect dominium, so that the state could transferred these lands to settlers as individual property plots.[61]

This was a potent legal fiction underpinned by a potent nation-building ideology. It took more than a century to slowly realize the fiction and lots of violence to enforce it –if it has ever been fully realized, as indigenous peoples, like the *Mapuche*, continue to resist the fiction today as we write and probably as you read these words. The parliamentary debates of the 1860s illustrate one aspect of the dispossession of indigenous peoples, namely the prevalence of the law-enforcement framework, which resulted from their inclusion as subjects within the territory of the Republic. The opposite trend, the exclusion of the indigenous as savage, which we also saw in the debates, was carefully handled, for it could undermine the Republic's sovereignty. Let us consider this second aspect by looking how international legal thinking in the region placed the indigenous within international law and within the larger nation-building project.

2. Treading carefully with indigenous peoples: Bello and Calvo

The first international law thinking of the post-independence period was fully immerse in the nation-building project, laying down the doctrinal foundations for the new Republics' claim to sovereignty and diplomatic recognition, and for drawing territorial boundaries and respect of jurisdictional autonomy within boundaries. A long road had to be travel before these doctrines became rules of international law –culminating in the 1933 Montevideo Convention's inclusion of a formal definition of statehood, declaratory recognition and non-intervention.[62] The foundations of this project were put down in the 19th century by men of letter like Andrés Bello in the mid-century and by Latin Americans like Carlos Calvo, who towards the end of the century, participated –as one of the men of 1873– in the formation of the modern discipline of international law.[63]

In the process of laying down the international-legal-building-blocks for the independent Spanish-American Republics, Bello first and Calvo later, among many others, treaded carefully when considering indigenous peoples' place in the international legal order. If simply regarded as 'uncivilized,' the new Republics' sovereignty over territories inhabited by indigenous peoples could be questioned. There was no doubt that the empire of law had to extend to the whole of the Republics' territory, bringing civilization to the territories occupied by indigenous peoples. Thus, as an essayist, Bello advocates to 'contain the barbarians and extend the benefits of

[61] We have been inspired to identify this relationship between international law, property law and land registration regimes by Elisabetta Fiocchi Malaspina, *Dans cette diversité, des principes d'unité. Intrecci transnazionali nei sistemi di pubblicità immobiliare tra Otto e Novecento*, (Roma: Historia et Ius, 2023).

[62] Arnulf Becker Lorca, *Mestizo international law* (Cambridge: Cambridge University Press, 2014).

[63] Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law 1870–1960* (United Kingdom: Cambridge University Press, 2001).

civilization' to the southern provinces, for incursions and war by *Araucanos* are the real causes of these provinces' misery.[64] As long as this threat is not removed –Bello argues– 'capitalists and entrepreneurs' will not come to cultivate land and establish industry. The relative tranquillity, obtained by force to prevent incursions from our 'terrible neighbors the indigenous,' is not enough –Bello maintains, demanding: 'more efficient and radical means' to provide safety to capitalist investments.[65]

In contrast, Andrés Bello the international lawyer was much more careful not to undermine the sovereignty claims of the new Republics by the presence of 'barbarians' within their territory. As explicit articulations of the standard of civilization may render American territories *terra nullius*, Bello justified dispossession relying less on the characterization of indigenous peoples as uncivilized than on the direct dominium of the Republics. And Bello did so appropriating Emer Vattel. Paraphrasing Vattel's famous passages on effective occupation, Bello explains that when a nation finds an uninhabited country without an owner, it can legitimately take possession. But only effective possession and the establishment of settlements sustain a claim to sovereignty and property.[66] Nations whose explorers find monuments erected by other nations as signs of possession, pay no attention to these 'empty ceremonies,' like the Pope's bull conferring dominium over the New World.[67] Accompanying these paragraphs, and probably noting the potential danger that Vattel's doctrine presented to the new Republics, Bello adds in a long footnote: 'it must be confessed' that in the American continent some powers have gone beyond Vattel claiming land without effective possession, namely, claiming exclusive rights to acquire land from natives, buying or conquering it from them.[68]

Conversant with universal international law via Vattel, Bello departs from it, qualifying the view that only effective occupation is a legitimate title. Bello opts here for the continuity of colonial law, arguing that the power that first discovers or is first to occupy land exercises supremacy or direct dominium recognized by other nations. Invoking direct dominium Bello can square indigenous occupation with the rights of a discovering–occupying power that lacks effective occupation. Direct dominium, even under continuous indigenous occupation, includes an exclusive right opposable to other powers over the claimed territory, it would therefore be a hostile aggression –Bello clarifies– if a power disturbs the direct dominium of another nation. Moreover, direct dominium gives not only rights to settle disputes with indigenous inhabitants

[64] Andrés Bello, "Las Provincias del Sur", in Andrés Bello, *Obras completas,* Vol. XV (Santiago: Imprenta Cervantes, 1893), pp. 247-257, at 249.

[65] Andrés Bello, "Las Provincias del Sur", pp. 249, 257. "(…) another of the country's primary needs (…) consists in the security of the southern provinces, or the acquisition for the Republic of the vast possessions of the Indians which intercept the territory (…); rendering almost impossible the establishment of frequent communication and of the other means which might be employed to propagate the benefits of a comparatively advanced civilization (…)." p. 248.

[66] Emer de Vattel, *The Law of Nations,* Book I, Chapter XVIII, §208; Andrés Bello, *Principios de derecho internacional*, Chapter 2, 2nd ed. (Paris: Librería de Garnier Hermanos, 1864), p. 32, 40.

[67] Andrés Bello, *Principios de derecho internacional*, p. 40-41.

[68] Andrés Bello, *Principios de derecho internacional*, p. 40-41.

over land use, but also right to acquire indirect dominium from the natives, by purchase or conquest.[69]

Are all indigenous groups and tribes capable of acquiring indirect dominium, occupying land? Bello answers again following and then departing from Vattel. 'Pastoral tribes,' which live wandering within a certain territory, although without having divided property between their members, do possess the land they occupy and therefore cannot be dispossessed without injustice.[70] 'Wandering tribes,' in contrast, are too small to effectively inhabit land. Their 'elusive inhabitation' –*vaga habitación*– can pass neither as real and legitimate possession nor as just and rational use of land. Leaving what is necessary to indigenous subsistence, other men who can effectively use land and settle, may occupy it without injustice. This is how Bello paraphrases Vattel. Then, Bello once again adds a qualification, arguing that the distinction between the two types of tribes and between what is real possession and just and rational use of land from what is not, is difficult to establish. And here again Bello turns to a footnote when departing from Vattel by way of quoting the German jurist Theodor Schmalz: 'Ownership of land is acquired only by cultivation, because it must be the reward of work ... Wherever the savage hunter or the nomadic herdsman leads a wandering life, land has no owner, and nothing forbids its cultivation by the industrious settler. By what title would native hordes arrogate to themselves the dominion of a soil they have not wanted to mark with labor?'[71]

In these passages, Bello's international law textbook may have offered a legal framework not just to conduct the parliamentary debates of the 1860s in Chile, but also to respond the indigenous question in Spanish-America: the Republic has direct dominium, indigenous peoples in principle have indirect dominium; when the Republic extends its authority into indigenous land, their indirect dominium should be respected if considered a pastoral tribe, if they make 'just and rational use' of their land, but if they do not, if their 'elusive inhabitation' does not count as rational use of land and thus as valid possession, the Republic can solve the indigenous question by transferring land to settlers and removing those who become obstacle to bring civilization as cultivation of land and establishment of industry.

Latin American international lawyers preserved the legal framework that Bello articulated towards the mid-century in front of the crystallization of the standard of civilization in European international law towards the end of the 19th century. For example, although echoing the language of civilization, the Argentinian Carlos Calvo, decoupled possession from a standard of civilization.[72] Disallowing possession because of indigenous' 'barbarous' nature was explicitly rejected by Calvo:

> Where a country that does not belong to any State and is possessed by savage or barbarous peoples, one could recognize the necessary duty to extend the domain of civilization as justifying occupation by a civilized State; however, this cannot be

[69] Andrés Bello, *Principios de derecho internacional*, p. 40-41.

[70] Andrés Bello, *Principios de derecho internacional*, p. 40-41.

[71] Andrés Bello, *Principios de derecho internacional*, p. 42; citing Theodor Schmalz, *Droits de Gens Européen*, Book IV, Chapter I, (Paris: Chez N. Maze Libraire, 1823).

[72] Carlos Calvo, *Le droit international théorique et pratique précédé d'un exposé historique des progrès de la science du droit des gens*, Vol. 1, (1896), pp. 207, 209, 408-409.

> admitted, (…) these barbarians possess their country; they use it as they wish; they make use of it in a way that suits their way of life, and they are not subject to anyone's law.[73]

Then, however, Calvo argues that the states of the Americas have complete dominium over their entire territory, regardless of actual possession by indigenous peoples. Therefore, third states cannot claim land not effectively occupied by a state of the Americas, for these states may gradually colonize these lands, allowing European settlers in:

> When a State is in possession of a country, all that the country contains becomes its property, even if its occupation is only effective over a portion of the country. If it leaves uncultivated or deserted areas, no one has the right to take possession of these areas without its consent. It is in the interest of the possessor state to preserve them for future use, and it is not accountable to anyone for the way in which it uses its property. …
>
> Such is the particular situation of the United States of North America, Mexico and the States of South America, which possess vast territories still unpopulated or inhabited by savage tribes. It is understandable that colonization can only be established slowly and gradually in these vast regions, which is why most of the states of the undisputed national domain of which they are a part are making incessant efforts to attract European emigration."[74]

Andrés Bello and Carlos Calvo formulated the *uti possidetis* doctrine in international law, a legal fiction that had been also codified in the constitutions of the new Republics. Towards the end of the 19th century, this doctrine became also part of the project of codifying a regional international law. At the first International Conference of American States, meeting in Washington in 1889-1890, delegates adopted a recommendation in relation to the right of conquest, affirming that 'there is, in America, no territory which can be deemed res nullius.'[75]

III. The endurance of the nation-building framework in the 20th century

The nation-building legal framework, sustaining the domination of indigenous peoples by advancing the empire of law, which coalesced around the middle of the 19th century, remained in its fundamental elements, unchanged up to the 1990s, if not into the present. It is worth repeating that we have argued that the rise of this framework was a regional phenomenon but that the process of indigenous domination and dispossession should be understood in concrete terms in relation to a specific people in its relation to a specific Republic. Here we have only focused on the example of the Chilean state and the *Mapuche*. The story is very different in states where many indigenous groups have historically coexisted, like Mexico, or in Bolivia and Ecuador that have recently recognized plurinationality in their constitutions, for example. Thus,

[73] Carlos Calvo, *Le droit international théorique*, p. 408.

[74] Carlos Calvo, *Le droit international théorique*, p. 409.

[75] James Brown Scott (ed), *The International Conferences of American States, 1889-1928: A Collection of the Conventions, Recommendations, Resolutions, Reports, and Motions Adopted by the First Six International Conferences of the American States, and Documents Relating to the Organization of the Conferences* (Oxford University Press 1931), p. 44.

the argument that the nation-building legal framework continues to structure relations between Latin American states and indigenous peoples requires a more nuanced and detailed explanation.

However, given that when the nation-building framework was challenged Latin Americans across the region came to its defense, we believe that it is possible to recognize a regional dimension in the controversies about the place of indigenous peoples in international law. During two periods in the 20th century history of international law, during the interwar and then during the early decades of the post-1945 era, the nation-building framework was fundamentally challenged. The minorities regime, international supervision of the indigenous question by the ILO and self-determination could have bestowed international legal subjectivity to indigenous peoples.

International lawyers and diplomats from the region reaffirmed Latin American states' sovereignty over the entire territory and population, limiting international accountability of state behavior in relation to indigenous peoples within their territories and excluding them from the international regime for the protection of minorities and from decolonization. The reaffirmation of state sovereignty marks the endurance of the nation-building framework. At the same time, the notion of the indigenous and its place in the nation changed. Under the nation-building framework, indigenous as such did not exist, as they were either assumed to be citizens enjoying formal legal equality, or law-breakers to be disciplined by the expansion of the empire of the law.

The 'absence' of the indigenous, that is, negating its presence as such, continued into the 20th century, when, as we will see, confronting potential international accountability regarding the social or economic conditions of indigenous peoples, lawyers and diplomats argued that as a matter of law, Latin American states did not have indigenous populations. They understood that legally equal citizens formed homogeneous nations. During the early 20th century, the nation-building ideology was gradually reconfigured by the rise of another project –*indigenismo*. Indigenous peoples started to be recognized as a special population in need of protection and assimilation. Latin Americans articulated *indigenismo* as part of a national development and modernization project, thus reconfiguring but preserving the nation-building framework, for matters and policies related to indigenous peoples continued to be part of states' reserved jurisdictional domain.

1. Embracing the turn to internationalism while keeping indigenous within the nation

The 19th century consolidation of statehood depended as much on international recognition of the new Republics as on the conversion of *uti possidentis* and direct dominium into a claim of jurisdictional and territorial control within which indigenous peoples found themselves enlisted to assimilate into the nation. This project depended on an absolute notion of sovereignty that during the 20th century and in particular after the First World War, became, in the name of social interdependence, peace and internationalism, under attack. It is remarkable that Latin American international lawyers were able to enthusiastically support the internationalist turn while keeping indigenous peoples within the state's reserved domain.

Latin Americans, fighting to keep international supervision of indigenous affairs off-limits, reframed 19th century ideas about the expansion of law's empire into 20th century

internationalist legal language affirming national responsibility over the assimilation of indigenous as 'backward' peoples in need of protection. This reframing justified keeping indigenous peoples within the realm of state sovereignty. It also kept 19th century prejudices alive.

The Chilean jurist Alejandro Alvarez, a prominent exponent of the turn to internationalism is a good example of this Latin American trend.[76] Alvarez relentlessly denounced the egoistic individualism that put sovereignty at the center of 19th century classical international law. The modern international law that Alvarez advocated to replace classical international law imposed limits on sovereignty in the name of international solidarity and interdependence.[77] Alvarez saw no contradiction between his internationalism and the prejudices he shared with most of his predecessors.

Highlighting the 'amalgamation of races' in colonial Latin America –between 'the aborigines, the whites, and the negroes, together with the creole element'– Alvarez clarifies that it was the 'whites … although in the minority … [who] exercised control and guided a multitude which was in great part illiterate and ignorant.'[78] This is why the 'creole element' claimed for itself sovereignty over the entire territory of the independent Republics, including unexplored territories and lands that 'from time immemorial have been in possession of native tribes' – Alvarez argued.[79]

We have mentioned that *uti possidetis* has been mostly understood as a doctrine that emerged to define the boundaries between the new Republics. Alvarez, however, was fully aware of the second dimension we have identified regarding indigenous dispossession. Alvarez explains that the '*uti possidetis juris* of 1810,' not only meant that the new Republics claimed the territory they possessed at the moment of independence, but also, adding the expression *juris*, meant that the Republics had the right to possess that land, even if occupied by indigenous.[80] That there are no *nullius* territories in the Americas, meant that indigenous possession had no 'international value' becoming a matter of 'internal public law' instead of international law.[81]

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[76] See the special issue on the life and work of Alejandro Álvarez in the *Leiden Journal of International Law* 19, no. 4 (December 2006), with contributions by Arnulf Becker Lorca, Jorge Esquirol, Carl Landauer, Lialiana Obregon and Katharina Zobel.

[77] See Arnulf Becker Lorca, "Alejandro Alvarez situated: subaltern modernities and modernisms that subvert," *Leiden Journal of International Law* 19, no. 4 (2006): 879-930.

[78] Alejandro Álvarez, "Latin America and International law," *American Journal of International Law* 3, no. 2 (1909): pp. 269-353, pp. 271-272. Then, Alvarez describes independence as sparked from the "creole element, the only thinking part of the population" (p. 272).

[79] Alejandro Álvarez, "Latin America and International law", pp. 342-343

[80] Alejandro Álvarez, *Rasgos generales de la historia diplomática de Chile (1810-1910). Primera época, la emancipación* (Santiago: Imprenta Barcelona, 1911), pp. 218-219, 222-223.

[81] Alejandro Álvarez, *Rasgos generales de la historia diplomática de Chile,* pp. 342-343. In consequence, Alvarez believes mantains that Latin American states are responsible for the acts of tribes within their territory, even if they do not recognize the sovereignty of the state.

Maintaining the indigenous question within the bounds of the nation enabled Latin Americans to pursue recognition of a regional 'Latin American international law' that reflected interdependence and solidarity between states in a supposedly ethnically and racially homogeneous continent. The prominent Colombian jurist Jesús María Yepes, for example, writing for the Hague Academy, emphasized that 'irreducible rivalries ... antagonisms of race, language or religion' were foreign to Latin America.[82] The political, historical and social particularities of the region produced an international law that not only was concerned with the problem of extra-continental interventions, state recognition and diplomatic protection, but also reflected continental solidarity –Yepes affirmed comparing Latin America to Europe. Rather than pursuing solidarity, Europe pursues a balance of power, and rather than trying to secure the recognition of the principle of non-intervention, Europe is preoccupied with colonial and minority issues.[83]

The preoccupations enunciated by Yepes –outlawing intervention, sanctioning sovereign equality and a declaratory doctrine of recognition, among others– had been persistently tackled by Latin American international lawyers since the 19th century. Their efforts to codify Latin American international law were crowned with success in 1933 –with the signing of the Montevideo Convention on the Rights and Duties of States– in part because this time sovereignty and statehood were couched in the language of solidarity and internationalism.[84]

The strengthening of statehood –linked now to internationalism– that was achieved in Montevideo, announced forbidding consequences to indigenous peoples. Under the formal standard of statehood instituted by Montevideo, a state comes to existence by the conjunction of formal attributes: territory, population and government. Montevideo was in consequence an important step towards the weakening of civilization as a standard to recognize international legal personality and thus sovereignty. This change, which arguably made the international community more plural, did not translate into indigenous autonomy. To the contrary, it increased state pressure to consolidate sovereignty through effective control of territory inhabited by indigenous peoples, increasing also the incentives to assimilate indigenous populations.

The recombination of the languages of sovereignty and internationalism achieved by early 20th century Latin American international lawyers may explain why they did not see contradiction between deepening internationalist commitments and claiming statehood and assimilating indigenous peoples as fulfilment of an internationalist duty, a 'sacred trust' regarding individuals and groups understood to be economically and socially disadvantaged in comparison to the rest of the population.

The internationalist sensibility was reflected not only in the paternalistic duties states imposed on themselves regarding indigenous peoples, but also in the institution of a formal regional interstate project to formulate and pursue the policies of assimilation. At the same meeting

[82] Jesús María Yepes, "Les problèmes fondamentaux du droit des gens en Amérique," in *Collected Courses of the Hague Academy of International Law*, Vol. 47 (The Hague: Hague Academy of International Law, 1934), pp. 1-144, at p. 14.

[83] Jesús María Yepes, "Les problèmes fondamentaux du droit des gens en Amérique," p. 10-11.

[84] See Arnulf Becker Lorca, *Mestizo international law*, chapter 9.

where the Montevideo Convention was adopted –the Seventh International American Conference– it was decided to organize a first Inter-American Indigenist Congress.[85]

Montevideo, both as the culmination of the project of institutionalizing formal statehood and as the beginning of a regionally-coordinated project of assimilation –*indigenismo*– marked Latin Americans' ability to nationalize and take control over indigenous matters in an internationalist key. It is from this position that they disciplined international supervision of indigenous affairs and challenged the pertinence of minority rights and ultimately of self-determination.

2. *Indigenismo*: setting limits to international supervision

At the Seventh Montevideo Conference it was decided to organize an Inter-American Indigenist Congress. The Eight American Conference of 1938, meeting in Lima, reiterated the call to organize an Indigenist Congress and adopted a resolution on the protection of indigenous populations.[86] The resolution defined indigenous peoples as original peoples: 'descendants of the first settlers of the American lands.' But also, as precarious subjects in need of guardianship, and as populations that have a preferential right to the protection of public authorities, in order to compensate for the 'deficiency' of their 'physical and intellectual' development.[87] At the same time, however, the resolution declared that native peoples must be protected so that certain 'positive indigenous values' can be preserved in the assimilation process. A policy of 'complete integration' will ensure that indigenous people participate effectively and on an equal footing in the life of the nation.[88]

The Indigenist Congress, which finally took place in April 1940, in Pátzcuaro, Michoacán, Mexico, further elaborated indigenist policies, approving a series of agreements and declarations on indigenous political and social welfare, land distribution, irrigation and education policies, among others, and the creation of the Inter-American Indian Institute based in Mexico.[89] The Institute advanced indigenist ideology in the region for at least half a century, until the breakdown of this paradigm in the 1990s.[90]

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[85] The International Conferences of American States 1933-1940, Seventh Conference, Resolution XCIII, First Supplement (Washington: Carnegie Endowment for International Peace, 1940), p. 104.

[86] The International Conferences of American States 1933-1940, Eighth Conference, Resolution XIII, American Indigenous Experts Conference (Washington: Carnegie Endowment for International Peace, 1940), p. 242; and The International Conferences of American States 1933-1940, Eighth Conference, Resolution XI, on the Indigenous population protection (Washington: Carnegie Endowment for International Peace, 1940), p. 241.

[87] The International Conferences of American States 1933-1940, Eighth Conference, Resolution XI, p. 241.

[88] The International Conferences of American States 1933-1940, Eighth Conference, Resolution XI, p. 241.

[89] Congreso Indigenista Interamericano, *Acta final del Primer Congreso Indigenista Interamericano: celebrado en Patzcuaro, Michoacan, Mexico del 14 al 24 abril de 1940* (Washington, D.C.: Unión Panamericana, 1940).

[90] See José Bengoa, *La emergencia indígena en América Latina*, pp. 86-125.

The gradual institutionalization of *indigenismo* within Latin American states and in the Inter-American context intersected with the increasing attention that in the 1920s the ILO devoted to the working conditions, poverty and rurality of native labor, concluding the first conventions for their protection, for example, on the regulation of abusive methods of recruiting workers and criminal sanctions for the breach of contract.[91]

The convergence between *indigenismo* and the ILO was part of the larger trend that marked the long road leading to what Bengoa described as the 'indigenous irruption' in the 1990s, reflected in the passing of the ILO Convention 169 and the UN and American declarations of indigenous rights.[92] This convergence also marked the rise of the indigenous as a specific target of social policy. That is, while regarded as citizens under the nation-building framework, under *indigenismo*, the indigenous gradually became a vulnerable group to be carefully integrated as Latin American states were engaged in the project of development and modernization.[93]

Although the rise of *indigenismo* occurred at the same time the international system was undergoing a process of increasing institutionalization, with the creation of permanent intergovernmental organizations, such as the ILO and the League of Nations, and in the Americas, by the consolidation of the system of inter-American conferences and the process of codification of American international law, the indigenous question in Latin America was not fully internationalized –remaining to a great extent within sovereignty's reserved domain.

Indigenous rights and labor rights scholar, Luis Rodríguez Piñero, in his comprehensive and groundbreaking study of indigenous peoples and the ILO, notes that Latin American *indigenismo* was well entrenched by the time when the ILO turned its attention to the Americas. The assimilationist framing of *indigenismo* 'set the discursive limits of ILO policy concerning indigenous groups in the Americas and beyond.'[94]

Rodríguez Piñero traces a trajectory similar to the one we have identified here. Since indigenous were understood to be integrated as citizens in the nation-building framework, Latin Americans resisted ILO's expansion of its mandate to scrutinize conditions of native laborers. Latin Americans changed their attitudes, gradually accepting ILO supervision when *indigenismo* framed ILO engagement within the limits of social and economic assimilation.

As it is well known, the ILO began to study the condition of indigenous labour in the 1920s, undertaking special investigations, establishing a Committee of Experts on Native Labour in

[91] ILO Conventions 50, 64 and 65 (only recently abrogated by Report VII (2) 107 OIT meeting, 2018). Then, ILO Convention 107, negotiated and signed in the 1950s, culminated the rise of an assimilationist paradigm. See Luis Rodríguez Piñero, *Indigenous peoples, postcolonialism, and international law: The ILO regime (1919–1989)*. Oxford University Press, 2005.

[92] José Bengoa, *La emergencia indígena en América Latina*.

[93] *Id*. pp. 204-253. There is a vast literature on *indigenismo*, for an overview see Rodríguez Piñero, *Indigenous peoples*, pp 54-59.

[94] Rodríguez Piñero, *Indigenous peoples*, p. 59. The influence of *indigenismo* on the ILO, the policy-oriented framework centered on assimilation, was gradually replaced by a focus on legislation. *Id*. Chapter 4.

1926 and adopting the first Conventions we have mentioned above.[95] During the first decades of its existence, the ILO expanded its mandate to investigate the conditions of workers, not only in factories, but also in other sectors like agriculture.[96]

Should the ILO also expand its scope of attention from European workers to laborers in 'special countries' and in 'colonies, protectorates, and the mandated territories'? This question was asked by the Indian workers' delegate Narayan Malhar Joshi at the Seventh International Labour Conference of 1925, reproaching governments responsible for these countries and territories, for not having provided information about native workers in their reports, or for maintaining that ILO Conventions and Recommendations cannot be applied in overseas possessions.[97]

On the one hand, as it became clear that member states with colonial possessions and mandates had the obligation to provide information, the problem was that they had ignored the obligation or justified unequal treatment of workers in overseas territories.[98] On the other hand, ILO's foundational treaty established that special 'climatic conditions' that contributed to the 'imperfect development of industrial organization' must be taken into account when drafting new conventions or recommendations.[99] Accordingly, the ILO considered certain countries, in particular 'Far Eastern Countries,' as 'special countries.'[100] In relation to these countries Joshi demanded greater attention, proposing a resolution concerning the 'conditions of labor in Asiatic countries' which was adopted by the Seventh Conference.[101]

The following year, the Indian workers' delegate at the Eighth International Labour Conference, the renowned politician, union organizer and independence activist, Lala Lajpat Rai, followed up on his predecessor's demands, proposing another resolution expanding the ILO's mandate over native labor. This time Lajpat Rai proposed scrutinizing working conditions of '"Native Labor" and "Colored Labor" in the continents of Africa and America.'[102] After strong opposition

[95] Rodríguez Piñero, *Indigenous peoples*, p. 17 and in general see chapter 1.

[96] Collecting information on the 'conditions of industrial life and labour' was one of the central functions of the International Labour Office –accoring to Article 396 of the Treaty of Versailles.

[97] International Labor Conference, Seventh Session, Record of Proceedings (Geneva, 1925), p. 104-105.

[98] As Joshi pointed out, these states had provided incomplete information or argued that law regulating working conditions do not apply overseas For example, reporting on the Conventions ratified, the Belgian government declared that the laws protecting workers in Belgium are not applicable to the Belgian Congo because of local conditions. *Id*, p. 1187.

[99] Art 405 of the Treaty of Versailles.

[100] See e.g. International Labor Conference (1925), p. 1197.

[101] The original draft resolution submitted by Joshi mentions Asiatic countries. The final text mentions in particular China, India, Japan, Persia and Siam and the colonies, protectorates and mandates territories in Asia. International Labor Conference (1925), p. 672, 837.

[102] International Labor Conference, Eight Session, Record of Proceedings (Geneva, 1926), p. 116-120, 260. Lajpat Rai argued that investigating the 'conditions of labour in the Orient and in the coloured world of Africa and America,' was important, not only because of the sheer numbers of involved, but because 'white workers' may have not

from delegates, many of whom were Latin Americans, Lajpat Rai's proposed resolution was amended to exclude any reference to Africa and America. Without sparing words, the Brazilian government delegate and diplomat Elyseu Fonseca de Montarroyos declared that:

> in Brazil … I could even say in all of Latin America, there is no such thing as a colored or indigenous workforce. What exists is simply a workforce. Whether men are black, yellow, of all the colors you would want, blue, green, this distinction does not exist. All are citizens.[103]

That Lajpat Rai's singled out the continents of Africa and America was the main reason to reject the proposal, not only for Latin Americans who seconded the Brazilian representative but also for the South African delegate. But, whereas the South African read the proposal as revindicating differences in race and civilization to justify inequality in the treatment of laborers, disagreeing only in relation to the proposal's African scope, Latin Americans disagreed invoking the recognition in their legal systems of the principle of formal equality under the law.[104] After the remarks by the Brazilian delegate, those from Cuba, Venezuela, Argentina, Uruguay and Chile repeated the Latin American position that did not see the need to develop a specific focus on indigeneity and race in the region, as labor laws applied to every citizen equally.[105]

In these debates various representatives expressed ambiguity about the scope of the expression native labour and about whether it included or not indigenous workers in Latin America. Latin Americans dispelled any doubt. Because everyone is a citizen, as a matter of law, there are no indigenous, or native workers. The Argentinean delegate rejected the proposal because it did not define the expression 'native workforce' –the proceedings recording '*main d'oeuvre indigène*' in French translation, and 'native labour' in English translation.[106] César Charlone, the Uruguayan delegate, made the position plainly clear, using neither 'native' nor 'indigenous,' but the term 'aboriginal' in English translation. We may infer (since the proceedings do not record the original Spanish version) that Charlone affirmed that he comes from a country '*donde no hay indios*,' the proceedings translating, a country where 'there are no aboriginal inhabitants' '*il n'y a pas d'indiens*;' insisting again: 'we are all free and equal citizens.'[107]

Lajpat Rai responded welcoming the statements by the representatives of Latin America, for their views placed their countries 'in a very favorable contrast with the empires of the world.'

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realized that the protections that they have earned after long struggles could be lost if employers transfer their activities to Asia and Africa taking advantage of labour conditions in these countries. *Id*. 116-117.

[103] *Id*, p. 264 (in translation). The relevant section in the original French reads: 'il n'existe pas de main d'oeuvre de couleur ni de main d'ouvre indigene.' p. 263.

[104] Clarence Cousins, the South African Secretary of Labor stated that 'distinctions of civilization, racial instincts and tribal traditions do undoubtedly exist … we do well to respect and cherish those distinctions,' *Id*. P. 261.

[105] See *Id*. 266-269. For example: 'There is no native workforce in Cuba. There only is workforce tout court. There is no difference based in color: black and whites enjoy the same rights.' *Id*. 265. The Venezuelan delegate proposed to delete the reference to Africa and America. *Id*. 266.

[106] *Id*. 267.

[107] *Id*. 268.

But then he made clear that he knew exactly what he meant by native and colored labor. It refers to the problem emerging in colonies and protectorates as well in other places governed by white people where 'white labor comes into competition with native or colored labor.' It is there where 'the trouble arises' and there where 'the question of conditions of labor requires elucidation and ventilation.'[108]

'I reluctantly accept.'[109] In light of the opposition voiced by many representatives, this is how Lajpat Rai approved the changes to his proposal, which eliminated references to the Americas and Africa. This was not a great defeat, but rather, a milestone in the expansion of ILO's indigenous agenda. The amended resolution welcomed the creation of a Committee of Experts and the first report on the conditions of native labour to be presented in the next conference.[110] The approved resolution was also not a defeat for Latin Americans. The discussion ended with the Cuban delegate concluding that the situation presented by Lajpat Rai did not apply to Latin America, insisting that 'white, Indian and negro,' –*blancs, peaux-rouges et nègres*– enjoy the same rights.[111] The resolution preserved the idea that there was no indigenous question in the region, because, juridically integrated in the legal order of Latin American states as citizens, indigenous enjoyed formal equality. Resolving the problem in formal legal terms preserved also *indigenismo*, as the ILO project of inquiring native labor conditions white labor comes into competition with native or colored labor could continue within the limits of a social and economic policymaking centred on assimilation.[112]

3. Indigenous, not minorities

In 1925, the Seventh Assembly of the League of Nations discussed a proposal to expand the scope of minority protections, from a European to a universal regime. After the First World War, a special treaty regime emerged to protect some minority populations in Europe, to protect them not only from physical extermination, but also from cultural, religious or linguistic assimilation. Recognized minorities enjoyed special rights, such as the right to private and public use of native language and its teaching and to the exercise of religion and other cultural practices. Latin American international lawyers and diplomats opposed the universal application of the system for the protection of minorities, arguing that the minority system should be applicable only to certain European States, by virtue of the Treaty of Versailles, or as a condition of admission to the League of Nations. It was not only the safeguarding of difference characteristic of the minority regime that Latin Americans saw as incompatible with assimilationist *indigenismo*. But also, Latin Americans saw minority protections as threat to the

[108] *Id*. 273.

[109] *Id*.

[110] *Id*. 431.

[111] *Id*. 273.

[112] See Luis Rodríguez Piñero, *Indigenous peoples,* Chapter 3.

territorial and political integrity of their countries, for minority treaties emerged as a substitute for self-determination.[113]

At the Seventh Assembly, the Lithuanian delegation raised the problem of the scope of application of minority protections. After the First World War, during the Paris Conference, endorsement of the nationality principle in the creation of new states came with the imposition of treaty obligations to protect minority populations. Minority treaties, however, were only imposed, first on Poland, and then, among others, on new Eastern European states applying for League membership. The lack of universality (Germany and Italy, for example, were excluded) meant that the imposition of minority treaties was resented as a sign of humiliation.[114] This is why the Lithuanian representative argued that only a universally applicable treaty would resolve the violation of the principle of sovereign equality.

Opposition to the Lithuanian proposal came not just from Europe, but from Latin America.[115] The Brazilian delegate to the Assembly, Afranio de Mello-Franco, in charge of analyzing the Lithuanian proposal explained that a general treaty for the protection of minorities would be impossible to apply in the Americas, since there were no minorities in the region. For the states of the region 'had produced in them national organizations in which collective unity is complete.'[116]

De Mello-Franco also commented on the Lithuanian proposal's effort to define the concept of minority more precisely. Arguing that minorities included not only racial, linguistic and religious characteristics, but also psychological, social and historical ones, the Brazilian delegate, referring to the American reality, concluded that 'mere coexistence of groups of persons forming racially different collective entities in the territory and under the jurisdiction of a State is not sufficient ... to recognize ... a minority requiring protection by the League of Nations.'[117]

De Mello-Franco did not explicitly invoke indigenous peoples, but for an ethnic or racial group to be recognized as a minority, he explicitly demanded the existence of a dispute between nationalities or the transfer of territory from one to another sovereign. The Brazilian delegate explicitly clarified that these circumstances did not exist in the Americas.[118]

Latin American attitudes regarding minority protection reflected their general approach to limit supervision of domestic –indigenous– affairs by international bodies, as we saw in relation to the ILO. In this case, potential supervision could come from the League. The League of Nations Mandates regime established by the infamous Article 22 of the Covenant, granted guardianship

[113] For an example of this idea see e.g. Josep L. Kunz, "The present status of the international law for the protection of minorities," *American Journal of International Law* 48, no. 2 (1954): pp. 282-287; and in general see Patrick Macklem, *The sovereignty of human rights*, (New York: Oxford University Press, 2015), Chapter 5.

[114] Mark Mazower, "Minorities and the League of Nations in Interwar Europe," *Daedalus*, 126, no. 2 (Spring 1997): pp. 47-63, at 52.

[115] League of Nations, 7th General Assembly (1925), Sixth Meeting, *League of Nations Office Journal*, p. 141.

[116] Ibid, p. 141.

[117] Ibid, p 141.

[118] Ibid, p. 141.

over colonies and territories of the losers of the Great War that were 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.' Mandates were conferred to 'advanced nations' by virtue of their resources and experience, in order to tutelage the 'welfare and development' of less developed peoples. This tutelage –Article 22 clarified– formed a 'sacred trust of civilization.'

Supervision of Mandates was given to the League's Mandates Commission. Although the Commission operated with respect to colonies and territories that ceased to be under the sovereignty of a state after the war, the reference in Article 22 to guarantees to provide for the welfare and development of the 'indigenous population' could bring potential international supervision in relation to indigenous peoples of the Americas. It was no longer a hypothesis when a delegation sent by a native people, the Iroquois Confederacy represented by Deskaheh, arrived in Geneva with requests for mediation in its dispute with Canada.[119]

Minorities were entitled to protection when self-determination, as a principle used to redefine European borders after the Frist World War, was not possible to apply for political reasons. Both the principle of self-determination (that each national group should enjoy self-government) and the minority regime (that a non-self-governing national group is protected in its particularities from the dominant national group in which it is embedded) were conceived to solve European problems. Yet, the mere possibility of extending these institutions to the Americas was understood to represent a danger. Latin American states' foreign policy, during the interwar and in the post-Second World War era, remained firmly entrenched around preventing self-determination from being contemplated. This attitude did not change when human rights rose to assume a central role in the post-war international legal order. Human rights, as universal rights, cohered better with assimilationist *indigenismo* than with a special system of minority protection, for neither the United Nations Charter nor the Universal Declaration of Human Rights incorporated minorities as special international subjects as in the interwar minority treaties.[120]

Latin Americans therefore intervened actively when minority questions resurfaced during the codification of human rights. When new mechanisms for acquiring and limiting and sovereignty (self-determination and human rights) emerged in the post-1945 order, Latin Americans reaffirmed the traditional position with respect to indigenous peoples. As groups made up of individuals under state authority, indigenous peoples would only be considered as subjects of internationally recognized rights insofar they were considered citizens.

For example, during drafting negotiations of the International Covenant on Civil and Political Rights, Latin American diplomats successfully proposed a restrictive definition of the legal concept of minority. The Chilean delegation headed by Humberto Díaz-Casanueva proposed the final wording of Article 27 of the Covenant, which, at the cost of logical inconsistency, left

[119] See J. Rostowski, "The Redman's appeal for justice: Deskaheh and the League of Nations," in *Indians and Europe: an interdisciplinary collection of essays*, edited by Christian F. Feest (Aachen: Edition Herodot, 1987), pp. 435–453; Arnulf Becker Lorca, *Mestizo international law*, pp. 281-286.

[120] Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (New York: United Nations, 1991).

no doubt that the protection of minorities would only apply where minorities exist.[121] This circular language in the Chilean proposal was intended to make absolutely clear that indigenous peoples could not be considered a minority.[122]

In contrast, the Soviet and Yugoslavian delegates proposed the recognition of minority rights to individuals and groups belonging to ethnic, religious or linguistic minorities that went beyond non-discrimination and included cultural, linguistic and religious rights as well as the right to political and economic life.[123] Díaz Casanueva, the Chilean diplomat, declared sympathy for countries facing minority problems. However, he strongly opposed recognizing minorities without first defining the concept of minority. He equally objected the inclusion of rights beyond non-discrimination, since Latin American nations, with a 'common language, origin and culture' have not had a minority problem.[124] It was in this context that Diaz Casanueva thought that it could be dangerous to have a general formula that could trigger minority protections in states that have no minorities, thus proposing the mentioned wording in article 27 that limits protections to 'well-established historical minorities,' including the redundant expression 'in States where minorities exist.'[125]

Adopting the assimilationist paradigm during negotiations, Díaz Casanueva was conscious of excluding indigenous peoples from minority protections in the human rights covenant, for the: 'young Latin American countries seek the integration of their national communities.'[126] Recognizing minority protections would be against the interest of Latin American states, not only because immigrants could claim special rights, but also because minority rights could be claimed by indigenous peoples. The Chilean delegate, using Mexico as an example, argued that when preserving their own ways of thinking and their own language, indigenous groups have remained outside of the benefits of modern civilization, therefore it would be 'pure romanticism' to transform indigenous into minorities.[127] Seconding Díaz Casanueva, the delegate of the United Kingdom, affirmed that 'with the march of the civilizing process,

[121] 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 practise their own religion, or to use their own language". On the logically inconsistent wording of definition of minority see Timo Makkonen, *Identity, Difference and Otherness: The Concepts of "people", "Indigenous People" and "Minority" in International Law*, (Helsinki: Erik Castrén Institute of International Law and Human Rights, 2000), p. 84.

[122] Chile, Amendment to the Draft Protection of Minorities. Document E/2256, Annex II, Section A III.

[123] United Nations, Economic and Social Council, Commission on Human Rights, Ninth Session, *Summary record of the 368th meeting held at the Palais des Nations,* (Geneva*,* 30 April 1953). Document E/CN.4/SR.368, pp. 4-8; Soviet proposal Document E/CN.4/L.222; Yugoslav proposal, Document E/CN.4/L.225.

[124] United Nations, Economic and Social Council, Commission on Human Rights, Ninth Session, *Summary record of the 370th meeting held at the Palais des Nations*, (Geneva, 4 May 1953)*.* Document E/CN.4/SR.370, p. 5.

[125] United Nations, Document E/CN.4/SR.370, p 5. Díaz Casanueva also proposed postponing the discussion of the article until the concept of minority is defined at a later date. This proposal was rejected. See United Nations, Document E/CN.4/L.261 and Document E/CN.4/SR.371, p. 4.

[126] United Nations, Document E/CN.4/SR.368, p. 10.

[127] United Nations, Document E/CN.4/SR.368, p. 10.

underdeveloped groups will in the course of time be assimilated ... it would be undesirable for states to be obliged to postpone an inevitable historical process... .'[128]

The outcome of these debates foreclosed minority protections of indigenous peoples in Latin America. Opposition to minority rights reflected Latin Americans' fear of weakening national sovereignty. Opposition also reflected a conviction that indigenous peoples were part of the nation. Belonging to the nation, indigenous peoples became groups that had to be assimilated as individual citizens. And as groups of citizens, indigenous do not form a people in the international law sense of a people with the right to self-determination. To the Latin American international lawyer there was a danger averted. As Díaz Casanueva explained: if states would have to guarantee special rights and privileges to minorities, this process will culminate in minorities claiming autonomy within the state.[129]

4. Indigenous, not peoples with a right to self-determination

If Latin American international lawyers and diplomats thought that in the final wording of minority rights they averted the danger of indigenous autonomy, the danger resurfaced in the post-45 context during deliberations on the right to self-determination. The rise of self-determination, from a legal principle to an international right, did not revolve around determining the rights enjoyed by indigenous peoples. However, some of the debates that lead to the rise of self-determination, lead at the same time to the development of a legal doctrine –the 'salt water' or 'blue water' doctrine– justifying the exclusion of indigenous peoples from the right to external self-determination.[130]

We have mentioned the gradual internationalization of the indigenous question in the ILO, in a process starting in 1926 with the establishment of a Committee of Experts, which continued in the 1940s and 1950s, with the work undertaken by ILO's Indigenous Labor Program and the Andean Indian Program as well as the studies and reports on the working conditions of native labor in independent countries, among others. In this gradual process, Latin American *indigenismo* and the developmental framework that emerged in the international arena came together to conceive indigenous peoples as recipients of assimilationist policies of modernization.[131] Luis Rodríguez Piñero has shown that this shift represented a significant change because the international bodies and programs bringing about the internationalization of indigenous affairs paved the way for another gradual shift, from a focus on policy to a focus on legislation.[132]

[128] United Nations, Document E/CN.4/SR.369, p.5

[129] United Nations, Document E/CN.4/SR.368, p. 9.

[130] See W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law*, (New York: Nellen Publishing Company, 1977), p.119; Anaya, *Indigenous Peoples*, pp. 54-55, 75-76.

[131] Rodríguez Piñero, *Indigenous peoples*, Chapter 3.

[132] See Id. Chapter 4. Rodríguez Piñero argues that Latin Americans considered indigenous problems a matter of policy not legislation (p. 117), the shift was therefore gradual. The idea of outlining special labor standards for native

The shift to law culminated in 1957 with the adoption of the first ILO Convention devoted to indigenous rights, Convention 107.[133] It is not surprising that Latin Americans supported Convention 107. Not only was the Convention's assimilationist framework consistent with *indigenismo*. But also, by the late 1950s it was clear that indigenous rights did not include a right to self-determination. Thus, recognizing indigenous rights in a treaty like Convention 107 did not threaten national statehood. However, the exclusion of indigenous peoples from self-determination did not come about in the ILO context, but rather, exclusion resulted indirectly from the resolution of a conflict between colonial and anti-colonial states, regarding the scope and meaning of non-self-governing territories as a 'sacred trust' in Chapter XI of the UN Charter. And more specifically, regarding the obligation that states with responsibilities over non-self-governing territories have to transmit to the Secretary General, information about the socioeconomic and political conditions of the populations in these territories.

A. Decolonization

Before the 1960s, it is difficult to speak of a fully recognized right to self-determination. Self-determination appeared in the 1945 UN Charter only twice. Article 1(2) on the purposes of the UN and article 55 on international cooperation, insert self-determination as a principle regarding friendly relations between nations, without imposing any specific obligation on member states regarding its realization.[134] The Charter, imposing a system of international accountability, conceded colonial rule. Chapter XII instituted a trustee system for territories that had been under League mandate or territories that after the War were detached from defeated states. Chapter XI instituted a regime for non-self-governing territories. Moreover, the 1948 Universal Declaration of Human Rights did not mention self-determination.

In 1960, self-determination emerged from a series of resolutions adopted by the General Assembly of the United Nations. The first and most important of them, Resolution 1514 (XV) on the granting of independence to colonial countries and peoples, of 14 December, 1960, transformed self-determination, instantly upon signature, into a rule of customary international law. Resolution 1514 was followed by other resolutions giving substance to the right, spelling out the obligations necessary to uphold self-determination.[135] Only after these resolutions, self-determination was recognized as a human right, as a first article of both of the 1966 human

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populations emerged within the developmentalist policy framework, as a technical project of adapting labor norms to the reality of populations understood to be less advanced (p.119).

[133] The adoption of Convention 107, with active participation of Latin American labor experts, but very much in line with *indigenismo*, without consultation or participation of indigenous representatives. *Id*. p. 123. This explains why Latin Americans, with the support of the Soviet bloc backed the draft, overcoming opposition from countries with indigenous populations, such as Australia and the United States. *Id*. p. 125.

[134] Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, pp. 43-47; Hurst Hannum, *Autonomy, sovereignty, and self-determination: The accommodation of conflicting rights*, (Philadelphia: University of Pennsylvania Press, 2011) p. 33.

[135] Umozurike Oji Umozurike, *Self-determination in international law,* pp. 69-74.

rights treaties: the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights.[136]

Self-determination struck a radical blow to classical international law, culminating the long process through which the standard of civilization was weakened and ultimately replaced by a formal standard of statehood, as the legal criteria according to which polities would be considered sovereign. The UN resolutions on self-determination that followed projected and secured this transformation of classical international law. Decolonization wars, for example, became legal, as states acquired the obligation to refrain from the use of force to deprive peoples of their right to self-determination.[137] International humanitarian law, in turn, was updated to this new reality of the legitimate use of force by peoples exercising the right to self-determination.[138]

Why did these profound transformations not reach indigenous peoples? Paraphrasing James Anaya, we may ask, why where they bypassed by self-determination?[139] But before answering, there is another question to ask: why would indigenous peoples be included in the first place? Neither the UN Charter, nor the abovementioned GA Resolutions mentioned specific peoples as holders of the right to self-determination. Thus, the general formula used by Resolution 1514, circumscribing self-determination to peoples under 'alien subjugation, domination and exploitation,' could have been interpreted as including indigenous peoples.[140]

More specifically, the intersection between the terms 'people' and 'native' in the context of discussions about the 'sacred trust of civilization,' elicited questions about the inclusion of indigenous peoples as natives subject to international tutelage. Articles 22 and 23 of the League Covenant used the term 'peoples' in reference to peoples under colonial and mandate rule and 'natives' in reference to inhabitants. The rise of self-determination put an end to the idea of tutelage over peoples regarded as 'not yet able to stand by themselves under the

[136] Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, (Cambridge: Cambridge University Press, 1995), Part II, Chapter 3.

[137] United Nations, General Assembly, Resolution 2625(XXV), 24 October 1970, "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations". United Nations, General Assembly, Resolution 3103(XXVIII), 12 December 1973, "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes". And United Nations, General Assembly, Resolution 3314(XXIX), 14 December 1974, "Definition of Aggression".

[138] See Jochen von Bernstorff, "The Battle for the Recognition of Wars of National Liberation," in *The Battle for International Law: South-North Perspectives on the Decolonization Era*, Chapter 2, edited by Jochen von Bernstorff and Philipp Dann (Oxford: Oxford University Press, 2019).

[139] Anaya lamented that self-determination:

> largely bypassed indigenous patterns of association and political ordering that originated prior to European colonization. Instead, the population of a colonial territory as an integral whole, irrespective of precolonial political and cultural patterns, was deemed the beneficiary unit of decolonization prescription.

Anaya, *Indigenous Peoples*, p. 54.

[140] United Nations, General Assembly, Resolution 1514 (XV), 14 December 1960, "Declaration on the Granting of Independence to Colonial Countries and Peoples", article 1.

strenuous conditions of the modern world,' (Covenant, article 22), or as not yet having 'attained a full measure of self-government,'(Charter, article 73). If tutelage turned into independence for some peoples, why did it not for indigenous peoples?

Indigenous peoples were bypassed for at least two reasons. First, exclusion was a byproduct of the geopolitical context. Resolution 1514 culminated long and difficult diplomatic negotiations between Western-colonial states, on the one hand, and the Afro-Asia bloc, with the support of other states, including the Soviet Union and Latin American states, on the other. But it was sustained Afro-Asian activism, Soviet support and fragmentation within the bloc of Western colonial powers that lead to the adoption of the GA Resolutions that transformed self-determination into a right.[141] The Afro-Asian bloc did not have the indigenous question in mind when fighting to end Western colonialism. Latin Americans thus offered support while understanding that decolonization did not affect their polities, as it was clear that self-determination would not mean a right to secession. Resolution 1514, for example, declares national unity and territorial integrity as limits to self-determination.[142] Living within the territory of an independent state, indigenous peoples were left without a right to external self-determination.

Second, indigenous peoples were not simply bypassed because decolonization targeted Western colonial rule, they were explicitly excluded. International lawyers and diplomats, prominently among them Latin Americans, developed a legal doctrine –the saltwater doctrine– to justify the exclusion of indigenous peoples from self-determination.

B. Reviving the 'sacred trust'

The saltwater doctrine excluded indigenous peoples from self-determination. But the doctrine came as a response to a question only indirectly linked to self-determination. It emerged in response to the controversy caused by the 'Belgian thesis,' defending the 'sacred trust' that a 'government representing a superior civilization exercises over certain ethnic groups belonging to an inferior civilization.'[143]

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[141] See Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia*. (The Hague: Martinus Nijhoff, 1971) and Umozurike Oji Umozurike, *Self-determination in international law,* (Hamden: Archon Books, 1972). Western states emphasized self-determination as a principle guiding the internal exercise of sovereignty and guaranteeing democratic governance. The Soviet Bloc and the Third World emphasized self-determination in its external facet, as an essential element in the struggle for decolonization. This is why, for example, the controversy over which facet of self-determination –internal or external– to enshrine in the 1966 human rights treaties was resolved in a compromise. Although self-determination in its external facet was included in both treaties as the first human right, its definition was not only ambiguous, but also omitted specific obligations. Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, pp. 48-52.

[142] United Nations, General Assembly, Resolution 1514 (XV), article 6; United Nations, General Assembly, Resolution 2625 (XXV), preamble.

[143] F. Van Langenhove, The *Idea of the Sacred Trust of Civilization with Regard to the Less Developed Peoples*, Government Information Center, New York 1951, p. 4; see also pp. 13-15. See in general the statements by Belgian diplomats collected by the Belgian government and published as: *The sacred mission of civilization: to which peoples should the benefits be extended? The Belgian thesis* Belgian Government Information Center, New York, 1953.

In the General Assembly of 1952, the Fourth Committee of the Assembly, responsible among others for decolonization, discussed the obligations that in accordance with Article 73 of the UN Charter, states have in relation to non-self-governing territories over which they are responsible. In particular, the Assembly discussed the obligation to transmit to the Secretary General, information on the economic, social and educational conditions of those territories.

The question about the nature and scope of the obligation to transmit information had been discussed in 1949, when the General Assembly constituted a Committee on Information from Non-Self-Governing Territories to study the obligations contained in article 73.[144] The Committee was established for a three-year period, after which its renewal would be discussed in 1952. At the Assembly of 1952, colonial states like Belgium, France and the United Kingdom opposed the renewal of the Committee.[145] Specifically, the Belgian delegates justified the opposition to the renewal based on the idea of a 'sacred trust.'

Pierre Ryckmans, former Governor General of the Belgian Congo, explained that opposition to the renewal of the Committee did not reflect disagreement with international cooperation, since Belgium had always supported the internationalist spirit that served the interests of small nations.[146] On the contrary, according to Ryckmans, Belgian opposition sought to strengthen the principles underpinning the regime of non-self-governing territories in Chapter XI of the Charter. These principles, which concern the prosperity and social progress of all peoples, must extend not only to peoples in non-self-governing territories, but also –the Belgian delegate affirmed– to all 'underdeveloped' ethnic groups and 'backward' indigenous peoples, wherever located, in America, Asia or Africa.[147]

Where the Covenant of the League used the term 'indigenous,' the Charter of the United Nations speaks of 'territories whose peoples have not yet attained full self-government' – Ryckmans notes asking: to which territories and to which peoples does the Charter refer?[148] The problems of misery and exploitation, which deprive some peoples of the benefits of civilization, are the same whether these peoples are found in independent states or in territories under trusteeship –the Belgian diplomat observed, arguing that the protection to which populations in non-self-governing territories are subject should also be extended to 'backward

[144] United Nations, General Assembly, Resolution 332 (IV), 2 December 1949.

[145] A/2219 p. 14. Other colonial states like Denmark and the Netherlands, with the support of the United States, argued for a further trail three-year period; while Third World states lie Brazil, Ecuador, Egypt, India and Indonesia and the Soviet Union favored establishing the Committee on permanent basis. *Id*

[146] United Nations, General Assembly, Seventh Session, Fourth Committee, 253rd meeting, 23 October 1952, p. 22. Similarly, the Danish delegate regretted that by strictly limiting the obligation to submit information it was not possible to carry out comparisons between populations in non-self-governing territories and neighboring populations in independent territories. *Id*. p. 21.

[147] United Nations, General Assembly, Seventh Session, Fourth Committee, 253rd meeting, 23 October 1952, p. 22.

[148] United Nations, General Assembly, Seventh Session, Fourth Committee, 253rd meeting, 23 October 1952, p. 23.

peoples' in independent States.[149] That the Committee could not draw comparisons between 'backward' peoples in non-self-governing territories and in independent countries had jeopardized its work. In consequence, according to the Belgian representative, discussions on these matters, should be conducted by a specially created international body.[150]

Paul Van Zeeland –a law professor and minister of foreign affairs– reiterated in the General Assembly the Belgian position, describing the responsibilities of 'highly developed people' 'helping the backward indigenous peoples' as a 'sacred trust.'[151] The Belgian minister echoed the idea that the sacred trust should not be limited to states administering non-self-governing territories under the Charter, namely, it should not be limited to territories 'known as colonies,' but should be 'binding on any state … in whose territory live native peoples who have not attained the normal level of civilization.'[152] 'All backward peoples whose advancement is in the hands of representatives of a more highly developed race have the same rights: they are entitled to the same protection.' –Van Zeeland concluded offering an example pointing to Latin America: 'By way of example, I might mention … the service for the protection of Indians in Brazil.'[153]

The Belgian proposal to expand the obligation to transmit information beyond non-self-governing territories was defeated by opposition from the Afro-Asian bloc, whose representatives resented its neocolonial implications, for the Belgian proposal did not advocate the ending of tutelage, but its expansion to all populations considered backward.[154] Latin Americans, in contrast, were particularly vocal against the Belgian proposal, as it could bring about international supervision of indigenous peoples within their states' jurisdiction. The anticolonial drive to end tutelage lead paradoxically to the rise of self-determination as a right exclusively circumscribed to peoples subject to colonial rule by overseas powers.

B. The saltwater doctrine

The saltwater doctrine excluded indigenous peoples from self-determination. Whereas peoples enjoying self-determination are those subject to formal colonial rule, that is, peoples separated from colonial metropoles by the ocean; indigenous peoples, in contrast, are not a people with a right to self-determination, given that as ethnic minorities within the territory of a state, they

[149] United Nations, General Assembly, Seventh Session, Fourth Committee, 253rd meeting, 23 October 1952, p. 24.

[150] A/2219, p. 14.

[151] United Nations, General Assembly, Seventh Session, 392nd Plenary Meeting, 10 November 1952, p. 189.

[152] *Id*.

[153] *Id*.

[154] Andrés Rigo Sureda, *The evolution of the right of self-determination. A study of United Nations practice* (Leiden: Sijthoff, 1973), p. 104. In general, see Yassin El-Ayouty, *The United Nations and decolonization: The role of Afro-Asia*.

are only separated from the rest of the population by freshwater.[155] The saltwater doctrine emerged as a legal doctrine in the sense that it was an interpretation of the scope of the right to self-determination invented by lawyers and diplomats. It then became soft law when officially adopted by General Assembly Resolution 1541.[156]

Latin American support for self-determination was as clear as their rejection of the extension of this right to indigenous peoples in their territories. For example, at the same General Assembly where the Belgian thesis was voiced, Guatemalan delegate José Luis Mendoza expressed unwavering support for self-determination. The 'proper application' of the UN Charter –Mendoza affirmed– would allow 'self-determination to be put into effect as soon as possible and self-government to be achieved.' Guatemala 'believes that the colonial system should be wiped out immediately.'[157]

Then, however, the Guatemalan delegate explicitly responded not only to the Belgian thesis, but also to the use by Belgian representatives of the 'Indians on the American continent' as an example. Mendoza rejected the 'unacceptable suggestion' that the obligation that colonial powers have to submit information extended also to countries with 'backward' populations.'[158] Mendoza explains that the term 'Indian' used in Latin America was not the same as the term 'indigenous population' in the colonies. Whereas in European colonies opposition between indigenous and European populations was the basis of a system of racial discrimination that gave preponderance to the colonists, in 'Guatemala there are only Guatemalan nationals.' 'All Guatemalans, without exception, enjoy the same political and civil rights under the Constitution … no tribes or isolated groups of the population live on the fringe of the law and with a different status from the rest of the inhabitants.'[159] Mendoza concludes affirming that 'Chapter XI of the Charter could not be applied within the national frontiers of independent States.'[160]

Mendoza couched his conclusion in an internationalist language similar to the one invoked by the Belgian representatives. Mendoza's argument was less about the reserved domain of sovereign states than about the internationalist spirit being anti-colonial. 'According to modern international law –Mendoza points out– living conditions in the colonies and the steps taken for the progressive development of the colonial peoples were no longer the exclusive competence of the administering Powers but a matter of universal interest and deep anxiety to all

[155] See Andrew Erueti, *The UN Declaration on the Rights of Indigenous Peoples: A New Interpretative Approach* (New York: Oxford University Press, 2022).

[156] United Nations, General Assembly, Resolution 1541 (XV), , 15 December 1960, "Declaration on principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter." Principle IV states in part that there is an obligation to transmit information 'in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.'

[157] United Nations, General Assembly, Seventh session, Fourth committee, 255th meeting, 27 October 1952, p. 39.

[158] United Nations, General Assembly, Seventh session, Fourth committee, 255th meeting, 27 October 1952, p. 40.

[159] *Id*.

[160] *Id*.

countries.'[161] The difference between the Latin American and the Belgian positions lies – according to Mendoza– in that the latter is intended to 'justify colonialism' and direct criticism against independent countries with the aim of diverting it from the colonial system.'[162] It is true that independent countries like Guatemala have sectors of the population with 'low standards of living' and 'lacking the benefits or modern civilization' –Mendoza acknowledges. But these are national problems bearing no relationship to the problem of decolonization –Mendoza argues, pointing out that the poor living conditions of indigenous peoples in Guatemala were in fact the result of 'three centuries of colonialism' and its feudal and anti-democratic institutions.'[163]

The General Assembly deliberations of 1952 echoed familiar differences within Latin American publicists and commentators regarding the place of indigenous peoples within the nation, differences similar to those we have seen in the context of the 19th century nation-building framework. Whereas Mendoza did not invoke civilizational differences as criterion to reject international supervision, others like Enrique de Marchena, the representative from the Dominican Republic invoked distinctions between indigenous peoples and other peoples under colonialism to reject supervision.[164] The Peruvian delegate Carlos Salazar, in turn, resorted to the recurring idea of the assimilation of indigenous peoples in the national legal order. The states of Latin America are under no obligation to transmit information to the UN, since the legislation of these countries effectively safeguards the rights of the 'Indian population,' whose members are considered as an 'essential part of the nation … in complete contrast to the attitude of the colonial Powers.[165] In the case of Salazar, it was not superior civilization, but wellbeing that justified rejecting supervision: 'the social and cultural position of the Indians of Latin America was much better than that of the indigenous peoples of Africa.'[166]

The 1952 controversy over the international trusteeship of indigenous peoples came to an end when the General Assembly moved on to discuss the report of the ad hoc Committee on the factors defining a territory as self-governing and when the Belgian representative Ryckmans returned to the arguments about extending to independent states the obligation to transmit information.[167] Offering examples taken from reports about indigenous peoples in Brazil and

[161] *Id*, pp. 39-40.

[162] *Id* p. 40.

[163] *Id*.

[164] '… the ethnic groups found in the Spanish-American countries could not be compared in any way to the backward peoples of Africa.' United Nations, General Assembly, Seventh session, Fourth committee, 256th meeting, 27 October 1952, p. 48.

[165] United Nations, General Assembly, Seventh session, Fourth committee, 254th meeting, 24 October 1952, p. 31.

[166] *Id*.

[167] 'the list of factors did confirm the Belgian delegation's opinion that there were many peoples to which the criteria applied and on which information was not transmitted.' United Nations, General Assembly, Seventh session, Fourth committee, 274th meeting, 14 November 1952, p. 169.

Venezuela, Ryckmans insisted that he could see no good reason why information could not be submitted on these peoples.'[168]

The Venezuelan representative Victor Manuel Rivas protested the Belgian reference to his country, pointing at the difference between the Belgian Congo, which has never been part of the territory of the metropolitan state, and Venezuela, which in part inhabited by indigenous peoples is a territory that has achieved self-government.[169] The Brazilian delegate Carlos Calero Rodriguez protested that the Belgian remarks were irrelevant to the question before the Committee. 'It is true that there were Indians in Brazil' –the Brazilian diplomat conceded, reminding that Brazil has no objection to discussing 'ethnic, social and cultural problems of the indigenous peoples,' and reminding that Brazil has cooperated in these matters with different international institutions, mentioning the ILO among others. What Brazil rejects is subjecting these issues to the Fourth Committee, which deals with decolonization. Calero Rodriguez warns: 'If the question was raised again, he would be compelled to raise a point of order.'[170]

From a Latin American angle, we may understand the debate to have been closed by the pointed words of the Brazilian delegate. The saltwater then consolidated when incorporated in the UN General Assembly Resolution 1541. Since then, we may also understand this doctrine to have become part of the Latin American international law tradition. Let us finally consider one brief example of a prominent Latin American international lawyer who after the 1960s conceived self-determination as a comprehensive right, including not only political but also economic self-determination, yet a right that in its external dimension, bypassed indigenous peoples.

The report on self-determination prepared by the prominent Uruguayan international lawyer Héctor Gross Espiel, as Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, endorsed a wide concept of self-determination.[171] Gross Espiel regarded not only direct subjugation, but also indirect neocolonial or imperialist domination as violations of self-determination. For example, when transnational corporations play a neocolonial role, self-determination as economic self-government is infringed.[172] Although conceiving self-determination broadly, Gross Espiel interprets the requirements to constitute a people subject to the right to self-determination narrowly. Mentioning peoples subject to colonialism or foreign domination, the Uruguayan omits indigenous peoples.[173]

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[168] *Id*.

[169] *Id*, p. 170.

[170] *Id*.

[171] Héctor Gros Espiell, *The right to self-determination: implementation of United Nations resolutions* (New York: United Nations, 1980), Document E/CN.4/Sub.2/405/rev.1.

[172] Héctor Gros Espiell, *The right to self-determination: implementation of United Nations resolutions*, par. 47, p.8, and par. 136, p. 26.

[173] Héctor Gros Espiell, *The right to self-determination: implementation of United Nations resolutions*. See also Erica-Irene A. Daes, "The right of indigenous peoples to "Self-Determination" in the contemporary world order," in *Self-Determination*, edited by Donald Clark and Robert Williamson (London: Palgrave Macmillan, 1996), pp. 47-57.

The examination of the debates at the General Assembly suggest that the question about the scope of the obligation to transmit information about non-self-governing territories was resolved in the 1950s by restricting it exclusively to colonial powers, the saltwater thesis prevailed excluding indigenous peoples precisely when self-determination was consolidating as a right.[174] Similar to the example about the exclusion of indigenous peoples from minority rights, Latin American international lawyers and diplomats' contributions to the saltwater thesis reveal strong continuities between 20th century international law and the 19th century nation-building project.

IV. Conclusion

In this essay we have seen Latin American men of letters, statemen, politicians, international lawyers and diplomats laying down the legal foundations for indigenous dispossession. While some argued that the matter was as simple as waging war against the savage, we have shown that the position that predominated was one considering the expansion of the empire of the law as the justification for using force against indigenous peoples.

The 19th century legal fiction of *uti possidetis* enclosed indigenous peoples' lands and assimilated indigenous individuals into citizens.[175] The new Republics, as we saw in the case of Chile, claimed direct dominium, while leaving indigenous peoples like the *Mapuches* with indirect dominium. When indigenous peoples resisted the legal fiction, it was through law-enforcing violence that the fiction of *uti possidetis* became a reality. Conversely, if accepting enclosure and assimilation, indigenous peoples were in principle not dispossessed, for direct dominium recognized by the new independent states left indigenous property intact. But then, if indigenous lands was not under 'just and rational use' –to use Andres Bello's term– lands could be considered vacant. Dispossession in this case occurred again within the law. In the process of land registration, indigenous land considered vacant became public property, and then became private property when the state auctioned or gave away public lands to local or foreign settlers.

The international legal doctrines and justifications for enclosure and assimilation were part of the larger 19th century nation-building framework. We think that this framework and the patterns of enclosure and assimilation of the indigenous continued structuring relations between Latin American states and indigenous peoples in the 20th century. However, if in the 19th century Latin Americans developed international law doctrine to sustain the nation-building framework, in the 20th century, in order to defend this framework, Latin American international lawyers rejected the rise of new legal doctrines. They rejected international legal norms, doctrines and institutions that potentially conferred international rights to indigenous peoples. We have seen

[174] Subsequent resolutions that gave greater specificity to self-determination would confirm that only peoples subject to colonial or foreign domination, and peoples subject to a regime of racial discrimination such as apartheid, enjoyed the right to self-determination. Quincy Wright, "Recognition and Self –Determination," in *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 48 (April 22-24 1954), pp. 27-30.

[175] In the case of Chile, as early as 1823, the protector of natives, a colonial authority was eliminated, as indigenous were to enjoy the legal rights and protection of citizenship. See Lei Nº 10.084 de 10 de junio de 1823. Myléne Valenzuela and Sergio Oliva*, Recopilación de legislación indígena 1813-2017*, Tomo I, p. 34

Latin Americans resisting ILO supervision of native labor, resisting the extension of minority protections to indigenous groups and ultimately we have seen them refusing to consider indigenous peoples as one of the peoples enjoying a right to self-determination.

Has this continuity between the 19th and 20th centuries been broken? the continuity between the nation-building framework and the rejection of supervision of native labor, minority rights and self-determination? has the continuity been broken by the 1990's 'indigenous irruption in Latin America,' embodied in ILO Convention 169? One may consider indigenous peoples' activism invoking human rights, the ILO Convention, or even autonomy rights as signs of cracks in the nation-building framework. This trend could be seen as culminating a long history of indigenous resistance through international law in Spanish America and then Latin America, among many other examples, from Titu Cusi Yupanqui, the Inca who appropriated the law of nations in the 16th century, to the Coordinating Council of the Waorani Nationality of Ecuador Pastaza, who recently obtained judicial redress against an oil project for violation of the right to prior consultation.[176]

At the same time, however, the nation-building framework remains alive and well as the legacies of enclosure and assimilation remain unaddressed. Conflicts between indigenous communities and Latin American states in many cases remain alive and unresolved. As the struggle for indigenous peoples rights continues, the problem of dispossession is not one of the past, but one of the present.

We have mentioned that demanding greater cultural and political autonomy characterized the indigenous movement that emerged in the 1990s and that international law became central to the demand of indigenous rights.[177] As the conflict remains unresolved and parties become not only entrenched in their positions but also have radicalized, the question of indigenous rights under international law, including greater autonomy and a right to self-determination, looms large. As this essay focused on how Latin American publicists, diplomats and international lawyers turned international law against indigenous peoples, we hope to have offered insight to contemporary intellectuals, lawyers and activists, members and non-members of indigenous peoples, to Latin Americans and beyond, who are willing to write the next chapters in the history of international law, the chapter where international law might be turning towards indigenous resistance.

[176] On Titu Cusi Yupanqui see Arnulf Becker Lorca, "The Legal Mechanics of Spanish Conquest." On the Waorani people see "Boletín de Prensa por Resistencia Waorani y CONCONAWEP," Amazon Frontlines, 26 April 2019, https://amazonfrontlines.org/es/chronicles/victoria-waorani/ ; Also in general on indigenous consultation Meghan Morris, César Rodríguez, Natalia Orduz y Paula Buriticá, *Justicia Global 2. La consulta previa a pueblos indígenas. los estándares del derecho internacional*, (Bogotá: Universidad de los Andes, Programa de Justicia Global y Derechos Humanos), pp. 1–52.

[177] Arnulf Becker y Amaya Alvez, "La Consulta Indígena en Chile: ¿Derecho de Participación o de Libre Determinación?" Estudios Sociales año XXX, Nº 59 [julio – diciembre 2020] ISSN 0327-4934, p. 89- 111.