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*Spatio-Temporal Dimensions of Indigenous Sovereignty  
in International Law*

The sovereignty of indigenous peoples has long been a matter of debate. This chapter investigates the spatio-temporal dimensions of indigenous sovereignty in international law. The topic holds both theoretical relevance and contemporary practical significance, as it can inform and transform ongoing debates on the rights of indigenous peoples. The author highlights the importance of history in any serious and constructive consideration of the territorial and spatial dimensions of sovereignty. It also highlights that a just or at least fair resolution of any question relating to sovereignty, including its territorial dimension, must fully consider competing stories, histories, and temporalities of sovereignty. This method of analysis infuses the concept of sovereignty with inter-civilisational connotations, which are often neglected in current debates. Going beyond the traditional conception of state sovereignty, the chapter supports the emergence of novel concepts, such as parallel sovereignty, to complement and give further impulse to the self-determination of indigenous peoples within the state. This reflection appeals to the experiences and histories of non-Western cultures and civilisations, thereby opening new avenues for informing future theory and practice of international law.

1. *Introduction*

The sovereignty of indigenous peoples has long been a matter of debate. Indigenous peoples are situated between the national and the international arenas. They belong to given states and yet, at the same time, they constitute nations with inherent rights under international law.<sup>1</sup>

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<sup>1</sup> K. Göcke, *Indigene Landrechte im internationalen Vergleich* (Springer 2016).

Although the recognition of indigenous peoples' inherent rights has gained some momentum at the international law level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>2</sup> law and policy have often failed to respect, protect, and fulfil indigenous entitlements. For instance, many of the estimated 370 million indigenous people around the world have lost or risk losing their ancestral lands because of the exploitation of natural resources.<sup>3</sup> Therefore, investigating the concept of sovereignty in relation to indigenous peoples not only holds theoretical relevance, but also contemporary practical significance, as it can inform and transform ongoing debates on the rights of indigenous people.

This chapter investigates the concept of indigenous sovereignty in international law not only 'for the purpose of revealing and remedying the past' but for contributing to the development of international law.<sup>4</sup> For indigenous peoples, indigenous sovereignty (i.e., the supreme power over their polity and autonomy) has never yielded or terminated; rather, it has a perpetual temporal dimension. Their traditional notions of indigenous sovereignty also include a key spatial dimension that transcends the drawing of boundaries and notions of property. For indigenous peoples, their sovereignty expresses the spiritual tie between the land and indigenous communities. At the same time, they acknowledge that indigenous sovereignty has in part co-existed with, and is parallel to, the sovereignty of the state. Most indigenous peoples do not aim to secede from the states in which they reside; rather, they seek to exert greater control over natural and cultural resources, and to obtain greater autonomy in order to safeguard their cultural legacy and determine their own future. The aim of this chapter is to investigate whether a notion of parallel sovereignty of indigenous peoples can be conceptualised, and whether sovereignty can be shared

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<sup>2</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007). The Declaration was approved by 143 nations, but was opposed by the United States, Canada, New Zealand, and Australia. However, these four nations subsequently endorsed the Declaration. Drafted with the very active participation of indigenous representatives, the Declaration constitutes the outcome of two decades of preparatory work. While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law. UNDRIP, preamble.

<sup>3</sup> V. Vadi, 'Heritage, Power and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration' (2018) 50 *George Washington International Law Review* 101–155.

<sup>4</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2005) 199.

between states and indigenous peoples.<sup>5</sup>

This chapter examines the question of indigenous sovereignty in international law by focusing on three distinct dimensions: 1) time; 2) space; and 3) law. First, it highlights the importance of history and the temporal dimension for any serious and constructive consideration of sovereignty. The chapter explores the theoretical basis that supports notions of parallel indigenous sovereignty in municipal and international law. It further affirms that a just or at least fair resolution of any question relating to sovereignty, including its territorial dimension, must fully consider competing stories, histories, and temporalities of sovereignty. Second, the chapter investigates the notion of space in relation to indigenous peoples' rights and sovereignty, holding that there is 'some promise ... in a practice of sovereignty that operates in spite of lines on a map.'<sup>6</sup> Third, the chapter suggests the adoption of a novel approach to analysing sovereignty in international law, developing the concept of parallel sovereignty and infusing the concept with inter-civilisational connotations and meanings, which often remain invisible in current debates.<sup>7</sup>

The chapter proceeds as follows. After briefly examining the notion of sovereignty, it discusses the spatio-temporal features of indigenous sovereignty and briefly illuminates the legal issue raised by the historical encounter of civilisations. It then explores the emergence of novel concepts such as parallel or shared sovereignty as useful conceptual tools that can contribute to the respect, protection, and fulfilment of indigenous peoples' rights. In this way, such notions can contribute to dismantling colonial relics,<sup>8</sup> appealing to experiences and histories of non-Western cultures and civilisations and thereby opening new avenues for informing future

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<sup>5</sup> M. Nino, *Land grabbing e sovranità territoriale in diritto internazionale* (Napoli: Editoriale Scientifica 2018) 203.

<sup>6</sup> M. Fakhri, 'Third World Sovereignty, Indigenous Sovereignty, and Food Sovereignty: Living with Sovereignty despite the Map' (2018) 9 *Transnational Legal Theory* 218–253, 218.

<sup>7</sup> But see Y. Onuma, *International Law in a Transcivilizational World* (Cambridge: CUP 2017).

<sup>8</sup> See W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press 2008) 362 (calling the assumption that domestic law consists of the state law and that public international law consists of the law of sovereign states as the 'Westphalian duo'); R. Dibadj, 'Panglossian Transnationalism' (2008) 44 *Stanford Journal of International Law* 253, 256 (noting that as 'a product of the Westphalian state-centered system of world law', international law 'maintains that the states are the only subjects of international law...').

theory and practice of international law.<sup>9</sup> Although several countries have adopted notions of concurrent or parallel sovereignty which recognise the sovereignty of indigenous peoples within their lands, international law instruments refrain from openly discussing the question of indigenous sovereignty. However, this chapter argues that the use of concepts such as shared or parallel sovereignty would be sound in theory and viable in practice. Recognising indigenous sovereignty as a special form of sovereignty that is parallel to and coexists with state sovereignty is not only a way to implement indigenous peoples' rights at the domestic level, but also a way to strengthen the role indigenous people play in international affairs by reframing the relationship between state and non-state actors in ways which privilege human rights over the reason of state.<sup>10</sup>

## 2. *Sovereignty*

The concept of sovereignty indicates supreme power and has both internal and external dimensions. Internal sovereignty refers to the supreme power over a given polity, autonomy, and exclusive competence over its internal affairs. External sovereignty refers to the capacity of a polity to act in international relations, its right to exercise self-defense, and to ratify treaties. The notion of sovereignty implies the equality of nations.<sup>11</sup>

Since the 1648 Peace of Westphalia, sovereignty has been traditionally associated with the notion of state meant as a political entity with its own people, territory, and government.<sup>12</sup> As Crawford put it, sovereignty has been conceptualised as a package of rights and obligations that accompanies

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<sup>9</sup> K. Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Milton: Ashgate 2014) (advancing legal pluralist approaches to indigenous rights and relying, *inter alia*, on Indigenous legal traditions).

<sup>10</sup> H. Nicol, 'From Territory to Rights: New Foundations for Conceptualising Indigenous Sovereignty' (2017) 22 *Geopolitics* 794–814.

<sup>11</sup> *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, [1949] ICJ Rep 174, 177–8 (defining states as 'political entities equal in law, similar in form ..., the direct subjects of international law.');

John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *AJIL* 782–802.

<sup>12</sup> A. Pagden *Lords of all the World. Ideologies of Empire in Spain, Britain and France c. 1500–c.1800* (New Haven/London: Yale University Press 1995) 15; R. H. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2003) 73 *British Yearbook of International Law* 116.

statehood.<sup>13</sup> The European concept of sovereignty presupposes statehood.<sup>14</sup> By the middle of the sixteenth century, ‘the traditional universal powers, the Pope and the Emperor, had lost the struggle for the establishment of their supremacy in Europe.’<sup>15</sup> Therefore, a number of European states acquired external sovereignty (*supremitas*),<sup>16</sup> no longer recognising ‘a higher external authority’ (*superiorem non recognoscens*). No longer were states merely parts of a greater political entity; rather, they were perfect communities, complete in and of themselves (*communitates perfectae*). Sovereignty increasingly overlapped with statehood, sovereign states became the primary subjects of the international community.

However, the concept of nation (indicating ties of ‘belonging, language, religion, shared cultural as well as civilizational traditions’) as the holder of sovereignty ‘antedates the advent of the idea of state.’<sup>17</sup> In Africa, the Americas, and Asia different concepts of sovereignty existed. In these continents, countries developed ‘their own ways of articulating ... concern about the nature and scope of sovereign power’<sup>18</sup> and sovereignty was layered.<sup>19</sup> Immense native empires ruled diverse peoples in Africa, the Americas, and Asia.<sup>20</sup> In Africa several imperial states including the Songhay Empire exerted control over large areas. In Asia, the Ottoman, Safavid, and Mughal empires as well as the Chinese Ming Dynasty (1368–1644) and Japanese Tokugawa shogunate (1603–1868) exercised power differently but all controlled large territories and different peoples. For instance, international relations among Asian countries reflected China’s predominant status in the region.<sup>21</sup> In the extreme North, Russian tsars governed an immense empire.

The fact that European states and Indigenous nations signed treaties

<sup>13</sup> J. Crawford, ‘Sovereignty as a Legal Value’, in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: CUP 2012) 117–133.

<sup>14</sup> Montevideo Convention on Rights and Duties of States, in force 26 December 1934, 165 *LNTS* 19.

<sup>15</sup> Lesaffer, ‘The Grotian Tradition Revisited’, 115.

<sup>16</sup> L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: CUP 2010) 5.

<sup>17</sup> U. Baxi, ‘India–Europe’, in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: OUP 2012) 744, 745.

<sup>18</sup> *Id.* 747.

<sup>19</sup> Z. Leonard, ‘Law of Nations Theory and the Native Sovereignty Debates in Colonial India’, (2019) *Law and History Review* 1–35, 2.

<sup>20</sup> C. H. Parker, *Global Interactions in the Early Modern Age* (Cambridge: CUP 2010) 2.

<sup>21</sup> K. Akashi, ‘Japan–Europe’, in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: OUP 2012) 724, 726.

suggests that native powers exercised both internal and external sovereignty.<sup>22</sup> It also suggests an implicit ‘acknowledgment of their equal juridical existence and status.’<sup>23</sup> Indigenous nations had their own forms of governance and social and cultural systems. As sovereign nations, they had ‘a natural right of resistance’ and self-defense.

The history of the seizure of the African, Australian, and American continents can be read as ‘a complex and multifaceted story of the de-legitimation of pre-colonial political powers over territory and people.’<sup>24</sup> In encountering different perceptions of governance, the European concept of territorial sovereignty as statehood prevailed.<sup>25</sup>

International lawyers may well wonder whether the historical early modern features of the concept of sovereignty as distinct from statehood have any relevance today. Contemporary international law remains state-centric. Nonetheless, the fact that the concept of sovereignty has historically included polities that were not states demonstrates that, at least theoretically, there is no necessary coincidence between sovereignty and statehood and that other conceptualizations of sovereignty in addition to and complementary to that of state sovereignty are not only possible, but used to be a part of the fabric of the early modern law of nations.

Proposals to recognise and reconcile indigenous and settler sovereignties have increasingly been made.<sup>26</sup> For instance, Jeremy Webber examines different notions of sovereignty, demonstrating that while sovereignty is often conceived as a unified and monolithic concept in international legal theory, it can instead be understood as complex, multifaceted, and multi-layered.<sup>27</sup> For others, indigenous sovereignty should be a fundamental element of reconciliation between settler and indigenous societies.<sup>28</sup>

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<sup>22</sup> Leonard, ‘Law of Nations Theory and the Native Sovereignty Debates in Colonial India’, 4.

<sup>23</sup> Baxi, ‘India–Europe’, 745.

<sup>24</sup> D.-E. Kahn, ‘Territory and Boundaries’, in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: OUP 2012) 225–235 (referring to the African continent).

<sup>25</sup> Id. 236.

<sup>26</sup> See P. Macklem and D. Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press 2016).

<sup>27</sup> J. Webber, ‘We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty’ in P. Macklem and D. Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press 2016) 63–99.

<sup>28</sup> S. Rigney, ‘The Hopes and Discontents of Indigenous–Settler Reconciliation’ (2017) 11 *International Journal of Transitional Justice* 359–68, 365.

### 3. *Space*

Indigenous communities are geographically rooted in given places, but politically, historically, and legally situated between the national and the international spheres. Indigenous peoples are geographically ‘indigenous’ because they have been living in a given territory since time immemorial, even before the establishment of the state under whose sovereignty they live today.<sup>29</sup> Their roots ‘are embedded in the lands on which they live ... much more deeply than the roots of more powerful sectors of society living on the same lands.’<sup>30</sup> They are ‘culturally distinctive societies that find themselves engulfed by settler societies born of the forces of empire and conquest.’<sup>31</sup> They ‘have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.’<sup>32</sup> They hold ‘inherent rights which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.’<sup>33</sup>

For indigenous peoples, land is the basis of economic livelihood and the source of spiritual and cultural identity.<sup>34</sup> Indigenous peoples maintain cultural and spiritual ties with the territory they have traditionally occupied<sup>35</sup> due to the presence of sacred sites and the intrinsic sacred value

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<sup>29</sup> Article 1 of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries defines indigenous peoples’ ‘on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’

<sup>30</sup> J. Anaya *Indigenous Peoples in International Law* (Oxford: Oxford University Press 2<sup>nd</sup> edition, 2004) 3.

<sup>31</sup> *Ibid.*

<sup>32</sup> UNDRIP, preamble.

<sup>33</sup> *Id.*

<sup>34</sup> J. Gilbert ‘Custodians of the Land- Indigenous Peoples, Human Rights and Cultural Integrity’ in M. Langfield, W. Logan and M. Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights* (Oxon: Routledge 2010) 31.

<sup>35</sup> Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 (clarifying that ‘For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.’)

of the territory itself.<sup>36</sup> They ‘see the land and the sea, all of the sites they contain, and the knowledge and the laws associated with those sites, as a single entity that must be protected as a whole.’<sup>37</sup> Although indigenous cultures vary across continents, ‘there is a common thread that runs through these diverse indigenous groups—a deep cultural and spiritual connection to the land, and a belief that the world is interconnected. Native peoples traditionally strive to live sustainably with the land, as stewards of it.’<sup>38</sup> Land rights transcend drawn boundaries and notions of property.

Although indigenous peoples are politically situated between the national and the international arenas, for decades, indigenous peoples have been considered solely as components of states, rather than ‘legal unit[s] of international law.’<sup>39</sup> As a result, indigenous peoples have been perceived and treated solely as subjects of domestic law.<sup>40</sup> As Daes contended, for centuries international law seemed to know no other subjects than states.<sup>41</sup> By denying the sovereignty of indigenous peoples, or failing to implement their obligations toward them under the law of nations, states have infringed indigenous peoples’ rights.<sup>42</sup>

Nonetheless, in the past decades there have been attempts to listen to indigenous voices and to appreciate their methodologies and knowledge systems. An understanding has arisen that a given territory can be ‘home to multiple sovereignties which must meet’ as a matter of ‘legal pluralism’ and as an expression of the ‘interactions between different ways of knowing and doing law.’<sup>43</sup>

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<sup>36</sup> Inter-Am. Ct. H.R., *Case of the Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, (ser. C) No. 172, para. 82.

<sup>37</sup> C. O’ Faircheallaigh, ‘Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia’ (2003) 39 *Development and Change* 27.

<sup>38</sup> E. M. Genia, ‘The Landscape and Language of Indigenous Cultural Rights’ (2012) 44 *Arizona State Law Journal* 653, 659.

<sup>39</sup> *Cayuga Indians (Great Britain) v. United States*, 6 *Review of International Arbitral Awards* 173 (1926) 176 (stating that an Indian tribe ‘is not a legal unit of international law.’)

<sup>40</sup> S. Wiessner ‘Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press 2012) 38.

<sup>41</sup> E.-I. Daes ‘Indigenous Peoples’ Rights to their Natural Resources’ in A. Constantinides and N. Zaikos (eds), *The Diversity of International Law* (Leiden/Boston: Martinus Nijhoff 2009).

<sup>42</sup> See generally C. Rossi, *Sovereignty and the Territorial Temptation* (Cambridge: CUP 2017).

<sup>43</sup> Rigney, ‘The Hopes and the Discontents of Indigenous–Settler Reconciliation’, 367.



#### 4. *Time*

Time plays a crucial role in indigenous peoples' expressions of sovereignty and struggles for self-determination.<sup>44</sup> Indigenous peoples have historically played a significant role in international relations, signed treaties, and been recognised as sovereign nations.<sup>45</sup> The issues of '[indigenous] rights and sovereignty are rooted in the first encounters between the [tribes] and the colonial powers of the sixteenth and seventeenth centuries.'<sup>46</sup>

In the early modern period, many scholars acknowledged the sovereignty and territorial rights of indigenous peoples, including Alberico Gentili (1552–1608). A religious refugee and Regius Professor at the University of Oxford, Gentili wrote on a variety of matters ranging from state immunity to territorial waters, from piracy to preventive war. His reflection on cultural diversity and indigenous sovereignty were relatively atypical for his time and deserves exploration. For example, Gentili perceived indigenous sovereignty 'as preventing land from being classified as *terra nullius*, or open to acquisition by mere occupation.'<sup>47</sup> According to Gentili, if other nations 'live in a manner different from that which we follow in our own country, they surely do no wrong.'<sup>48</sup> As such, no one should be offended by the fact that another person practices a different faith. Acknowledging a limited cultural and religious pluralism, Gentili believed that religion should not give rise to any war, just as cultural diversity should not constitute a just cause for waging war. He therefore rejected the legitimacy of any form of religious violence, arguing that there should be no forced conversions, persecutions, or exterminations. Gentili condemned the Spanish conquest of the Americas, in which the Spaniards used religion as a pretext for their wars against the natives. For this reason, the Spanish conquest was a clear

<sup>44</sup> M. Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham NC: Duke University Press 2017) 180 (addressing the question as to whether sovereignty can be expressed in ways that differ from dominant frames of reference.)

<sup>45</sup> See, *ex multis*, M. Hickford and C. Jones (eds), *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Vancouver: University of British Columbia Press 2018).

<sup>46</sup> A. F. Kinney, 'The Tribe, the Empire, and the Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes' (2007-2008) 39 *Case Western Reserve Journal of International Law* 897, 898–99 (referring to the situation of indigenous tribes in Virginia).

<sup>47</sup> J. Cassidy 'Sovereignty of Aboriginal Peoples' (1998) 9 *Indiana International and Comparative Law Review* 65, 69.

<sup>48</sup> A. Gentili, *De Iure Belli Libri Tres* [1612] (On the Law of War) J. C. Rolfe transl. (Oxford: Clarendon Press 1933) Book I, Chapter 9.

example of an unjust war. Gentili contended that the pursuit of conquest (*cupiditas gloriae et dominationis*) was not a legitimate cause of war.

In rejecting the notion that cultural differences could constitute a legitimate cause for waging war, Gentili aligned with the position of the Dominican friar and historian Bartolomé de Las Casas (1484–1566) and the philosopher Giordano Bruno (1548–1600). In his 1552 *Brevísima Relación*, Las Casas described indigenous kingdoms as ‘illustrious’ (*illustria regna*), ‘with great cities, sovereigns, judges, and laws’ (*magnas civitates, reges, iudices, leges*).<sup>49</sup> He also firmly disavowed the notion that cultural difference could be a just cause for war. Las Casas believed that people could legitimately defend themselves against those who waged war under the pretext of ‘civilizing’ them (*praetextu sapientiae*).<sup>50</sup> While Las Casas did not appear among the Gentilian sources, Gentili may have known his work, as an English translation of Las Casas’ *Brevísima Relación* appeared in 1583. Both scholars fiercely condemned the Spanish conquest as being based on illegitimate grounds. They both acknowledged the sovereignty and property rights of the Indians and their right to defend themselves against the unlawful expansion of others. Furthermore, both scholars considered all human beings to be born free. Like Giordano Bruno, Gentili argued that none should be subject to forced conversion to any religion.<sup>51</sup>

Nonetheless, there was a clear divide between theory and practice. Powerful states articulated arguments of discovery and *terra nullius* and, in manifest disregard of the legal theory of the time, granted territorial concessions over land they did not own.<sup>52</sup> Colonisers in this way became proprietors of given land ‘for reasons which had nothing to do with its original inhabitants.’<sup>53</sup> Wars of conquest motivated by greed and empire

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<sup>49</sup> L. Baccelli, ‘Guerra e diritti. Vitoria, Las Casas e la conquista dell’America’, (2008) 37 *Quaderni fiorentini* 67–101, 92.

<sup>50</sup> Id.

<sup>51</sup> D. Suin ‘Sovrani e sudditi: la riflessione di Alberico Gentili tra assolutismo e cosmopolitismo’, (2017) 9 *Storia e Politica* 255–278, 267.

<sup>52</sup> Alexander VI, bull *Inter Caetera* 4 May 1493 (‘should any of said islands have been found by your envoys and captains, [we] give, grant, and assign to you and your heirs and successors ... forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and the south ...’); Elizabeth I, Charter to Sir Humphrey Gilbert of 11 June 1578, reprinted in W. S. Powell, ‘An Elizabethan Experiment’, in L. S. Butler, A. D. Watson (eds), *The North Carolina Experience: An Interpretive and Documentary History* (Chapel Hill: University of North Carolina Press 1984) 29–52, 36 (granting colonists title to land that the queen did not own).

<sup>53</sup> R. Parfitt, ‘The Spectre of Sources’, (2014) 25 *European Journal of International Law* 297, 301.

were waged. Invaders imposed their own religion and cultural systems, and non-state forms of politics gradually became ‘invisible.’<sup>54</sup> Indigenous peoples faced decimation due to disease, war, and economic exploitation.<sup>55</sup>

After ‘years of warfare, disease, and increasingly scarce natural resources’, indigenous peoples likely assented to various treaties with colonial powers to prevent further violations of their sovereignty and to ‘preserve what remained of their heritage and traditional way of life.’<sup>56</sup> The aim of most treaties between the colonial powers and Aboriginal peoples ‘was to preserve Aboriginal self-government rather than cede sovereignty.’ The treaties were ‘protective in nature, incorporating binding and effective clauses preserving Aboriginal rights in perpetuity.’<sup>57</sup> Nonetheless, indigenous peoples, soon considered part of the new states, ‘would encounter many difficulties in enforcing their treaty rights in either the municipal or international courts.’<sup>58</sup>

However, indigenous culture, practices, and rule endured.<sup>59</sup> Legal anthropologists have coined the term ‘inter-legality’ to refer to the blending of legal traditions and legal pluralism that has characterised the legal frame of colonial states inhabited by indigenous peoples. Indigenous peoples maintained their traditions, but also adaptively leveraged select legal instruments of the super-imposed legal system.<sup>60</sup> The concept of inter-legality captures the existence of various legal frameworks exposed to and influenced by mutual exchanges.<sup>61</sup> For indigenous peoples, colonialism—which sought to dispossess them and disregard their sovereignty—has failed and indigenous sovereignty has endured.

<sup>54</sup> Id. 302; T. Duve, ‘Indigenous Rights in Latin America: A Legal Historical Perspective’, Max Planck Institute for European Legal History, Research Paper No. 2 (2017), 2.

<sup>55</sup> Duve, ‘Indigenous Rights in Latin America’, 7.

<sup>56</sup> Kinney, ‘The Tribe, the Empire, and the Nation’, 902 (noting that these treaties ‘remained hardly more than empty words’, proving to be ‘little more than a cessation of open hostilities.’)

<sup>57</sup> Cassidy ‘Sovereignty of Aboriginal Peoples’, 96.

<sup>58</sup> See e.g. A. Harmon, *Reclaiming the Reservation: Histories of Indian Sovereignty Suppressed and Renewed* (Seattle, Washington: University of Washington Press 2019) (highlighting that ‘Tribal governments ha[ve] long sought to manage affairs in their territories’ and considering ‘the promises and perils of relying on the US legal system to address the damage caused by colonial dispossession.’)

<sup>59</sup> Wiessner, ‘Indigenous Sovereignty’, 1144.

<sup>60</sup> W. Assies, G. van der Haar, and A. J. Hoekema (eds), *The Challenge of Diversity, Indigenous Peoples, Multicultural Interlegality and Reform of the State in Latin America* (Amsterdam: Thela 2000).

<sup>61</sup> A. Hoekema, ‘Legal Pluralism: Conflicting Legal Commitments Without a Neutral Arbiter’ (2014) 11 *Jura Gentium—Rivista di filosofia del diritto internazionale e della politica globale* 61, 74.

Due to the failures of early treaties and national law to adequately address indigenous peoples' rights, international law has increasingly regulated matters related to indigenous peoples in the past four decades, reaffirming their rights and various entitlements. The UNDRIP has recognised that 'the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility, and character.'<sup>62</sup> In the *Western Sahara* Advisory Opinion, the ICJ similarly implicitly acknowledged the sovereignty of indigenous peoples in the early modern period<sup>63</sup>

### 5. *Indigenous Sovereignty and Law*

The sovereignty of indigenous peoples 'continues to be one of the most burning issues in domestic and international law today.'<sup>64</sup> For indigenous peoples, indigenous sovereignty 'has never been ceded or extinguished' and co-exists with the sovereignty of the state. This sovereignty is 'a spiritual notion' representing the ancestral tie between the land, or 'mother nature', and indigenous peoples.<sup>65</sup> Most indigenous peoples do not seek to secede from the territories in which they reside; rather, they aim to 'wield greater control over matters such as natural resources, environmental preservation of their homelands, education, use of language, and [autonomy] ... in order to ensure their group's cultural preservation and integrity.'<sup>66</sup>

Several countries have adopted notions of concurrent or parallel sovereignty of indigenous peoples within their lands.<sup>67</sup> For instance,

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<sup>62</sup> UNDRIP, preamble.

<sup>63</sup> *Western Sahara*, Advisory Opinion, *ICJ Reports* 1975, p. 39, para. 80 (stating that 'agreements concluded with local rulers . . . were regarded as derivative roots of title.')

<sup>64</sup> Cassidy 'Sovereignty of Aboriginal Peoples', 69.

<sup>65</sup> J. Brave Noise Cat, 'Indigenous Sovereignty is on the Rise: Can it Shape the Course of History?' *The Guardian*, 30 May 2017.

<sup>66</sup> J. Cornassel and T. Hopkins Primeau, 'Indigenous Sovereignty and International Law: Revised Strategies for Pursuing Self-Determination' (1995) 17 *Human Rights Quarterly* 343, 344.

<sup>67</sup> Cassidy, 'Sovereignty of Aboriginal Peoples', 109. Cfr. R. Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (2018) 31 *Leiden Journal of International Law* 773 (highlighting the 'intrinsic tension in the Bolivian and Ecuadorian experience: on the one hand, plurinational governments try to unify the people around the 'national interest' of developing extractive industries; and on the other hand, they attempt to recognize ethno-political differences that often challenge the transnational exploitation of local resources.')

in the United States, Indigenous peoples have long been recognised as sovereign political entities. In *Johnson v. M'Intosh*, Justice John Marshall of the US Supreme Court affirmed that at the time of the encounter between European and American civilizations, 'North America ... was held, occupied and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of territory, and the absolute owners and proprietors of the soil.'<sup>68</sup> In *Worcester v. Georgia*,<sup>69</sup> Justice Marshall held that Indian nations have always been recognised as 'distinct, independent, political communities and are, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but by reason of their original tribal sovereignty.'<sup>70</sup> More recently, the Supreme Court held that 'before the coming of the Europeans, the tribes were self-governing sovereign political communities' and they maintain 'inherent powers of a limited sovereignty which has never been extinguished.'<sup>71</sup> Justice Sandra Day O'Connor discussed the existence of 'three types of sovereign entities—the Federal government, the States, and the Indian tribes' within the US legal system.<sup>72</sup> Policy frameworks that build on the principle of self-determination characterise the current US legal system.

In New Zealand, indigenous sovereignty is part of the existing legal framework. The Treaty of Waitangi between the British Crown and the Maori testifies to the sovereignty of the Maori people (*tino rangatiratanga*).<sup>73</sup> The treaty was finally given effectiveness by the 1975 Treaty of Waitangi Act by instituting the Waitangi Tribunal to settle land-related disputes. In Australia, in *Mabo v. Queensland*, the indigenous plaintiffs, who inhabited

<sup>68</sup> *Johnson v. M'Intosh*, 21 US (8 Wheat) 543, 545 (1823).

<sup>69</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (building the foundations of the doctrine of tribal sovereignty in the United States.) Cfr. *Cherokee Nation v. Georgia* 30 US 1, 5 Pet 1 (1831)(the majority held that Indian tribes could not bring suit to the Supreme Court against state law requiring their relocation from their lands because they were neither foreign nor a state).

<sup>70</sup> E.-I. A. Daes, Indigenous Peoples Permanent Sovereignty Over Natural Resources, Lecture delivered at the National Native Title Conference, Adelaide, 3 June 2004, available at <<https://www.humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>> (last visited 30 September 2019).

<sup>71</sup> *United States v. Wheeler*, 435 US 313, 322–323 (1978).

<sup>72</sup> S. Day O'Connor, 'Lessons from the Third Sovereign: Indian Tribal Courts (1997) 33 *Tulsa Law Journal* 1, 1 ('Today, in the United States, we have three types of sovereign entities—the Federal Government, the States, and the Indian tribes.')

<sup>73</sup> Daes, Indigenous Peoples Permanent Sovereignty Over Natural Resources. See also D. Otto, 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law & Commerce* 65, 79–80.

the Mer Islands situated in the Torres Strait between Australia and Papua New Guinea sought declarations, *inter alia*, that the Meriam people were entitled to such islands ‘as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands.’ The High Court rejected the argument of *terra nullius* advanced by the defendant and recognised that the Mer Islanders had a pre-existing system of law, which remained in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.<sup>74</sup> In Latin America, reforms in Bolivia, Venezuela, Panama, and other countries have opened up ‘new spaces for indigenous nations’ political representation and the reconfiguration of territorial boundaries.<sup>75</sup> For instance, Bolivia defines itself as a ‘plurinational’ state that acknowledges ‘the precolonial existence of indigenous nations and peoples ... [and] guarantees their free determination with the frame of the unity of the State, ... [and] their culture ... in accordance with [the] Constitution and the law.’<sup>76</sup> The Plurinational Constitutional Tribunal of Bolivia has further clarified that the state ‘not only acknowledges the indigenous peoples as different cultures ... but also as nations’, that is, ‘as historical communities with a determined home territory that shar[e] differentiated language and culture’ [and have the] political capability to define their destiny ... within the ... State.<sup>77</sup> Although states have recognised ‘a limited degree of indigenous sovereignty, they consider such sovereignty as subordinated’ to state sovereignty, and indigenous rights, ‘although recognised in principle’, remain precarious in practice.<sup>78</sup>

International law instruments do not refer to the notion of indigenous sovereignty. On the contrary, by endorsing the notion of state sovereignty as one of its basic pillars, it validated the colonization process through ‘the recognition of the sovereignty claims of colonial powers and non-recognition of the sovereignty of indigenous populations.’<sup>79</sup> The concept of *terra nullius*, rejected by early modern scholars such as Gentili, was subsequently endorsed

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<sup>74</sup> *Mabo v Queensland* (No 2) [1992] HCA 23, (1992) 175 CLR 1.

<sup>75</sup> A. Gaitán-Barrera and G. Khalid Azeez, ‘Regaining Pre-colonial Sovereignty: The Case of Miskitu Resistance’ (2015) 21 *Journal of Iberian and Latin American Research* 360–373, 360.

<sup>76</sup> *SAS v Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation) para. 35.

<sup>77</sup> *Id.* para. 36.

<sup>78</sup> F. Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’ (2006–7) 42 *Texas International Law Journal* 175.

<sup>79</sup> S. Wheatley, ‘Conceptualizing the Authority of the Sovereign State over Indigenous Peoples’ (2014) 27 *Leiden Journal of International Law* 371–96, 378.

by members of the international community to justify conquest.<sup>80</sup> While ‘the various European powers made different claims as to the basis of the acquisition of territory ... there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions.’<sup>81</sup> In fact the concept of *terra nullius* ‘not only disregard[ed] the will of the conquered original inhabitants of the land, but treat[ed] them, in essence, as legally irrelevant.’<sup>82</sup> For instance, the International Court of Justice held that an 1884 treaty concluded between the Kings and Chiefs of Old Calabar on the one hand and Great Britain on the other was not ‘governed by international law’ because it was not a treaty between states.<sup>83</sup> It thus rejected the argument advanced by Nigeria that ‘in the pre-colonial era the City States of the Calabar region constituted “independent entities with international legal personality”.’<sup>84</sup> Quoting Huber’s Award in the *Island of Palmas* case, the Court considered the treaty ‘not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of the natives . . . And thus suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations.’<sup>85</sup> Today, international law has discarded the concept of *terra nullius* since the 1975 Western Sahara Opinion of the ICJ, which did not recognise original title obtained by occupation of *terra nullius*, rather holding that agreements between indigenous peoples and states were ‘derivative roots of title.’<sup>86</sup>

Nowadays, the symbiosis between state and sovereignty may gradually give way to a more nuanced, comprehensive, and multicultural conception of sovereignty. International law scholars have conceptualised the notion of indigenous sovereignty as a type of ‘parallel sovereignty’ that can co-exist with state sovereignty.<sup>87</sup> Critics have expressed concern about whether two ‘sovereigns’ can exist within one State. However, international law scholars have used the term indigenous sovereignty without diminishing or contradicting state sovereignty. For Lenzerini, indigenous sovereignty

<sup>80</sup> Id. 380.

<sup>81</sup> Id. (citing Wheaton).

<sup>82</sup> Wiessner, ‘Indigenous Sovereignty’, 1153.

<sup>83</sup> *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Jurisdiction) (2002) *ICJ Reports* 303, para. 205.

<sup>84</sup> Id. para. 201.

<sup>85</sup> Id. para. 205 (quoting Max Huber, *Island of Palmas case, United States v Netherlands*, Permanent Court of Arbitration Award, 4 April 1928, (1928) II *Review of International Arbitral Awards* 829, 858–859).

<sup>86</sup> *Western Sahara*, Advisory Opinion, 1975 *ICJ Reports* 12, 39.

<sup>87</sup> Lenzerini, ‘Sovereignty Revisited’, 155.

constitutes a form of shared sovereignty or diarchy, and an emerging norm of customary law.<sup>88</sup> It 'shift[s] some aspects of state sovereignty, providing indigenous peoples with some significant sovereign prerogatives that previously belonged to the state.'<sup>89</sup> Daes links the rights of indigenous peoples, including their self-determination, to the notion of permanent sovereignty over natural resources. As is known, the notion of permanent sovereignty over natural resources belongs to peoples and has become a general principle of international law since its inclusion in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Such provision provides that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'<sup>90</sup> It also provides that 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'<sup>91</sup> In a case involving the Ogoni people of Nigeria, the African Commission on Human and Peoples' Rights held that the term 'all peoples' includes Indigenous peoples in interpreting Article 21 of the African [Banjul] Charter on Human and Peoples' Rights which affirms a right of '[a]ll peoples' to 'freely dispose of their wealth and natural resources.'

The emergence of a notion of indigenous sovereignty, meant as an expression of internal self-determination within the state, is fully compatible with existing international law. In recent decades, international law has increasingly regulated matters related to indigenous peoples, reaffirming their rights and various entitlements.<sup>92</sup> The sovereign powers of states are 'effectively limited by parallel powers that are consolidating in favour of culturally distinct communities.'<sup>93</sup> The emergence of the human rights paradigm in the aftermath of WWII and the decolonisation process have offered momentum to the renaissance of indigenous rights at the international

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<sup>88</sup> Id. 187.

<sup>89</sup> Id. 189.

<sup>90</sup> ICCPR Article 1.1; ICESCR, Article 1.1.

<sup>91</sup> ICCPR Article 1.2; ICESCR, Article 1.2. See also ICCPR Article 47 and ICESCR Article 25 ('Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.')

<sup>92</sup> M. Barelli, *Seeking Justice in International Law: the Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge 2016).

<sup>93</sup> Lenzerini, 'Sovereignty Revisited', 183.



level by fostering the adoption of international law instruments which recognise indigenous peoples' rights. At the international level, these rights have been protected and promoted in two complementary ways: on the one hand, the protection and promotion of indigenous peoples' rights remain embedded in the human rights framework. On the other hand, indigenous peoples have supported the creation of special forums and bodies that exclusively deal with their unique situation as well as the elaboration of legal instruments that focus on their rights.<sup>94</sup> For example, the creation of the United Nations Permanent Forum for Indigenous Issues (UNPFII) reflects the efforts of indigenous peoples 'to create space for themselves and their issues' within the United Nations machinery.<sup>95</sup> Furthermore, both the 1989 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)<sup>96</sup> and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>97</sup> are special instruments for the protection of indigenous peoples. All these instruments aim at re-empowering indigenous peoples, limiting the power of the state over indigenous peoples and acknowledging the simultaneous coexistence of multiple legal orders.

In particular, the UNDRIP, which is deemed to reflect customary international law, *inter alia* recognises the rights of indigenous peoples to control, use, and own their land.<sup>98</sup> It also recognises the rights of indigenous peoples to participate in political debates and to veto laws and policies that might affect their ways of life.<sup>99</sup> More fundamentally, UNDRIP recognises indigenous peoples' right of autonomy and self-government and considers their laws, traditions, and customs as a legal system.<sup>100</sup> Finally, 'the principal objective and purpose of UNDRIP' is 'to establish the necessary conditions to give effect to the right of self-determination for indigenous peoples

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<sup>94</sup> K. Göcke 'Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level' (2013) 5 *Goettingen Journal of International Law* 124.

<sup>95</sup> S. Sargent 'Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights' (2012) 16 *International Journal of Human Rights* 123–151, 136 (also noting, at 139, that the membership composition of the UNPFII – of state and indigenous representatives on equal footing – 'is a unique achievement in international indigenous rights, and indeed, in international law.')

<sup>96</sup> International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382.

<sup>97</sup> See generally UNDRIP.

<sup>98</sup> UNDRIP, Articles 25–30 and 32.

<sup>99</sup> UNDRIP, Articles 15, 18, and 19.

<sup>100</sup> UNDRIP Article 34.

within the territorial boundaries of the state.<sup>101</sup> Self-determination is a key element of indigenous sovereignty. The Charter of the United Nations, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.<sup>102</sup> As noted by Daes, ‘There is a growing and positive trend in international law and practice to extend the concept and principle of self-determination to peoples and groups within existing States.’ In this sense, self-determination does not necessarily entail a right to secession or independence (except for certain exceptional conditions); rather, it includes the right to various forms of autonomy and self-governance. As Daes explains, ‘[i]n order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources.’<sup>103</sup>

The UNDRIP explicitly recognizes that indigenous peoples have the right to self-determination. Article 46 of the UNDRIP nonetheless provides that ‘nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.’ As noted by Barelli, this provision ‘seems to be generally in line with the aspirations of the vast majority of indigenous peoples, whose self-determination claims are not aimed at dissolving states.’<sup>104</sup> The possibility of external self-determination or remedial secession might be exercised only if a state committed systematic and severe forms of oppression and subjugation.<sup>105</sup> While the existence and extent of a right to of remedial secession remains contested, the UNDRIP is not meant to restrict the rights of indigenous peoples, and therefore it can reflect further developments in international law.

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<sup>101</sup> Wheatley, ‘Conceptualizing the Authority of the Sovereign State over Indigenous Peoples’, 375 (referring to UNDRIP Article 46).

<sup>102</sup> UNDRIP, preamble.

<sup>103</sup> E.-I. A. Daes, *Indigenous Peoples Permanent Sovereignty Over Natural Resources*, Lecture delivered at the National Native Title Conference, Adelaide, 3 June 2004, available at <<https://www.humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>> (last visited 30 September 2019).

<sup>104</sup> M. Barelli, *Seeking Justice in International Law* (London: Routledge 2016) 25.

<sup>105</sup> J. Crawford, ‘The Right of Self-determination in International Law: Its Development and Future’, in P. Alston (ed), *Peoples’ Rights* (Oxford: OUP 2000) 7–68, 56 and 57.

There has been a clear paradigm shift in international law, whereby the international law protection of indigenous rights now constitutes a significant promise for indigenous peoples worldwide. This shift re-empowers indigenous peoples<sup>106</sup> and moves the discourse on their rights from the local to the international level with an intensity that was previously missing. From objects of protection, indigenous peoples have now become subjects of rights under international law.<sup>107</sup> The new legal framework is fully compatible with the emergence of a notion of indigenous sovereignty as a parallel sovereignty of indigenous polities that co-exists with state sovereignty. This notion overcomes the traditional Western (Westphalian) notion of sovereignty as an emanation of statehood. This notion has not emerged in order to encourage a secession of indigenous lands from states; rather, it aims at effectively limiting the power of the state over indigenous communities and empowering indigenous peoples.<sup>108</sup>

The notion of indigenous sovereignty encapsulates diverse albeit related rights and the international law regime on the rights of indigenous peoples as a whole. However, it is more than the sum of its parts. It reinforces the idea that indigenous peoples should have the freedom 'to choose what their future will be.'<sup>109</sup> It effectively acknowledges the linkage between indigenous people and their land, thus enhancing the fulfilment of their rights to land and self-determined development.<sup>110</sup> It does not alter the existing legal framework; rather, it can fulfil the promise of existing international law. As Otto wrote, 'within the modern discourse of a new world order are the seeds of resistance and change.'<sup>111</sup> For instance, by evoking the notion of supreme power, the notion of sovereignty can help states in protecting, fulfilling, and promoting the effective implementation of the rights of

<sup>106</sup> For a seminal study, see R. L. Barsch, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law' (1994) 7 *Harvard Human Rights Journal* 33. See also J. Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Ardsey: Transnational Publishers 2006).

<sup>107</sup> F. Gómez Isa, 'Indigenous Peoples: from Objects of Protection to Subjects of Rights' in A. Brysk and M. Stohl (eds), *Expanding Human Rights 21st Century Norms and Governance* (Cheltenham: EE 2017) 55–74.

<sup>108</sup> Nicol, 'From Territory to Rights.'

<sup>109</sup> R. Porter, 'The Meaning of Indigenous Nation Sovereignty (2002) 34 *Arizona State Law Journal* 75, 75.

<sup>110</sup> J. Gilbert and C. Lennox, 'Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development' (2019) 23 *International Journal of Human Rights*, 104–124.

<sup>111</sup> D. Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Society & Legal Studies* 337.

indigenous peoples. Rather than considering free, prior, and informed consent (FPIC) as requiring mere consultations with indigenous peoples, FPIC should be interpreted literally as ‘consent’, meaning that they should have the last word on how to govern their land and resources. If the concept of indigenous sovereignty is not linked to secession, it is deeply linked to self-determination and can help to shape state policies in conformity with existing international law.

Proponents of indigenous sovereignty do not use it as a tool to undermine indigenous peoples’ rights, and diminish the obligations that states have towards indigenous peoples. On the contrary, discussing indigenous sovereignty is a way to create momentum, and to invite states to reflect on how best to implement their obligations towards indigenous peoples under international law. Indigenous sovereignty is not meant to indicate a state of semi-sovereignty or a state of vassalage.

Rather, through adopting an inter-civilizational lens, it is possible to conceptualise a notion of indigenous sovereignty which expresses self-determination and draws on concepts used by indigenous peoples themselves, and is supreme and parallel to that of the state. Self-determination, full and effective participation of indigenous peoples in decisions that can affect them and their rights in accordance with their right to give or withhold free, prior, and informed consent, together with equity of remedies, are key principles to realise indigenous sovereignty.<sup>112</sup> In this regard, scholars have argued that indigenous notions of sovereignty should be recognised in addition to classical Western notions of state sovereignty.<sup>113</sup> Indigenous notions of sovereignty aim at safeguarding the ways of life of indigenous peoples through their own decision-making processes and distinct legal frameworks.<sup>114</sup> While political and legal theorists have long

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<sup>112</sup> Special Rapporteur on the Rights of Indigenous Peoples, Report on the rights of indigenous peoples, International investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, A/HRC/33/42 (2016) para. 17 (‘States are obliged to establish culturally appropriate mechanisms to enable the effective participation of indigenous peoples in all decision-making processes that directly affect their rights. To ensure this, international human rights law standards require good-faith consultations to obtain their free, prior and informed consent. This requirement applies prior to the enactment of legislative or administrative measures, the development of investment plans or the issuance of concessions, licences or permits for projects in or near their territories.’)

<sup>113</sup> S. Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

<sup>114</sup> L. Graham and S. Wiessner, ‘Indigenous Sovereignty, Culture and International Human Rights Law’ (2011) 110 *South Atlantic Quarterly* 403, 410.

taken for granted that law is the province of states only, tribal law has always existed. There exists a 'plurality of legal dimensions.'<sup>115</sup> Discussing indigenous sovereignty is a way to acknowledge the plurality of civilizations.

## 6. Conclusion

Sovereignty is a concept in flux. Several scholars have discussed the concept of indigenous sovereignty, meant as parallel sovereignty, in addition to state sovereignty. While some argue that such sovereignty may be an expression of an emerging norm of customary law, others link the notion to the concept of permanent sovereignty over natural resources and the right to self-determination. Irrespective of the legal status of the concept, this chapter argues that indigenous sovereignty is a useful heuristic tool to guide states in implementing their international obligations towards indigenous peoples.

The time has come to acknowledge indigenous sovereignty as an expression of 'the simultaneous authority of many co-existing legal orders.'<sup>116</sup> Indigenous sovereignty does not replace state sovereignty but exists in parallel. The concept of indigenous sovereignty is not only compatible with international law, but it has also been a historical (albeit for a long time invisible) feature of international law for centuries. While the course of international law could have taken different turns, this chapter suggests that international law contains the seeds of resistance, and of transformative, albeit unrealised, potential. The question of indigenous sovereignty has its roots in history and holds fundamental importance for the present and future of millions of people worldwide. The notion of indigenous sovereignty does not have clear borders in space or time; rather, it can give 'an open future back to the past.'<sup>117</sup> It is based on the recognition that cultural diversity is an essential component of the international community. It acknowledges that the struggles of indigenous peoples have not yet ended, and aims to contribute to broader debates about international justice.

Even if we admitted that international law is a fragmented and/or broken system, 'the alternative is despair', violence, and inequality.<sup>118</sup>

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<sup>115</sup> M. Bussani, 'Strangers in the Law: Lawyers' Law and the Other Legal Dimensions' (2019) 40 *Cardozo Law Review* 3125, 3126.

<sup>116</sup> R. Parfitt, 'The Spectre of Sources' (2014) 25 *European Journal of International Law* 303.

<sup>117</sup> I. Ventzke, 'Possibilities of the Past: Histories of the NIEO and the Travails of Critique' (2018) 20 *Journal of the History of International Law* 263–302.

<sup>118</sup> N. Berman, 'But the Alternative Is Despair: European Nationalism and the Modernist

Only by looking beyond the cracks of the system and by reflecting on how to deal with such ruptures can international lawyers contribute to the development of the system. Some hope remains that international law can bring some justice, equality, and peace, to the world. Human dignity, equality, self-determination, permanent sovereignty over natural resources, and the prohibition of slavery and genocide are all paramount values that are inscribed in the grammar of international law. International lawyers can learn from the mistakes of the past in order to create a more just international system. By connecting the fragments in which humanity, civilizations, and interests are divided, international lawyers can build bridges among civilizations, foster dialogue among them, and promote peace and justice.<sup>119</sup>

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<sup>119</sup> Y. Onuma, *International Law in a Transcivilizational World* (Cambridge: CUP 2017).

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