Reformulating human rights from an indigenous perspective: embedding the San views on property rights

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Part I

Introduction

Wisdom is like a baobab tree;
no one individual can embrace it alone
(Ewe proverb)

Human rights are a milestone achievement of proclaimed common standards for all that should be promoted, secured and enjoyed by all human beings. These 'universal legal guarantees' are enshrined in several documents, principles and practices of different binding force in what has become today, the body of international human rights law (non-political normativity, solid and non-ideological). They have further inspired numerous other instruments adopted at regional level, permeated constitutions and national laws, as well as influenced the design of protection mechanism, procedures and discourses for the last 70 years and plus.

In parallel to the institutionalisation of human rights, the term has become a frequently used expression and part of common day-to-day language in different settings and context. They are understood as something that a person (or sometimes a group of individuals) is or should be morally or legally allowed to have, get or do. Their ultimate justification varies, from the mere existence as a human being, a just claim to enable a fair society, to protect one's agency, value and interests due to inherent vulnerability. The negative side of human rights becoming a buzz word (and of their proliferation and expansion), subject to opportunistic interests, co-optation and political instrumentalizations lies in the danger of their value being undermined.[1] "When nature is no longer the standard of right, all individual desires can be turned into rights" (Douzinas, 2000, 11). Human rights are alluded to so regularly as entitlements disconnected from any kind of responsibility, obligation or broader connection to a community of equal fellow humans, constrained by substantive particular ideals and social objectives, that they also risk to become trivial. In addition, this sense of entitlement encapsulated in such a 'universal paradigm' shapes our expectations and

[1] "The critical power of that language is largely lost." (Koskenniemi, 2011, 142), as every interest, concern and preference is presented in the language of human rights and firstly justified on the basis of culturally conditioned prioritisations, thus, making it difficult to balance and assess without a certain bias and creating uncertainty (regarding 'emerging rights').

behaviour. However, it does not seem to offer a response to the billions of people living under extremely difficult conditions with little prospects for improvement, impoverished in terms of hope, for whom the human rights grammar[2] appears insufficient.

The above-mentioned risks can compromise their constructive, liberating,[3] and transformative potential towards a social distributive justice that addresses inequality and secures dignified lives.

In addition, there is also a friction between human rights' conceptual and theoretical premises and the various realities of living socio-cultural practices and ethos (value-based scepticism). Despite them having been conceived as arising from shared values common to all cultures and civilisations (universal imperatives), Western ideological principles and values are predominant in the human rights conceptualisation.[4] They were designed within an imperial framework aimed at protecting the status quo, maintaining moral leadership and the structures of hegemonic power (as will be argued below). Abstract rationalism, secularity, techno-scientific epistemology, liberalism[5] (individual rights, autonomy and abstract equality), anthropocentrism and a hierarchised conception of being, economic growth, state-centrism, universalism, rights and legalistic approaches, are the foundations on which they stand. In turn, liberalism embraces the following aspects: multilateralism, western capitalism (the liberalisation of economy, open markets and free trade as facilitators of prosperity), liberal democracy, the promotion of the rule of law, human rights, moral individualism, human equality and freedom (the universal moral order of the Enlightenment). Besides, Western imperialism is intrinsic to liberalism, born from liberal ideas. "The imperialistic

[2] The "grammar of human rights" makes reference to the mainstream dominant human rights narrative articulated within the international human rights corpus.

[3] Liberation subsumes the idea of emancipation, being more encompassing by referring to the lifting of constrains and oppression. Emancipation relates to releasing bondage and transferring ownership, although without necessarily delving into the causes of those elements and circumstances which are deemed to be changed (the logic of coloniality).

[4] Surya Prakash Sinha, Shivji, Mutua, Burke, Douzinas, Goodale, Burke, Moyn, Étienne-Richard Mbaya. Other authors critique the eurocentrism of international law more generally (see article 1).

[5] "Western liberalism in its classical variant endorses democratic governance, the rule of law, private property, private enterprise, capitalism, individual liberty, and freedom of opportunity and expression. In its liberal internationalist form, it endorses international law, free and open international communication, diplomacy as means of conflict resolution, free trade, open markets, and international organisations as custodians of international order and facilitators of collective action" (Puchala, 2005, 581).

"urge is internal to" liberalism" in the sense that it "remains marked by features that rendered it often supportive of imperial domination, including a commitment to progress and a teleological view of history, a suspicion of certain kinds of cultural or ethical particularism, and a hospitable stance toward capitalism and the economic exploitation of nature" (Pitts, 2010, 216). "the [universalization] of liberalism is the West's project; employing Western power to construct a liberal world is the overriding purpose of Western hegemony today" (Puchala 2005, 571-584, 580). Furthermore, According to Charlotte Langridge, "liberalism has compelled other states to establish international institutions, liberalise their economies and strengthen their democracies. The façade of legitimacy built on perceived consent has eroded into concealed coercion," thereby, absorbing counter-hegemony (Langridge, 2013, 2).

In view of the devaluation and criticisms that affect the concept[6] 'human rights' and its conceptual underpinnings, as well as presupposing them as an unfinished project, this dissertation aims at reshaping their conceptualisation in order to bestow them broader legitimacy and a more comprehensive meaning. Such a transformation would embrace perspectives, world-views and world-senses that did not feed the initial conceptualisation that culminated in their current formulation (the dominant human rights grammar). In this way, this research seeks to enrich their content and meaning by engaging with 'differences,' manifested in the existence of multiple cultures, plural legalities, customs, justice projects and paradigms, as well as with alternative sensitivities and different ways of thinking and doing.[7]

More concretely, this thesis aims at identifying and defining values and aspects of indigenous peoples' epistemologies that could expand the current hegemonic human rights discourse, while challenging the supremacy and assumed completeness of such a

[6] "Concepts are part of the ideological apparatus." (Oyěwùmí, 1997, 78). The topicality of this problematic is exemplified by the continuous debates, discussions and publications on the topic. A recently launched podcast sessions by a leading global network on human rights education engages on its first series, with human rights scepticism (To the Righthouse, Global Campus of Human Rights).

[7] "Difference must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic. Only then does the necessity for interdependency become unthreatening. Only within that interdependency of different strengths, acknowledged and equal, can the power to seek new ways of being in the world generate, as well as the courage and sustenance to act where there are no charters." (Lorde, 2007, 111), The Master's tool will never dismantle the Master's house.

mainstream grammar. It is understood here that the hegemonic human rights discourse legitimates domination through law.[8] It embodies a specific ideology, imperial, cultural, political and economic interests that are spread through law and concealed through the legitimacy and authority endorsed by its supposed neutrality and universality as well as by the formal ratification of normative instruments (legal universality),[9] while hiding expansionist ambitions, antagonistic agendas and concealing certain violations.

This hegemony of western[10] preferences and ideas that are captured in the human rights dominant discourse, is inclusive of legal, political, intellectual and moral aspects (thus, of liberal ideas encompassing economic, political, social, cultural and ideological features). From a critical perspective, beyond confining hegemony to a hegemonic state, its values and culture, global hegemony is understood as a coalition of powers projecting hegemony on a world scale. This western hegemony is viewed as "a transnational coalition of elites sharing interests, aims, and aspirations stemming from similar institutions and a common ideology" (Puchala, 2005, 577). According to Robert Cox, world hegemony (besides a social, economic and political structure), "is also a normative, ideological, or ethical structure" (in Puchala, 2005, 575).[11] He refers to five elements that contribute to the maintenance of the hegemony of western liberal international organisations (including the UN): They embody the rules that enable the expansion of world hegemonic orders; they are themselves the product of the world hegemonic order; they ideologically legitimate the norms of the world hegemonic order; they incorporate the elites of peripheral countries; they absorb counter-hegemonic ideas (Cox, 2016, 149). Thus, stemming from the ascent of an imperial rhetoric derived from the ambition of universalism,[12] in view of the relationship between systems of

[8] Hegemony is understood following Adam D. Morton's definition: "the articulation and justification of a particular set of interests as general interests, the spread and acceptance of ideas and values, as well as rules and institutions that the dominant class imposes nationally and internationally, while expanding and meshing with similar social forces across different countries to shape the world order in its interests" (in Molchanov, 2012, 788), (Bieler & Morton, 2004).

[9] Normative power as ideational that uses normative justification whereby implying legitimacy of the principles it promotes, persuasion regarding the actions needed to promote those principles, and "involve socialisation, partnership, and ownership" in relation to the impact of those actions (Manners, 2009).

[10] In which the west refers to an epistemic location of a multinational entity beyond a limited geographic understanding.

[11] He further connects the hegemonic world order to international organisations, understood as mechanisms of hegemony through which hegemonic universal norms are expressed.

[12] In the context of environmental law (Natarajan & Khoday, 2014) argue that the modern project of international law "puts forth a vision of an all-encompassing universal system of governance" (578),

political[13] and economic control and current international legal systems, this thesis asserts that ongoing injustices and imbalances are rooted in the unchallenged and hegemonic power system that enables exploitation, control and marginalisation.

This predominance and self-legitimation of the liberal democratic order and its internationalisation, including the imposition of a specific cultural order and values, further reaches research models and paradigms. They are reinforced in contradistinction to non-western knowledge systems consolidating inequalities in knowledge production. Thereby reproducing the power relationships of asymmetry and inequality in patterns of knowledge production and dissemination, maintaining the authority to define meaning and preventing alternative ways from becoming viable possibilities.

Coloniality,[14] understood as the imposition of the Western cultural imaginary that continued beyond colonial administration, includes the epistemic subordination of other worldviews. Ideological coloniality[15] and epistemic injustice are connected to the monopolisation of knowledge and the marginalisation of ways of being and knowing.

As a way out, this dissertation argues for the inclusion of alternative paradigms from peripheral (subaltern) legalities, proposing a decolonised formulation of the right to property from the indigenous peoples of Southern Africa, the San. African traditional justice systems have been the object of numerous studies approached from the angle of customary justice and alternative dispute resolution mechanisms. However, studies of indigenous justice systems specifically do not abound (OHCHR, 2016). For that reason, this thesis examines indigenous understandings of rights,[16] values and principles to

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because, "in order to exist, international law depends on an assertion of unity based on a fundamental sameness between all states and between all people" (583), thus, effacing differences.

[13] With the state as the chief protector of individual rights (privileging individual interests such as private property), in disregard of other socio-political structurings.

[14] The negative side of modernity that "the progressive rhetoric of modernity including liberal democracy and human rights discourses help in hiding" (Ndlovu-Gatsheni, 2013, 14). According to South African professor Tshepo Madlingozi "Western modernity is that long fifteenth century phenomenon whose condition of possibility is the violent expansion and universalisation of Europe and Eurocentrism; and at the other end, the dispossession, dislocation and, ultimately, 'invisibilisation' of the rest of the world." (Madlingozi, 2018, 30).

[15] "Colonial intellectualism" (Sylvia Tamale).

[16] "Los conocimientos subalternos son aquellos que se encuentran en la intersección de lo tradicional y lo moderno. Son formas de conocimiento híbridas, transculturales, no simplemente en el sentido del sincretismo tradicional o mestizaje, sino en el que les da Aimé Césaire de 'armas milagrosas' o lo que he

counter the ideological dominance of the current mainstream narrative of rights (underlying ideas, beliefs and values), which contributes to sustaining the status quo by reinforcing power and structures of inequality.[17]

In order to guide this exploration, the main research questions steering this dissertation are the following ones:[18]

- To what extent can the epistemological premises behind the human rights dominant discourse be considered to have a Western bias.
- How can human rights be reconceptualised to embrace alternative perspectives?
- What could be the contribution from the indigenous peoples/San people world-senses and lived-worlds to expand the human rights hegemonic conception?
    - How could indigenous peoples' justice worldviews and values feed and enlarge the current mainstream human rights discourse?
    - What elements from the San could reconfigure the right to property?

To answer these questions, I have opted for the collection of articles format, which are arranged as the three chapters following this introduction. Each of the three articles that conform the core of this work build on the central argument that runs through the logic and structure of this dissertation, in response to the main research questions mentioned above. They have been published or accepted for publication in different journals and an edited collection and the versions included here are the accepted manuscripts following the process of peer-review ('postprint'). The possible differences in formatting and writing styles correspond to the editing requirements of each of the journals and editing houses. However, and despite these differences, there is an internal consistency within each of the articles regarding style and referencing systems. Among the reasons

llamado 'complicidad subversiva' contra el sistema. Son modalidades de resistencia que resignifican y transforman las formas de conocimiento dominantes desde el punto de vista de la racionalidad no eurocéntrica de subjetividades subalternas que piensan desde epistemologías descoloniales." Grosfoguel, in (de Sousa Santos et al., 2007, 394). Subaltern knowledges are those that are found at the intersection of the traditional and the modern. They are hybrid, transcultural forms of knowledge, not simply in the sense of traditional syncretism or mixing, but in the sense that Aimé Césaire gives them of "miraculous weapons" or what I have called "subversive complicity" against the system. They are modalities of resistance that resignify and transform the dominant forms of knowledge from the point of view of the non-Eurocentric rationality of subaltern subjectivities that think from decolonial epistemologies (translation by the author).

[17] "Inequality has proved time and time again to be a far more potent spur for political action than absolute poverty." (Suzman, 2018, no page).

[18] "Research is about satisfying a need to know, and a need to extend the boundaries of existing knowledge through a process of systematic inquiry." (Smith, 1999, 170).

behind this choice of compendium of articles rather than a monograph format, are: enabling quicker feedback, facilitating early dissemination of ideas and exposure of the ongoing research as each chapter in this dissertation is a finished study in itself. In addition, it allows for the examination of the main related aspects derived from the overall goal of the research in a progressive, complementary and more detailed fashion.

Each one of the research questions is addressed in one the three articles that follow this introduction. As such, the article-collection format enabled for delving from the more general exploration around the epistemological basis of human rights that tries to answer the hypothesis of human rights being Western centric, to a second chapter examining and justifying the need for an alternative formulation and what such a perspective could be, and thirdly, to advance a concrete proposal stemming from indigenous peoples' world-senses (the San) that can contribute to expanding the dominant human rights conceptualisation. Thus, closing the circle of inquiry from a more general subject of study (to what extent human rights dominant conceptualisation has an ideological bias), to a concrete alternative for reformulation pertaining to the right to property specifically.

Structure

This dissertation is written as a collection of three papers that stem from the central argument explained above. Starting from a more theoretical chapter discussing the eurocentrism[19] of human rights, Western centric influences and ideological coloniality are critically analysed from decolonial theory and Third World Approaches to International Law perspectives (TWAIL) with regard to the human rights

[19] Western centric human rights discourse. West and euro-centrism are used here beyond their geographical signification, including the centres of mainstream knowledge production aligned to the same ideological premises, not unaware of the existing diversity within. "it is the neoliberal, Whitecentric/supremacist, binary/Cartesian, intellectually-arrogant depoliticizing kind of Western thought." (Tamale, 2020, 13). "Eurocentrism refers to a specific form of ethnocentrism that became globalized, and which is closely associated with modernity and coloniality… the distinct socio-historical and cultural perspective that produced those racial boundaries and nation-state territorial lines that today frame ethnocentrisms… As part of the modern colonial abyssal thinking, Eurocentrism is the hegemonic thought of the west/global north that essentialises itself while claiming to be universal, and categorising any perspective that points to this essentialism as being irrelevant, subjective, or uninformed." (Suárez-Krabbe, 2019).

conceptualisation. The second chapter presents a justification for endorsing an alternative narrative to the dominant human rights grammar. It explores how international law reads the narrative on indigenous peoples and rights. Building on those premises, the third chapter presents a more concrete alter*native* from an indigenous perspective, that of the San in Southern Africa. It focuses on the right to property (and land), aiming at contributing to the transformation of the prevailing human rights discourse. A more developed elaboration on the connections and arguments bringing the three articles together will be presented in what follows, as well as within the conclusions of this compendium at the end of this chapter.

Departing from the hypothesis of the existence of an ideological bias in the conceptualisation of human rights as per their dominant understanding, the controversy around the ideological groundings of the dominant human rights conceptualisation is addressed in article 1 entitled "Transforming Human Rights through decolonial lens." On the basis of the predominance of Western ideological components and values as the premises of international human rights law precepts, this article problematises the dominant human rights narrative arguing for the incorporation of alternative understandings and perspectives. It suggests transforming the frame of reference that gave them meaning, and expanding the visions of the goods and values deserving such fundamental protection. In this article, different positionings around the groundings and ideological underpinnings of human rights are reviewed. Concluding that those foundations and values, rather than being universal, were the embodiment of a particular worldview (rational, secular, anthropocentric), privileged as the dominant narrative on the basis of underlying epistemic asymmetries, hierarchies and hegemonic power.

Against this background, this research aims at acknowledging pluriversality by stressing different ways of knowing and living, by means of examining how indigenous paradigms can enlarge and enrich knowledge about the world, notions of justice and rights. It thus poses preliminary aspects concerning whose knowledge counts as valid, which forms of apprehending reality are privileged. This enquiry brings up unsolved questions regarding different ontologies, alternative understandings of the subject, the individual, the community and their relationship to objects, resources and nature. Therefore, article 2

contests the dominant ethnocentric Human Rights grammar and proposes a decentred alternative by focusing on the legal epistemologies of Southern African Indigenous Peoples: "Deconstructing the dominant Human Rights grammar: an alternative narrative based on Indigenous Peoples' world-views." In an attempt to transcend the limitations of the current hegemonic paradigm, the proposal advanced here aims at reclaiming and recapturing the insights and values of African Indigenous Peoples as intellectual capital to reconfigure the human rights discourse, reverting epistemic injustice by presenting an alter*native* narrative based on Indigenous Peoples' world-views.

Furthering the endeavour of deconstructing the hegemonic discourse, this dissertation explores the understanding of property rights/the right to property from the perspective of the San. The most characteristic aspects around their comprehension of property (and land), are discussed in article 3 entitled "A is for apple, M for mongongo: An alternative conceptualisation of the right to property from an indigenous peoples' perspective." Against liberal conceptions of property contained in positive laws, this third article presents 'an alternative conceptualisation of property, ownership and non-exclusive uses of land.' It identifies concrete aspects from which we can reformulate and transform the right to property and expand the mainstream rights discourse from an alter-*native* perspective based on aspects such as mutual dependence, egalitarianism, sharing, redistribution, reciprocity and earth's boundaries.

On the next pages, the following aspects are covered: 1) theoretical framework and conceptual clarifications, where a comprehensive overview of the premises supporting this research is presented, 2) methodological notes including questions around positionality and limitations of the study, 3) the main discussion connecting the three papers that presents the central arguments leading to the conclusions, and 4) final remarks and reflections on possible venues for further research. This introductory chapter is followed by the three main chapters containing each of the articles discussed. They are each preceded by linking sections containing a one-page presentation that includes the following: a brief abstract summarising the main propositions and elaborating on the guiding argument of the dissertation, a few key words, the reference to the published version of each of the texts that follow, and a brief quote.

Theoretical framework and conceptual clarifications

Beyond Eurocentric visions of international law (EVIL) and Western-centric paradigms of knowledge, this research builds on decolonial approaches and TWAIL work. It navigates legal pluralism and the political nature of human rights conceived as power categories that emanated primarily from a Western centric epistemic location and set of beliefs inherited from Theology and secularized by Philosophy and Science. As a result, it is argued here that Western ideological components and values are predominant in International Human Rights Law precepts, leaving elements of non-dominant cultures at the margins of human rights discourse and the controversy around universality versus relativism unsolved.[20] On account of those limitations, this research strives to deconstruct and transform the dominant understanding of human rights from a counterhegemonic perspective informed by peripheral knowledge(s), subaltern legalities and epistemologies. It thereby presents the San as an alternative to the hegemonic grammar, exploring elements from their world-views in an attempt to remedy epistemic injustice, ideological coloniality and the universal pretension of validity of the dominant human rights conceptualisation.

In addition to the introductory paragraphs elaborating on the connection between the grammar of human rights as an imperial rhetoric, another central premise that underlines this research will be addressed in what follows, namely, the western bias of human rights.

Despite the above-mentioned proliferation of human rights as well as their institutional and normative expansion, their foundations and status have been questioned and debated ever since the discussions leading to the adoption of the Universal Declaration of Human Rights (UDHR). The lack of agreement around those aspects has resulted in an ongoing polarisation pertaining their value, nature and content ascribed to them, a controversy that remains unsolved.

The application of human rights standards by the west has been equally questionable and problematic despite states embracing the human rights grammar and protection

[20] Cobbah 1987, Howard, Mbaya 1997, de Sousa Santos, Garzón-López 2013, Jensen 2016.

framework. Western powers have infringed human rights despite their formal positioning in favour of the promotion and protection of rights, having strategically used this framework to legitimise and justify certain interventions and inactions elsewhere, presenting themselves as the bearers of human rights. In the 50's for example, against the backdrop of colonialism, western delegations used the language of cultural relativism as a way to evade their human rights obligations, resorting to the dichotomous argument of traditional cultures versus civilized countries, and resisting "any attempt to extend human rights to their colonies" (Burke, 2010, 114). In the 70's, human rights were "associated with an imperialist pattern of conduct… universality was now imperialist" (ibid 137). The relativistic approach dominated the debates during 80's and 90's, until the Vienna Conference in 1993.[21] This problematic application and respect for human rights from the west has been put forward as evidence of human rights not being solely a western construct.

In addition to that, it is alleged that non-western actors and struggles have contributed to the human rights regime. Certain elements such as moral agency, personhood and tolerance can be found in other traditions. Besides, the institutionalisation of human rights (embedding the human rights conception, norms, values and beliefs within societies at global level) has been a gradual process not solely driven by the west. However, despite advances towards respect and protection of human beings and peoples also emanated from peripheral locations (as will be described below), those contributions are often not sufficiently explicitly stated, nor their world-views and philosophical underpinnings duly included in positive laws and legal instruments.

A genealogy of human rights theory unveils key aspects around the making of the narrative leading to the acclamation of human rights. Heated debates revealed ideological divisions, and culturally marked premises and philosophical postulates

[21] Which had a much larger representation than the meetings that led to the UDHR. 171 States were represented at the Vienna Conference, as well as more than 800 NGOs, UN bodies and concerned people who actively participated in this conference aimed at reviewing the human rights machinery to provide the international community with a new framework for dialogue and cooperation to protect human dignity (according to the Closing Statement by the Secretary-General of the World Conference on Human Rights). During this meeting it was recognised that "the national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind" (United Nations, 1993, point 20). Furthermore, the importance to "recognize the value and diversity of their distinct identities, cultures and social organization," those of indigenous peoples, was reaffirmed (ibid).

pertaining to a western mentality, ended up becoming the scaffolding sustaining the normative principles of international human rights standards and instruments.[22]

Thus, and in line with an important set of literature that explores the predominance of western components and values within the international human rights corpus,[23] this thesis argues for the ethnocentric bias (cultural and ideological) of the dominant human rights ideas. It is argued that "there is little room for debating the simple historical fact that the Universal Declaration was based largely on western philosophical models, legal traditions, and geopolitical imperatives" (Normand and Zaidi 2008, 195), also when considering the background materials used for the drafting.[24] The justificatory prototheory of human rights is conceived as "an exercise in "situated" geopolitical moral rationality" following Tore Lindholm's understanding (Na'im, 1995, 397), resulting from the commitment to the normative principles of equal dignity and freedom, jointly with the historical circumstances of the time.[25]

Article 1 below refers to Goodale's archival research on the UNESCO global survey around the philosophical foundations of human rights and the theoretical problems for elaborating an international declaration and the principles on which a declaration might be founded. It sheds light on the debates preceding the adoption of the UDHR around the status of human rights, opposing conceptions of rights and the myth of universality. The resulting report of UNESCO's survey was not distributed among the United Nations

[22] "After a few years had passed, the meanings the idea of human rights had accreted were so geographically specific and ideologically partisan_ and, most often, linked so inseparably to Christian, Cold War identity_ as to make the fact that they could return later in some different guise a deep puzzle." (Moyn, 2012, 47).

[23] (Douzinas, 2000), (Moyn, 2012), (Pollis, 1980), Burke, Goodale. The exclusion of other voices in the dominant western human rights narrative is also stressed by other authors sensitive to Western hegemony (Mbembe, An-Na'im).

[24] For a detailed account on the history of human rights and the UN, affirming the western orientation of the declaration see also (Normand & Zaidi, 2008): the drafting process "kept moving forward, all the while remaining in conformity with the US vision of human rights" (177) that exerted a predominant influence and an "unparalleled ideological power." See Burke's detailed historical and contextualized account of the making of international human rights law instruments within the UN.

[25] International human rights standards, "Like all normative principles, they are necessarily based on specific cultural and philosophical assumptions. Given the historical context within which the present standards have been formulated, it was unavoidable that they were initially based on Western cultural and philosophical assumptions. Although this orientation was somewhat modified during the international negotiation processes through which those standards were subsequently elaborated, the formative Western impact continues to influence the conception and implementation of human rights throughout the world" (Na'im, 1995, 428).

(UN) member states, being rejected by the UN Commission on Human rights (CHR), which was to produce an international bill of rights,[26] on the basis that they had not been consulted. Consequently, it was not included in the drafting process. Thus, the controversy around the ultimate foundations was left aside given the importance of what was at stake. A pragmatic approach focusing on intergovernmental negotiations and practical agreement on rights was adopted instead, out of optimism and necessity: "we must not expect too much… Pending something better, a Declaration of Human Rights agreed by the nations would be a great thing in itself" (Jacques Maritain, in UNESCO, 1948, IX).

At the time when the UDHR was adopted in 1948 (UNGA A/RES/217A), only 58 states were members of the UN, thus 'universal' should be interpreted within this specific context. However, the Declaration was "formulated as if metaphysically grounded on principles of universal validity" (Falk, 2000, 49). Furthermore, the CHR was composed not by independent experts, but by representatives of governments from the Security Council permanent members plus additional members from other regions of the world representing 18 states in total (among whom there were only two women), on the basis that they were to prepare a text that should be accepted by governments.[27] This procedural decision "provided a high degree of government control over the daily workings of the CHR and ensured that state concerns would predominate as the basic contours of the human rights system were established" (Normand & Zaidi, 2008, 147). Furthermore, "opposing ideological and practical differences… were either papered over or resolved in favour of the dominant view, generally the one backed by the United States" (ibid 185).

Neither the positioning in favour of the mainstream human rights conceptualisation of diplomatic and representatives of non-western countries, nor the voting in favour or the adoption of legal instruments, are equivalent to the recognition and incorporation of

[26] This commission was not to deal with implementation mechanisms. Proposals regarding the enforcement of human rights were strongly opposed by the United States and the Soviet Union. See 1947 ECOSOC Resolution 75(V) relating to communications concerning human rights (E/CN.4/27), no-power doctrine.

[27] Australia, Belgium, Byelorussia, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, the Soviet Union, Ukraine, United Kingdom, United States, Uruguay and Yugoslavia (for an overview of the geographical origins and intellectual background of the CHR members see Normand and Zaidi 2008).

non-western traditions and popular perceptions within the dominant formulation of human rights. Geographic space does not equal epistemic location: "we should not assume from the fact that governmental delegates "participated" in their formulation and adoption that there is necessarily sufficiently broad popular acceptance of these standards, and commitment to their implementation, in our respective countries." (Na'im, 1995, 428).

In its statement on human rights submitted to the CHR, the American Anthropologist Association, concerned with the respect for the individual as well as for the diversity of cultures in which those individuals develop as members of a social group, raised the question of "how can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?" (American Anthropological Association, 1947, 539). These expressed worries of such a declaration becoming a product of western ethnocentrism were later on reaffirmed by critics and sceptics, and equally rebutted by others (Morsink, 2000).[28]

Different aspects raised dissatisfaction with the text of the declaration regarding its validity, legitimacy and cross-cultural intelligibility. Among them were its liberal and secular roots: the centrality of western liberal individualism (and a uniform human), freedom without correlated responsibilities, rights oriented, as well as the prescriptive nature of specific views for the achievement of a certain model of a good life that responded to specific values, which were rendered universal and valid for the entire human community, (in continuation of the universalising endeavour and imperial backdrop). The declaration was perceived as built on a particular understanding of the individual and a specific notion of the person, based on the antinomies of dualisms such as politics-society, society-religion, economy-politics, society versus culture and nature.[29] The ultimate foundations of human rights (human dignity, the person, human

[28] In his thorough analysis of the drafting process of the declaration, he acknowledges that "large regions of our world, such as Asia and Africa, were grossly underrepresented at the drafting table." (Morsink, 2000, 36).

[29] According to Natarajan and Khoday, international law's understanding of nature "as a resource for wealth generation to enable societies to continually develop" where humanity is at the centre, reinforces ecological harm while contributing to normalise environmental degradation as an externality and to universalise such understanding. They further conclude that "disciplinary solutions to environmental problems require radical departures from existing disciplinary tenets, necessitating *new formulations that*

nature), as well as the notion of nation-state as guarantor of rights (versus other political entities and institutions), were aspects seen with considerable suspicion and resistance. The orthodoxy of the dominant views led to criticisms and a polarisation of voices; on the one side those defending universal foundations and ambitions, and on the other, those endorsing relativist claims that resisted universalism.

This controversy has been captured in countless discussions around universalism and relativism. Approached in light of the hegemonic world order, these debates encompass positionings and discourses around antagonistic narratives. Spanning from those defending human rights universalism (ontological, on the basis of their foundations,[30] substantive/content or regarding the concept), to a range of viewpoints endorsing different degrees of cultural relativistic stances and criticisms (weak or strong).[31] However, the potentiality of this grammar (despite its creation did not stem from all voices nor did it reflect all views and life-worlds), has led many authors to construct theoretical and more practical elaborations aimed at guarding human rights in the absence of a better framework to protect these minimum standards.[32]

Beyond theoretical discussions along those opposing angles, alternative documents were created such as the Cairo Declaration on Human Rights in Islam (1990) or the Bangkok Declaration that portrayed the Asian values argument on the premises of cultural relativism, a hierarchical view of society and "the interdependence and social nature of human beings" (Barr, 2000, 311).[33]

It is within this scenario and engaging with the disagreements around these issues that this research explores alternative approaches to the dominant narrative, epitomised in the international human rights law corpus, given that despite their acclaimed universality, in practice, different standards of humanness operate, as evinced through

*encapsulate rich and diverse understandings of natur*e" beyond natural resources as commodities that exist for the benefit of human's exploitation (Natarajan & Khoday, 2014, 573) (emphasis added).

[30] The search for foundations of a normative system is the search for authority (Pahuja, 2005). Consensus can also be assumed as a founding reference.

[31] On the basis of legal and formal endorsement or at the level of the concept regarding certain principles of justice; functional and overlapping consensus.

[32] Alternatives such as "human rights as a pragmatic approach to empowerment" Chandler, D., Sally Engle Merry's vernacularisation of human rights, intercultural translations to mention a few.

[33] It draws from Confucianism as an ethical and humanistic system, emphasising community and communitarianism, as well as the following principles: "personal virtue, obedience to authority, family loyalty, and education" (Barr 2000, 309-334, 311).

contemporary classifications of 'uncivilised,' racism and so forth.[34] Selective bestowal of rights occurred at the time when the UDHR was being drafted, and still happens today when different collectives and persons (those at the margins, the rest who is not the west) are denied their humanity in spite of the human rights normative apparatus.[35]

International law's civilising impulse (Anghie, 2007, Koskenniemi) and superiority are based on prejudices that are justified by 'ontological differences.' The "dynamic difference" between European culture (universal) and the rest, justified the civilisation mission (rooted in natural law) on the basis of the distinction between the civilised and the un-civilised. Later on, the justification evolved towards an economic subordination that was equally sustained by the international law system. This led, among other consequences, to the differentiation of the Third World; developed and underdeveloped states, the 'garden' and the 'jungle',[36] turning the focus to the legitimacy law provides, in order to justify its practices. Human rights substituted prior ideas such as progress or civilisation (Holloway, 2009) to justify domination.

> "Even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism. The human rights corpus is driven by what I have called the savage-victim-savior metaphor, in which human rights is a grand narrative of an epochal contest that pits savages against victims and saviors. In this script of human rights, democracy and western liberalism are internationalized to save savage non-Western cultures from themselves and to "alleviate" the suffering of victims, who are generally non-Western and non-European." (Mutua, 2000, 850).

Radical transformations have occurred in the last decades: the coming of independence of many colonised countries, geo-political shifts, changes in strategic priorities, growing inequalities and a not so effective protection apparatus that weakens the

[34] As argued by (Lo Coco, 2021) in the context of borders and migrants' rights unveiling the racist assumptions behind the protection logic. Her analysis presents the biopolitical contradiction embedded in EU's migration policies, whereby the human rights protection results in the negation of (certain) lives and the creation of "espacios de no-derecho" (spaces of no-rights).

[35] Hence the use of the expression human rights rhetoric in this text, interchangeably with that of human rights grammar or mainstream dominant narrative.

[36] Words of the EU High Representative for Foreign Affairs and Security Policy and Vice-President of the European Commission Josep Borrell during his inaugural speech of the European Diplomatic Academy in Bruges, Belgium 13/10/2022.

implementation and application of rights. Consequently, it is time to transcend the controversy universalism relativism given the current global context of intense political, economic and social exchanges. Theorisation should advance alongside practical solutions fed by anthropological contributions close to lived realities. The problematisation of the condition of human rights in this work aims at providing a feasible transformation by engaging with difference, keeping at its heart the unquestionable plurality of the multiple otherness that characterises humanity (beyond factual multiculturality) but including positive interaction and coexistence within existing diversity.[37]

Therefore, approaching this Western-centrism from decolonial and TWAIL perspectives allows for decentring the discourse and transforming a monologue into an epistemological dialogue,[38] inclusive of non-dominant voices at the margins for a truly plural conceptualisation. It will at least enable to advance towards a more dialogical understanding away from ethnocentric limitations, drawing attention towards effective participation and difference.

Decoloniality and TWAIL

Decoloniality, as it is the case with the notion of human rights just discussed, has become a widely used term, and similarly distorted and indiscriminately applied sometimes. As a concept it emerged from the modernity/coloniality group in Latin America, driven by

[37] Catherine Walsh asserts that the term multiculturalism "instala y hace visible una geopolítica del conocimiento que tiende a hacer desaparecer y a oscurecer las historias locales y autoriza un sentido "universal" de las sociedades multiculturales y del mundo multicultural… una concesión hacia la diversidad en el "uni"": "Sets up and renders visible a geopolitics of knowledge that tends to efface and obscure local histories and authorises a 'universal' significance of multicultural societies and of the multicultural world… a concession to diversity within the 'uni'" (diversity in unity, pluriversality) (Walsh, C., 2007, 54). Concluding that "El reconocimiento de y la tolerancia hacia los otros que el paradigma multicultural promete, no sólo mantiene la permanencia de la inequidad social, sino que deja intacta la estructura social e institucional que construye, reproduce y mantiene estas inequidades" "The recognition of and tolerance towards others that the multicultural paradigm promises, does not only uphold the permanence of social inequality, but also leaves intact the social and institutional structure that it creates, it reproduces and maintains these inequities" (ibid, 55). Translation by the author.

[38] In the sense of the epistemic interculturality defined by Catherine Walsh, as a counter-answer to the geopolitical hegemony of knowledge; a logic built from the particularity of difference (the colonial difference), to include and negotiate diverse knowledges geared towards *transformation* and an alternative organisational construction (Walsh, C., 2007). (Emphasis added).

figures such as Colombian anthropologist Arturo Escobar, Puerto Rican sociologist Ramon Grosfoguel, Argentinian feminist philosopher María Lugones, Puerto Rican philosopher Nelson Maldonado-Torres, Argentinian semiologist Walter Mignolo, and Peruvian sociologist and political theorist Anibal Quijano, among others.[39]

Decolonial thinking is increasingly present in critical studies that aim at problematising and radically changing asymmetric power structures of domination. However, it has transcended academic jargon and debates attracting a lot of interest for advancing liberation struggles against the legacies of colonialism, the absence of the other, the rhetoric of modernity and the logic of coloniality.[40] Euro-centred paradigms of knowledge, power and being are the units of analysis that, by focusing on power relationships other than economic ones, help unpack and examine the colonial world order established by European empires. They further reveal that the hierarchisation resulting from the division between the centre and the periphery (metropolis and the colony), is further reproduced in spheres such as knowledge, the political, spiritual, racial and ethnic divisions,[41] gender, sexual, and so forth. Decolonial thinking, within the paradigm of critical theory fosters an ethics of not seeing the others as morally inferior.

The decolonial project critiques the situated knowledge stemming from a particular epistemic location that presents itself as objective, neutral and featuring universal truths under the myth of a non-situated ego, putting forward a decolonial conceptualisation of the world as an alternative (decolonial turn). In the same vein, this text proposes to decolonise the Western epistemic canon underlying the language of rights, from/with subaltern-ised and silenced knowledges. Therefore, this approach is applied in the critical examination of human rights through the inclusion of indigenous peoples' views

[39] However, the sources trace back to "Nueva corónica and buen gobierno by Waman Puma de Ayala; in the de-colonial critique and activism of Mahatma Gandhi; in the fracture of Marxism in its encounter with colonial legacies in the Andes, articulated by Jose´ Carlos Mariátegui; in the radical political and epistemological shifts enacted by Amilcar Cabral, Aimé Cesaire, Frantz Fanon, Rigoberta Menchú, Gloria Anzaldúa, among others." (Mignolo, W. D., 2007, 452). Other African authors and scholars stand out for their contributions to decolonial thinking and have been deeply inspirational in composing this text: Ngũgı wa Thiong'o, Oyèrónkéé Oyeˇwùmí, Sabelo J. Ndlovu-Gatsheni.

[40] Understood as a conceptualization of the world based on modern-colonial-patriarchal-capitalist traits, namely: liberal democracy, rationalism, individualism, secularism, industrialisation, capitalist economy, techno-scientific epistemology, longing of universality and a hierarchised conception of being.

[41] "The historical use of ethnic identity to rule and conquer, and the role law played in it, represents a critical legacy of colonization that impacts on contemporary legal approaches to ethnicity in most African states." (Gilbert, 2013a, 429).

and epistemologies that have been supressed for the benefit of mainstream ideas, designs and solutions. The attempt to rescue alternative conceptualisations of rights and formulate their content responds to the need to contribute to an epistemic shift within the rights discourse that is currently framed within the hegemonic narratives and power system. Epistemic justice goes hand in hand with social justice. If, as Laclau explains it, the existence of differences is possible in contraposition and relation to the other/s, and therefore, the claims of the subaltern can be formulated only vis a vis the entitlements of the ones in power, this logic presupposes an all-embracing umbrella within which the subaltern and the rest can fit. Otherwise, each grouping would be living in fullness within their own particular worlds. But we need more elements to juggle the debate in order to realize a dignified life for everyone, and the ones presented here are brought from indigenous world-views, for their value and intrinsic qualities.

Dealing with these topics and talking from the West is perceived with distrust in certain decolonial circles. However, the aim here is to bring this perspective not to the usual advocates and sympathizers, but to broaden it to places not that much engaged with this line of critical thought, as a cross cutting fertile perspective that should transpire orthodox approaches and disciplines. As it was just mentioned, decolonial thinking and projects are ever more common. Some voices critique it becoming 'hype'[42] (a buzzword that weakens its purpose) and warn about co-optation or misuse of this approach that distorts and will ultimately undermine the radicality this de-centring to dismantle coloniality and its ideological scaffolding puts forward. Moosavi identifies six dangers around intellectual decolonisation. Together with the risk of overlooking "decolonial theory from the Global South" he includes the following limitations that can jeopardize the decolonial project: "simplify intellectual decolonisation; essentialise and appropriate the Global South; overlook some forms of colonial exclusion; produce nativism; and be tokenistic" (Moosavi, 2020, 332-354, 334). The author has been aware of these dangers, critically engaging with humility and a high sense of respect while dealing with this project and advancing the proposal presented here, with the goal of

[42] (Táíwò, 2022) critiques the idea of 'decolonisation' as a "catch-all idea to tackle anything with any, even minor, association with the 'West.'" Despite he differentiates decolonisation from decoloniality, I see his understanding of both concepts rather blurred conflating coloniality and colonialism, almost analogous to one another and therefore his critique valid for the idea of decoloniality in the sense this thesis engages with it.

addressing "the epistemic crisis in the efforts at displacing received western paradigms" and their epistemic frameworks with an epistemic rebuttal (Adesina, 2002, 91).

Alongside the decolonial project, TWAIL thinkers[43] share the ethical commitment to cross-examine the role of international law in maintaining a global unjust order. By deconstructing the colonial legacies of international law, in connection to imperialism and Eurocentrism they reveal how the techniques of potential powers are still operational today in sustaining global injustice. This movement puts forward a scholarly transformation (not a canon) that aims at redefining law in plural terms beyond eurocentrism, by dialoguing with third world perspectives. TWAIL places the emphasis on global historization (not merely Eurocentric counts) and is sceptic of universality narratives, acknowledging the continued lack of incorporation of alternative sources and thus bringing the peripheries (the rest), to the centre currently still occupied by the West. This response unveils the connections between power, normative systems and colonial past (or coloniality), scrutinising certain assertions of universality and the politics of knowledge.

As TWAIL school of thought, a field in constant expansion, this analysis is critical to dominant discourses, seeking to transform narratives of international human rights law. It further aims at exposing and unpacking the colonial legacies of the international legal regimes that sustain the subordination of the South and the prevailing interests underpinning the implementation of international norms, excluding indigenous peoples' laws and normativity. It seeks to contribute towards transforming the current legal discourse by including notions stemming from those so far marginalised views (on sovereignty, ownerships and uses of resources including land), in an attempt of epistemic resistance and to put forward a constructive and concrete alternative.

Both decolonial thinking and TWAIL highlight the insularity of historic narratives and contest Eurocentric narratives that emerged from the differentiation from others, conceiving them as parochial. They contribute to bringing attention to underlying factors, including historical and political dimensions, which resulted in the ongoing inequalities and exclusions. In addition, the focus on silenced perspectives allows us to

[43] Antony Anghie, José-Manuel Barreto, Upendra Baxi, B. S. Chimni, Luis Eslava, James Thuo Gathii, Keba M'baye, Makau Wa Mutua, Obiora Chinedu Okafor, Sundhya Pahuja, Blakrishnan Rajagopal.

explore other knowledges, to broaden the analysis delving into the ramifications of colonial legacies. This critical examination is applied here to the analysis of the dominant human rights conceptualisation, in order to reveal "how human rights had so often been used as the enabling discourse for empire" (McMinn, 2012),[44] and to advance a more complex theory of rights from a dialogical and pluralistic approach: by acknowledging and embracing alternative perspectives, cultures and views, including principles and ideas such as solidarity and community, the human being as undivided into political/social/religious/economic and the fluidity among ontological categories (against individual autonomy, liberty and abstract equality).

Beyond a Eurocentric theorisation and the ontological negation of others, this research aims at addressing cognitive amnesia and the privilege of ignorance.[45] In order to set forth ideas for such a reformulation of rights, the analysis puts forward a reconstruction of elements from the San worldviews, undertaken through an exhaustive review of relevant anthropological studies and ethnographic records as well as reports and policy papers. "Indigenous epistemology has emerged as a new epistemic culture out of a necessity to provide indigenous ethnic groups to assert the validity of their own "ways of knowing and being, in resistance to the intensifying hegemony of mainstream epistemology from the metropolitan powers" (David Gegeo and Karen Ann Watson-Gegeo)" (Grincheva, 2013, 3). "This marginalization or blinding of Indigenous worldviews "has been and continues to be one of the major tools of colonization" (Walker, 2004, 531).[46]

Thus, the focus here is on the particularities of the San, (label that emerges from a collective construction that brings together different groups affected by similar political, historical, economic and current circumstances and processes of marginalisation,[47]

[44] Conference conclusions.

[45] According to British-Ghanaian philosopher (Appiah, 2007, 22): "la absoluta ignorancia de las costumbres ajenas es en gran parte un privilegio de los poderosos." The complete ignorance of foreign traditions is to a large extent, a privilege of the powerful ones (translation by the author).

[46] In (Hart, 2010, 4).

[47] The acute marginalisation of the groups that could lie under the category of indigenous peoples in the terms that will be explained below, is evinced when comparative measurements go beyond considering economic values (per capita income) to include other variables affecting quality of life such as the ones provided by indicators that cover various dimensions of human development and deprivations (health, education and standard of living), namely: Human Development Index, Multidimensional Poverty Index (which includes various indicators per each dimension of poverty).

alienation and exclusion), vis a vis what is presented here as the dominant hegemonic human rights paradigm rooted in Eurocentric reasoning, which is certainly also the result of hybrid encounters, but has operated as a universal.[48] A universal that is problematic because it does not imply equality for everyone, but one that has served the purpose of the powerful ones, maintained on the sustenance of unequal structures and erasure of others. Stemming from Said, the universal in the European thought that has been maintained through "the exercise of material power in the world" (Bhambra, 2014, 120).

Therefore, this text interrogates the dominant human rights conceptualisation through decolonial lens and TWAIL, while expanding the human rights constructs through peripheral knowledges and sources from the outer-peripheries,[49] by exploring indigenous peoples' ideas around 'rights,' world-views, world-sense/s and legal notions. Without appropriation or essentializing these marginalized and silenced voices, beyond this being mere symbolic exercise of concession and acknowledgment, this work evidences the epistemic potential (and ability) of alternatives stemming from the specific worldviews of the San in Southern Africa. Further considerations around the legitimacy of this approach and of avoiding "*rewesternization disguised as dewesternization or decoloniality*" (Mignolo, W. D., 2014, 589)[50] is contemplated below. In addition, the treatment of the San here averts any romantic constructions of an idealised past and tradition that might mainly respond to an authentication of a particular subjective ontology that introduces a bias, rooted in a moral and intellectual superiority.

Having revised the main theoretical postulates that support this work, the following section will examine and clarify the central concepts around which this thesis has been constructed.

[48] "With the creation of modern European identity in Enlightenment the world was reduced to European terms and those terms were equated with universality. That which stood outside of the absolutely universal could only be absolutely different to it. It could only be an aberration or something other than what it should be." (Fitzpatrick, 1992, 63).

[49] Regarding the dichotomy centre/periphery, Moosavi proposes shifting "the axis to 'centre/semicentre/semi-periphery/periphery/outer-periphery' in order to be even more precise in trying to understand the nuances of coloniality in academia" (2020, 347).

[50] Emphasis in the original.

Conceptual clarifications

This thesis deals with complex terms that have no univocal meaning such as law, culture (in connection to identity), property (law and rights), as well as categories like indigenous peoples that are understood here beyond their common use and meaning. Therefore, this section aims at clarifying the different understandings and significance of two core concepts that are central to this thesis, namely: property and indigenous peoples.

On account of the heterogeneity of indigenous peoples worldwide,[51] it is beyond the ability of this research to describe the different patterns of indigenous land uses and tenure systems. However, there are central characteristics that are generally shared among self-identified indigenous peoples besides the harsh lived realities and circumstances they have in common.[52] Among those common elements present within indigenous worldviews is the intimate relationship with land, natural resources and the territories they have traditionally used or occupied, which are basic to their existence as indigenous. As a result, the ownership, control and use of land, territories and resources are of critical importance for indigenous peoples, for their identity, survival, integrity, culture, spirituality and economies. Despite land tenure systems may vary among indigenous peoples, they are often organised around customary tenure schemes framed as collective in nature.

These communal property agreements take into consideration intergenerational aspects and environmental preservation, as will be explained in more detail below. Furthermore, the unique indigenous' relationship with land, territories and resources differs from the "Western European concept of land ownership" (in Hohmann and Weller 2018, 406).

[51] Estimates indicate they represent 6.2 per cent of the world's population spread across more than 90 countries, almost 500 million indigenous peoples (16.3 per cent of whom are in Africa), belonging to more than 5000 different groups and speaking more than 4000 languages. Furthermore, "The highest share of indigenous peoples living in rural areas across all regions is found in Africa (82.1 per cent)" (ILO, 2019, 56), engaging in activities such as agriculture, fishing, forestry, hunting-gathering, pastoralism etc.

[52] Namely, lack of recognition of rights, discrimination, marginalisation, violence, vulnerability to climate change, land insecurity. With regards to land tenure, indigenous peoples are also united by their experiences enduring discrimination, lack of participation in territorial claims, forced resettlement and dispossession without consent to mention a few.

a) *Property*[53]

The right to property is vaguely formulated in the human rights legal instruments. The Universal Declaration of Human Rights refers to it in article 17 guaranteeing everyone the imprescriptible right to *own* property of which no-one can be unjustly deprived.[54] It entails a dual right of owning (alone as well as in association with others) and acquiring something that comes to belong to someone who consequently possesses it. It is somehow related to article 12 on privacy rights (for what falls under personal property). According to Morsink's analysis of the discussions behind the drafting of the UDHR, the debates around the issue of property "were some of the most openly philosophical ones in which the drafters engaged" (Morsink, 2000, 140). The different versions and phrasing of the content of this right mirrored the dilemmas around the fundamental nature and internal limits of such a right; to be conceived as a human right due to its intrinsic value, or as a legal right, being strategic for the achievement of other rights. This happened in an effort to accommodate different economic systems, schemes and forms to own property, hence its brevity and vagueness.[55] The discussions included different ways of organising the economy, covering aspects such as personal property and/or modes and means of production, private ownership of profit-making enterprises, commonly owned property, the minimum necessary to satisfy essential needs, limited to public interest or the criteria of social utility. However, unlike with other rights, the right to property is not elaborated on subsequent core international human rights instruments. The African Charter on Human and People's rights (article 14) guarantees the right to property that can only be encroached upon in the interest of public need, the general interest of the community and in accordance to laws' provisions.[56] In spite of this, the right to property

[53] von Benda-Beckmann et al 2006: property "concerns the ways in which the relations between society's members with respect to valuables are given form and significance" (15), therefore, subjects holding rights, "valuables as property objects," and those rights and obligations themselves, "all three set into time and space."

[54] UDHR Art. 17.1. Everyone has the rights to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of [his] property.

[55] During the discussions, three types of property were distinguished; personal property, real property and modes and means of production.

[56] Furthermore, "all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people" (Art. 21).

remains a highly contested issue, as evinced by indigenous peoples struggles to get it recognised[57] and respected.[58]

However, the focus on property in this research seeks to tackle the limited understanding of alternative organisational schemes that regulate different interests and values, other systems to manage uses and prerogatives over valuables/resources (control,[59] access, decision making), beyond those conferred by tenure rights, documented individual property supported by title holding. Although current property models "purport to be universal are in fact largely based on Western legal categories, the most important of these being the notion of private individual ownership, often regarded as the apex of legal and economic evolution as well as a precondition for efficient market economies" (von Benda-Beckmann, F., von Benda-Beckmann, K. and Wiber, M, 2006, 3).

- Why property – property as a right, a human right

"For the indigenous world, Western conceptions of space, of arrangements and display, of the relationship between people and the landscape, of culture as an object of study, have meant that not only has the indigenous world been represented in particular ways back to the West, but the indigenous world view, the land and the people, have been radically transformed in the spatial image of the West. In other words, indigenous space has been colonized" (Smith, 1999, 51).

Within the scope of this exploration, property is analysed in relation to land: "Land being the major resource and the site of the construction of culture, custom and conflicts, the actually existing perceptions on land would, it is hoped, be able to give us a fair picture of the alternative, and possibly competing, perspective on rights and justice," embedded in statutory law and policy (Shivji, I. G., 1998, 61). Land is in turn connected to many

[57] The non-recognition of land rights often stemmed from "a general – negative – legal view that a nomadic or semi-nomadic use of land may disqualify people from a legal title over land." (Sapignoli et al., 2016, 18).

[58] "As typical property law is primarily concerned with property in the form of land, an appropriate framework for the recognition of indigenous peoples' land rights would be through the recognition of their right to property" (Gilbert, 2007, 87).

[59] "Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access…, and resolving disputes over claims to land." (Cousins, 2006, 23).

various fields and dimensions: economic, geo-political, social, cultural, spiritual, demographic (migration, urbanisation, population growth), climate and the environment. It is further related to aspects such as ethnicity, gender, class, nationality, age and ultimately, power.

Property is connected to the control of resources and goods, their use (for income generation and other purposes), governance and exclusion (possession and dispossession). It results in different situations and schemes depending on the rights conferred and the extent of the intervention granted to the owner in a given property regime. Property rights, in connection to land issues, have major and manifold implications in people's lives and therefore, a strong strategic value. Starting from the possibility to enjoy a territory and its resources, it entails the ability to sustain oneself and dependant ones, preserve one's culture and heritage, affecting the ability to design the individual, wider community and social institutions' self-development.[60]

Thus, property (and land), is approached here as a multifunctional marker. It does not only mean economic wealth (von Benda-Beckmann, F., von Benda-Beckmann, K. and Wiber, M, 2006), but it is a marker of identity, of present individuals and groups (shaping ethnic based claims), and future ones (through inheritance), of social organisation, relationships and practices, with religious connotations, manifesting itself in different ideologies (expressed by cultural ideals), to different degrees, corresponding to different legal institutions and regimes, defining political power and legal entitlements, and responding to diverse sources of legitimacy. Its instrumental importance is related to issues such as legitimate sources of rights (state, organisations), the role of different actors in protecting and distributing those rights, its role in determining and shaping justice, equity and responsibility (between individuals and vis a vis the collective, private and public). Besides, attached to it are temporal dimensions and symbolic significance (ibid 2006).

Thus, the right to property intersects with other fundamental rights such as the right to housing, it contributes to "the development of individual liberty and initiative," (UNGA, 1990, para 5) enables economic activity (being connected to agriculture, industry,

[60] See Gilbert and Lennox elaboration on self-determined development as a new development paradigm whose conceptualisation has been influenced by the UNDRIP (in Short et al., 2021).

commerce) and to be free from hunger, to achieve an education, health care, etc. Thus "fostering widespread enjoyment of other basic human rights" (ibid).

These considerations have led to the assumption of the importance of securing property by favouring property titling (also of land) given that it is generally presumed that deed (or title) confers the safeguard for investments and further advantages for economic development. Together with this, private property systems have been privileged as more efficient and productive than collective ones on the assumption that this arrangement leads to maximising the value of resources and incentivises trade and competition.

In the case of indigenous peoples, the lack of formal titles of the lands they have traditionally occupied is one of the major challenges that has led to dispossession[61] (resulting from expropriation and forced removals), having a ripple effect in their well-being. However, the value of land in this case, the importance of accessing ancestral territories and resources goes beyond their economic worth as a tangible good as just mentioned. Despite land is widely considered as a key factor for living, mostly associated with food production, physical survival and well-being, housing and sustainable livelihoods; spiritual, religious and cultural dimensions are also essential aspects in relation to land, territories and the access to resources for indigenous peoples. Their relationship to land is connected with the spirit world, the idea of guardianship and the customary principle of parallel non-exclusive use of land.[62] Resources are shared among 'land-holding' group members in different degrees, whereby access granting, transit or pasturing rights, varies depending on periods of stress (due to droughts, availability of wild life, livestock, etc). Richard Lee (Hitchcock, 2003) underlines the San attachment to land and the obligation to share, as connected to their ethical and spiritual life.

[61] With regard to the broad significance of land, and the equally ample consequences of land dispossession, South African Professor Tshepo Madlingozi argues that "land dispossession must be understood as a position, or leading to a status of worldlessness – that is being without a world. An important consequence of landlessness and worldlessness is pariahdom; the idea that people who have been dispossessed of their land become pariahs in the land of their birth." (Madlingozi, 2022).

[62] See information received from non-governmental and indigenous organizations for the Open-ended inter-sessional working group on UDNRIP draft E/CN.4/1995/WG.15/4 (10 October 1995).

Reciprocity and complex sharing[63] would therefore be guiding rules of social interaction, resulting in the persistence of a moral economy in spite of a cash one.

Article 25 of the United Nations Declaration on the rights of Indigenous Peoples (UNDRIP) provides for their right "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[64] Furthermore, the recognition of those lands, territories and resources should be guaranteed *with due respect to their tenure systems*.[65]

For its part, the African Commission on Human and Peoples' Rights (ACHPR), in its 69th ordinary session urged state parties to adopt "policies and laws that safeguard indigenous populations/communities' rights to customary ownership and control over their lands, and recognize the life style of the indigenous populations, especially in hunting and pastoralism."[66]

In view of the dissonance of possible property regimes and the important consequences a given model can have on the lives and prospects of those affected by it, this research will look into the different layers of property relations[67] (involving the subjects, the

[63] For an elaborate analysis of sharing as a complex social phenomenon see (Widlok, 2013).

[64] In its Resolution No. 3/2020, The International Law Association (ILA) committee recommends states to "establish effective mechanisms for the demarcation, legal recognition and titling of Indigenous traditional lands, in accordance with the customary laws of the Indigenous peoples concerned and with their traditional use of the relevant territories" (ILA Committee on the Implementation of the Rights of Indigenous Peoples, 2020).

[65] Articles 26 and 27 (UNGA, 2007). According to Claire Charters, "the rights to lands, territories, and resources were some of the most contentious during negotiations on the Declaration" (in Hohmann & Weller, 2018, 401). However, she concludes, significant agreement was reached in the end, on the basis of 'constructive ambiguity' rather than on the precise language regarding the nature of indigenous' rights (who sought full recognition and protection) and States' obligations "States and Indigenous Peoples deliberately both chose language that could accommodate their respective, and divergent, interpretations of it." (Ibid, 402).

[66] As well as to "recognize indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution." (ACHPR/Res., 2021, para 1 and 6).

[67] Considering the different interdependent layers theorised by von Benda-Beckmann when unpackaging the intellectual freight around the idea of property, namely: Legal-institutional (categorical property relationships), concretised social relationships (actual property relations between property holders and the concrete valuable), and the layer of ideology, as well as the social practices influencing property relationships within those three layers.

object 'owned' as well as related rights and obligations).[68] It will explore and identify valuable aspects stemming from indigenous peoples in Southern Africa to put forward a reformulation of the right rooted on the San, which is guided by fundamental principles such as collectivism (as an aggregate of cohesive individuals) and communitarianism (mutual benefit among the individuals part of a unity, with a sense of communion and coherence of interests and values),[69] characteristic and prevailing in the social organization within this context.

b) *Indigenous peoples*

> "The current understanding of indigeneity has emerged from a complex discourse universe that has developed around legal claims of self-determination. A minimum standard of self-determination can now be viewed as a fundamental principle of international customary law… today's use of the term offers a starting point to connect to and (self-)critically review the historical roots of oppression and dispossession… an analytical tool for its deconstruction" of "obsolete anthropological theories of nativity." (Zips-Mairitsch, 2009, 386).

The ACHPR acknowledges the complexity and misconceptions around the term indigenous peoples in the African context. Beyond clear cut definitions and classifications under specific categories, it stresses the need to "apply a flexible approach based on a concrete analysis of the human rights issues at stake."[70] However, the Working Group on Indigenous Populations and Communities and Minorities in Africa (WGIPC/M)[71] has set out some criteria for identifying indigenous peoples. It is to this working definition that this thesis ascribes to: "common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities,

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[68] The moral economy ""The right to make claims on others, and the obligation to transfer a good or service, is embedded in the social and moral fabric of the rural community."" (Adams, 1993, 41).

[69] "A human being is a social being, not an individual being. The assertion of a right of a human being therefore is not a claim possessed by an atomist individual, but a reflection and an embodiment of social relations in the language of rights." (Shivji, Issa, 1999, 268).

[70] Working Group on Indigenous Populations/Communities and Minorities in Africa special mechanism.

[71] The term population and community rather than peoples was opted for given that it was less politically charged (the term people was closer to the legal concept of state), despite they can all referred to sub-state groups and ethnic communities and affiliation. Following Dersso: "one cannot find a commonly discernable pattern in the Commission's jurisprudence on the conceptualisation and interpretation of peoples' rights" (Dersso, S., 2006, 380), thus, not being standards for determining the markers of peoplehood.

territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy."[72]

The terminology around indigenous peoples and the San in particular is a complex one. They have been categorised on the basis of different criteria, by their livelihood activities (hunter-gatherers, foragers, forest dwellers), their language or ethnic ascription. This work has opted for the more neutral and general term San[73] rather than any other ethnonyms. Among the ethnic self-designations that can be found under the term San are individual groups such as the Hai||om, the Ju|'hoansi, the !Kung, the !Xun, the Naro, and the !Xóõ and the Khwe in Namibia. The following subgroups in Botswana: Ju/'hoansi, Bugakhwe, Khwe-ǁAni, Ts'ixa, ǂX'ao-ǁ'aen, !Xóõ, ǂHoan, ǂKhomani, Naro, G/ui, G//ana, Tsasi, Deti, Shua, Tshwa, Cuaa, Kua, Danisi and /Xaise. In South Africa we could mention the ǂKhomani San, the Khwe and !Xun, and the Tshwa (Tjwa, Cua) in Zimbabwe (IWGIA, 2022).

Other terms have been used to refer to them, including many denominations a number of which are loaded with negative connotations: Basarwa, as they are referred to in Botswana, meaning people who have nothing (in reference to no cattle), whereby they are defined by their absence of, their lack. The term Khoesan comprises groups with click-sounds languages (merging Khoekhoe and San groups). Some governments refer to them as 'marginalised communities' (Namibia). The term bushman is frequently used in South Africa, (omitting women and simplifying by reference to the environment, with a connotation of primitive people).

The term San Bushmen is a cultural concept, different groups "only came to be defined by that collective term … in relation to outsiders" (Barnard, 1992, 238). However, one can say that it is a cultural entity in the sense that they have retained tradition, which brings together different linguistic groups as has been just explained. Despite relocations, population displacements, impact of climate crisis, economic insecurity,

[72] Endorois case para 151. In line with the working definition proposed by the UN Working Group on Indigenous Populations, to be read in conjunction with the 2003 Report.

[73] This choice is in line with the most recent literature and a common San identity that reflects a certain "pan-San-movement" in Southern Africa taking shape since the 90s'. The consensus around the label San in the absence of a more neutral one "emerged at the Common Access to Development Conference held in Botswana in 1993" (Suzman, 2001, 4).

development and policy interventions, the San have demonstrated a striking ability to adapt (cope) and survive (resist) in spite of those challenges and difficulties.

The complexity inherent to a definition is connected to the debate between traditionalists and revisionists dating back from the 1980s, the Kalahari debate. The former emphasises ethnicity (and the historical isolation of these groups) while the latter puts the accent on past socio-economic networks among San and other groups, highlighting the historical processes and context that resulted in their relegation to an underclass. This difficulty increases when considering aspects such as authenticity and belonging. Many of those primeval characteristics might have transformed along the years as a result of different factors, namely: the interaction with dominant or more powerful groups, challenges brought by the cash economy, as a result of shifting perceptions caused by new uncertainties and vulnerabilities, changes in environments that have confronted the San with limited access to institutions of power (including government), constrained resources and unequal access to them, generational changes and tensions brought by the duality modern/tradition. However, some of those features still remain.

Among the traits characterising their culture is their symbolic behaviour, a collective ethos of sharing and exchange (marked by its social meaning) and egalitarianism. With a mixed economy that includes gathering as the main subsistence strategy, but also hunting, farm labour, herding, food sharing, craft-making, they privilege the non-accumulation of material property[74] (connected to the custom of immediate sharing and consumption of food for example). A simple life with a focus on community and people conceived as free individuals, where followership (and respect for the elderly) prevails over leadership. There is universal kinship by which everyone is in a kin relation to everyone else with a keen sense of family.[75] This varies on the basis of ecological necessities for survival (with dynamics of aggregation and dispersal of groups and individuals). Thus, the social order characterised by the above-mentioned features combines band solidarity and autonomy, with a certain sense of anarchy stemming from small populations with no need for hierarchical social organisation. Their peaceful

[74] They value free time rather than money.
[75] "Ethnic groups and ethnic boundaries are fluid entities." (Barnard, 2019, 167).

nature is questioned by some authors on accounts of sexual jealousy and personal violence, arguing that it shifted in reaction to circumstances. The social structure follows the patterns of seasonal cycles depending on availability of resources (surface waters, etc.), resulting in flexibility of lifestyles and the ability to adapt to changing circumstances. The land is considered as sacrosanct. Among many San groups there is communal ownership of land and land tenure changes consequently affect systems of re-distribution and exchange of property (as expressions of reciprocity or transfer). Their reverence for the bush and the revitalisation of its appreciation has been in part propelled by the advent of tourism as a subsistence strategy. Their oral traditions are connected to the past and relate to present concerns, displaying adaptability and flexibility.

Indigenous Peoples in the African context:

The complexity around indigenous peoples in Africa can be illustrated by the process which led to the adoption of the UNDRIP. The process started back in the 80s' with the creation of the United Nations Working Group on Indigenous Populations (UNWGIP) in order to develop minimum standards for the global protection and promotion of indigenous populations. The draft was concluded in 1993 and two years later the Working Group Draft Declaration was created to work on it. At first, states opposed the participation of indigenous representatives, leading to indigenous peoples' threat of walking out of the negotiations unless their voices were heard in equal terms to those of governments. They claimed that such a Declaration would lack legitimacy if they would be absent.

At the time, the debate around indigeneity and indigenous peoples was fractured among different regional approaches and perceptions of the issue. Special Rapporteur Alfonso Martínez's understanding[76] that Asian and African groups were not indigenous and should instead bring their complaints to the newly formed U.N. Working Group on Minorities exemplifies those divisions. Alfonso Martínez repeatedly argued that most if

[76] Miguel Alfonso Martínez was appointed Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations to report to the UNWGIP.

not all African groups who claimed to be indigenous should in fact be considered minorities, given their complex histories of migration, murky distinctions between who was indigenous and nonindigenous in Africa, and other differences with more easily recognized indigenous peoples from the Americas, Australia, and New Zealand (with the possible exceptions of the San in Botswana and the Maasai in Kenya). However, it is the position of the ACHPR and the WGIPC/M, to distinguish these two terms; indigenous and minorities, pointing at the element of non-dominance and to collective rights as central to indigenous peoples' human rights protection demands. Whereas persons belonging to minority groups (national, ethnic, religious, linguistic) advocate for individual rights (to participate, right to culture, religion, language), which can be exercised individually as well as as members of their community.

The late participation of African indigenous peoples in the international scene[77] was due to different reasons, including the absence of local, national or regional African indigenous movements.[78] According to Kwame (2014), the first participation of representatives from African indigenous peoples in international fora took place in 1989. Moringe ole Parkipuny, a Maasai activist member of the Tanzanian parliament since 1980 was the first African participating in the UNWGIP in Geneva.[79] When it came to the making and debates around the UNDRIP, the role of African countries was not very active due to various constrains. According to Maasai anthropologist Naomi Kipuri, the indigenous question was not considered a priority (in UN Department of Economic and Social Affairs, 2009, 51-81). Firstly, it was assumed that the term indigenous was not controversial and comprehended internationally the same way it was understood in the African context, namely as autochthone, native. Secondly, because of the lack of

[77] See (Saugestad, 2008). "The process of domestication of indigenous identification and narratives on the African continent began at the end of 1980s and early 1990s with a still limited participation of African actors in global indigenous platforms" Ndahinda, F. (in Dunbar-Ortiz et al., 2015, 431).

[78] Different organizations from Scandinavia and the Americas started organizing themselves already in the 70s' in what would become the indigenous international movement: National Indian Council (NIC) and National Indian Brotherhood (NIB) in Canada, American Indian Movement (AIM) and International Indian Treaty Council (IITC) in the US, the Nordic Sami Conference that enabled the formation of the Nordic Sami Council. The network of these organizations resulted in the conference of the World Council of Indigenous Peoples (WCIP) already in 1975.

[79] His participation in the USAID Maasai Range project brought him to the US where he got in touch with the Navaho people. Finding so many similarities between his people's struggles and the situation and claims of indigenous peoples abroad, motivated his connection to the international indigenous movement.

presence of diplomatic missions at UN forums due to limited resources and the cost implied in maintaining delegations where the discussions were taking place. In addition, given the history of colonization and the late process of independence from colonial powers in the African continent (50s'-80s'), the priority of the newly independent countries as well as of regional institutions was the construction of the nation state, striving for national unity, sovereignty and territorial integrity. The Organization for African Unity OAU was the first post-independence continental institution (1963-1999), later replaced by the African Union AU. The OAU guiding philosophy was that of Pan-Africanism and its focus on decolonization and therefore, non-interference in domestic affairs, political-economic independence, safeguarding sovereignty of member states and their territorial integrity. Therefore, the question of indigenous peoples as a differentiated group was not contemplated at the time. The idea that all Africans were indigenous to Africa was the general understanding, obscuring the subject and preventing any debates around such a distinction.

Going back to the UNDRIP, the African caucus was comprised of organizations such as The Indigenous Peoples of Africa Co-ordinating Committee (IPACC)[80] and the Organisation of Indigenous Peoples of Africa (OIPA).[81] Besides their complementarity not being evident at the time (regarding competences and division of labour as to avoid competition but synergies), they proved divided around geographical lines and priorities (cultural and linguistic ones versus territorial claims).[82] Network creation across countries was challenging and resulted in unequal representation of groups and its legitimacy being often questioned. The assumption of shared and common interests stemming from a common identity of indigenous peoples has been distrusted by some authors who claim that a common identity was more rhetoric than a reality (Hodgson,

[80] IPACC is a network of 135 indigenous peoples' organization coming from 21 African countries that was founded in 1997.

[81] Founded in 1999 by 21 different organisations representing indigenous groups in seven African countries with the mission of bringing together indigenous peoples of Africa and articulating their claims in a unified way (self-determination and identity). The organisation argued being closer to the grassroots that IPACC.

[82] During the negotiations of the text of the UNDRIP, Claire Charters explains that indigenous peoples' organisations expressed different priorities with regard to land: "for nomadic peoples, it was especially important to secure access to lands for subsistence activities, including hunting and fishing. For more sedentary Indigenous peoples, it was important to secure recognition to the lands, territories, and resources they had a historical connection with." In Hohmann & Weller, 2018, 404.

2011, 142), responding to strategic goals, particular aspirations and political opportunism (Suzman, 2001).

Crawhall's analysis of the motivations and interactions among different African actors in advocating for the UNDRIP (Crawhall, 2011), shows that there were diverse attitudes and approaches to the international discussions and the issue of indigenous peoples at national level; from mild support to suspicion based on ethnic and legitimacy concerns[83] and different degrees of organization and engagement within indigenous peoples themselves. He claims that other factors such as the global power politics influenced the process leading to the adoption of the UNDRIP as well. At the AU GA in January 2007, the Africa heads of state and government's decision provided the Aide Memoire with political leverage which left little room for manoeuvre to the diplomats at UN circles. The Draft Aide Memoire was proposed by Namibia and supported by Botswana and Kenya.[84] It asserted the conflicting nature of the Declaration vis a vis the African constitutions even though it did not refer to any concrete examples. It found the term indigenous peoples problematic and criticized the lack of a concrete definition. It further considered the right to self-determination a threat to the integrity and territorial unity of states, fearing inter-ethnic tensions and political instability. Lastly, in relation to the free prior and informed consent (FPIC), [85] it was claimed that it could be used as a veto mechanism for democratic legislative initiatives. Thus, another concern revolved around the disagreements between conflicted rights, those advocated by indigenous peoples versus states' interests upon land and natural resources. Rather than focusing on the

[83] Namely: Namibia, Botswana and Kenya, and to a lesser extent Nigeria. Kenya and Nigeria, they both had economic interests connected to indigenous peoples' territories (strategic natural resources, conservation and wild-life based tourism), which might explain their position as well as the presence of more contentious indigenous peoples groups. Also, Namibia (leading the African Draft Aide Memoire of November 2006) and Botswana (facing a domestic court case for forced evictions: Sesana and Others v. the Attorney-General 2002 (1) BLR 452 (HC). On the supportive side Crawhall places countries such as South Africa, Congo Republic, Gabon, Cameroon, DR Congo and to some degree Morocco and Algeria.

[84] However, there were allegations that it was drafted by some of the CANZUS states (Canada, USA, Australia and New Zealand, the four countries that would later vote against the UNDRIP). This document was the result of a consultation at the Executive Council of the AU in January 2007. A specific item on the agenda for that meeting (session 10, 25-26 January 2007) was introduced at the proposal of Botswana in order to exchange views on the matter aiming at achieving a common position to defend at the UN. That proposal was later endorsed by the AU general assembly's decision adopted by the heads of states and governments (8th Ordinary session 29-30 January 2007).

[85] For the adoption and implementation of legislative or administrative measures that may affect indigenous peoples, that is: consultations, relocations, compensation and redress (art. 10, 11, 19, 28, 29, 32 UNDRIP).

failure of the states to commit to guarantee rights of these groups and communities, the debate concentrated on the concern about potential secessionist threats. The tone was a defensive one. Therefore, at a critical moment for the UNDRIP, IWGIA (and IPACC) initiated lobby and advocacy campaigns to shed light about the importance of the Declaration to different diplomatic missions. The supporting role of the ACHPR was also influential at the latest stages of the negotiation of the Declaration:[86] its 2007 Advisory Opinion[87] backing the approval of the Declaration, as well as the subsequent November Communique,[88] which brought to light the position of the ACHPR expressed in the 2005 Report of the African Commission's Working Group of experts on ethnic and indigenous communities[89] (that became the authoritative position in relation to the indigenous peoples' question in the continent). Despite the above-mentioned impediments, pressure and influence from different actors together with sentiments of not bearing the responsibility of jeopardizing the Declaration, led to the final agreement of the majority of African countries at the voting moment.

In addition to the above-mentioned factors that render the indigenous issue even more complex, and as a consequence of it, there is minimal recognition of indigenous peoples in the African continent. In most cases, there is no explicit acknowledgement of groups as indigenous peoples but they are referred to in legislation by their ethnonyms or as

[86] Thirty-six African countries voted against the draft presented at the GA in 2006 (there were six abstentions: Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia). Despite South Africa, Cameroon and Zambia had voted in favour of the Declaration, it was decided to accept the amendments in order to seek consensus. The AU shared the need for achieving accord and adopted a decision supporting a united positioning on the matter. On the final vote in 2007, all African states voted in favour of the final declaration, 3 abstained (Burundi, Kenya and Nigeria), while 15 countries (that had voted in favour of the Namibian-led deferment the previous year) were not in the room, in what it seems they preferred to be seen as neutral (Barume in Charters, C. and Stavenhagen, R. editors, 2009). UNDRIP being the "most widely supported human rights instruments on the African continent" according to Barume (ibid 181).

[87] Adopted by the Commission at its 41st Ordinary Session held in May 2007 in Accra (Ghana), it interpreted the protection of indigenous peoples within the limits of respecting the inviolability of borders and the obligation of maintaining territorial integrity of states. It furthermore tackled the following aspects: definition (considering it not necessary and rather advocating for criteria for identification), the right to land and resources, it clarified that in the African context indigenous does not equal first inhabitants, proclaimed the respect of sovereignty, emphasised the lack of hierarchy of rights and the equality of all citizens. It called on the African states to support consensus based on this view.

[88] ACHPR/Res.121(XXXXII) 2007 on the UNDRIP.

[89] In 1999 the Conference on indigenous peoples in Africa brought together indigenous representatives from more than 30 organizations of nine countries in the continent together with others from regional and international indigenous networks. It led to the Arusha resolutions and the ACHPR's Resolution 51 on the Rights of Indigenous Peoples' Communities in Africa (2000) by which a Working Group of experts on ethnic and indigenous communities (WGIP/C) was created.

autochthonous or marginalised groups and communities. In the case of Botswana, the post-independence government focused on unity under one nation-state despite the country's cultural diversity, prioritizing the coexistence of differentiated minority groups and communities along the majority Tswana population. This decision of favouring cultural unification and non-racialism to avoid discrimination and foster unity, responded to the contextual situation after independence as a British protectorate and the complex realities in the neighbouring countries driven by some sorts of ethnicity-driven conflicts (Apartheid South Africa and South West Africa, modern day Namibia, being under South African administration). Thus, in addressing a scenario of ethnic (and/or tribal) distinction, the narrative of equality was privileged,[90] one of national unity and a common development horizon without discrimination, non-tribal and non-racist but loyal to a national identity. The Tswanisation strategy[91] was controversial also at the time of independence, seen by some as the government positioning against pluralism and assimilation. In any case, the official discourse and policies in relation to the San, often depict a positioning that contradicts this formal equal citizenship and dignity, or at least, have the opposite effect to the non-discrimination that the government narrative pursues and aims at.[92] In Botswana, the state-nation and an equal access to services were brought together in order to strengthen development, including that of marginalized citizens. A mainstream model 'way of life' was promoted, not

[90] For a commentary on the legitimate distinctiveness of indigenous peoples and the issue of discrimination against non-indigenous (including questions of preferential treatment, special measures and rights, and legitimate differentiation), see Kirsty Gover in Hohmann & Weller, 2018.

[91] Interesting to note, the term employed for a citizen of Botswana and for a member of the majority ethnic Tswana tribe are both Motswana (for the singular, Batswana for the plural), thus conflating the meaning of what it implies being a citizen and Tswana. Moreover, "that the Bechuanaland protectorate was at this time named Botswana, meaning place of the Tswana, is telling, as despite Botswana's claim of distancing itself from ethnic citizenship, it is one of only four out of fifty-three African states to name the nation after the dominant ethnic group (Young 2007:249)" In (Gressier 2018). There are currently 54 countries in Africa to date (after the independence of the Republic of South Sudan in 2011), 55-member states in the African Union (including the Sahrawi Arab Democratic Republic (SADR) and the Kingdom of Morocco, which re-joined this continental body in 2017 after having withdrew in 1984 due to the admission of the SADR in the AU).

[92] "The government's management of the Central Kalahari Game Reserve shows how the principle of botho (humanitarianism) that guides Botswana policies and approaches to development, equality, and citizenship is contradictory and often suspended" (Sapignoli, 2015, 290). Botho, "one of the tenets of African cultures" is, together with the other 4 principles democracy, development, self-reliance and unity what should guide the country's development plans for all Batswana (citizens of Botswana) (Vision 2016, 5).

embracing minoritarian life styles and standards that the state considers contrary to progress and civilization, consequently hampering the ability to effectively enjoy rights.

Positive developments for indigenous peoples:

Despite the scenario described above, there have been legislative and judicial achievements concerning indigenous peoples in Africa. The 1972 Cameroon Constitution (amended in 2008) affirms in its Preamble the attachment to the preservation of indigenous peoples' rights, which is further reaffirmed by the Government's Indigenous Peoples Development Plan (and prohibition of the term pygmy). Furthermore, the Central African Republic is the only African country to have ratified the ILO convention 169 on Indigenous and Tribal Peoples (1989). 1996 South African Constitution recognizes language rights of indigenous groups (explicitly mentioning the San, Nama and Khoi in article 6.(5)). In the Republic of the Congo, besides the recognition of the promotion and protection of indigenous peoples in article 16 of the new Constitution, a law on the Promotion and Protection of the Rights of Indigenous Peoples was enacted by the government (Law No. 5-2011). The Lower House of the National Assembly of the Democratic Republic of Congo adopted the Bill on general principles relating to the rights of indigenous Pygmies in the DRC in 2020, recognising their right to land and natural resources and providing for free assistance before the courts, education (primary and secondary), as well as free health care (IWGIA, 2022). The Amazigh language and culture gained official recognition in the 2011 Constitution of Morocco.

Further progress has taken place in fields such as education. The Government of Burkina Faso has introduced schooling for nomadic children through the creation of mobile schools. Botswana announced that from February 2022, mother-tongue San languages would be introduced in schools (IWGIA, 2022), with the aim of attaining inclusivity and equity by promoting language development and quality accessible education. In Kenya, the OSILIGI established a mobile school targeting pastoralist Maasai youth in the Laikipia area. The government adopted the Nomadic Education Policy in 2010 and the new

Constitution recognises the rights of "marginalized communities". In Chad an institution was established to provide education and health services to nomadic children.

More recently, the Ugandan Constitutional Court rendered a judgement[93] ordering affirmative action to remedy the wrongs caused to the Batwa due to forced evictions from their ancestral lands. The appropriate measures to be adopted will be determined by the High Court. In Namibia, the final version of the Draft White Paper on Indigenous Peoples has been submitted to the Ministry of Justice for further processing.[94] It includes strategies to address the core problems experienced by indigenous peoples in the country with regard to access to land and land tenure security, sustainable livelihoods and food security, discrimination, access to education and improvement of health status, equality of women and girls. In South Africa, the Traditional and Khoi-San Leadership Act No. 3 of 2019 came into effect in April 2021. Among its objectives is to restore the integrity and legitimacy of the traditional and Khoi-San leadership institutions, in line with customary law and practices, as well as to protect and promote them (in accordance with constitutional principles). In Zimbabwe, following an instruction from the Cabinet in 2021, the San (Tshwa) could elect their own headman and chiefs to appoint their own leaders.

Within the regional human rights promotion and protection system, there are other milestone decisions that have entailed a step forward in the recognition of indigenous peoples. In February 2010, a landmark recommendation was adopted by the ACHPR in the case of the Endorois people in Kenya.[95] The expulsion of the Endorois from their ancestral lands around Lake Bogoria was condemned and restitution was recommended on the basis of a collective right of the Endorois to their ancestral lands. For the first time, an international human rights treaty monitoring body expressly recognized the right to development of indigenous peoples. Another ground-breaking rule for indigenous peoples was the African Court of Human and Peoples Rights (ACtHPR)

[93] [2021] UGCC 22. Two of the respondents have filed for appeal to the Supreme Court though.
[94] Namibia Report for the Universal Periodic Review 2021, A/HRC/WG.6/38/NAM/1.
[95] 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya. Despite the lack of 'formal' title recognition of their historic territories, the ACHPR states on para 187: "The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter." It also points at the "failure of domestic legal systems to acknowledge communal property rights."

judgment on the Ogiek case in May 2017.[96] This case was referred by the commission to the Court in 2012 given the lack of action of the Kenyan government regarding the provisional measures dictated by the commission back in 2009, following the complaint of two NGOs on behalf of the Ogiek community at the African Commission. It dealt with the eviction of the Ogiek from Mau Forest without prior consultation and without consideration of the consequences for this people. The ruling recognised the Ogiek as an indigenous population with a particular status that deserves special protection given their vulnerability. The government of Kenya was found in violation of the right to no discrimination, right to culture, religion, property and development, ordered to take all appropriate measures within a reasonable time frame to remedy the violations.[97]

Furthering those achievements, in the year 2021 the ACHPR adopted resolution 489 on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa and resolution 490 on Extractive Industries and the Protection of Land Rights of Indigenous Populations/Communities in Africa.

Limitations of International instruments:

In his analysis of the ILO Convention 169 from a TWAIL perspective, Gordon affirms that "under such an approach the Convention fails to adequately effectuate indigenous peoples' rights because of the fact that the Convention is couched in the vocabulary of traditional international law. Ultimately, the traditional international legal vocabulary places states and sovereign rights at the forefront of all international legal discourse, and furthermore, when non-traditional rights are declared – such as under the human rights regime – the traditional system has other mechanisms that basically nullify such rights." (Gordon, 2006, 404).

[96] Case No.006/2012 ACHPR versus Rep. Kenya. This was followed by a judgment on reparations in June 2022, which dismissed the Government of Kenya's objections and ordered, among other non-pecuniary reparations, to grant the Ogiek collective title to their ancestral land.

[97] Furthermore, indigenous peoples can seek redress for ancestral lands dispossession through the filing of claims at the National Land Commission, as it falls under its mandate to "initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress" (Kenya Constitution 2010 art. 67(2)e).

There are also limitations concerning the UNDRIP, including the "implementation gap"[98] and the recognition of collective rights, a soft sort of self-determination (related to internal and local issues rather than external forms versus state). Scheinin and Åhrén (in Hohmann & Weller, 2018) refer to the problematic wording of some of its provisions, particularly in relation to territorial integrity (UNDRIP art. 46.1).[99] In their view, the obligation vested upon indigenous peoples of not challenging it (which is available to other collectives) is discriminatory towards them in that it prevents them from pursuing secession in order to exercise the right to self-determination[100] they are entitled to as peoples (A/RES/1514(XV)). Also, regarding the scope of the right to autonomy or self-government enshrined in art. 4 derived from the right to self-determination (art. 3). The lack of definition around how to effectively implement that right is another important weak point of the UNDRIP. These authors further point at the lack of clarity with regard to the right to equality (articles 1 and 2), from where one cannot extract that it formally applies to indigenous peoples as collectives but it is rather an assertion of their status as peoples with legal personality and subjects of international law. Another shortcoming they highlight has to do with the omission of a human rights safeguard for individual rights, to ensure collective rights are exercised with due regard for the rights of group's members,[101] therefore failing to identify indigenous peoples as duty bearers. However, article 46.2 on limitations of rights (read in light of the Preamble and the drafting

[98] Despite the declaration having "become an unavoidable parameter of reference when dealing with indigenous peoples' rights, an increasingly robust legal instrument" according to Gómez-Isa (in Short et al., 2021, 7).

[99] According to the UN Charter, the Friendly Relations Declaration among other legal sources, only states have the duty to respect the territorial integrity of other states. The fact that the right to self-determination is attached to peoples and not to states further confirms that international law does not prohibit a quest for autonomy and self-determination for peoples… originally, people meant an aggregate population of state or territory, but it is not a fixed term that has come to embrace not only populations that have formed states but also segments of that population (indigenous peoples).

[100] According to Weller, self-determination in the context of indigenous peoples seems hollow given that it would entail "autonomy, political participation, and substantive rights relating to land, culture, education, etc." not including the right to secession (although the UNDRIP "does not add a positive prohibition of secession") (Hohmann & Weller, 2018, 147-148). Indigenous peoples' sovereignty over natural resources as applied to states was compromised and accommodated through provisions on land rights instead.

[101] On the positive side, some authors would argue that the UNDRIP breaks from the traditional primacy of the individual by focusing on collective rights, also distancing from the general international legal system in that it recognises other entities than states (indigenous peoples) as international legal subjects, seemingly transferring "parts of the jurisdiction normally associated with States" under international law, to indigenous peoples without the corresponding obligations placed upon them. (Hohmann and Weller 2018, 69).

records), could be interpreted as such a safeguard clause. According to these authors it should be further seen within the specific social context of indigenous peoples acknowledging the general principles of legality, legitimacy and proportionality.

In addition to the above, the declaration focused on the right to culture in a narrow sense (individually understood) and neglected "issues of economic dependency, structural discrimination, and lack of indigenous autonomy" (Engle, 2011, 142). In the course of the debates, indigenous peoples' advocates began deferring some of their claims and framing them within the human rights paradigm discourse ("the individual liberal rights paradigm of human rights. That is, the *rights are ultimately defined by a human rights framework that is based on some of the very premises they are meant to challenge*" Ibid, 149, emphasis added). In that sense it was seen as little more than a "site of resistance, to those whose aim was to reject assimilation" (Engle 2011, 141-163, 151). Human rights had thus become the dominant language of resistance with a focus on the individual, secularity,[102] dependant on state voluntary compliance.

The approach of the UNDRIP (as customary international law) falls in what Esterling (2021) refers to as the "no new rights" narrative to justify its implementation.[103] The UNDRIP is thus viewed as an interpretative instrument of fundamental rights for their application to indigenous peoples, making the issue of sources of law (soft law in this case)[104] irrelevant, and as a result, undermining (or at the least, questioning) the legitimacy of international law as a "foundational principle" resulting in poor law enforcement.

[102] In his rethinking of the western human rights paradigm, Falk refers to postmodern forms of secularism "with its strong connections to consumerism and its propagation of a mood of despair" (Falk, 2000, 90).
[103] "The 'no new rights' narrative erases the colonial history of indigenous claims. This reflects the essentialism of the human rights discourse which is not directly geared towards addressing the ills of colonialism and its vestiges though these vestiges continue to affect the realities of Indigenous Peoples" (Esterling, 2021) "While human rights might deliver some gains to Indigenous Peoples, these gains have not been substantial in many areas in affecting change in the lived realities of Indigenous Peoples" (303). For an explanatory analysis of the relationship between soft law instruments (and the UNDRIP specifically) and indigenous peoples' rights see (Gómez Isa, 2016).
[104] Rooted in the consent of states that is demonstrated by compliance or lack thereof between practice, standards and state implementation.

Furthermore, ILA Resolution No. 5/2012 on the Rights of the Indigenous Peoples[105] affirms, among its ten conclusions, the customary character of their right to self-determination, self-government, cultural identity and traditional lands, territories and resources,[106] including consultation, FPIC, reparation and redress. Land rights are considered a key issue. It further asserts that their land rights "have attained the status of customary international law" (ILA Committee on the Rights of Indigenous Peoples 2012, 23). It further notes that such a right "is functional to the safeguarding" of their distinct identity and survival as a different community ("not aimed at safeguarding a "property right", i.e. an exclusive absolute right to use, enjoy and dispose of a thing (uti, frui, fui) – conceived, according to the common meaning of this expression in the Western world, as a right having first of all an economic connotation" ibid, 27).

Among the advancements in the situation and recognition of indigenous peoples is the inclusion of indigenous peoples in the 2030 Agenda for Sustainable Development.[107] However, this 2030 agenda falls short in many respects, lacking: recognition of indigenous peoples' collective rights (in terms of land, health, education, culture and ways of living), cultural sensitivity across several goals (mother tongue education for example), with a major challenge to be addressed being the limited availability of reliable data on the situation of indigenous peoples and disaggregation of data on the basis of indigenous identifiers/ethnic allegiances (Chandler, D.).

[105] A commentary intended to be an "authoritative clarification, elucidation and guidance" regarding the normative status of the UNDRIP.

[106] Together with self-identification, the special relationship with ancestral lands is considered "essential for a community to be considered as an indigenous people." (ILA Committee on the Rights of Indigenous Peoples, 2012, 3).

[107] There are six references to indigenous peoples in the 2030 Agenda for Sustainable Development. Two of the SDGs targets make specific references to indigenous peoples, committing to double agricultural output of indigenous small-scale farmers (target 2.3) and to ensure equal access to education for indigenous children (target 4.5). However, there is no mention of the principle of FPIC in the text of the UNDRIP.

Methodology:
Disciplinary issues and methodological questions

"Esta complejidad[108] requiere una flexibilidad metodológica que no sigue pautas específicas de acción sino, … un principio ético de descolonización."

(Suárez-Krabbe, 2011, 201).

This dissertation is a theoretical study that builds on secondary sources, anthropological findings and data to sustain and develop its arguments, combining different disciplines of study, law, anthropology and philosophy. This propositional legal research aims at connecting theory and experience, bridging the normative and authoritative dimensions and a concrete proposal to reformulate the dominant human rights conceptualisation. It therefore combines related critical dimensions[109] that are applied to the topic of human rights and its understandings, through a multidisciplinary approach to legal theory and thinking[110] in the study of changing law, legal pluralism and human rights theory and practice. Beyond philosophical theorising around normative questions, foundations of rights and justice issues, this thesis incorporates elements from anthropological studies, history of ideas, sociology, economics and political science. Thus, it feeds the legal analysis with empirical data extracted from the studies and descriptive examinations of field research done by anthropologists and ethnographers.

Despite the category indigenous peoples is controversial given "the inevitable fallacy of the equation of 'indigenous' status with ethnographic fact" (Barnard, 2007, 14), the notion of indigenous people is a denomination employed here as a legal construct.

The conceptual analysis of human rights positive law and its philosophical foundations allows for a critical approach to this legal regulatory system. Agreeing with Díaz, the philosophical perspective of law makes it possible to question the concrete normative facts, the social phenomenon investigated through socio-legal analysis as well as the temporal event dealt with in a historic-legal research (in Tantaleán Odar, 2016). It therefore "generates a debate around the concepts, categories and paradigms that

[108] The complexity of the contemporary global crisis "requires methodological flexibility that does not follow specific patterns of action but… an ethical principle of decolonisation" (translation by the author).
[109] Logical, substantive, dialogical, contextual and practical. (Rojas Osorio, 2013).
[110] "legal theory can best fulfil its goal if it provides tools for multidisciplinary theorising as well as categories for critical reflection on the preconditions of legal epistemology" (Auer, 2021, 29).

organises and make sense to norms" assessed from the perspective of what ought to be that justice puts forward (Díaz 1998, 184).

Philosophy of law reflects on the principles sustaining the content of rights, analysing legal concepts and ideas and further clarifying dogmatic principles and assumptions. Closely related to issues of moral and political philosophy, it deals with different dimensions of the legal realm; normative, social and axiological aspects.

A critical analysis of the current hegemonic human rights grammar reveals a link between law making and the legacies of European imperialism. Its impact has resulted in debilitating the dissemination and application of the knowledges and experiences of marginalised groups. Decolonising research methodologies challenges Eurocentric methods of research, knowledge production and therefore, power. In line with this approach, this dissertation embraces alternative epistemologies and other ways of knowing through critical reflexivity and respect. It focuses on the realities behind the plights of indigenous peoples, the problematic around land and access to ancestral territories as well as on indigenous voices, in order to be able to attest their concerns and self-determination paths.

Some lines are due to justify the lack of fieldwork among the San to retrieve inputs on their conceptualisation of rights, property and land, and in order to validate the conclusions presented in this work. After a lengthy and at times exasperating ten months long process to arrange the necessary official research permits and affiliation status in order to be able to develop research and field work in Botswana, the COVID 19 pandemic hit and circumstances changed diametrically. This added to the already stressful uncertainty that the lockdown brought, the paralysing anxiety of reconfiguring the research plan. Unfortunately, undergoing empirical work in Southern Africa faded away when borders closed for an unspecified period of time. Trying to make up for this limitation with telephonic engagement and remote online discussions became unrealistic given the panic mode reigning, the uncertainty and adaptation plans in the hosting institution, as well as due to the priorities and (lack of) technical means of potential respondents during that period. Within the time and resources allocated for this PhD research, the empirical work deemed necessary in order to achieve significant

results that would enhance existing sources, anthropological data and analysis was not realistic.

The author acknowledges the complexity of achieving conceptual clarity in the attempt of putting in dialogue two different conceptualisations of rights. Different categories are bound to each perspective and are often not readily translatable or even identifiable as parallel or directly related dimensions. Agreeing with Zips-Mairitsch, "the reciprocal translation of indigenous and Western legal systems, understandings and terms is problematic" (2009, 177). As a consequence, this study rests upon the solid corpus of existing literature on the San, within the discipline of socio-cultural anthropology mainly, but also the subfields of archaeological, linguistic and legal anthropology, from which notions around property, tenure and ownership schemes within the San have been obtained. The first order question being what the San conceptions of land, property and rights are, aimed at identifying ideas that would contribute to expand and ameliorate the understanding of the dominant conceptualisations of those constructs. Given that it is challenging to define what law and those connected ideas would be.[111]

By articulating what transpires from existing literature despite it might not have a specific focus on the legal perspective of the San, ideas that can contribute to an alternative formulation of rights were recaptured. Through the exploration of narratives, stories around land, traditional rights, landscape, nature and resources, elements for an alternative paradigm to contest dominant law standpoints and rights' formulation will be advance. Not much (or not enough) has been systematically examined about some indigenous peoples' legal worldviews understood in this sense, specially not in the African context and about the San. The focus on the San has mostly been on ethnographic studies of aspects related to their economies, livelihoods and lifestyles, diet, social life and structure, kinship organization and relationships, settlement patterns and land uses (linked to environmental patterns), technical and artistic expressions (mythology, music, dance, rituals), language, religion and spirituality, and processes of identity formation. Despite the interrelatedness of those elements,

[111] "We are not Navajo… their traditional stories don't work for us. Their stories hold meaning for us only as examples. They can teach us what is possible. We must create our own stories." (Tempest William, 1984, 6).

their legal constructions and justice conceptualisations (rooted in legal culture and practices, authority arrangements, notions of generalizable standards for a good life, etc), have not been the focus of systematic examination in the context of African indigenous peoples. The need for endogenous conceptualisations emanating from alternative epistemic locations beyond international and regional institutions, codification and discourses, has already been addressed by examining other forms of knowing, often referred to as *indigenous*, but meaning by indigenous no other than native (in contrast to the colonial imprint and exports). Thus, not in the sense of indigenous peoples used along this work.[112]

Indigenous methodologies emphasise a paradigm in which knowledge is conceived as relational and is culturally centred in contrast to conventional research and its epistemological assumptions associated with constructivist meaning-making research approaches to make sense of the world and their inductive logic of enquiry. Furthermore, indigenous epistemology 'acknowledges the interconnectedness of physical, mental, emotional, and spiritual aspects of individuals with all living things and with the earth, the star world, and the universe.'[113] Such a knowledge is thus dialogical and relational given that it does not immediately correspond with an ontological reality. "Truth or knowledge is not separated from human beings; rather it is integrated into the social context through which knowledge is co-constructed. In adopting this epistemological premise, the theoretical perspective adopted in the study is that an exploration of a social phenomenon requires a study of lived experiences of people through an understanding of their social world. This generates an interpretation" (Gaus, 2017, 5).

Thus, indigenous legal concepts, orders, principles, traditions, sensibilities and theories are explored in article three. Those rooted in indigenous cultures (and legal cultures) but specially in their social practices and regulations (grounded and lived experiences), as codification might not have occurred. A set of known and accepted rules as constructs generated by agency, emanating from customs, traditions and conceptual worldviews,

[112] Which is aligned to the defining criteria of the ACHPR mentioned above: self-identification, special attachment to the ancestral land, which is vital for their collective physical and cultural survival, experience of subjugation, marginalization, dispossession, exclusion or discrimination.
[113] See Lynn F, Lavallée.

that regulate social harmony and are enforced by sanctioned institutions. In addition, this dissertation addresses the understanding of property as a right among the San indigenous peoples in Africa, despite the limitations regarding blurred conceptual boundaries of key notions and the exogenous interpretation of San views explained above.

Therefore, in challenging the hegemonic versions of law and their ensuing understanding of rights that is the goal of this research, the author seeks for ideas on the margins, beyond the traditional centres of knowledge creation highlighting the value of San's world-views. This contribution adds to the ultimate quest of this project of challenging dominant epistemologies and hegemonic design by the west of human rights constructions. At the same time, it evinces the profound silencing, othering and marginalisation that indigenous peoples, especially in Africa, continue to face to these days (also in relation to their intellectual and theoretical contributions). Articulating alternative indigenous conceptions erodes the current situation of exclusion and epistemic injustice (with all it implies).

Positionality

The limitations described in the previous section bring up questions of legitimacy and ethnocentric approaches in articulating a particular legal discourse from a non-indigenous perspective (also as per its teleological motives) in connection to the author's underlying ideological presuppositions. They point out the complexities and difficulties around the legal theorising and the limits of own's conceptual universe, particular political or ideological agendas (Christie, 2009). They also bring to the fore further non-negligible issues related to extractivism of ideas and appropriation of knowledge, which revolve around relations of power in knowledge production (which data is considered, who undertakes theory formulation and building and so forth).

In the process of conceiving this research as well as throughout the different phases of dealing with existing literature, especially on decoloniality as well as when examining secondary sources that have informed the content about the San's conceptualisations

around property, the issue of positionality has been constantly present.[114] The lack of first-hand data from members of San communities regarding their perceptions and notions about human-rights, legal orders, and to a lesser extent, land ownership and property notions, is a limitation in this study. However, within the theoretical scope and time extension of a doctoral research, lack of language competence, and the unfortunate emergence of COVID-19 as a global pandemic, the collection of sufficient information to be representative of the views of these communities from San members themselves, was challenging and turned out to be unworkable. Despite the impossibility to collect first-hand data to explore ideas around justice, rights and the legal worldviews (underexamined in existing literature), this work rescues elements around those indigenous philosophies, which have been researched for decades by anthropologist mainly (from the West and Japan), as well as views from the South (African voices). This research relies on renowned experts and authoritative literature in the field of indigenous peoples and the San (as demonstrated by the cross-reference of texts and scholars in this field). It is assumed (for those instances where the researchers and/or publishing houses cannot be assessed by their good track records), that the findings and conclusions presented by these authors and sources have been validated by the scholarly community and published in accordance to the appropriate quality assessment criteria as well as the required and applicable ethical guidelines (in the cases of anthropological work on indigenous peoples).

The question of speaking on behalf of the subaltern is a concern that has been carefully ponded before and during this research process: who can speak for whom, and who actually does. Relations of power in knowledge production and the question of epistemic location are at the centre of this critical analysis: which data is considered and who undertakes theory building based on it. The biggest challenge being that "it must be from their voices [of indigenous communities] that emerge articulations of their shared visions." (Christie, 2009, 209). The author is aware of the fact that reconstructing the position of the subaltern does not equal to the subaltern speaking by itself, and the limitation this certainty poses for this study.

[114] The awareness of the fact that the research enquiry might lead to create the same category/ies in different contexts in its attempt of rendering it visible (Oyěwùmí, 1997).

In bringing forward indigenous particular vision or world-view, the issue of culture arises in all its complexity. Also within communities of indigenous peoples there are discrepancies and dissenting views with regard to legitimacy and authority for depicting tradition[115] (validity of stereotypical images and essentialist ideas of cultural continuity), determining identity issues (politics of identity, reaffirmation, authenticity and revitalisation of cultural traits), defining priorities and contemporary claims, about how they envision the future.[116] Furthermore: "international models of indigenism have colluded with essentialist conceptions of culture and ethnicity to obscure the contemporary complexity of San cultural identity and to distort representations of San claims for social and economic justice into demands for "cultural preservation."" (Hodgson, 2002, 1037-1049, 1042).

However, aware that the past is a "finite cultural resource" (to paraphrase Arjun Appadurai), the continuity of certain social actions, customs and norms can be affirmed. Conceding that cultural changes and revisions are not often that radical as to deny the possibility of cultural continuity (unless the collapse of a civilisation occurs). Thus, a reformulation based on existing sources would render valid and actual previous studies and analysis that focus on the San (which are filled with the narratives, stories and ideas of these groups themselves), for the purpose of disputing a universal conceptualisation of property rights (the prevailing liberal one), and of land more specifically: as a commodity rendered with economic value and a financial resource. These alternative views broaden the narrow-generalised understanding of property as it is conceived in the West; to manage property on the basis of scarcity and economic privileging. Property and land are more than economic assets,[117] and marginalised conceptualisation and world-views like those of the San, better capture this expanded notion from the dominant one that is challenged here.

[115] Emerging from the western classification between tradition and modernity binary thinking, versus a fluid understanding of 'indigenous modernities' (Sahlins, 1999). But which "are also reinvented and re-appropriated" by subjects of claims themselves (Robins, 2001). This mirrors the complexity of postcolonial subjectivities and their construction through a process of alterity (Bhabha, 1994).

[116] "Consider the extent of which people on the ground are manipulating the idea of culture as a tool for securing political, economic, and development resources. The international indigenous peoples' movement is an important example of globalization-from-below (see also Appadurai 2000), and it is a good example of a global deployment of a particular Western idea of culture." (Sylvain, 2005, 355).

[117] As it is the case with the air we breathe and the sun which makes it possible for life to exist.

Besides, it needs to be stressed that this thesis is not a rejection of the human rights paradigm and the needed safeguard they provide. That would involve denying the value and certainty about the importance of guaranteeing the protection and an effective realisation of fundamental spheres that are subject to harm and abuse (ingrained in our inherent vulnerability). This work strives for an ameliorated version of the standards they have set, one that is inclusive of neglected epistemological views.

However, the aim here is not to present a normative proposal of alternative human rights constructs from the San. Nor this thesis sustains the superiority of indigenous groups' views with a universalising logic. On the contrary, this work engages in an inter-epistemic dialogue that acknowledges and respects plurality as well as the necessary consideration of historically oppressed views. Infusing the normative framework with alternative values, the purpose is to advance elements stemming from the San world-views and senses that can contribute to expanding the dominant version of human rights, in view of current and future challenges we are facing that exceed the capacity and potential of the hegemonic formulation of rights to tackle them, and as a question of epistemological justice. It is in times of uncertainty that people long for universal valid principles, in need for guidance. However, it is also is in times of crisis that alternative approaches might provide the paradigmatic ideas needed for change and direction. Some features drawing from alternative epistemic locations have already permeated the international law corpus (such as collective rights, the rights of nature), where influence and cross-fertilisation in the legal field have occurred and consolidated, representing a path for the future.

Along those lines, this research involves a critical exploration of the ways in which the human rights field could bring into dialogue the plurality of non-dominant knowledges and epistemic communities, to legitimise a 'parenthetical objectivity' at normative level beyond discursive critiques and theorisations. In an attempt to overcome the features of modernity and Eurocentric rationality, and in order to decolonise the western epistemic canon into a pluriversal project in which many worlds coexist, objectivity has been treated as a myth within the decolonial literature. Rather than ontological transcendental abstract universals (and the belief in accessing an independent reality), Humberto Maturana refers to 'objectivity-in-parenthesis' (Maturana, 1988). This entails

non-universalizable elements or ideas whose validity relies upon different legitimate levels of 'reality' (cognitive domains, of pluriversality). This understanding compels us to intensify the reflection and dialogue in order to reach agreements. It is inseparably connected to ethical requirements (regarding the consequences of actions), as well as to one's choices (implying the disclosure of values and positionality, given the inevitable subjective elements of knowledge).

Legal systems are epistemically located, they are embedded in the local (Trubek). The soundness of situated knowledge does not stem from its valuation in relation to western perspectives and criteria, but from its contextualisation. The particularities, connections and specificities of the context become indispensable to account for, thus, nuancing the gaze of the researcher and rendering the analysis more complex and complete by embracing other(s') positions. The present analysis acknowledges the pluriversality of diverse human experiences and is aligned with those critical positions that advocate for the inherent value of peoples and cultures that have for so long been rendered invisible, erased, decimated, as peoples as well as with regard to their cultures, traditions, wisdom and inherent richness.

Discussion

"Ultimately, however, it is its humanity, the quality and valuation of its own existence, and modes of managing its environment – both physical and intangible (which includes the spiritual) – that remain the primary, incontestable assets to which any society can lay claim or offer as unique contributions to the attainments of the world."

(Soyinka, 2012, p. viii).

The first article entitled "Transforming Human Rights through decolonial lens" problematizes the hegemonic human rights conceptualisation contained in the International Human Rights Law corpus. It explores the ideological roots of this normative system arguing that Western ideological components and values are predominant in the human rights discourse, leaving non-dominant cultures at the margins of the dominant conceptualisation and framing. Against the background of

decolonial and TWAIL, this article provides with a justification for incorporating other understandings of rights and of making sense of the world from alternative epistemic locations.

The dominant human rights paradigm falls short in realising their transformative potential for social change and an equitable world. The protection provided by human rights instruments and mechanisms is not a straight forward effective process. It has been criticised for focusing on the individual, as well as for being legalistic and state-centred. The latter can deter victims of human rights violations from seeking remedy based on this protection paradigm. Besides, this formulation and institutionalised rights grammar can overshadow endogenous practices[118] as the chosen strategic path to achieve certain goals and safeguard their aspirations. However, attuning their claims to the available mechanisms and existing rhetorical discourse might appear more feasible and efficient than challenging the system and status quo that supports it.

Furthermore, human rights have been criticised for not reflecting or even addressing the structural causes and power imbalances that lead to systemic abuses and result in lack of effective enjoyment of rights. This aspect is especially relevant in the case of the right to property. Its framing is connected to models (mainly economic ones) that do not resonate clearly with the concerns, values, interests and plights of those in vulnerable situations who are most in need for guarantees and protection. Indigenous peoples' assertions are often based on different world views and senses, grounded on interrelatedness and collective demands.

Building on those premises, the second article "Deconstructing the dominant human rights grammar: an alter-*native* narrative based on indigenous peoples' world-views" proposes a decentred alternative by focusing on the legal epistemologies of Southern African Indigenous Peoples. By contesting the hegemonic ethnocentric human rights grammar, this text aims at recapturing African Indigenous Peoples' insights and values

[118] Namely, customary more accessible forums (culturally, geographically, financially and time wise), characterised by flexible procedures without technicalities that allow for lengthy discussions and tailored solutions, enabling the participation of the broader community, which infuses the process with a sense of ownership and legitimacy (and trust on the decision maker), and restorative in purpose (both of social balance and harmony as well as for the victims).

as intellectual capital to enlarge the current notion of human rights, in order to revert epistemic injustice in the formulation of the dominant human rights discourse.

Despite the decolonisation period led to the autonomy and independence of former colonised African countries, it did not result in those self-governed states becoming actors on equal terms in the global scene. As the idea of coloniality suggests, the long-standing patterns of power and systems of domination remained part of the global post-colonial configuration. Formal independence from colonial powers did not spark greater empowerment of indigenous peoples either within the boundaries of those newly independent states. The idea of self-determination (connected to the blue water thesis) did not apply to indigenous peoples, who were considered at most as minorities within self-governing sovereign states. Their status and rights underwent improvements with the adoption of legal instruments that increasingly incorporated their specific concerns, reaching a peak moment with the adoption of the UNDRIP. However, giving the limitations of this instrument and of international human rights law in general as already discussed above, there is still a long way to realise the promotion and effective protection of the rights of indigenous peoples in their own terms.

The divide between the human rights discourse and the functioning of the international system is a contemporary one. International practices in relation to trade, politics, the economy and environmental management among others, are still more aligned with liberal policies, extractivist interferences, discriminatory and capitalist logics,[119] at the expense of those in situations of greatest vulnerability. Thus, the ability of indigenous peoples and individuals to pursue their self-determined pathways to fulfilment and happiness still encounters numerous structural barriers: socio-economic, political, environmental, but also ideological ones. The legacies of colonialism reach the domain of ideas, impacting the intellectual validity and legitimacy of knowledge production, despite the dichotomy centre periphery might appear less obvious than it was during the colonial era. Cognitive justice exemplified by a new grammar of rights that reconciles elements from the pluriversal, should grant space for everyone to lead meaningful and dignified lives in different but harmonious ways.

[119] Including the enforcement of classic liberal economic liberties and privileging of strong rights to private property.

Therefore, building on the previous theoretical analysis and elaboration, article 3 presents a concrete proposal for an alternative construction of rights, taking as a starting point the right to property: "'Our human rights are our land.' An alter-native conceptualisation of the right to property from an indigenous perspective." This chapter advances an alternative conceptualisation of ownership and non-exclusive uses of land based on the San. Despite changes and dynamisms of cultures, there is some continuity of the main features that identify the San understanding and relationship to resources and the territory they inhabit. Against liberal conceptions of property, these are characterised by aspects such as mutual dependence, egalitarianism, sharing, redistribution and reciprocity.

As opposed to an ownership paradigm, the focus here is on an alternative model of land uses and tenure that can be tracked back to pre-colonial times. Quoting Du Plessis, "African indigenous law in property was more concerned with people's obligations towards one another in respect of property than with the rights of people in property." (Plessis, 2011, 49). Despite property is always determined and influenced by the context and economic, social and political conditionings, in the case of the San (as with the general African indigenous law du Plessis refers to), this ever-complex embeddedness is more prominent, "a system of complementary interests held simultaneously" (Cousins in Du Plessis 2011, 49).

Long term protection of property rights was needed once resources became scarcer and settled patterns of life more common. Together with other factors, this led to the idea of individual ownership, which in turned is connected to the assumption of absolute inalienable right to property and that justify the state's protection. However, the patterns of property arrangements of the San, do not only respond to the shared need of subsistence,[120] but to their relationships with others beings and the environment. Following Bennett's other uses of the term 'communal' in relationship to land and property, "membership of a political community is the basis of an individual's entitlement to land,… an individual is not free to dispose of land at will" (Okoth-Ogenda

[120] Nor do ownership entirely justifies itself based on scarcity, as shown by the value and importance conferred to 'own appropriations' regardless of the current or foreseeable scarcity of what is owned. See (Becker, 1977).

in Du Plessis 2011, 52). It is thus one's positioning in the group (those contemporary ones but also connected to the past, and the future)[121] and the belonging[122] to certain social units, the social context and ordering, that confers certain rights (relative and inclusive). The collective ethos of the San societies, one of sharing[123] and the lack of appreciation of surplus, responds according to Barnard to the following motive: "they share because sharing is the essence of cultural life for them… The accumulation of wealth is considered antisocial, while giving it away is idealised" (Barnard, 2019, 50).

The focus on indigenous peoples responds therefore, to the assertion that other conceptualisations and world-views grounded in alternative relationships to land and resources can inspire a reconfiguration of the right to property. It aims at: firstly, addressing the shortcomings the dominant take produces, secondly, challenging the economic and political structures supporting such a perspective (understood as the root causes of the inequalities, alienation, marginalisation and barriers for self-driven development), and thirdly, to present a reconfiguration that enables the effective enjoyment of implicated rights by those who are more affected by a narrowly conceived title-based prerogative, (surpassing neoliberal individualism and an unrestricted accumulation of property).

Frame of reference:

"The globalization of knowledge and Western culture constantly reaffirms the West's view of itself as the centre of legitimate knowledge, the arbiter of what counts as knowledge and the source of 'civilized' knowledge."

(Smith, 1999, 63).

Often, indigenous peoples have to adapt their struggles, resistance and vindications within the framework of state and international law. The legal grammar they have to

[121] These dimensions prevent or at least, limit the ability to alienate those resources (among other actions), imposing an obligation to protect and preserve.
[122] The most basic level of belonging being related to safety, ease and comfort, while at a higher level (at the space of self-reflection), it is associated to commitment, loyalty and a common purpose.
[123] With its potential trickledown effect to other people beyond one's close family.

make use of is alien (see du Plessis, 2011). They apply assimilated concepts to understand, interpret or reframe others' concepts, to make them fit within the property schemes and systems grounded on 'ethnocentric legal categories.' There is a lot that is lost from their views that could feed and enrich the current existing models of laws and ordering of the world, if the asymmetric legitimacy of other ways of be-ing is overcome. However, existing barriers in current knowledge production systems and dynamics render alternative knowledge frameworks and other non-dominant socio-cultural inputs unimportant and often non-viable. By contrast, this research seeks to incorporate alternative views, unaccounted-for values and indigenous sets of ideas and concepts in a reformulation of rights.[124] The elements examined and highlighted along this research focus on the articulations and formulation of the San, the inner logics of their value systems, world-views and norms. Shifting towards alternative inclusions beyond the Western canon is a matter of epistemological justice.

In line with this goal, there are examples of alternative models based on lived realities and rationales that draw away from conventional schemes but, which have nevertheless been included or acknowledged as legitimate variants against mainstream configurations. Despite these and other ideas stemming from African socio-cultural frameworks refer to local or African[125] principles and traditions (not from indigenous peoples in the sense that has been defined for the purpose of this work), they address the issue of epistemic dissonances in the legal order. These cases of alternative discourses[126] instantiate de-centred alternatives in relation to family schemes, democracy models, moral philosophy and gender categories, feeding law making initiatives, governing systems and social constructs' classifications from the peripheries.

- Polygamy versus monogamy unions (each model encapsulating different values as essential: love, financial or emotional stability, expansive caring, group cohesion, preservation of the lineage, happiness).

[124] Boaventura de Sousa Santos refers to mestizo conception of human rights "as a constellation of local and mutually intelligible meanings, networks of empowering normative references." (de Sousa Santos 2007, 15).
[125] A generalisation grounded on the commonalities and the dynamism of multiple African identities.
[126] Toward de-westernization (Mignolo, W., 2011).

Preparatory research and work leading to the Marriage Act 2014 that legalized polygamy in Kenya, revealed wide support for this polygamous marriage practice. Cognizant of the fluidity of cultural traditions and the importance of protecting women: "the reality of the Kenyan situation required registration of polygamous marriages" (Wamwara, 2019, 88). The largely extended resort to this type of marriage and the value attached to the ritual justified its inclusion in the Act.

As the above-mentioned study on legalization of polygamy illustrates, the values and logic behind a given practice (based on its suitability to answer societal practices and accommodate expectations, purposes, needs and conceptualisations of life) were at one point legitimized by legal means. The logic behind polygamous marriages from the point of view of Kenyan society is based on the understanding of the family as the unit of society, its relationship with having kids and what that means in terms of broader interpretations about life, time, space and purpose. Its legalisation evidences an approach that gives all its meaning to the practice that epitomizes all those aspects. Wamwara outlines those valued elements behind polygamous marriages and contrasts them with the ones inspiring monogamous marriage, namely: union for life between a single man and a single woman, with love as the centre. Even though it is true that both traditional ways of understanding marriage have evolved and changed, some distinctive elements, foundations and premises continue to define both, differences that are rooted in their respective traditions of thought, culture, religion, rationales and so forth.

Different choices are shaped by particular conditionings. Those are solved differently in different settings, unveiling a spectrum of preferences and priorities based on a variety of conscious and submerged values, meanings, purposes and merits. The scope of free choice also varying depending on the specific context.[127] Solving the quandaries that a given context and life complexities pose to one person, is contingent upon the elements at the disposal of the person and the different dimensions and sensitivities at stake. The prioritisation of specific values responds to a given conception of a good life,[128] of a good

[127] This is exemplified in Ferguson's analysis the Anti-politics machine and the Bovine Mystique, whereby livestock is seen as a "special domain of property" (Ferguson, 1994, 147), prestige, visible form of wealth, and other social functions as retirement fund not directly convertible to a cash price, thus, valued and appreciated beyond its economic value.

[128] What does it encompass? Human beings, the living ones, the unborn, future generations?

society. It implies choices that are culturally conditioned and that determine certain preferences in a dynamic appreciation of some terms and exceptions (what is reasonable, proportionate). Those privileged aspects might have the ability to influence the law and a given conceptualisation of rights to a certain extent. This vernacularization within law (in opposition to vernacularization by law) occurs "where indigenous claimants seek to work within the framework of existing law, not in order to redraw the boundaries of law itself, but to either push for the adoption of new laws, or to shape the application of laws already on the books" (Goodale, 2020, 9).

- Principles and ideas such as ubuntu,[129] the living philosophy of Bantu speaking peoples[130] in Southern Africa (botho[131] in Sesotho language) as the "moral conscience of the community" (Ramose, 2020, 266), the moral dimension of umu-ntu, the ethics as understood and practised by umuntu (a human being who produces ubuntu).
- Bantucracy as an alternative political discourse to multiparty democracy[132] is a principle of popular democracy guided by mutual care and sharing, in which ethics precede politics and the political community rests on a "mutual recognition by everyone of the right of all to exist and to reason in a peaceable condition conducive to the protection and the promotion of each individual's right to life," thus aiming at providing "optimal living conditions ensuring the survival… and security of all the members of the political community" (Ramose 2020, 271).

"For the Bantu-speaking peoples, there is no philosophical basis for the acquisition of land on the claim to absolute and exclusive property. Land as private property, owned

[129] Nguni word meaning humanness that refers to a complex concept and way of life 'Umuntu ngumuntu ngabantu', "a person is a person through other persons," humaneness. The ontological indeterminacy of *ubu*, referring to -ness (open, motion, as the principle of be-ing), turned normative when coupled to -ntu thus becoming normative, the obligation to become ethical (based on umuntu). "An African-based praxis of a 'political economy of obligation'" according to Praeg, (Douglas, 2015, 307).

[130] Bantu cultures are not homogenous and there are specific cultural customs. However, there are similarities and certain unity that allow us to refer to common traits in their philosophy (Ramose 2020).

[131] "According to Livingston (2008, 294), botho implies recognition that being human involves engaging in actions, words, and feelings that have effects on others, and that being human therefore entails responsibilities" (Sapignoli, 2015, 2).

[132] Where elections can be seen as adversarial politics and government can lead to become undemocratic or dysfunctional due to disagreement rooted in ideological basis, defence and opposition of, for example, capitalism or socialism.

by a single or collective group of human beings, is a philosophically alien concept among the Bantu-speaking peoples. Instead… acknowledge the right of everyone to have access to land, to use it, to protect and sustain the individual and the collective lives of all that lives." (Ramose 2020, 276).

- Gender: As renowned academic Oyèrónkẹ́ Oyěwùmí underlines with her work, the uncritical adscription to Western categories as universal introduces a bias in research:

"Western theories become tools of hegemony as they are applied universally, on the assumption that Western experiences define the human." (Oyěwùmí, 1997, 16). In her ground-breaking book "The Invention of Women: Making an African Sense of Western Gender Discourses" (1997), she argues that "global gender formation is then an imperialistic process enabled by Western material and intellectual dominance" (p. 78). She refuted the idea of gender as a timeless and universal category by analysing Yorùbá culture and society, debunking the idea of gender as a social category in Yorùbá society, which is instead "genderless because human attributes are not gender-specific." Yorùbá society privileges other markers than bio-anatomical differences, such as lineage membership, generational factors, social roles, division of labour, categories informed by the specific frame of reference and 'model of being' of Yorùbá (not gender-determined), in contrast to the privileged 'way of seeing' and bio-logic of the West.

The right to property:

The human rights conceptualisation in relation to the right to property is analysed in article 3 from the perspective of the San of Southern Africa, their frame of references, own conceptions grounded in their own realities, value systems, socio-cultural logics and traditions. In an attempt to present an alternative conception, different elements are highlighted that can be rescued and applied to reconceptualise the idea of property right in a less Western centric manner. Since indigenous philosophies are concretized in

lifestyle practices that are closer to nature and to a balanced society, they can inspire alternative formulations and a different future.[133]

The imposition of Western centric views applies to how land is perceived in the centres of power. Related to the genesis of the right to property is the commodification of land. The contradiction (irrationality) of this perspective is illustrated in this quote on nature wild law: "the loss of identity with land, with territory, is one of the root causes of our alienation from the Earth and her laws…" (Burdon, 2011, 31). The ideological premises of the West (its liberal logic, privileging of rights,[134] efficiency over sufficiency and money dominating structures) have permeated many categories rendering to the margins alternative conceptions that clash with the values underlying those dominant notions. The case of land is an example. Within the indigenous context, the importance of land goes beyond its economic value, transcending it as an asset for monetary purposes and placing worth in dimensions other than financial (spiritual, religious, cultural) and individual ones ('possessive individualism').[135] Territories have symbolic value for indigenous peoples, beyond their consideration as resources to be used and exploited.[136] Different values are ascribed to it (as it is with water, coastal sees and other natural resources), including spiritual relationships and a collective dimension. Among the San everyone is somehow a kin, thus, the relationships and overlapping networks result in increased cooperation among groups that give further access to land and resources.

However, the dominant benchmark for considering land (and by extension, ownership of land), what is valued, how is it valued and why, are the prevailing standards that emanate from the specific socio, political, cultural context and economic systems (capitalism) of the West. Communal origins of property gave way to individual property that conferred different powers upon what is owned and determined who is excluded. These arrangements became regulated by law in order to protect the acquired interests,

[133] "Rights are always political and frequently re-negotiated, and the terms of those negotiations are widely diverse across time and space." (von Benda-Beckmann, F., von Benda-Beckmann, K. and Wiber, M, 2006, 11).
[134] "above other kinds of relationships between people and place" Graham in (Burdon, 2011, 262).
[135] "Rights under this conception are a bundle of things that can be possessed, held, alienated and exchanged, and express the positionality of a possessing unitary subject" (Porter, 2014, 394).
[136] Land is more than "a possession and a means of production… a commodity" (Martínez Cobo, 1983).

also as a result of increasing scarcity of resources (including availability of land), transforming into the new reality of law/commodities and state protection. Alternative values intrinsic to other world-views are marginalised and subordinated to this dominant normative position.

At continental level, according to the Guidelines and Framework on land policy in Africa designed in 2010,[137] land is seen as a "valuable natural resource endowment" [138] linked to economic development and poverty reduction (as well as peace and security). Despite this limited approach, the document further acknowledges that in the majority of societies in the continent, land is also a "social, cultural and ontological resource" for the construction of identity, culture, spirituality and religion (p. 26). The Framework and Guidelines expressly mention the marginalisation suffered by 'particular ethnic groups' and "certain categories of indigenous peoples such as the San of Botswana" among others, that needs to be addressed (p.9), further acknowledging the diversity "of indigenous cultural and normative systems." It refers to several barriers and conditionings to land use and governance such as the colonial background and resulting dualistic land holding system, economic organizations and patriarchy, while acknowledging the complexity and intersection of factors such as culture, ethnicity, gender, class, nationality, generation, etc. It further highlights among other guiding principles, the need for popular participation in the formulation of land policies.

Besides the frame of reference related to the conceptualisation of rights and property, it is necessary to address the question of the appropriateness of the use of the category of indigenous peoples. Having discussed aspects around the conceptual ascription and use of this term by indigenous groups themselves under the theoretical framework and conceptual clarifications sections above, the following lines will delve into some criticisms that have arisen concerning this category and the revalorisation of indigeneity (Lindroth, M. and Sinevaara-Niskanen, H, 2018 and 2019).

[137] It resulted from the Land Policy Initiative started in 2006 as a joint product of the AU Commission, UN Economic Commission for Africa (UNECA) and the African Development Bank. It sought "to examine land policy issues and challenges in Africa with a view to developing a framework to strengthen land rights, enhance productivity and improve livelihoods" (AUC-ECA-AfDB Consortium, 2010, foreword).
[138] (AUC-ECA-AfDB Consortium, 2010).

The issue of indigeneity/ness is a complex one that has been approached from different perspectives, based on genetics, on temporal presence (prior in time), the location and belonging to a certain place, rooted in culture, language and life-styles (distinguishing endogenous and external influences). These different aspects are considered when trying to respond to the question of authenticity[139] in relation to indigenous peoples. There is a risk of essentialization of indigenous identity that disregards the fluidity of culture and that puts the emphasis on ethnic differences. It further poses challenges of legitimacy for land claims and for accessing resources. The intricacy of belonging and identity is often diminished and simplifications used by community members, NGOs, academics and others, in order to advance diverse projects and claims. The complexity of belonging is described in the work of Robins (2001) and the vast literature, discussions and anthropological scholarly work on indigenous peoples in the continent. It shows that the issue is a more nuanced one than the mere self-identification or clear-cut identities based on ethnic origin and background, language and attire, but rather encompasses broader elements involving economic, power relationships[140] and leadership aspects.

Despite criticisms that see efforts to revalue indigenous peoples' world-views as attempts to render justice to existing pluralism, some views see them as an instrumental strategy for the west to adapt to current challenges, or an appropriation of their practices resulting in essentialising (ontologising indigeneity) and exploiting their knowledge. It is somehow true that these attempts might appear paradoxical in the sense that they try to portray certain indigenous features (resilience, resistance) as alternative solutions, given their lived realities, when those same peoples are struggling to survive and live in accordance to their own ways. Such economic and survival insecurity is driven by different interrelated economic, social, political, historical factors as well as structural conditionings that have led to livelihood diversification (including dependence on social handouts, government assistance and foreign aid).

[139] In his book about Khoisan in South Africa, Verbuyst distinguishes "between 'authenticity' as the subjective interpretation of the essence of the past and 'accuracy' as that which is in line with established fact" (Verbuyst, 2022, 323). This subjective interpretation that goes against reification or 'repressive authenticity' (Patrick Wolfe, in Verbuyst, R. A. R. L, 2022), results in plural articulations of indigeneity.

[140] According to Gressier, the internalisation of shame derived from discrimination, poor treatment and marginalisation, further results in "suppression of their own identities" (2018, 149).

However, their survival and resilience mode of being (taken as a lesson to cope with current times), is considered by some authors as a myth that only reinforces what the process of recognition had intended to revert in the first place. Chandler asserts that, indigenous people, "by being dispossessed this subject challenges hegemonic ways of asserting possession" (Chandler & Reid, 2018, 257). Critiquing this ontological turn that entails the revalorization of indigeneity as a "new form of neoliberal governmentality, cynically manipulating critical, postcolonial and ecological sensibilities for its own ends" (Chandler & Reid, 2018, 251).

Customary law

With regard to indigenous peoples and the issue of land, the topic of recognition of customary and traditional land rights has been the focus within the academic studies on legal pluralism and policy debates. However, when (colonial) customary rights are studied in the African context they mostly relate to indigenous not in the sense of the term used here (as the category of international law described previously in this introduction).

This thesis ascertains that traditional systems, values and views are hardly consider when it comes to feeding the mainstream human rights discourse. Professor Shivji's analysis of the Tanzanian land tenure reform brings to the fore some of the reflections and contradictions of that process, which are valid for the postulates defended in this thesis. The Land Commission that was created to draft a report to inform the reform process, built its recommendations on the experiences and views it gathered during the consultations it undertook. Shivji quotes: "The Commissioner went further that traditional subjecting of the customary law to the standards of justice, good sense and morality of 'white' colonial judges (the repugnancy clause' in the reception statutes) should be *turned over on its head by providing that the received common law and principles of equity should not be repugnant to* Basic Principles of National Land Policy and *principles of justice, fairness and equity held in common by Tanzanian communities*'" (Shivji, I. G., 1998, 82, emphasis added).

As Mamdani understands it, colonialism was defined by the 'civilising mission'[141] and turned to 'conserving tradition' "uncritically reproduced as authentic tradition of Africa" (Mamdani, 2001, 659), as a result of indirect rule of colonial powers that followed the crisis of empire (Vizcaíno, 2021). This led to customary law being shaped by settler colonialism to enable indirect rule, which was further transformed in the post-independence times up to these days, triggering criticisms of customary law as a reification of changing regulatory practices. Despite customary law (both official and unofficial) is not a homogenous body of law but a living entity.

According to Mamdani, the mainstream conservative nationalism after colonialism tried to privilege indigenous who would have the right to a native authority, as a 'bonus,' having the right of custom (customary rights). This implied "turning the colonial world upside down" reproducing the duality colonialism had created: "the native sat on the top of the political world designed by the settler" (Mamdani, 2001, 658). He distinguishes between the native and the non-native as a legal identity. Ethnicity was said of the former, as a reflection of cultural diversity, whereas race was applied to the latter, denoting civilizational hierarchy, which was applicable both to the colonized and the coloniser.[142] Tribe, as an administrative unit for those of indigenous origin (natives) was a category that sometimes overlapped with ethnic identity stemming from cultural identity, and in other cases became a fictional category encompassing different tribes. Thus, European settlers tribalized ethnolinguistic groups and colonialism caused the politization of indigeneity[143] "as a native self-assertion" (Mamdani, 2001, 664).

This had major significance for the applicable law in each case: an homogenous civil or common law for all races, and customary law in its multitude variations stemming from cultural differences, for the tribes. The applicable law was based on the distinction by which each person was defined. Customs and tradition were the legal domain enforced among the natives by the native authority sanctioned by the colonial power (a chief who

[141] Professor Karen Engle argues that human rights were seen in the early decades within the discussion of indigenous peoples, as inseparable to the civilizing mission of colonialism and liberalizing one of neo-colonialism. (Engle, 2011).

[142] "Races were said to comprise all those officially categorised as non-indigenous to Africa" (Mamdani, 2012, 4).

[143] "The system of native administration and indirect rule transformed cultural identity into political identity, and ethnicity into tribe." (Mamdani, 2012, 7). "Once the law makes cultural identity the basis for political identity, it inevitably turns ethnicity into a political identity." (Mamdani, 2001, 661).

would combine legislative, executive, administrative and judicial powers), while rights, functioning as a limit to the state power, were part of the law governing non-natives. However, among pre-colonial customary authorities "only one of these—chiefs—was sanctified as a native authority under indirect-rule colonialism, and only its version of custom was declared "genuine." The rest were officially silenced" (Mamdani, 2001, 655). In contradistinction, some authors see customary law as an enabler for exercising "a degree of local autonomy… insulated from external interference" (von Benda-Beckmann, F., von Benda-Beckmann, K. and Wiber, M, 2006, 86).

In addition, "customary law as co-opted by the colonial state was both subordinated to it and disembodied of its own autonomous notions and perspectives of justice" (Shivji, I. G., 1998, 64). Moreover, the increased juridification of social life (and judicialisation)[144] of the social processes by which law is socially constituted resulted in moral and religious discourses replaced by legal and rights ones. In this way, the prioritisation of the legal over political dimension contributed to law to continue playing as a colonial (or neo-colonial) 'tool for dispossession' (Sieder, R.).

Peter Ekeh considers colonialism as a "social movement of epochal dimensions" (1983, 4) in that it introduced enduring qualitative social changes in social formations, whose significance and consequences reach beyond the post-independence period (and beyond the individual), consolidating structural social changes. He highlights three types of changes: first, transformed pre-colonial indigenous institutions, resulting in the generalization and expansion of tradition. For example, symbols of high culture became popular culture, social structures and institutions like chieftaincy were adopted from other areas, at the dismissal or symbolic preservation of checks and balances institutions and mechanisms. Secondly, migrated social structures and constructs that acquired 'their own-life world,' thus distorted from their original significance and suffering from 'organizational fixation' in the new settings. Thirdly and lastly, the emergence of social structures self-generated from colonialism, such as ethnic groups or rather, identities, as the dominant form of social structures (an expanded version or revision of kinship systems, vis a vis tribes of pre-colonial times).

[144] "Growing recourse to state and international law" (Sapignoli, 2018, 9).

These customary laws were aimed at being fixed by codifying them and enabled for land tenure by use as opposed to ownership.

Some reflections by way of conclusion

Although this research acknowledges the virtues, achievements and prospects of a framework such as the one provided by the human rights protection system, it has presented some of its weaknesses, limitations and problematic ideological foundations. Despite its potential for empowerment, the human rights discourse contributes to (or does not challenge enough), a certain specific model currently at place, which does not automatically lead to equality and justice due to structural gaps and its discriminatory underpinnings. On the contrary, such a system (neoliberal globalisation, as a development and public policy model) is nowadays compatible to an unfair distribution, poverty, marginalisation and exclusion.

Within the background of the critical approach to international human rights law presented here, the overall objective of this dissertation was to challenge the human rights dominant conceptualisation by transforming that hegemonic discourse with new elements arising from alternative sources of knowledge. The ultimate goal has been to capture the specific understanding of property rights and land tenure, holding and management ideas stemming from the San. Therefore, it intended to deconstruct law by decolonising the meaning of rights, transforming it and instilling new alternative significances, insights and consistency, so that an expanded version could be outlined.[145]

Such an undertaking aimed at providing with arguments that could contribute to settle a fair balance among differing but connected priorities, interests and conflicts that converge on the question of property, namely: biodiversity conservation, access, govern, use and management of land, wildlife protection[146] and tourism, infrastructure

[145] Makau Mutua argues that "the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world" (Mutua, 2002, 15).

[146] ACHPR/Res. 489 (LXIX) 2021 called on "African States to recognize the rights of indigenous populations & communities over the conservation, control, management and sustainable use of their natural resources including wildlife."

developments, raw materials extraction and production, agro-business enterprises, energy and food supplies, urbanization, etc. Consequently, this research sought to devise an alternative formulation that could effectively permeate policies, legislation and development initiatives in a global scenario where ideological colonialism and liberal logics are still prevalent.

This proposal claims that the prioritization of powerful interests and economic gains behind the logic regulating property and land rights, perpetuates dispossession while increasing marginalisation and deprivation (not only material ones). Moreover, it has been argued that property rights based on neoliberal logics of possession (as opposed to other models that privilege non-financial profits and concerns), are further justified and reinforced through policies of socio-economic betterment and development that disregard existing alternatives and values.

In contrast, an enriched conceptualisation would be characterised by being relational,[147] connecting those binaries that have been traditionally placed in hierarchical scales of inclusion and exclusion: culture-nature, past-present-future, us-others, human/non-human. It would result in a new grammar fed by alternative world-views and knowledges for making sense of the world beyond the traditional centres of hegemonic power and knowledge. This new approach to human rights should match current times, problems and challenges as well as the undeniable plurality and interdependence of connected worlds of sense.

Article 1 starts by examining the epistemological roots of the dominant human rights grammar. It argues that human rights are constructs whose foundations are grounded on the Western modern worldview, identifying the fundamental ideological premises of the current mainstream conceptualisation, namely: anthropocentrism, rationalism, secularism and universalism. The assertion of their universal character implies a hierarchisation that denies existing pluri-versalism and have resulted in the dominant

[147] Indigenous people do not distinguish between the legal order and other social and cultural orders. For them there is only one reality and neither is there [necessarily] a distinction between the action of political-legal authorities and religious authorities." While this observation may not hold true for all indigenous communities or peoples, it does question the extent to which the different belief systems that exist within complex legal pluralities are commensurable and warns us against any simple assumptions that different legal systems in Latin America will eventually converge." (Sieder 2012, 110) commenting García Serrano.

narrative that has privileged rights versus duties, individual aspects over the collective (and communal sense of solidarity, unity and humanity), as well as legalism under the guise of neutrality.

Against this universal grammar that has resulted in parochial ideological principles becoming a legal global discourse, the pluriverse of senses is rich in all its differences as a result of a dialogue among the many particulars (following Grosfoguel). Building on decolonial thinking and TWAIL, the text suggests a polycentric approach for transforming the hegemonic human rights conceptualisation in order to transcend ongoing epistemic asymmetries. By identifying elements stemming from counter-hegemonic narratives, peripheral knowledge(s) and subaltern legalities that can inspire a decolonised human rights alternative.

Article 2 consequently explores how to revert the western-centrism of human rights in a quest for epistemic justice and plurality. In order to deconstruct the hegemonic human rights discourse it stresses the heterogenous multiplicity of legal imaginaries aiming at devising an alter-native narrative based on Indigenous Peoples' world-views. Against the epistemic arrogance and the privilege of ignorance (about other valuable knowledges), this proposal acknowledges alterity and theoretically justifies the need for reconstructing the dominant human rights paradigm. Seeking to strengthen the legitimacy of a discourse meant to guarantee a good and dignified life for all, the analysis embraces excluded rationales and views that can contribute to redress persisting systemic iniquities and structural wrongs: "The cultural specificity of human rights as well as their rise as normative instruments and legalistic assertions of universal entitlements, stripped them of the political and transformative potential to challenge economic, social and political structures at the core of the imbalances and inequalities they aim at remedying."[148] Under those premises it presents distinctive elements of the San's values, regulatory principles, understanding of the person, community and nature, that can inspire an alter-native narrative.

[148] Article 2 Deconstructing the dominant human rights grammar: an alter-*native* narrative based on indigenous peoples' world-views. 2022. African Journal of International and Comparative Law 30.4 (2022): 477–501.

Finally, article 3 presents concrete content grounded on the San as a legitimate source of knowledge to put together the conceptual basis for an alternative formulation of rights, with a focus on property. This chapter analyses property paradigms and land conceptualisations under different rationales, the Western legal orders and that one of the San. It further looks into the relationships between people and resources and how they are regulated from different perspectives, making explicit the characteristics and qualities behind each logic. From the study of the understanding of land and property among the San, egalitarism, mutual dependence, non-exclusive uses, reciprocity, redistribution and sharing are highlighted. Against this, a monetary and individualistc logic, protection against interferences on private rights, exclusion and restrictions to non-owners (alienation rights) account for the model of property of Western legal systems that treats what is owned as tradeable commodities.

Based on those features, three aspects are considered for redefining property: the interest of the person who claims certain prerogatives, the consequences for what is owned and the implications for others (the human dimension of solidarity), as well as the responsibility (duties and obligations) of the right holder towards others and the natural world (broadly considered). Summarising, the social function of property, re-distribution patterns and the obligation to share, reciprocity and equalised access to resources are elements that could constitute the foundations of a different conception of property, inspiring legislation and land reforms, but also related governmental policies and development projects.[149]

> "Africa is a treasure trove not only of Benin bronzes, coltan from the Democratic Republic of the Congo, and diamonds from Botswana. The real unmined gems are African concepts, ideas, values, ways of being and systems of knowledge and episteme." (Oyewumi, 2022, no page).

[149] A new conceptualisation that prevents indifference and disengagement, and puts an end to the privilege of being immune to our responsibilities towards fellow human beings and the preservation of the natural environment.

Way forward

The author acknowledges the need to further contrast the ideas highlighted as a way of concluding elements of a San conceptualisation of the right property and land. Furthermore, additional research is needed to assess the ability of those views to influence any debate around property models in a given context.

Another aspect that appears necessary within the focus of this research would be to explore to what extent the role of development actors working with Indigenous peoples in Southern Africa are influencing and/or altering the San understanding of rights, property and land. This would entail investigating to what extent do western development actors play a role in legitimizing and consolidating certain rights, justice and development discourses in their interventions targeting indigenous peoples, becoming what Tanzanian scholar Shivji refers to as the "ideological foot soldiers" of globalisation (Shivji, I. G., 2006, 45).

On a different note, the anthropocentrism that permeates and guides law has been challenged by new perspectives such as the ecology centred approach of Earth Jurisprudence[150] that places earth community at the centre, recognising the rights of all beings. Other examples that have successfully influenced and shaped binding normative orders are the Sumak Kawsay or Buen vivir in Latin America, the Maori deep ecology in New Zealand, as well as ideas of reciprocity and sacredness of nature in Africa.[151] These examples expand beyond the human self-centredness and anthropocentrism of law to include other beings that we rely on for survival (ecosystems, nature) as well as a broader time scale, to include rights of those yet to come. These are relevant questions to study further also in the African context.

Within the ontological turn (end of the divide between culture/nature and how to think about difference), a new paradigm that confers materiality to the environmental crisis and climate change realities we are facing has emerged. It urges us to react to these challenges in new ways, for which embracing the non-human and other modes of existence is essential. In that regard, "it is important not to lose sight of the role of

[150] A new legal philosophy advocated for by Thomas Berry.
[151] ACHPR/Res 372 (LX) 2017. Resolution on the Protection of Sacred Natural Sites and Territories.

hegemonic political power in privileging certain ontological claims in the world," that is the case with western ontology describing the world, which "valorises control, self-sufficiency, heroic individualism, and a disembodied disposition that are built on a denial of our vulnerability and mortality, resulting in individuals feeling deep disconnection" (Walsh, Z., 2019, 9).

Advancing rights of nature and ecosystems in the African context is a topical subject given the progress being made in that direction.[152] Careful consideration should be given to the implications that regarding nature elements as rights holders could have in certain circumstances such as: situations where they are shared between states and disparate legislations and policies are applicable, in terms of resulting obligations, the compatibility with states' development aspirations and safeguarding those resources, to name a few.

These are trends that capture visions and lifestyles approaching values as non-competitive, which are compatible with the preservation of the environment that we do not own.

[152] Uganda National Environmental Act 2019 that recognises nature as a legal person, the River Ethiope Rights Act 2019 (Nigeria) conferring legal rights to the River Ethiope (legal entity with legal standing in court on the basis of the river's ecological, cultural and religious value), the Nigeria National Water Resources Act 2016 currently under review.

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Part II

Foreword article 1

Transforming Human Rights through decolonial lens

This paper problematizes the Human Rights conceptualization embodied in the International Human Rights Law corpus. It considers human rights as a construct stemming from a particular historical context, rooted in a specific ideological background and arising from a concrete socio-cognitive system, which led to the current dominant human rights discourse. Despite the fragmented foundations of International Human Rights Law, western ideological components and values are predominant in International Human Rights Law precepts. That has left elements of non-dominant cultures at the margins of human rights conceptualizations and legal instruments that epitomize them. This paper argues that those conditionings and rationale led to a dominant human rights discourse endowed with specific characteristics that turned it into a discourse of empire. It proposes challenging the above-mentioned mainstream human rights grammar and alleged universalism. In addition, after critically examining International Human Rights Law conceived as a Western hegemonic ideology it will provide with the justification for incorporating other conceptualizations of rights stemming from alternative epistemic locations and world-views through an inter-epistemic conversation with Indigenous Peoples of Southern Africa.

Key words: Human rights, eurocentrism, decoloniality, TWAIL, alternative epistemologies, Indigenous Peoples.

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"When Western speech becomes universal, its native speakers - the West – will be running the show."

Martti Koskenniemi[153]

[153] Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," *Rechtsgeschichte - Legal History* (2011), 152-176.

Abstract: This article problematizes the Human Rights conceptualization embodied in the International Human Rights Law corpus. It considers human rights as a Western construct rooted in a particular historical context, located in a specific ideological background and grounded in a concrete socio-cognitive system. Thus, in disregard of features of non-dominant cultures, the mainstream human rights grammar became a discourse of empire. Building on TWAIL and decolonial theory, this article challenges that hegemonic human rights discourse while providing a justification for incorporating other conceptualizations of rights through an inter-epistemic conversation with alternative world-views.

Key words: Human rights, eurocentrism, decoloniality, alternative epistemologies, Indigenous Peoples, development.

"Rights were no longer universal, because "North" and "South" did not occupy the same universe" (Burke, 2008, p. 296).[154]

DEBUNKING HUMAN RIGHTS UNIVERSALISM

Introduction and preliminary clarifications

Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, much has been written about the Eurocentric origins and western conceptualization of human rights (HR) and International human rights Law (IHRL). Predominantly, the discussion has dealt with three controversial aspects around HR. Firstly, the ultimate foundations of the HR discourse; secondly, the debate about universalism/relativism of HR, and lastly although to a lesser extent, the idea of HR as a strategic tool that retains

[154] This position gained strength during the First UN International Conference on Human Rights held in Tehran in 1968. Princess Pahlavi of Iran (member of the royal family who hosted the conference) referred to a "distinctive Third World human rights ideology" (Burke, 2008, p. 285). This view will come back to the forefront in the 90's with the Asian values' cultural relativist challenge.

an imperial ambition due to its inherent universal claim, characteristic of a postcolonial postmodern era.

This article will critically examine the dominant HR discourse that has consolidated in the IHRL corpus as universal. It examines the issue from the premises of critical legal theory focusing on critical approaches to international law (IL). From that perspective, this paper reads the positivisation of HR precepts and claims,[155] in connection to power and ideology. Thus, it will shed light on to what extent this dominant conceptualization of HR is rooted in Western ideology and can therefore be seen as a hegemonic order. Within this overarching goal, special attention will be paid to the elements behind the theoretical construction of HR, namely: historical context, geo-political factors and particular ideological underpinnings. Thus, the context, the actors and the ideas that led to the HR conceptualization will be examined along the different sections below. In order to do this, the focus will lie in the politics and support of different key actors involved in decision, policy and law-making processes that hold unequal power; the ideas and interests which influenced their choices, and the elements which contribute to shifting discourses, legitimizing support and decision making.

In order to critically explore the epistemological roots of HR (the genealogy of the IHRL corpus) and interrogate the dominance of the Euro-Western HR discourse (coloniality of knowledge, power and ideology), the theoretical framework of analysis will bring together Third World Approaches to International Law theory (TWAIL) and decolonial approach. Based on the outcomes of such exploration, a subsequent stage of the analysis will anchor the theoretical stance on a concrete proposition as an alternative: the epistemologies of Southern African indigenous peoples (IPs) to advance ideas in an attempt to transform HR and debunk HR universalism.

HR are proclaimed universal in their scope of application, entitlements and formulation of content. However, the particular conceptualization and concrete meta-narrative where the discourse is rooted undermines any alternative ones, defying their claim of universalism. Despite critical stands questioning the universalism of HR and its particular ideological sources, concrete proposals on how to shuffle what will be

[155] "The legalization of rights or *politics by other means*" (emphasis added) as put by Wilson, 2007.

referred here as the 'HR hegemonic legal order' (dominant HR discourse)[156] do not abound. Alternative understandings inspired in different logics and non-dominant epistemologies and cultural backgrounds have been minimally included in the mainstream discourse. To overcome 'ideological coloniality' (Ndlovu-Gatsheni, 2018, p. 25) and navigate around existing plurality, delving into the worldviews of Southern African IPs is the alternative proposed here to remedy the current epistemological bias. The justification of this approach is aptly summarized in the following excerpt:

> It creates space for the sorely needed unfettered nurturing of African thought-forms. For the discipline of philosophy in general, this paradigm is instrumentally necessary as the polycentric production of knowledge ensures the enrichment of philosophy by an open cross-pollination of ideas and intellectual experiences from diverse geo-cultural perspectives. (Lamola, 2015, p.13).

The point of departure of this critique is the relationship between HR and a particular idea of justice, which consequently implies the normativisation of the corresponding ethical values and principles deemed necessary for a good life in accordance to such a conception. The logic behind the positivisation in IL of those underlying values lies in a *promise* of universality that is derived from the belief on the unity of the human species, which implies, in turn, the existence of certain universal values applicable to every human being all over the world. According to Argentinian political theorist and philosopher Ernesto Laclau, the term universal was first understood as the 'logic of incarnation'. Later on, that interpretation was surpassed by the logic of rationalism that emerged with modernity and consolidated with the Enlightenment, and at a later stage, the universal became 'the symbol of a missing fullness' (the empty signifier).[157] That logic constitutes the terms and the frame of the conversation that articulates the specific message of the current HR grammar.

The particular conceptualization and legalistic discourse of the dominant HR grammar vested with the universalising logic mentioned above remained far from

[156] Discourse as the expression of ideological representations. (Van Dijk, 2013).

[157] "The relation by which a particular content becomes the signifier of the absent communitarian fullness is exactly what we call a hegemonic relationship. The presence of empty signifiers… is the very condition of hegemony" (Laclau, 2007, p. 13).

embracing the diversity represented by the cultures and societies upon which it aims at exerting authority and justiciability (the logic of rule). Instead of becoming a reflection of extant plurality (shifting from universality to pluriversality), that promise of universalism turned into a claim that has been presented as an undisputed fact. Thus, the unresolved controversy around the particular ideological groundings, the western philosophical roots of the HR discourse, will be part of the analysis in relation to the making of IHRL instruments below.

For the purpose of this text, the concept of universalism will be distinguished from that of universality, following Goodale's distinction by which

> Universality refers to the claims at the core of the modern idea of human rights: that everyone at all times is the same because they share a common humanness… Human rights universalism, by contrast, refers to the complicated discursive presence of these claims as they are acted upon within existing legal, moral and political practice (2009, p. 15).

Regarding the universal attribute of HR, we can therefore distinguish between two perspectives: concerning the universality of certain claims and prerogatives, and in relation to the underlying principles of HR as a concept protecting human dignity[158] and worth. Connected to the latter view, the universal character will be analysed in connection with the modern HR conception[159] and conceptualization, namely universalism.

As pointed out above, this piece problematizes the HR conceptualization as it is embodied in the IHRL corpus. HR are placed here within the limiting characteristic of the "ideological processes" described by Herrera Flores. He distinguishes ideological processes from cultural ones. The difference lying in the inability of the former to

[158] Ugandan academic Mahmood Mamdani and Beninese philosopher Paulin Hountondji both defend the approach by which HR are understood as a philosophical basis for the protection of human dignity.

[159] By conception it is understood here the construction of a concept which might vary with time and circumstances. It provides the rationale of the need for completing a discourse that comes out incomplete.

intervene in the hegemonic methodology, therefore, limiting alternative social action intended to influence, challenge, and change hegemonic relationships.[160]

IL is seen here as a site of politics, of power. Decolonial theory, beyond having enabled noticing the imbalance between what has counted so far and what has been rendered invisible, assists in the task of decentring; it implies reimagining and rearticulating power, change and knowledge through multiple epistemologies, ontologies and axiologies. However, in dealing with alternative epistemologies and other world-views distinct from the dominant ones (as in the case of IPs and of peripheral categories in general), one must keep in mind Grosfoguel's caveat: "the fact that one is socially located in the oppressed side of power relations does not automatically mean that he/she is epistemically thinking from a subaltern epistemic location" (2011, p. 6). Decolonial theory allows for the critical approach necessary to analyse those relevant aspects for decentring beyond a mere postcolonial critique. It more aptly accounts for the perpetuation of the colonial features in a post-independence era[161] as it happens at present in the African context.

Acknowledging Grosfoguel's caution and aware of the complexities around issues such as identity, collective representation, culture, etc., an enlargement and addition of richness can and should be advanced arising from those marginalized realities and excluded epistemologies, including the ones of IPs. Thus, thinking HR in the current global context of pluralism, multiculturalism,[162] secularism in dialogue with religion/s (both revealed and unrevealed), of globalization[163] and parochialism, requires decentring universalism. It calls however for a dialogical inclusive and transformative collaboration, to challenge the limitations of the hegemonic discourse and explore

[160] "Con esto lo que se hace es desplazar la primera tensión cultural hacia el campo de una acción social funcional a los intereses hegemónicos, pues cualquier tipo de universalismo apriorístico a lo que nos conduce es a legitimar la expansión, universalización o globalización de un particularismo" (Herrera Flores, 2005, p. 100).

[161] For a distinction between the terms neo-colonialism and post-independence see cultural-studies academic Shohat, 1992.

[162] Comaroff and Comaroff refer to the more apt term 'policultural', in which the prefix poli marks both plurality and its politicization. It refers to "an argument grounded in a cultural ontology, about the very nature of the pluri-nation". Comaroff, J. and Comaroff, J., 2012, p. 77.

[163] "Globalization can be understood as development without nation-states." Sachs, W. in Kothari, 2019, p. XII.

relational ways of being and existing in a common world, in order to transition from be-ing into we-ing.

"THE CONTINGENCY OF LAW'S GROUNDS"[164]

"The future demands thinking beyond the Greeks and eurocentrism", "a radical reconceptualization of the human rights paradigm"

(Mignolo, 2003, p. 85; 2000, p.12)

The following lines aim at reconstructing the genesis of what is comprised within the contemporary use of the term 'HR' as per its mainstream meaning.[165] In the horizon is the comparison between what the concept entails as per the dominant conceptualization[166] within the IHRL corpus, and the understanding of what it signifies from the perspectives of non-dominant world-views and epistemologies, for this proposal, those of IPs in Southern Africa.[167]

Since its inception, given the leading and deciding role played by the main European powers in the creation of IL and HR Law, as well as the marginal and subordinate position of the majority of non-Western countries and societies (including those of IPs), IL could be characterised as a hegemonic discourse, and consequently, as

[164] "The unity of the world remains diverse, multiple. But law has to have a foundation, for there is no authority in the world arising ex nihilo. The key to any possible praxis of decolonising IL thus lies here. Making clear the contingency of law's grounds." (Pahuja, 2011, p. 260).
[165] "The strange thing about legal objectivity is that it quite literally is *object-less*." (Latour, 2004, p. 35).
[166] The construction of concept (abstract meaning) that might vary with time and circumstances. Quoting Donnelly (2007): "HR are (relatively) universal at the level of the concept… Particular rights concepts, however, have multiple defensible conceptions. Any particular conception, in turn, will have many defensible implementations." It is at the level of concept, despite partial disagreement on the foundations, where the functional and 'overlapping consensus' universality lies. P. 299.
[167] The Preamble of the African Charter on Human and Peoples' rights of 1981 refers to "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights". In the same line, other voices highlight that "the communitarian and obligation-oriented cultures of East Asia generate particular Asian values that are incompatible with western, individualistic human –rights notions, and in fact generate different conceptions of justice, solidarity, and governance that 'work' as effectively as (if not better than) those found in the West." Rajagopal, 2004, p. 213.

a source of domination.[168] The contingency of law has been drawn by power imbalances. Gómez-Isa considers a civilizing mission as one of the core aspirational principles of IL (2017, p. 173).[169] Along the same lines, Elvira Pulitano has referred to traditional IL as "quintessentially Eurocentric" (Gómez-Isa, 2017, p 173). In a similar vein, Haskell asserts that:

> International law has perpetuated the colonial legacy by crystallizing the European-oriented political model of a centralized administrative state as the sole gateway to international legal personality… thereby supressing indigenous modes of organizing political life or structuring the distribution of material resources and social power. (Haskell, 2014, p. 399).

However, the erasures have been plenty, not just circumscribed to political organization structures and state's centrality, but including aspects such as customary rules and traditional justice systems, indigenous conflict resolution strategies etc.[170] The reach and daunting impact of that hegemony requires a critical interrogation to identify biases, wicked schemes and strategic positionings in disguise, as well as an analysis to help exploring alternative paths. After realizing the limits of one's own conceptual repertoire (Holbraad, in Blaser, 2013), complementary epistemological frameworks will help to overcome the bias contained in the features of the hegemonic HR conception, which is rooted in the European constructed identity: secular, anthropocentric, universal. The option suggested here is to theorize HR through IPs' worldviews. Such an approach would contribute to the incorporation into the mainstream discussions and discourse of conceptualizations grounded in IPs' own epistemologies: concerning the relationship towards unity with nature;[171] the past, present and future, the visible and the invisible; the living, undead and non-living entities; the self and the whole, etc. As well as other features favoured for example by many African traditions: duty-rights

[168] "God may have died, according to Nietszche, but at least we have international law." Douzinas, 2000, p. 9.
[169] This is in line with Douzinas consideration of HR as "the latest version of the civilising mission", "a hybrid category of liberal law and morality". In Douzinas, 2008 (accessed 14-3-2018).
[170] Despite pre-eminence of those forms are also influenced by the same power imbalances: "Articulations of cultural norms are expressions of power relations that are often limited to the dominant voices in a specific social interaction." (Nyamu, 2000, p. 11).
[171] Pointing at what Gudynas refers to as the 'biocentric turn', in Escobar, 2012.

conception,[172] non-state centric logic, individuality-community, peoples' rights, citizenship- membership (of family, clan, kinship), family as natural unit and basis of society.[173]

Therefore, in aiming at attaining cognitive, axiological and normative justice and genuine participation in global affairs and IL, IPs' have to move to the centre of the discussion and contribute to the terms of the conversation by redefining the framework where the deliberation is taking place. This is the first step for a pluri-cultural exchange grounded in an inter-epistemic communication "toward pluri-versality as a universal project" (Mignolo, 2007, p. 499).

Locating the Making, Rooting the Discourse:

"When Western speech becomes universal, its native speakers - the West – will be running the show." (Koskenniemi, 2011)

This section strives to unveil the Eurocentric foundations of the HR discourse. It has as its point of departure the solid and profuse critiques that point at Eurocentrism (western epistemology and western legal thought) as the foundational logic behind HR and the principles of justice behind it.[174] Such a Western hegemonic paradigm of knowledge is what Peruvian sociologist Anibal Quijano names 'the provincial [pretence] to universality' (Mignolo, 2007, p. 493). Realizing the different degree of influence and unequal contributions from different cultures, belief systems and traditions, evinces the hierarchical position of the various actors involved in the process.

IL professor Antony Anghie stresses the colonial origin of IL and its role in legitimizing imperialism. His analysis points at the concept of sovereignty (Westphalian

[172] "Individual rights are not absolute. … The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others." Mutua, 1995, p. 369. Duties are owned to the family and community, not only to the state.
[173] Art 18 para 1, Organization of African Unity, 1981.
[174] Anghie, Barreto, Burke, Mutua, Nussbaum, Pahuja, Pulitano, Sinha.

sovereignty)[175] as central for the bias of the discipline and the subordination of non-Western states. The proclamation of those standards as universal (European turns international) emerged from the XIX century onwards, deriving and consolidating in what he calls the 'dynamic of difference' between European culture (considered universal) and the rest. Thus, negating it to the later and therefore justifying the civilizing mission upon 'inferior' cultures, intervention and conquest that where until then justified by natural law.

The shift from doctrines of naturalism to positivism, the sovereign state becoming the central entity of power leaving aside other traditional societal formations and growing into the source of law and the subject of it upon consent, discriminates between some states which are subject of IL (the West, civilised) as opposed to those considered object of it (the rest, uncivilised). State sovereignty consolidated the state centric vision according to which the primary responsibility as duty bearer lies on the state, reinforcing the state as the source of normative framework, of enforceability, protection, accountability, provider, etc. This dichotomous understanding exempts other actors from bearing any form of responsibility (being them corporations, development actors, non-governmental organizations NGOs, communities, etc.). Furthermore, focusing mainly on the role of the state as the guarantor of rights, legitimizes and reinforces its role within a system (market, economic development, globalization, welfare state) that generates many of the crisis, violations and challenges that are paradoxically, connected to the wrongs that IHRL should right. Simultaneously, this doctrine allowed for the maintenance of the terms defined by the West in the international arena,[176] given that the only law binding to a state would be the one to which that state had consented. This differentiation would translate into economic subordination. It brought about the categorization of developed and underdeveloped states (economically considered) influenced by an understanding of development as a

[175] In the terms conceived by the West even though they were presented as neutral and universal; secular, rooted in principles of legal personality, justice, political institutions, etc.

[176] While operating at every level, "international, national; economic, political and social; private and public" page 752, Anghie continues: "International law seeks to transform the internal characteristics of societies." Anghie, 2006, p. 751.

linear path, resulting from the geo-economic reality while reinforced and sustained by the system designed by IL (Bassey, in Kothari, 2019).

A decolonial approach brings a new perspective to the analysis, one that places the accent on the different historical locations and contexts behind the making of IL, and investigates their reach. This study sees the consolidation of the dominant HR grammar that translated into the IHRL corpus from the specific context where it took place, the colonial encounter and 'colonial subtexts' (Flynn, 2016). It was that particular context of power asymmetries what marked not only the content and development of the discourse, but also its global expansion, consolidation and its later pre-eminence as it is known nowadays.

A critical genealogy of the dominant HR narrative traces its conceptual foundations back to the enlightenment, which crystallized the rationalisation of life and the world, the universalisation of reason, the individual as the centre and the rule of a secular rationale.[177] That determining theoretical background, which contributed to the process that culminated in the birth of modern IHRL in the XX century and its strengthening ever since, developed in the context of modernity. Its main defining features being liberal democracy, rationalism, individualism, secularism, industrialization and capitalism. That context, which influenced and defined the main features of the mainstream HR formulation, made them ill-suited for contexts other than Western societies (according to Ibhawoh's interpretation of Sinha's argument). Sinha identified three main elements that define the Western conception of HR: the individual as the unit of society (rather than the family),[178] rights as the basis for securing human existence (instead of duties and obligations), and lastly, legalism as the method for securing those rights (as opposed to reconciliation, education, repentance). These elements coincide with the values previously identified by Sinha as the "axiology of the international bill of HR" (Sinha, 1989). His main claim being that the central values around which HR are erected correspond to a particular Western historicity (a 'single catalogue approach') not accounting for the plurality of value systems present in other

[177] "From Theo-logy to secular Egology" Mignolo, 2007, p. 451.

[178] See Chantal Mouffe's view of 'non-individualistic conception of the individual' (Baxi, 2oo2), "la individualidad solo se construye a través de la inscripción en un conjunto de relaciones sociales… sin reducirla a mero componente de un todo orgánico." (Mouffe, 1999).

civilizations that are equally aimed at protecting human emancipation and guaranteeing the spiritual, physical existence and well-being of the person and the group. While some elements are not exclusive of the Western civilization, the main principles respond to the values that govern the social and political organization privileged in the West. There is no doubt that the world reflects a tendency towards a global cosmopolitanism with some shared models and values concerning different spheres of life; issues such as life, protection against inhuman and degrading treatment, working and living standards to a certain degree, education, are common basic concerns. However, different cultures might have a different understanding of those aspects, of how to resolve them in practice and thence, exercise them in plural and diverse ways. The following quote exemplifies this paradox:

> We assumed that this was because women did not know their rights, so we 'educated' them. But then we saw that even when women were 'educated' about the law, they still did not go to court to enforce their rights. We then assumed that was because there were 'other factors' such as fear of courts and inadequate finances. To overcome these we then helped women enforce their rights. But this did not always work either. One of the running point in our ideas was when group of WLSA members helped a woman go to court and obtain a court order declaring that all the property which she had [been] in her house was hers and that her deceased husband's family should return it to her. They did so. However subsequently, the widow took all the property and delivered it back to her husband's relatives. (Juma, 2006, p. 199).[179]

When particular qualifiers rooted in a specific tradition are translated into the articulate of HR instruments, they might not correspond with what the same or similar ideas, values and perceptions mean in different cultural setting or societal models beyond the basic commonalities that the concepts themselves enclose. This inconsistency does not refer to controversial practices that are being progressively discarded by members of the cultures where they have traditionally been part. The quandary appears when a system, claiming to be universal, opts for one model (out of

[179] Report statement about widow inheritance in Southern Africa exemplifying the complexity of strict application of HR law.

the many) preventing an alternative model which is felt as one's own from thriving. Examples of this relate to the definition of family (nuclear versus joint, extended, lineage or kinship), the understanding of life (when it starts and when does it end), equal versus hierarchical human relationships that give value to the person and relationships, an industrial economic system versus other economic models, private property versus communal uses, judicialisation versus diverse conflict resolution mechanisms, and so forth. That points toward a civilizational uniformity (Sinha, 1989), which does not correspond to the plurality of worldviews and apprehensions of reality. Once the genesis of the HR discourse is outlined, the bias and limitations of the particular ideology supporting it unveil, and the lack of inclusive and plural underpinnings is revealed.

Notwithstanding, the structure of the modern world is grounded in the epistemology of the world's capitalist economy whose intellectual and cultural scaffolding is rooted in elements such as: liberalism,[180] division between science (the truth) and the rest (the good and beautiful), longing of universality, discriminatory and excluding practices. However, the crisis of the capitalist world economy when it comes to the unfeasibility of its sustainability, comprises its epistemological foundations and knowledge structures as well as the modern world itself.[181]

After locating HR in the historical context of modernity and shedding light on the ideological features which were the backbone leading to the formulation of HR (in the sense mentioned above; IHRL), this paper will examine the conceptualization of HR themselves. Despite exploring the foundations of a normative system implies digging for its authoritative features (being them God, the human being,[182] human dignity, duty,[183] morality, etc.), this study will not delve into the philosophical and metaphysical

[180] According to Zaidi and Normand thesis regarding the foundations of HR, they "grew out of the triumph of liberalism over its two main rivals- communism and fascism." (Normand, R. and Zaidi, S., 2008).
[181] The "Euro-North American-centric modernity"; the asymmetrical world system characterised by the coloniality of power, the global or international order/European world order (defined by imperialism and coloniality), capitalism, techno-scientific epistemology, a hierarchized conception of being, Christian-centrism. (Ndlovu-Gatsheni, 2015).
[182] Maldonado-Torres' genealogy of HR and of the notion of the human as the foundation of HR, reveals a secular humanist project which led to the conception of the human which became the dominant, characterised by the following traits: secularism, individualism and racism. (Maldonado-Torres, 2017).
[183] "All rights to be deserved and preserved came from duty well done." Statement by M. Gandhi in his 'Letter to the DG of UNESCO' of 1949. Ulrich, G. in (McCall-Smith, K., Wouters, J. and Gómez-Isa, F., 2019).

foundations of HR. Paraphrasing Goodhart (2014), the focus of HR debates around their philosophical foundations, have caused more heat than light. Thus, settling that debate goes beyond the aim of this paper. The argumentation here concentrates on the study of the ideology[184] behind the content of the dominant discourse of HR, namely; those characteristics that shaped the precepts influenced by the context from which they emerged. It will also critically analyse the positioning and determining role of the actors participating in the adoption of those instruments that conform the IHRL corpus, that 'ideological-institutional complex' (Pahuja, 2011) which is IL. Those actors served as persuasive and influencing vehicles in advancing a specific discourse grounded in a particular tradition of thought and values.

The results arising from the study of the origins and roots of the theoretical construction behind the dominant HR discourse unveil the factors that gave rise to the protection of certain values over others that crystalized in the current mainstream HR narrative and its current dominance. The modus cogens whereby the European intellectual inventory and assumptions are taken as universal to the detriment of other epistemic cultures, values and traditions, responds to specific patterns of reasoning that can be transformed by the selected theories. The chosen theoretical framework where this study locates itself relates to decolonial theory and TWAIL approach. They enable unveiling the epistemic injustice behind the process of endorsing a set of normative principles under the rubric of HR whose content is loaded with an aspiration of universal validity, and an illusion of consensual global agreement and support.

Summarizing, this piece defends a thesis that locates the dominant HR ideology in western principles and values as explained above. It asserts that the hegemonic HR discourse (positivized in the IHRL) is grounded in a parochial and anthropocentric culture with a narrow understanding of the (human)-being and its relationship with other/s (beings, nature, past-future, etc.). One of the features of a western understanding of HR is universalism,[185] a consequence of HR arising as ethical, symbolic and normative

[184] Ideology is understood here as the system of ideas that is instrumental for hegemonic purposes of domination and maintenance of control. It deals with the values, terms and understandings comprehended in IHRL instruments and precepts as well as the views and perspectives of a certain epistemology. As opposed to a metaphysical approach of an ontological inquest that would put the accent on what exists, a vision of the human being.

[185] The universal as a 'hegemonic act of radical *construction'* (emphasis added). Laclau, 1990, p. 29.

guidelines and standards as in a unitary globalized world. Stemming from that particular conception[186] that lies at the basis of the creation of HR and its intrinsic universalism, some authors infer imperialism[187] as the necessary logic consequence of this claim of universal character (Huntington, 1996), or at the minimum, its instrumentalisation as an enabling discourse for empire (McMinn, 2012). As Wallerstein puts it, paradoxically, "there is nothing so ethnocentric, so particularist,[188] as the claim of universalism"[189] (Wallerstein, 2006, p. 40). This European claim of universalism is in fact, a particularism derived from European values and views that aspire to become a universalism of global validity.[190]

Thus, the ideas endorsed in HR were promoted within a framework of imperialism[191] in order to protect the status quo and maintain hegemonic power. That reveals a strategic approach consisting of advancing certain rights whereas the enforcement and respect of those same rights elsewhere to the benefit of the colonized population was not recognized.[192] Examining the dominant HR grammar from a historical perspective by looking at the strategic positioning of states contributes to unveiling the interests and preferences that propelled a specific HR view over another along the history of HR making. A critical and contextualized historical account of the

[186] "These values cannot be privileged globally if they are identified as 'ours'. Instead, they must be seen as universal in everyone's estimation; the world must 'recognize' their universality. The representational violence inherent in the appropriation of 'our' name hints at the way that the recognition does not entail actually globalising or sharing the universal values, whether or not that be a good thing. Instead, it entails 'recognition' of the rightful superiority of some values, and the maintenance of the hierarchy that places those values at the top, along with the maintenance of all the divisions and advantages that entails." Pahuja, 2011, p. 257.

[187] What has been described as 'moral imperialism' (Hernández-Truyol, 2002). Among the authors that defend that imperialistic trait of Eurocentric root bound to HR are the following ones: Shivji, Mutua, Pollis and Schwab, Burke, Douzinas, Moyn, Mbaya, 1997.

[188] "The conclusion seems to be that universality is incommensurable with any particularity yet cannot exist apart from the particular." Laclau, 1992, p. 90.

[189] "So European imperialist expansion had to be presented in terms of a universal civilizing function, of modernization, etc. As a result, the resistances of other cultures were presented not as struggles between particular identities and cultures, but as part of an all-embracing, epochal struggle between universality and particularisms- the notion of peoples without history expressing precisely their incapacity to represent the universal." Laclau, 1992, p. 90.

[190] "Any instantiated 'universal' is always particular." Pahuja, 2011, p. 256.

[191] "The essence of imperialism is the evacuation of alternative discourses on the basis of what the imperial power believes – earnestly or not- is the correct, or morally superior, or economically more advantageous set of perspectives and practices. Since HR norms do not emerge fully formed in different parts of the world… there will always be the problem of how ideas about human rights are accompanied and shaped by political, economic, and other forms of power." Goodale, 2009, p. 108.

[192] In the period of the early 50's, "cultural relativism was the language of the Western colonial powers, which resisted any attempt to extend human rights to their colonies." Burke, 2010, p. 114.

intricacy of the making of the IHRL corpus reveals a multi-faceted process located within complex political, security and economic frameworks and narratives (Jensen, 2016). For reasons closely connected to geopolitics and interests determined by the historical situation, the stance taken by country representatives shifted in time, accommodating itself to the vicissitudes and changes of the historical-political context. This will be illustrated in the following section through the study of the making of the UDHR.

Relative Universalism or "Not at All"

In preparation for the drafting of what would become the UDHR, the United Nations Educational, Scientific and Cultural Organization UNESCO conveyed a committee of philosophers to work on the philosophical underpinnings and foundational principles of HR in order to bring stronger legitimacy to the question of its universality. In addition, a survey was undertaken before the Conference of Philosophers. However, the participation was limited and unrepresentative despite its global aim, as were the responses and the background of the contributors: 45 replies came from the USA and UK only, 16 from Western Europe, three from South Africa, two from Australia, one from Canada, (accounting for 80 per cent of the total number), six from the Soviet Bloc, three from India, two from Latin America, one from China (Goodale, 2018b). The lack of agreement among the thinkers and philosophers present at the symposium evidenced the distance between the diplomatic stands in charge of the drafting of the Declaration and that of the intellectuals concerned about the topic (Goodale, 2018a).

> One of the main drafters of the Universal Declaration of Human Rights in 1948, René Cassin… knew at the time they were deferring for the sake of consensus all the difficult questions about the authority of human rights so as not to 'delve into the nature of man and of society and to confront the metaphysical controversies, notably the conflict between spiritual, rationalist, and materialist doctrines on the origins of human rights. (Hopgood, 2013, p. 188).

The quote above illustrates the shifts in positioning to come regarding the universalism/relativism discussion, starting with the preparation of a universal

document on HR in the 40s'. Agreeing on the sources to achieve consensus seemed unrealistic at that time. At this point it is useful to clarify the distinction between accepting an outcome based on the same reasons (consensus), or based on different reasons (leading to agreement). The former consolidates moral rules whereas the latter leads to legal rules. Following Donnelly (2007), it is at the level of the concept (of human dignity and the nature of justice), in spite of disagreement over the conceptualisations, where the functional and overlapping consensus enabling universality lies.

Thus, the proclaimed universality of HR was more a rhetoric label that contributed to confer validity and legitimacy to the ideological doctrine as has been previously explained. The 'institutional complex' and intentional commitment towards the HR project was propelled by the events of the World War II as well as by the optimism for a peaceful future that was vested in the HR project. Rather than a truly embracing set of values and ideas depicting the diversity and richness of the world's spectrum of cultures in truly comprehensive, plural and inclusive terms.

The question of universality can therefore be understood twofold: with regards to the content comprised in the HR conceptualization and IHRL, and concerning its applicability. In relation to the latter, it relates to who fell under the category of beneficiaries of HR "along the same axis of inclusion and exclusion that has characterized their liberal antecedents" (Kapur in Rathore and Cistelecan, 2011, p. 37): the man, the civilized/non-European colonized, women, black people, the other, the human being, etc. It determined who those subjects of the rights and liberties enlisted in the different HR legal instruments were. The focus of this analysis lies in the former; namely, the universalism of the elements that fed the content of HR as a set of values and goals of fundamental relevance as to be proclaimed essential for every human being (at least in theory). Baxi denounces that the notion of universality (understood in the sense just explained), does not merely deny "difference but also monopolizes the 'authentic' narrative voice" (Baxi, in Rathore and Cistelecan 2011, p. 61). For Hopgood, this grand narrative (corresponding to universal humanist norms) is the "ideological alibi to a global system whose governance structures sustain persistent unfairness and blatant injustice" (Hopgood 2013, p. 2). He argues that humanism resulted from the social

transformations, industrialization and scientific order (the ideology of modernity) being its main manifestations international justice, humanitarism and *HR*.

At the time of the making of the UDHR, only around 50 countries were part of the United Nations (UN). The discussions and approval of the Declaration took place at the beginning of the period of gaining independence from colonial power (only four African countries were part of the UN), and the political context of the time marked the process as well as the outcome of the drafting. By the year of its adoption in 1948 not a single state in Africa was considered a democracy. More than 30 years later, in 1981 (the year of the adoption of the African Charter), only four states (out of 38 worldwide) were consider democratic states (namely Botswana, the Gambia, Mauritius and Nigeria).[193] Once the number of independent African countries grew bigger, they played a countering role as non-aligned countries as per their contributions to the HR debate. They positioned themselves as supportive of certain rights and categories of rights that are part of the HR discourse, namely: self-determination (in defence of national sovereignty and democracy) and freedom (in opposition to racism and discrimination). During the so-called Bandung[194] era, non-Western country representatives were defendants of HR universality (at least in theory, as an instrument to advance anti-colonialism and as a tool against racism):

> The successful defence of the UDHR at Bandung by the small countries of Asia, and to a lesser extent Africa, was a remarkable achievement. It demonstrated the significant engagement many of the new states had with the concept of HR in the early phase of their achieving political independence, and the absence of any prejudice against the principles in the universal Declaration, despite the Western intellectual provenance of both its form and a considerable number of its provisions" (Burke, 2010, p.33).[195]

[193] Based on data retrieved from Roser, 2013, online source.

[194] The Bandung Conference took place in April 1955 bringing together 29 countries from Asia and Africa against colonialism and to agree on guiding principles for their cooperation as non-aligned powers. During the conference, the full support "of the fundamental principles of Human Rights as set forth in the Charter of the United Nations and took note of the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations" was declared. Bandung Conference, 24 April 1955, p. 5.

[195] In this regard "The appearance of consensus, however, did little more than paper over ideological cracks within the human rights idea. Fundamental philosophical questions about human rights were suppressed in favour of a dominant western paradigm of individual rights; practical disputes were

Recently independent African states pushed for the universality of the text of the declaration, HR and the principle of self-determination: "There was no call to preserve traditional ways of living or other ways of protecting cultural spaces, though colonialism and racism were condemned as means of cultural suppression" (Rajagopal, 2004, p.76). Those priorities and views were stated in many debates during the period comprising the transition towards independence: at the Conferences of African Independent States (Accra 1958 and Addis Ababa 1960), during the Monrovia meeting for Foreign Ministers (1959), in the United Nations General Assembly resolution 1514 'Declaration on the granting of independence to colonial countries and peoples' (1960), during the African Conference on the Rule of Law (Lagos 1961). During that meeting, former Senegalese president Abdoulaye Wade considered that certain ideas and institutions given by the West had become "our common property" (International Commission of Jurists, 1961).

However, this position will change two decades later. The agreement around the universality of HR would fluctuate from the Tehran conference[196] onwards (May 1968). Historical analysis evidences a shift of priorities that peaked at the Tehran conference: "from the Western-inflected concept of individual human rights exemplified in the 1948 Universal Declaration to a model that emphasized economic development and the collective rights of the nation" (Burke, 2008, p.276). The importance of individual rights,[197] national sovereignty or self-determination, was asserted until then against the background of the threat of communism (in the case of western countries) and colonialism (by non-western countries that defended racial equality). States' territorial integrity, inviolability of borders and non-intervention were given preference by recently independent countries, due to the end of the territorial colonial domination and the consolidation of self-governance and sovereignty (not emancipation). Rights

resolved quickly and expediently on the basis of U.S. power and, when necessary, the vote." (Normand and Zaidi, 2008, p.177).

[196] The Tehran conference was organized by the UN General Assembly in order to "promote further the principles contained in the UDHR, to develop and guarantee political, civil, economic, social and cultural rights and to end all discrimination and denial of human rights and fundamental freedoms." (United Nations 1968) Out of the 84 countries present, one fifth of the representatives attending this HR conference were from African countries (17 countries, equalling 20 per cent), in comparison to the 7 per cent of the 58 members voting the UDHR 20 years earlier (four countries). According to Burke (2008), more than two-thirds of the countries represented in the Conference were undemocratic.

[197] Quoting Ibhawoh: "the modern concept of human rights stems from the contemporary articulation of legal entitlement, which individuals hold in relation to the state" in Tiyambe Zeleza and McConnaughay ed 2004, p. 23.

were strategically prioritized by all parties based on the historical context and worldwide power struggles in a period between the colonial era and the rise of post-colonial dictatorship in many independent African countries. The convergence and prominent agreement among those powers was therefore of a negative nature (Eckel, 2014), namely as an opposition to western ideology and colonialism ("a strategy of anticolonial legitimation").[198]

Following Jensen's analysis (2016), we can interpret the support of European countries in the process leading to the adoption of the UDHR as a strategic way of solving the issues of the post-Cold War context. Not that much based on a firm conviction that those rights and principles enshrined should be extended to those in the Global South, which were still at that time under colonial rule. Paradoxically, "the Western countries were calling for adherence to international standards and binding instruments to which they themselves had not committed" (Jensen 2016, p. 232). This type of timeserving pushes were part of the HR and IL making politics and diplomacy. They were used by the states to achieve their own strategic aims and to justify their own foreign policies, domestic shortcomings, and to denounce other countries' practices and records (within their own borders and abroad) in order to gain legitimacy and support. Several factors guided the lack of interest of Western powers in defending the universality of rights at the time (understood as applicable to everyone), namely, reacting against the self-determination claims of peoples under colonial rule that endangered their colonial enterprise as well as racial discrimination[199] concerns voiced by non-western countries that defended universality. Those were the main reasons for universality not being a priority in the political agendas of western countries, which prioritized individual rights such as freedom of thought, conscience, religion and belief.

That same differentiation which hampered universality reinforced by the reluctances to worldwide applicability of the same rights for all peoples, lies behind the

[198] "The Afro-Asian group's shaping of the UN human rights agenda cannot be considered as a series of steps developing a universal rights regime. Rather, their human rights policies were part of a symbolic struggle to counter the dominance of First World nations in the international sphere." Eckel, 2014, p. 129.
[199] The Convention on the Elimination of All Forms of Racial Discrimination was only approved in 1965.

American Anthropological Association (AAA) position at that time, in a famous statement submitted to the United Nations Commission of HR (HRC):

> Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole. … Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life. … The rights of Man in the XXth century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. … Only when a statement of the right of men to live in terms of their own traditions is incorporated into the proposed Declaration, then, can the next step of defining the rights and duties of human groups as regards each other be set upon the firm foundation of the present-day scientific knowledge of Man. (AAA, 1947, p. 542).

This excerpt evidences the view of the AAA at the time in two ways: firstly, the standards contained in the UDHR were rooted in a specific particular tradition (western). Secondly, the values enshrined in a declaration aimed at having global validity and universal applicability could not emerge from a single culture. However, with the adoption by the AAA membership of the Declaration on Anthropology and Human Rights Committee for Human Rights in June 1999, AAA's position shifted to embracing the mainstream HR rhetoric.[200] This presents us with the challenge posed by Wallerstein of particularizing our universals and universalizing our particulars.

In addition to the situation described above and exemplifying the feeble support and value conferred to HR, the use of its terminology was not a prominent one in the claims among activists, leaders from African countries,[201] nor by anti-colonial figures. Besides, when it was present it did not always had the meaning conferred to in the IHRL

[200] Despite this apparent turnaround, some authors claim that the issues and positioning of anthropologist did not vary, being culture the focus of concern and the controversies extent (Engle, 2001).

[201] Even though, as Burke acknowledges, some colonial leaders and nationalist manifestos showed support to HR in the 50s'. (Burke, 2006).

corpus. Several authors highlight a shift in the official support of HR from countries formerly under colonial rule in the late 60s' and 70's:

> The cultural relativist turn[202] was not merely an expression of authoritarianism. In addition, it was a reaction to the new HR interventionism of Western actors, both governments and NGOs, rapidly expanding in the 1970s and primarily directed against Third World nations. (Eckel, 2014, p. 122).

Universality was now imperialist. Western countries strongly advocated for HR in order to pressure the so-called Third World countries for their poor records. As for non-Western countries, cultural differences, local cultural practices and traditions, customs, ancient laws and practices were put forward as the basis for refusing to concede 'universality' to HR. Within the UN, the division between blocs was felt not only in terms of the voting majority (which was still dominated by western countries despite the influx of newly independent states). The challenge/threat to western hegemony and the divide between colonial powers and the rest was manifest in the discourse of several influencing figures, which referred to the circumstances of the time in the following terms: "backward countries in revolt",[203] "dark skinned people against the white",[204] "the antithesis between the developed and the less developed".[205] The increasing weight of non-western powers was evident by the time the two Covenants developing further the rights enshrined in the declaration were adopted in the late 60's[206] (International Covenant on Civil and Political Rights ICCPR and International Covenant

[202] However, cultural relativistic views in relation to HR were first declared by Western democracies in the terms explained above.

[203] John Humphrey (Canada), first Director of the United Nations Human Rights Division, he had a significant role in drafting the UDHR. In Burke, 2008, p. 279.

[204] Eleanor Roosevelt (USA), US delegate to the UNGA (1946-1952) and first chair of the HRC (1947-1951). She played an important role in drafting the UDHR. Burke, 2008, p. 279.

[205] Charles Malik (Lebanon), Lebanese representative to the UN, president of the UN Economic and Social Council ECOSOC, second chair of the HRC. He played a crucial role in drafting the UN UDHR. Burke, 2008, p. 279.

[206] Quoting Burke's visual description: "Structurally, the Commission on Human Rights was no longer tilted toward the West, with an expansion and redistribution of seats to Asia and Africa in 1967. As the Western diplomats looked up to the newly computerized voting boards of the General Assembly, they saw a graphic representation of their minority status. If they looked down at the agenda of human rights items, dominated by economic development, apartheid, and racism, the effects of the UN's postcolonial transformation were unmistakable." Burke, 2008, p. 282.

on Economic, Social and Cultural Rights ICESCR)[207]. Moyn reads this lapse of time as illustrative of the "fiction of ideological consensus about basic values could no longer be maintained" (2012, p. 79). Furthermore, authoritarian and undemocratic regimes pushed for a decrease of the relevance of individual rights and democracy, which according to Rajagopal "has replaced modernization as the discourse of social transformation in the Third World" (2004, p. 160). A few years later, the new grammar would be development rather than democracy, veiled under the HR rhetoric. A relativistic approach dominated the debates from then on during the 80's and 90's until the Vienna Conference in 1993 where universality was strongly endorsed.[208]

Uprooting the Discourse, Dislocating the Making

The previous section described the complex process and ideological turns that culminated with the conceptualization of HR in their contemporary sense, and their positivisation in the IHRL corpus. The account focusing on the agency of delegates and representatives of states who defined and shaped debates and discourses that crystalized in a particular body of rights is considered as the diplomatic forefront of the discussion and of the consolidation of the theoretical debate. The positions and ideological priorities supported by the different actors and factions were deeply connected to the political context of the times, as has been showed above. The different stances varied along the process of consolidation of the mainstream discourse, in correlation with historical events, shifts in power and interests, illustrating the motivations (political and other) behind state representatives' articulations (Kang, 2009). Rights were strategically prioritized based on the historical context and worldwide power struggles.

Having stated the importance of the historical circumstances and how the context influenced the inception of the dominant HR grammar, two related aspects

[207] In relation to the content of those instruments, "What Western states sought to achieve was moral leadership through rhetorical support for economic and social rights, while at the same time ensuring that such rights did not bring any obligations". Kirkup, A. and Evans, T. 2009, p. 232.

[208] "The only unequivocal 'fact' that emerges from this ambivalent and diffuse historical picture is that human rights emerged in the 1940s from earlier incarnations as a *powerful signifier* which, because of its very *conceptual openness* and *semantic indeterminacy*, has engaged people's imagination all through to the 1970s and on to the contemporary period." (Emphasis added). Hoffmann, F. & Assy, B. forthcoming.

emerging from that observation need further attention. Firstly, the element of agency of the actors involved in the process. As mentioned above, so far, the focus lied on the diplomatic process and their perspectives around HR. Moyn refers to "the global diplomatic elite, often schooled in Western locales, who helped tinker with the declaration at a moment of symbolic unity." (2012, p. 66). Secondly, the representation and legitimacy of those actors in relation to the more abstract debate around the values of a society captured in the viewpoint advanced at diplomatic discussions, is connected to elements such as power, identity, interests, ideas[209] and cultural orientations influencing different choices.

A more detailed explanation of the transformation and unfolding of the theoretical debate around the concept of HR and its conceptualisation needs to be developed from a different perspective than the mainstream one referred to so far. The alternative proposal suggested here refers to the contributions arising from African philosophies as well as from the rationale of IPs in the African continent. Such a reflection will help illustrate the limited cross-fertilization that fed the Eurocentric conceptualisation of HR despite its aspiration to universalism. At the same time, that undertaking will set the grounds for the proposal advanced here which propounds an inter-epistemic conversation inclusive of other visions of 'rights conceptualizations' and a cross-paradigmatic approach that incorporates IPs' epistemologies in order to enlarge the dominant discourse and its current normative content. Such an attempt strives at redressing epistemic injustices of the past and enabling sustainability in the future. Both have been hindered so far in part due to the prevalence of the western imaginary in the present dominant HR discourse.

The dynamics and structures that prevent non-dominant conceptions, rationalities, perspectives, epistemologies and traditions, to permeate the hegemonic positioning,[210] have been conceptualized as coloniality; the aftermath of colonialism

[209] When analysing the politics of development, Lavers' political settlements framework (PSF) introduces the notion of ideas and how ideas, values and beliefs, shape policy choices and political settlements. He claims that ideational processes also shape interests, power and institutions (main elements of Khan's PSF), as well as actors and legitimacy. (Lavers, 2018).

[210] "La concepción "occidental" o el "eurocentrismo" es un componente cultural cuyo sustrato epistemológico ha pretendido universalizar y naturalizar la concepción del mundo a partir del marco cognitivo, valorativo y normativo de una particular tradición cultural" (Garzón López, 2013, p. 307) This

(Quijano, Ndlovu-Gatsheni). Its outcomes being: "long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, inter-subjectivity relations, and knowledge production well beyond the strict limits of colonial administrations" (Maldonado-Torres, 2007, p. 243). In reaction to the continuation of patterns of domination and oppression once colonial territories started achieving independence, the decolonial project emerged as a project of liberation from colonialism (according to Dussel) and of emancipation from modernity (Maldonado-Torres) to enable a dialogue between different rationalities and locus of enunciation (world-views conceptualization). It aimed at recovering what had been rendered invisible.

Inclusion of Alter-*natives* through Decolonial Theory

Having revealed that the claim of universalism results from specific predicaments grounded in a particular thinking, calls for reworking the process by which a particular conceptualization is achieved, in an inclusive and dialogical way. Such is the aim of a decolonial approach.

Decolonial thought is rooted in the ideas present already in authors such as Fausto Reinaga and Silvia Rivera Cusicanqui in Latin America. As a concept, it has been coined and elaborated primarily by authors such as Castro Gómez, Dussel, Grosfoguel, Maldonado-Torres, Mignolo, Quijano and Walsh. Following Mignolo's definition:

> De-coloniality is a planetary critical consciousness that emerged and unfolded, precisely out of the limits of abstract universal of its current manifestations and out of the dangers that, in the future, a 'new' abstract universal will attempt to replace the existing ones; or that the existing ones will renew themselves as 'new'. (Mignolo, 2007, p. 500).

quote from Garzón-López connects with post-structuralist thesis of the role of power in the creation of knowledge and discourse theory (Foucault).

This critical approach to the universal, to HR, is here in dialogue with TWAIL[211] theory and Eurocentric Visions of International Law (EVIL) in order "to unpack and deconstruct the colonial legacies of IL and engage in efforts to decolonise the lived realities of the peoples of the Global South" (Natarajan et al., 2016). Despite some authors argue that TWAIL lacks a revolutionary focus,[212] too accommodating of Western liberal theory, it does offer valid and important elements for change and reform, among other aspects, by shifting attention from state as the centre of IL towards individuals and social movements, therefore redefining "law in radically pluralistic terms". (Rajagopal, 2004, p. 400).

Both decolonial theory and TWAIL emphasize the importance of context and global history (not just from a western European perspective), in order to understand the defining features of the development of IL, which for decolonial thought stem from coloniality and for TWAILers reside in eurocentrism. Other shared characteristic are their emphasis on equality and equal dignity, caution towards assertions of universality that have often masked domination, and representation of all voices.[213]

In a broad sense, TWAIL theory is critical of Eurocentric international legal regimes. However, its methodological approach focuses on global historicisation (Mickelson, 1998) rather than in the West, therefore, bringing the 'third world' to the centre. Okafor stresses the following as the main defining elements of TWAIL analysis: insistence on history, continuity, centring the Third World, resisting global hegemony, demanding increased global equality, and unmasking the hand of power in the construction of knowledge.[214] These elements situate this research within the scope of this approach.

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[211] This approach includes authors like Antony Anghie (colonial origins of IL), Upenda Baxi, B.S. Chimni and James Thuo Gathii.

[212] "The argumentative logic of TWAIL ultimately operates according to the very conservative analytical framework it sets out to transcend." Haskell, 2014, p. 385. What would be alternative structures and logic to overcome this claim?

[213] Karin Mickelson (1998) defines TWAIL at the intersection of two discourses: traditional IL and legal scholarship, and the discourse of decolonization. Kenyan-American Law professor Makau Mutua defines TWAIL as the "dialectic of opposition to international law" understood as a discourse of domination whose universalization was "essential to the imperial expansion" (Mutua, Anghie, 2000).

[214] "TWAIL scholars (or "TWAILers") are solidly united by a *shared ethical commitment* to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order. They accomplish this

TWAIL theory is a response against the unjust global order and the hegemony of the West legal, political, economical. The changes brought about by the wave of independence of states in the second half of the twentieth century consolidated among others the principle of non-interference in sovereign states. However, despite non-intervention was accepted in theory, the dynamics of powerful states continued as they had operated previously. What shifted was the terms used as the justification of those interventions. As Wallerstein puts it:

> The justification of Christian evangelization was no longer available to legitimate imperial control, nor was that of the religiously more neutral concept of the civilizing mission of colonial powers. The rhetorical language now shifted to a concept that came to have new meaning and strength in this postcolonial era: human rights. (Wallerstein, 2006, p. 12).

The shift that took place, displacing religion as foundational of a moral order was in part a consequence of the consolidation of scientific and quasi-scientific knowledge. In this context, and following Fichte's thesis, philosophy appeared to enable and 'rescue utopian hope' from natural sciences. The moral justification to legitimize interventions shifted from theological and natural law grounds to HR and democracy.

> Democratization has supplanted modernization as the discourse of social transformation in the Third World and, therefore, as the driving ideology behind IL as the law that governs the relations between the West and the Third World, and provides a principal explanation for its expansion through institutionalization. (Rajagopal, 2004, p. 135).

NGOs and INGOs have joined Western governments in their role as promoters of democracy and HR.

In addition to the secularization trait, Maldonado-Torres (2017), in his analysis on the coloniality of HR, locates a crucial factor in the way the notion of the human is understood. Despite he recognizes the value of the UDHR when it came to the

through a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case." (Okafor, 2005, p. 176).

recognition of the human, he also acknowledges "the effort made in European countries to find a place for man involved the creation of a *new entity* separate from God and nature or animals" (Maldonado-Torres, 2017, para. 16). However, this conceptualization of the man still enabled in his view, the categorization based on hierarchical ontological differences. Thus, tinged with one of the basic characteristics of coloniality: the ontological difference (which he defines in terms of damnation following Fanon).

Nevertheless, consensus around HR remains an open to question. Supporting it does no longer come from undisputed knowledge. On the contrary, at the most it is grounded in speculative knowledge (rather than in scientific universalism), therefore non-falsifiable and consequently contestable, lacking authoritativeness and irrefutability. That is where we are situated nowadays in the debate around the validity and universalism of HR. Perhaps the foundations of what we can refer to as intuitions in the realm of the good life and justice, will find theoretical basis in the future by including types of knowledge which are rejected and casted out currently for their lack of scientificity, or by *better science* in the future (Van Binsbergen, 2008). In any case, sceptical and critical voices concerned about the lack of pluriversality might cling to HR as "the most we can hope for," (Ignatieff et al. 2001, p. 173) even if that justification is just a temporary one.

Awareness of the justifying elements and reasoning that helped legitimating certain imperial projects in the past allows one to examine the development of IHRL corpus through critical lenses that seek to unveil power, interest and ideas as paramount players within the HR discourse making and the knowledge paradigms it contains. This approach lies within a broad goal of ideational change and epistemic transformation.[215]

[215] It is in line with efforts of many authors aimed at addressing the gap of "carefully unpacking and resisting the sophisticated and complex processes of denial and mythmaking that have enabled this deceptive posture of innocence [of many global powers] to be maintained. This, of course, includes unpacking the myth of newness that grounds the current agitations for international law reform by certain great powers. This is one way in which room for international social (and thus legal) change can be created and enlarged." (Okafor, 2005, p. 190).

CONCLUSION: THE SIGNIFICANCE OF HUMAN RIGHTS

What are HR to assert their universalism? Many answers have been advanced from various disciplines and areas of study. Are they ideals? Axiological decisions (Ramose), moral claims, legalized moral norms, political demands,[216] the last utopia (Moyn), a myth of liberal democracy (Mutua), cultural capital (Hopgood), an idolatry, the "major article of faith of a secular culture" (Ignatieff et al 2001, p. 320), a minimum accepted everywhere, a strategic epistemology (Niezen), an instrument of emancipation or a mechanism of domination (Beitz), "the latest version of the civilising mission" (Douzinas), an empty vessel (Skinner), a site of power (Kapur, in Rathore and Cistelecan 2011, p. 49). Whatever their definition and contestation around them, they are still playing a major role in ordering the world and the lives of people/s.

The argument asserted along these pages is not antagonistic towards HR. The universalism of HR is certainly questioned, not their universal scope of application but rather their current mainstream conceptualization. The emergence of HR can be located in the context of eurocentrism and the western hegemonic paradigm of knowledge with the following features: rationalism, secularism, anthropocentrism, and universalism. HR are thus seen as a construct stemming from a specific ideology, that of the Western modern worldview. Consequently, the western HR conception was characterised by precedence of rights versus duties, of the individual versus the collective or communal, and legalism versus reconciliation. This specific HR conceptualization, this particularism, was turned into a universal with an aspiration of global validity. However, portraying HR as universal entails an inherent hierachisation that leaves out the rest (other particular conceptualizations) and denies pluriversalism. This hierachisation justifies critiques of imperialism given that by erasing alternative discourses, those at the margins, it allows for the maintenance of the status quo, the hegemonic power and hence the dominant discourse itself. The dominance of the current hegemonic HR discourse consolidated

[216] "As political claims, human rights are socially constructed; their meaning varies in different contexts and is profoundly shaped by the social forms of power they confront. Their validity is thus and intersubjective phenomenon rather than an objective fact that can be evaluated independently of what people actually think and do." in Goodale, 2014, p. 38.

across changes in ideological positioning and shifting support. This fluctuation responded to strategic interests and priorities connected to the political circumstances and historical context of the time. As a result, the hegemonic discourse of IHRL became a source of domination positioning itself as a universal grammar, denying difference and monopolizing the narrative voice enclosed within. However, that background casts doubts on its universalism that could be seen as opportunistic and rhetoric.

In an interconnected and fluid era like the present one and given the inherent incompleteness of every one culture, dialogue is unavoidable and indispensable in order to rearticulate power, change and enable knowledge to feed the Eurocentric conceptualization presented above. Intercultural philosophy and critical legal theory can assist in unfolding and fulfilling such a dialogue of many (a polylogue), transcending a mere harmonization of different normative traditions and delving into the spaces where certainties blur. Firstly, by identifying factors that can enable the exchange between asymmetric epistemologies (a dialogue of many) in order to expand the horizons and reconstruct the flawed current paradigm by building on alternatives to compose valid and solid solutions. To this end, the next step would be to advance concrete formulations stemming from peripheral knowledge(s), subaltern legalities, counter-hegemonic narratives and alternative universes (towards the pluriverse).[217] Such a critical exploration would focus on alter-*native* worldviews, those of African IPs' epistemologies, their systemic formulations of knowledge, models of societal organization, justice and value systems: a situated knowledge with "extensible" potential. Those elements would inspire the decolonized HR alternative and enrich with ex-centric content the HR construct in an attempt to render epistemological justice and valuable inputs to the dominant IHRL order and HR discourse.

Unveiling the epistemological roots of the HR grammar turned hegemonic, the situatedness of the knowledge it encompasses, its particularism, parochialism and purposive choice as that of any given system of legal rules has been the purpose of this text. However, the enquiry can go further. The same logic of domination that besets the

[217] "A world where many worlds fit" ideal of the Zapatistas.

current HR narrative imbues the development practice and praxis[218] through the centrality of rights (with its neo-liberal twist). Thus, the implications of the critique applied to HR could extend to development cooperation as far as it is connected with the expansion of the mainstream HR grammar as its conceptual framework (depoliticised and ideologically neutral), in disregard of alternative basis for advancing and grounding its goals. The programs and projects of development organizations revolve around and build on HR dominant paradigm and approaches, and it has been the NGOs that set themselves up to sustain HR as their main concern in response to the inaction on the side of governments. They became the preferred channel to make up for governments' shortfalls and absences and found a moral justification to legitimize their interventions in defence of democracy[219] and HR.[220] Moreover, the concept of development has become a cornerstone supporting the edifice of contemporary IL (Pahuja, 2011).

Therefore, a practical application of the argumentation presented here would incorporate development interventions. Analysing the 'developmentalisation of HR'[221] would contribute further to this attempt to reconstruct HR through the examination of the role of western development actors[222] in legitimizing and consolidating specific

[218] The relationship between development and assistance programs and human rights has been devised, systematized and operationalized through the so-called human rights based approach/es (HRBA) to development cooperation and programming. HRBA was agreed as a guiding principle by UN agencies in 2003 and ever since (UNSDG Human Rights Working Group, 2003). HRBA is being applied by many development actors rather than traditional poverty oriented or needs-based approaches.

[219] "A discourse of democracy- interpreted mostly in human rights term- has attempted to constitute itself as the 'approved' discourse of liberation and resistance." Rajagopal, 2004, p. 137.

[220] "Intervention is in practice a right appropriated by the strong. But it is a right difficult to legitimate, and is therefore always subject to political and moral challenge. The intervenors, when challenged, always resort to a moral justification- natural law and Christianity in the sixteenth century, the civilizing mission in the nineteenth century, and human rights and democracy in the late twentieth and twenty-first centuries." Wallerstein, 2006, p. 27.

[221] "By grounding the planning for development in human rights, an attempt is being made now to make development into a legal project. The motive for this move to escape ideology, and ground development normatively, comes from two sources" legitimacy crisis, [a] "a belief in law as a neutral, trans-ideological, meta-cultural terrain that is beyond contestation. By grounding development in such (an international) law of human rights, the development profession is hoping that the normative basis of the discourse will decrease contestation over its interventions." Rajagopal, 2004, p. 228.

[222] This proposal depicts western development actors as "missionaries of Themis" (Themis was the goddess of Justice in ancient Greek culture who first instructed humankind in the primal laws of justice and morality). The hypothesis being that they operate neglecting their role as agents of social transformation and of radical structural change. The civilizing mission endeavour of earlier religious missionaries is somehow continued nowadays by the work of development actors in their HR enterprise. Other authors have referred to them as the "ideological foot soldiers" of civilization (Shivji, 2006), "saviours" (Mutua, 2001).

justice and development discourses when implementing donor-assistance interventions. Development actors are catalyst of ideas connected to epistemic communities; agents that bring about ideological impact, contribute to shaping beliefs, shift discourses legitimizing actions and policies and reinforce specific ideologies.[223] The focus on development actors such as NGOs would hence lie in the ascertainment of the role they play within the international scene, including their influence in political[224] and domestic legal processes (as maintained by TWAIL scholarship). While supporting beneficiaries in their struggles, development actors and assistance organizations act as vehicles of power, ideas and values, and consequently, their influence might go beyond the measurable goals aimed with the projects they implement. The proliferation of those type of organizations during the period since the adoption of the UDHR onwards, is significant and revealing of the weight and influence they have attained. Furthermore, including development actors in the picture would help to overcome the limitations that arise from placing the focus solely on states as players within the legal international arena and policymaking when it comes to tackling HR shortcomings. It is a matter of coherence and of epistemic justice to reveal the way that influence takes place and the scope of its effects by determining how and to what extent, the dominant HR ideology and its epistemological premises are reinforced not least by the development enterprise.

Elucidating these unanswered questions as a way forward will add to the quest for transforming and des-absolutizing HR and their contested universalism to make them suitable for the challenges ahead.

[223] "Part of our 'unlearning' project is to articulate that ideological formation… into the *object* of investigation" (italics in the original). Spivak, 2001, p. 199.

[224] "International law must decentre itself from the unitary conception of the political sphere on which it is based, which takes the state or the individual as the principal political actor." Rajagopal, 2004, p. 236.

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