

The Right to Development at a Crossroad: “Aggressive Development” or “A World where Many Worlds fit”?

El derecho al desarrollo en la encrucijada:
¿“Mal desarrollo” o “Un mundo donde quepan muchos mundos”?

CECILIA GEBRUERS¹

Abstract: The article engages with the discussions around the right to development, with a special focus on the ongoing process of drafting a legally-binding instrument on the right to development that are currently centered within the United Nations framework in the Inter-Governmental Working Group on the Right to Development. The paper explains the reasons why the human rights framework of the right to development must account for and promote existing protections and rights for Indigenous and Afro-descendant women and their communities. The first section highlights the relevant role indigenous women’s movements have in the advancement of human rights law and the importance of an intersectional approach on the right to development. The second section develops the international human rights legal framework that cannot be disregarded from a legally binding instrument on the right to

¹ Postdoctoral fellow at the Argentinian National Council for Scientific and Technical Research (CONICET) based at the Interdisciplinary Institute for Advanced Social Studies of the University of San Martin (IDAES-UNSAM) and Adjunct Professor at the Human Rights Clinic of the Law School of Torcuato Di Tella University.

development. The third section applies the right to development in line with Indigenous and Afro-descendant women and Peoples through the notion of “Proyectos del Buen Vivir” of the Latin American region and in more detail through an example based in Colombia. The fourth and last section, as a mode of conclusion, provides recommendations for the furtherance of Indigenous and Afro-descendant women collective and individual rights in a development context.

Keywords: Right to Development, Intersectionality, Buen Vivir, Indigenous Peoples, Afro-descendant Women

Resumen: El artículo se inserta en las actuales discusiones en torno al derecho al desarrollo, prestando especial atención al proceso de elaboración de tratado vinculante sobre el derecho al desarrollo que lleva adelante el Grupo de trabajo sobre el Derecho al Desarrollo en el marco de Naciones Unidas. El artículo desarrolla los argumentos por los cuales el marco de derechos humanos del derecho al desarrollo debe dar cuenta de y promover las protecciones y derechos de mujeres indígenas y afrodescendientes y sus comunidades. La primera sección resalta el lugar relevante que las mujeres indígenas tienen para lograr el avance del derecho internacional de los derechos humanos y la importancia de un enfoque interseccional en el derecho al desarrollo. La segunda sección desarrolla el marco de derechos humanos que no debe ser dejado de lado por el tratado vinculante sobre derecho al desarrollo. La tercera sección muestra la aplicación del derecho al desarrollo en línea con pueblos indígenas y afrodescendientes a partir de la noción de Proyectos del Buen Vivir de la región latinoamericana, tomando como ejemplo casos de comunidades de Colombia. La cuarta y última sección, a modo de conclusión, brinda recomendaciones para el avance de los derechos colectivos e individuales de mujeres indígenas y afrodescendientes en contextos de desarrollo.

Palabras clave: derecho al desarrollo, interseccionalidad, Buen Vivir, indígenas, afrodescendientes, mujeres

Recibido: 18.1.2022 Aceptado: 22.6.2022

Summary

1. Introduction

2. International Human Rights Law Framework on Afro-descendant and Indigenous Women's Collective and Individual Rights relevant to the Right to Development

3. Self-Determined Development in Practice: *Buen Vivir* in the Communities of Indigenous and Afro-descendant People in Colombia

4. Conclusion

1. Introduction

Intersectionality, as a theoretical tool for the study of legal phenomena, promises a shift from conceiving different forms of discrimination that isolate the multiple, co-determined forms of discrimination, to an approach that addresses this co-determination, including the tension between individual rights and collective rights, and reaffirms inter-collective identities in their complexity. The notion of intersectionality is usually linked to the work of Kimberly Crenshaw and her two groundbreaking articles “Demarginalizing the Intersection of Race and Sex” (Crenshaw, 1989) and “Mapping the Margins” (Crenshaw, 1991). In them, the author uses the metaphor of intersecting roads to

describe the way racial and gender discrimination impact each other. According to Crenshaw, the idea that intersectionality crystalizes is that a “focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination” (Crenshaw, 1989, p. 140). Intersectionality in this sense, reveals what remains hidden when gender and race are conceptualized under separate frames.

A grounded notion of intersectionality applied in the human rights field challenges the unidimensional lens existing in the human rights analytical framework—in its international instruments as well as judicial decisions—and also the political liberalism in which the human rights system is rooted. Since the early 2000s different human rights instruments have increasingly addressed the importance of incorporating an intersectional perspective in human rights law through General Comments, Recommendations, Reporting Guidelines, etc.² However, when the right to development’s scope and content is studied by the human rights bodies, a western notion of development, oriented towards industrialization and male centered, predominates. Taking as an example the draft of the Convention on the Right to Development by the Working Group on the Right to Development, we observe that it includes a

² The first instrument that incorporated an intersectional approach was the General Recommendation 25 of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/55/18, annex V at 152 (2000); later, it was also included in the work of the CEDAW Committee through General Recommendation 28 CEDAW/C/2010/47/GC.2, October 19th, 2010, para. 18. For an extensive explanation of the development of intersectionality in human rights law see Patricia Hill Collins & Sirma Bilge, *Intersectionality* (John Wiley & Sons) (2016); Pok Yin S. Chow, “Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence”, 16(3) HUMAN RIGHTS LAW REVIEW 453-481 (2016); Johanna E. Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations”, 52 *Emory L.J.* 71 (2003).

reference to gender equality in Article 16, and to Indigenous and Tribal Peoples in Article 17. Still, the gender perspective is limited to an obligation to ensure full and equal enjoyment of the right to development; while the recognition of indigenous peoples' rights is to freely pursue their economic, social and cultural development, positioning the Convention within a western development paradigm. Other human rights instruments have little references to gender such as the latest report of the Special Rapporteur on the Right to Development under the subsection "other forms of inequality" — distinguishing them from those that are not income inequality— in which he addresses those based on sex discrimination (Alfarargi, 2018). This lack of gender analysis in the work of the high-level task force on the implementation of the right to development has been observed by Fareda Banda. She notes that while the report cited the specific impact of food crises in poor families, it failed to analyze the role of women in food sourcing, preparation, etc. (Banda, 2013, p. 156).

The paper is a call to act in accordance with the slogan "We want a world where many worlds fit" (*Queremos un mundo donde quepan muchos mundos*) (Escobar, 2018, p. 16). It argues that a binding treaty on the right to development must be grounded in an intersectional account of development. Therefore, it must reflect the needs that arise from concrete communities and subject formations instead of those of an abstract subject that would receive the benefits of an undemocratic industrialized business-oriented development. The human rights framework for conceiving the right to development that this treaty will enable must be receptive to the specificities that emerge from different ways of relating with the nature and the environment, such as those that arise from alternative forms of development that here are illustrated through the case of "Proyectos del Buen Vivir".

2. International Human Rights Law Framework on Afro-descendant and Indigenous Women's Collective and Individual Rights relevant to the Right to Development

a. The Right to Development and Afro-descendant and Indigenous rights

For the sake of development, countries have often invested in the exploitation of so-called natural resources. Since many of the resources are located in Indigenous people's territories, development has taken the shape of dispossession and destruction of their livelihoods. This way of proceeding is reflected in the term coined by Cathal Doyle and Jeremie Gilbert "aggressive development" as opposed to "self-determined development" (Doyle and Gilbert, 2009). The Special Rapporteur of the UN Working Group on Indigenous Populations peoples Erica-Irene Daes further explains the implications of this approach to development,

The legacy of colonialism is probably most acute in the area of expropriation of Indigenous lands, territories and resources for national economic and development interests. In every part of the globe, Indigenous peoples are being impeded from proceedings with their own forms of development consistent with their own values, perspectives and interests (Daes, 1997, p. 49).

Former UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, also noted the negative impact that development projects have for Indigenous communities: "the concerns of Indigenous peoples who are seldom consulted on the matter, take a back seat to an overriding 'national interest', or to market-driven business objectives aimed at developing new economic activities, and maximizing productivity and profits" (Stavenhagen, 2004, para. 8.5). This trend persisted in the 2009 report of

UN Special Rapporteur James Anaya before the Human Rights Council, which had a focus on “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development” (Anaya, 2009). Moreover, the International Labour Organization (ILO) noticed that most of the complaints they receive are due to the overriding of their right in relation to consultation and participation in development projects, especially those coming from the extractive industry (Doyle and Gilbert, 2009, p. 228). In the case of Colombia, for example, currently two out of seven complaints submitted following a Representation under article 24 of the ILO Constitution are based on alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).³

b. Core human rights obligations that prevail when Afro-descendant and Indigenous women’s rights are confronted with aggressive development

The human rights framework provides valuable norms that protect Indigenous Peoples from aggressive development. The International Labour Organization Convention 169 (ILO 169) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognize the right to free, prior, and informed consent as a requirement in development projects in Article 3 and Article 9 respectively. Article 27 of the Covenant on Civil and Political Rights (ICCPR) protects minorities’ rights to their own culture. Furthermore, both the UNDRIP and ILO 169 recognize the right to self-determination.

³ ‘Article 24’, accessed 23 June 2022, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50010:0::NO::P50010_ARTICLE_NO,P50010_DISPLAY_BY,P50010_COUNTRY_ID:24,2,102595

Depending on whether the State follows monism or dualism⁴ in their relationship with international law—although States usually move within the array of options between both extremes (Hilary Charlesworth et. al., 2005)—they have incorporated this framework to the domestic law through different means. However, besides the ratification of the treaties mentioned above, most Latin American countries have included specific legislation that recognizes at a domestic level the obligations originated from them.⁵ In the case of Colombia, the country has ratified ILO 169⁶ and approved the American Declaration on the Rights of Indigenous Peoples⁷; however, they have also passed specific legislation that echoes their provisions.⁸

⁴ Dualism considers that international law and domestic law are two different systems, and therefore, to apply international law at a domestic level it is necessary to incorporate it into domestic law, usually through an act from the legislature. On the other hand, monism follows a unitary conception of the law, therefore, international law is directly applicable at (i.e. automatically incorporated to) the domestic level.

⁵ That is the case of Argentina, Bolivia, Brazil, Colombia, Ecuador, Peru and Venezuela. See Peter Bille Larsen, “The ‘New Jungle Law’: Development, Indigenous Rights and ILO Convention 169 in Latin America”, *International Development Policy, Revue internationale de politique de développement* (2016).

⁶ Ratifications of ILO Conventions: Ratifications for Colombia, accessed 23 June 2022, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102595

⁷ Cancillería celebró aprobación de Declaración Americana sobre Derechos de Pueblos Indígenas, Cancillería, accessed 23 June 2022, <https://www.cancilleria.gov.co/en/node/14181>

⁸ Mainly Articles 1, 70, 7, 8, 80, 10 and 68 of the Constitution, as well as Act 21 from 1991 that ratifies ILO 169 and Act 70 from 1993 that recognizes Afro descendant communities land rights.

As noted by the UN-REDD Guidelines on Free, Prior and Informed Consent,⁹ the UNDRIP has seven provisions –included in Articles 10, 11(2), 19, 28(1), 29(2), 30(1), 32(2)– that recognize the duty of States to ensure FPIC from Indigenous peoples on different situations: from population relocations; the taking of “cultural, intellectual, religious and spiritual property”; any damages, takings, occupation, confiscation and uses of their lands, territories and resources; before “adopting and implementing legislative or administrative measures;” and “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources” (UN-REDD, p. 14).

The ILO 169 on Article 6 states

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

⁹ The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

While UNDRIP Article 32 establishes that

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 17 of the draft Convention seems to be inspired by Article 32(1) and 32(2) of UNDRIP, however, it does not include section (3) that refers to States obligation of providing mechanisms for just and fair redress, whenever States do not comply with FPIC.

Regarding Afro-descendant communities, the Concluding Observations of the Committee on Economic, Social and Cultural Rights (CESCR) on Colombia in 2010 stated that “infrastructure, development and mining megaprojects are being carried out in the State party without the free, prior and informed consent of the affected Indigenous and Afro-

Colombian communities” and recommended the State party to “adopt legislation in consultation with and the participation of Indigenous and Afro-Colombian people, that clearly establishes the right to free, prior and informed consent in conformity with ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, as well as the relevant decisions of the Constitutional Court”.¹⁰

In a different vein, but not less relevant for understanding the balance of the right to development and Indigenous Peoples’ rights, we find minorities’ right to culture protected in Article 27 of the ICCPR.¹¹ In *Angela Poma v. Peru*,¹² the Human Rights Committee ruled on a case where the Government of Peru was accused of taking different actions which caused the gradual drying out of the wetlands where llama-raising was practiced in accordance with the traditional customs of the affected Indigenous families. In this case, the Human Rights Committee appeals to Article 27 of the Covenant on Civil and Political Rights and affirms that

The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own

¹⁰ CESCR, Concluding Observations: Colombia (2010). E/C.12/COL/CO/5, para. 9.

¹¹ Article 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

¹² CCPR, Communication No. 1457/2006, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, views of 24 April 2009.

*culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.*¹³

The right to self-determination is a major safeguard against development projects that undermine Indigenous peoples' rights, and is considered complementary to the right to FPIC (HRC, Expert Mechanism on the Rights of Indigenous Peoples, 2011). They are mutually embedded, since neglecting the right to FPIC means that the communities did not have a say in projects affecting their own lands. The ILO Convention offers valuable norms that recognize the right to self-determination, granting Indigenous communities the right to determine their own development priorities and control implementation. Article 7(1) of ILO 169 reads

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Moreover, UNDRIP Article 3 states that Indigenous peoples have the right to self-determination, which entails the right to freely determine their political status and freely pursue their economic, social and cultural development. Article 25 and 29 of the UNDRIP recognize the special spiritual and intergenerational relationship of Indigenous peoples with their resources as well as their right to the conservation and protection of

¹³ *idem*, para. 7.4.

the environment and the productive capacity of their lands or territories and resources. Moreover, Articles 20 and 32(3) recognize that Indigenous peoples who were deprived of their means of subsistence and development are entitled to just and fair redress, and that States should implement effective mechanisms for this to happen.

During a workshop on Indigenous peoples, private sector natural resource, energy and mining companies and human rights, organized by the Office of the High Commissioner for Human Rights (OHCHR) in collaboration with the United Nations Conference on Trade and Development (UNCTAD), the ILO, the World Trade Organization (WTO) among other organizations, one of the conclusions affirmed the importance of economic and sustainable development for the survival and future of indigenous peoples and considered that “the right to development means that Indigenous peoples have the right to determine their own pace of change, consistent with their own vision of development, and that this right should be respected, including the right to say ‘no’.”¹⁴ In effect, the right “to say no”, to withhold consent, is a crucial aspect of the right to FPIC when read in connection with the right to self-determination. Though the right to “veto” is not necessarily the appropriate interpretation of the right to FPIC, in certain contexts if a project would have a significant and direct impact on Indigenous communities or territories, the presumption is that it should not continue without the communities’ consent (Anaya, 2009, para. 47).

¹⁴ OHCHR, Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, 2002, para. 8.

c. The Right to Development and Indigenous and Afro-descendant Women's Right to Participation

There have been different approaches regarding women and development: from women in development (WID), to women and development (WAD) and, finally, gender and development (GAD). During the 1970's the General Assembly adopted resolutions that tackled the issue of women's participation in development.¹⁵ Article 14 of the CEDAW grants women's right to development in the following manner

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (a) To participate in the elaboration and implementation of development planning at all levels.

The Sub-commission on the Promotion and Protection of Human Rights Report 1999/15 on Women and the Right to Development further addressed States and the CEDAW Committee, urging governments to take measures to amend or repeal laws and policies which inhibit women's

¹⁵ These resolutions follow the "women in development approach". The Resolution 3522 (XXX) "on the improvement of the economic status of women for their effective and speedy participation in the development of their countries", focuses on women's access to financial and lending institutions, access to credit and loans to "improve their economic activities and integration in national development", and the promotion of courses to improve the efficiency of women in business. The Resolution 3523 (XXX) "on women in rural areas" aims at the integration of rural women in development through non-formal educational programmes, and training programmes and urges international organizations and financial organizations to give special attention to government programmes that pursue this goal. Finally, Resolution 3524 (XXX) "on measures for the integration of women in development" recommends the UN development system to give sustained attention to the integration of women in the formulation, design and implementation of development programmes and projects. <https://www.un.org/documents/ga/res/30/ares30.htm>

economic rights and their right to development, especially laws pertaining to land, property and housing that deny women security of tenure and equal access and rights to land, property and housing, and loans (Pinheiro, 1999, para. 4). Consequently, invites the CEDAW Committee to pay special attention to women's economic rights, including the rights to land, property and an adequate standard of living (Pinheiro, 1999, para. 8).

There has not been much development of the interpretation of Article 14.¹⁶ However, CEDAW's General Recommendation 34 on Rural Women, addresses some key issues related to rural women and development. It highlights the macroeconomic roots of gender inequality and, in turn, affirms that States should ensure that economic policies take into account the needs of rural women (CEDAW, General Recommendation 34, para. 11). The General Recommendation also States that rural women face specific threats due to climate change, natural disasters, land and soil degradation, water pollution, droughts, floods, desertification, pesticides and agrochemicals, extractive industries, monocultures, biopiracy and the loss of biodiversity, in particular agrobiodiversity, hence, States should alleviate and mitigate those threats

¹⁶ In the Concluding Observations of the CEDAW Committee to Jamaica we see an interpretation of Article 14 in that it connects it with the impact that economic adjustment and trade liberalization programs have on women. CEDAW Committee, Concluding comments of the Committee on Jamaica (CEDAW/C/JAM/CO/5), para 37: "The Committee is concerned that insufficient attention is being paid to the gender-specific impact on women, particularly rural women, of economic adjustment and trade liberalization programmes as a cause of poverty. It is also concerned with the poor living conditions rural women face, especially in the country's interior. While noting the number of interventions for rural women, it is concerned that these are scattered and welfare oriented rather than aimed at rural women's empowerment, and indicate the absence of a holistic approach to implementation of article 14 of the Convention. While noting that the State party has placed a high priority on its National Poverty Eradication Programme, the Committee regrets the lack of data provided on its impact on women."

(CEDAW, General Recommendation 34, para. 12). Moreover, it stresses that States should protect disadvantaged and marginalized groups of rural women, which includes Indigenous, Afro-descendent, ethnic and religious minorities, from intersecting forms of discrimination (*idem*, para. 15).

The General Recommendation refers, in Section F, to political and public life and reaffirms the right to participate in decision-making at all levels and in community-level discussions with high authorities (*idem*, para. 53). It also lists the different measures that States should take, such as to ensure that development projects are implemented only after "participatory gender and environmental impact assessments have been conducted with the full participation of rural women", and to comply with the right of rural women to free, prior and informed consent (FPIC) (*idem*, para. 54). In doing so, the Committee lists women's participation as a specific requirement of FPIC.

This requirement is already present in the 1986 Declaration on the right to Development, Article 8(1) when it affirms that

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

However, Article 2(3) of the instrument also builds the framework on the right to women's participation, since it establishes a strong participatory right

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

It is crucial that the treaty on the right to development considers the connection between the right to development, right to self-determination in connection with the right to women's right to be free from violence, and Indigenous and Afro-descendant women's right to participate in internal and external decision-making processes.

Indigenous and Afro-descendant women and their communities have an important role in shaping international human rights law. This process can be traced back to 1982, when the UN Working Group on Indigenous Populations was created. Nowadays, it can be affirmed that the Indigenous and Afro-descendant communities have appropriated the human rights language to canalize their claims and demands to a point in which human rights are inextricably linked with questions of indigenous rights and indigenous rights movements (Speed & Solano, 2008, p. 7). Still, within those movements, indigenous and Afro-descendant women have had to struggle to include their perspective on topics that are often presented as gender neutral such as land, sovereignty, self-determination and the right to development (Davies, 2008, p. 143).

Different human rights mechanisms have addressed the disproportionate impact that development projects have on Indigenous and Afro-descendant women. When third parties limit women's access to natural resources that are used to provide for their families, the harmony of Indigenous and tribal peoples is affected, eroding the activities carried

out by women.¹⁷ As a consequence, women see their role in the community diminished, which can lead to disintegration of the networks and social fabric of their communities.¹⁸ In other cases, women are forced to find other ways of providing resources to their families or otherwise to migrate to urban centers in search of jobs.¹⁹ The CEDAW Committee also warns about the consequences of limiting women's access to land due to new development projects, as it triggers their displacement.²⁰ Development projects contribute to poverty and vulnerability amongst Indigenous women and their communities, and can lead to forced prostitution, trafficking, and negative physical and psychological effects on Indigenous women's health and culture.²¹

The Inter-American Commission on Human Rights report on Indigenous Women and their Human Rights in the Americas proposes various guiding principles including: empowered actors, intersectionality, self-determination, active participation, incorporation of their perspective, indivisibility and collective dimension.²² The right to self-determination has been considered one of the main rights that protect Indigenous peoples from aggressive development. Yet, when referring specifically to Indigenous women's rights, it is important to read the

¹⁷ Cfr. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, 2015, p. 167-68.

¹⁸ *Idem*.

¹⁹ Cfr. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, 2015, p. 168.

²⁰ Cfr. CEDAW Committee, *Concluding Observations: Guatemala*. (2009). CEDAW/C/GUA/CO/7, para. 33.

²¹ Cfr. IACHR, *Indigenous Women and Their Human Rights in the Americas*, 2017, p. 71.

²² Cfr. *idem*, pp. 32-38.

principle of self-determination in connection with Indigenous women's right to live free from violence. As the report stresses,

Violations of Indigenous peoples' rights to self-determination and to control over their lands and resources have heightened impacts on Indigenous women. One major form of violence inflicted upon Indigenous women specifically stems from the effects of colonialism and enduring racism found in society and current policies. These policies foster the imposition of extractive activities and mega development projects without their prior, free and informed consent, in violation of their right to self-determination, personal integrity, and way of life and development. Consequently, the IACHR finds a close link between respect for Indigenous peoples' right to self-determination, to integrity of their territories and natural resources, the right to live free from all forms of racism, and the guarantee of the right of Indigenous women to live a life free from all forms of discrimination and violence.²³

The UN Special Rapporteur on the Rights of Indigenous Peoples has also noted the importance of balancing the protection of Indigenous women and the respect for the self-determination and autonomy of Indigenous peoples (Tauli Corpuz, 2015, para. 75). Although this has oftentimes been framed as a dichotomy between “external values” or “Western values” that privileged individual over communal rights, since the Beijing Conference²⁴ indigenous women have been actively advocating for their

²³ Idem, para. 42.

²⁴ Since the Beijing Conference indigenous women have become more and more engaged at international stages. One of the main organizations that resulted from this process is FIMI (International Indigenous Women Forum). See Guamá, Lucy, Avelina Pancho Aquite, and Elena Rey, *Antigua era más duro: hablan las mujeres indígenas de Antioquia*. Bogotá: Centro de Cooperación al Indígena CECOIN, 2009.

right to self-determination, as well as for their right to live free from violence, among other rights.

The right to FPIC is said to be the reverse side of the right to self-determination (Expert Mechanism on the Rights of Indigenous Peoples, *Indigenous peoples and the right to participate in decision-making*, 2011). It is a crucial aspect since the causes behind development projects harming Indigenous women's rights are closely linked to the lack of respect of the free, prior, and informed consent when granting concessions, permits or other authorizations.²⁵

The right of Indigenous and Afro-descendant women to participate is recognized, under Article 14(2) of CEDAW. Indigenous and Afro-descendant women are entitled to participate in the formulation, implementation and evaluation of any and all policies and programs that may affect them, as has been recognized in Article XXIII (sections 1 and 2) and XXXII of the American Declaration on the Rights of Indigenous Peoples; Articles 5 and 23 of the UNDRIP; and Article 7 of ILO 169.

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has also stressed the need to involve Afro-descendant communities in the preparation of development projects stating that “the Government should involve the communities concerned in the preparation of development projects and in decisions that concern them. It should also ensure their effective participation in institutions responsible for community affairs, such as the Advisory Commission on Afro-Colombian Populations and the Inter-

²⁵ Cfr. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, 2015, p. 135.

Institutional Commission on the Human Rights of the Indigenous Populations” (Doudou Diène, 2004).

Indigenous and Afro-descendant women in Latin America still face many more obstacles when trying to exercise this right. The IACHR gathered different sources of information that show that “Afro-descendant women are notoriously under-represented in decision-making bodies as compared to other women; in fact, in the political sphere, only a handful of Afro-descendent women have achieved positions of power.”²⁶ Moreover, the Commission warned of the striking low percentage of participation of women of African descent in legislatures, at less than 1% of total legislators in Latin America.²⁷

The Expert Mechanism on the Rights of Indigenous peoples stressed the right of Indigenous peoples to participate in both internal and external decision-making processes.²⁸ Recently, the IACHR reinforced this approach and added that a way to pursue women’s participation in internal decision-making processes is to coordinate with Indigenous and tribal peoples within the framework of their own decision-making systems, and through means that are respectful of their customary law, for these to guarantee the participation of Indigenous women in said processes.²⁹ The IACHR further pointed out that “States usually relate directly with members of boards of directors of Indigenous peoples or their representatives, the majority of whom are men, despite the fact that

²⁶ Cfr. IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, 2011, para. 90.

²⁷ *Idem*, para. 90-91.

²⁸ HRC, *Expert Mechanism on the Rights of Indigenous Peoples*, 2011, para. 36.

²⁹ Cfr. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, 2015, p. 106

these members of boards of directors or representatives may not have an express mandate from their general or community assemblies to adopt decisions of special importance.”³⁰ In effect, the IACHR said that “it is necessary that the States know how the Indigenous peoples they relate to conduct their internal decision-making. Likewise, it is fundamental that in such decision-making instances, the States and Indigenous peoples, through coordination actions, foster the participation of women.”³¹

3. Self-Determined Development in Practice: *Buen Vivir* in the Communities of Indigenous and Afro- descendant People in Colombia

a. The emergence of alternative approaches to development

Since the late 1980s, alternative approaches have questioned the current development paradigm. Some promote the reform of the current model of development and encourage different measures such as the creation of a green new deal, like in the case of the New Economic Foundation.³² Others call for a model of prosperity without growth, which proposes redefining the notion of prosperity to incorporate people’s wellbeing (Jackson, 2009). Other alternatives lean on transformative rather than reformative approaches and come from feminist and Marxist scholars engaged in a critique of capitalism (Aronoff et al., 2019). In South America, alternatives to development have taken more concrete shapes through the practice of *Buen Vivir*.

³⁰ Idem.

³¹ Idem.

³² Margaret Welsh, *Five steps towards a Green New Deal*, New Economics Foundation, accessed 23 June 2022, <https://neweconomics.org/2022/01/five-steps-towards-a-green-new-deal>

The concept of *Buen Vivir* was first developed through political practice of Indigenous communities in the Andean region. For Afro-descendent communities in Colombia, the notion can be traced back to the 90s, in the writings of the organization *Proceso de Comunidades Negras* (PCN) and the thinker and activist Libia Grueso (Rojas et al., 2015, p. 173). The concept has since evolved and traveled to different fields, academia, policies, and activism, including the human rights discourse, such as the declaration of the “People's Summit in Rio +20 for Social and Environmental Justice in defense of the commons, against the commodification of life”³³ and the report of the international expert group meeting on “Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples.”³⁴ Moreover, despite not having express reference to *Buen Vivir*, the 2030 Agenda for Sustainable Development in paragraph 59 recognizes that each country has different ways of achieving sustainable development, in accordance with their “national circumstances and priorities.”³⁵

³³ The Declaration expressly mentions *Buen Vivir* as a model that opposes the model of consumption and promotes the revitalization of ancestral knowledge and the recognition of the rights of mother earth. Documento final de la Cumbre de los Pueblos en Rio +20 por Justicia Social y Ambiental.

En defensa de los bienes comunes, contra la mercantilización de la vida, p. 4, 2012, available at https://www.internationalrivers.org/sites/default/files/attached-files/rio20_peoplessummit_esp.pdf

³⁴ Economic and Social Council, Permanent Forum on Indigenous Peoples, 2010, E/C.19/2010/14 <https://undocs.org/E/C.19/2010/14>, para. 31.

³⁵ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 2015, A/RES/70/1. <https://undocs.org/A/RES/70/1>.

b. Differences between development, sustainable development and *Buen Vivir*

Buen Vivir is usually translated as “living well” or “collective well-being.” Although the concept is continually evolving (Tortosa, 2011, p. 16), the central elements of *Buen Vivir* are identity, equity and sustainability which can be understood as a way of living in harmony with oneself, society and nature, based on the principle of reciprocity (Cubillo-Guevara et al., 2016, p. 53-54). *Buen Vivir* values aesthetic, cultural, historical, environmental, and spiritual considerations over economic values (Harcourt, 2014, p. 1322).

The hegemonic model of development not only privileges economic growth and the international financial system, but also represents a “matrix of power”, creating a hierarchical system which legitimizes the domination of Western society over others (Walsh, 2010, p. 15). This bureaucratic and State-based approach sets a trap for communities when they are forced to be “productive” and “efficient” in the way they manage their “resources” (Rojas et al., 2015, p. 178). However, under *Buen Vivir*, territories are not resources. The world view of *Buen Vivir* does not conceive territories as source of productive wealth, but instead as a source of life; it is the place where the memories of the ancestors were built, and living and being in the territories ensures food autonomy, and preserves community bonds (Mosquera et al., 2018, p. 33). The idea of development itself, according to Catherine Walsh, is a concept and word that does not exist in indigenous and Afro-descendant communities which makes the model of *Buen Vivir* promoted by Indigenous and Afro-descendant communities an opportunity to construct a new model of development (Walsh, 2010, p. 18).

Although it is similar to the notion of “sustainable development” referenced in several human rights instruments, it is important to stress that they have substantial differences and cannot be equated (Chassagne, 2018, p. 3). The notion of sustainable development has expanded since its inclusion in the 1992 Rio Declaration on the Environment and Development, to its more recent expression in the Sustainable Development Goals. Chassagne identifies that the main differences between sustainable development and *Buen Vivir* are that the first centers on climate change without questioning the neoliberal model of economic growth; while *Buen Vivir* seeks the transformation of local contexts building from a bottom-up approach, sustainable development has universal aims and, therefore, disregards cultural, socio-economic and geographical differences; unlike the notion of sustainable development, *Buen Vivir* emphasizes the importance of communal wellbeing, rather than individual wellbeing, and requires collective action and mutual cooperation in order to be accomplished. Moreover, *Buen Vivir* underscores the reciprocal relationship of both nature and society, while sustainable development subordinates nature to human needs (Chassagne, 2018, p 3-8).

However, Indigenous peoples’ interpretations of *Buen Vivir* are often distinct from those adopted in policies. Both Bolivia and Ecuador included the concept in their constitutions in 2009 and 2008 respectively. In the case of Bolivia, it is an essential part of the preamble as well as in Article 8, I, Chapter II, First Section. In Art. 8 (I) of the Constitution, Bolivia recognizes the ethical and moral principles of a plural society which include *suma qamaña* or “vivir bien”. Although the constitutional text does not provide a clear definition, the preamble refers to a search for the “good living” and Article 306 connects it with Bolivia’s pluralistic economic model which aims to improve the quality of life and serve the collective

interests as a complement of the individual interests of Bolivian society. The Ecuadorian constitution also includes the concept in the Preamble and refers to *sumak kawsay* (*Buen Vivir*), as a new form of living together. There is no exact definition of the term; however, the CONAIE (Confederation of Indigenous Nationalities of Ecuador) presented a report at the constituent assembly explaining that the concept implies that the economy should be oriented towards human well-being, or “*buen vivir*”, rather than profitability (Barié, 2014, p. 17). Although referenced as such, it has been noticed that the governments implemented policies that were clearly opposed to the principle of reciprocity between nature and society by taking extractivist and contradictory approaches to achieving *Buen Vivir* (Chassagne, 2018, p. 5; Gudynas, 2014, p. 34). By incorporating the idea of *Buen Vivir* into their political discourse, governments have intended to co-opt the term to serve their own purposes (Gudynas, 2014, p. 34).

c. Characteristics of *Buen Vivir* and its Relationship with the Current Model of Development

Afro-Colombian communities refer to *Buen Vivir* as an ancestral “thinking-feeling”, and a concrete struggle rather than a philosophy (Mosquera et al., 2018, p.23). Afro-Colombian communities’ conception of *Buen Vivir* have also been influenced by the concept of Ubuntu, which has South African roots and refers to the interconnectedness of all humankind and the prioritization of life over wealth. Though experiences of *Buen Vivir* are plural and complementary, there are three main elements encompassed by Afro-Colombian notions of *Buen Vivir*: recovering the value of simplicity; a different humanity based on a reunion with others and nature; and spirituality based on the cosmic integration of all that exists (Mosquera et al., 2018, p. 28). The main characteristics are a

profound respect for nature and its humanity and an understanding that we all make up part of the whole; the rejection of the idea that ecosystems are “resources,” and encouraging the use of technologies that do not threaten the ecosystem; and finally, *Buen Vivir* seeks to reinforce community organization and the autonomy of communities (Mosquera et al., 2018, p. 11).

For Afro-Colombians, promoting *Buen Vivir* and their traditional practices is a form of decolonization, since western knowledge has hidden and obstructed the development of ancestral knowledge (Mosquera et al., 2018, p. 9). As Arturo Escobar stresses, the practice of *Buen Vivir* and the social struggles of Indigenous and Afro-descendant communities against the neoliberal economic model cannot be explained by Eurocentric theories (Escobar, 2016, p. 16). The notion of *Buen Vivir*, in this sense, envisions an alternative approach to capitalism and to imagine other futures. The struggles for *Buen Vivir* vindicate ancestral knowledges and challenges western logic that reduce rivers, minerals, and land to “resources” (Rojas et al., 2015, p. 173).

In Colombia, *Buen Vivir* emerged as a response to the harmful consequences of the current hegemonic development model. Some of the factors that triggered the struggle for the *Buen Vivir* include: an increase in the number of licenses granted from the State to gold mining companies in Afro-Colombian territories; the use of fumigation to destroy coca crops which also affects traditionally grown crops; militarization of Afro-Colombian territories resulting in repression of local organizations; the large-scale development projects approved without obtaining the communities’ free, prior, and informed consent (FPIC) and without environmental impact evaluations; constant threats and killings of leaders and local activists from paramilitary groups; and the State’s complicity in environmental degradation and non-State actors abuses (Mosquera et al.,

2018, p. 17). Afro-Colombian communities view these activities as a form of ecocide and ethnocide, which are “two sides of the same coin in the imaginary of progress” Mosquera et al., 2018, p. 17, 54).

The struggle of Afro-descendant communities in La Toma in Cauca, Colombia provides one example of *Buen Vivir* in practice (Escobar, 2016, p. 29). In 2014, a group of women marched from La Toma to Bogota protesting the illegal presence of backhoe machines in their territories used for gold mining. As Charo Mina Rojas explains, the mobilization was based on the premise that without a radical change in the global development model, there would be no possibility for their communities to exist (Rojas et al., 2015, p. 176-177). This represented a continuation of the work that Afro-descendant communities were already doing to develop an economic alternative to extractivism. During meetings facilitated by *Proceso de Comunidades Negras* (PCN) the communities discussed economic alternatives that did not respond to the current paradigm of development, for example, that “the rule says not to take more than what the earth allows us” (Rojas et al., 2015, p. 173). Ancestral mining, in this sense, is an example of alternative forms of organizing an economic activity, based in solidarity, sisterhood, celebration and collective work, rather than being purely transactional (Rojas et al., 2015, p. 177). Other examples of alternative economies are the cooperative work in the mills (or trapiche), subsistence crops, “la minga”³⁶, or the “entresaque”³⁷ (Mosquera et al., 2018, p. 48). These daily practices

³⁶ In the Cauca region, *minga* refers to meetings where a group of people tries to achieve a common good.

³⁷ *Entresaque* is the practice of not taking more fish than what the river allows or what it's going to be eaten.

challenge individualistic human rights approaches in favor of collective rights, territorial rights, and the conservation of biodiversity.

4. Conclusion

This paper unpacked the argument that the human rights framework requires the right to development to have an intersectional perspective that responds to the needs of Indigenous and Afro-descendant women and their communities. This was achieved by both, presenting the human rights instruments, as well as the local and concrete experiences that show different demands of communities to thrive and flourish, expressed in the notion of *Buen Vivir*. Among the urgent issues that should be addressed are the connection between development and discrimination that women face in the access to resources and power, especially using and owing land, access to adequate water and sanitation facilities, independent decision making over their bodies as well as a life without violence. Taking into account that the current approach equates the concept of development with industrialization, and that it exacerbates the inequality of Indigenous and Afro-descendant women and their communities, the Working Group on the Right to Development should expand the exclusionary approach to development of the current draft Convention on the Right to Development, that currently is centered in western industrialized approaches to development, and have the Convention encompass models of development such as *Buen Vivir*.

In the process of drafting a binding treaty on the Right to Development, the Inter-Governmental Working Group on the Right to Development must grant a meaningful participation to Indigenous and Afro-descendant women, in accordance with international human rights law provisions (CEDAW Art. 14(2); Declaration on the right to

Development, Art. 2(3) and 8(1) Art. XXIII (sections 1 and 2) and XXXII of the American Declaration on the Rights of Indigenous Peoples; Art. 5 and 23 of the UNDRIP; and Art. 7 of ILO 169). Moreover, a binding treaty on the Right to Development must reflect the current International Human Rights Law regarding Indigenous and Afro-descendant peoples and account for Afro-descendant and Indigenous people's rights to self-determination (ILO 169 Art. 7(1); UNDRIP Art. 3), free, prior, and informed consent (UNDRIP Arts. 10, 11(2), 19, 28(1), 29(2), 30(1), 32(2); ILO 169 Art. 6), and minorities' right to their own culture (ICCPR Art. 27). Lastly, a binding treaty on the right to development must consider the connection between the right to development, right to self-determination in connection with the right to women's right to be free from violence, and Indigenous and Afro-descendant women's right to participate in internal as well as external decision-making processes.

References

- Alfarargi, S. (2018). *Report of the Special Rapporteur on the Right to Development*, A/HRC/39/51.
- Anaya, J. (2009). *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34.
- Aronoff, K., Battistoni, A., Cohen, D. A., et al. (2019). *A Planet to Win: Why We Need a Green New Deal*, Verso Books.
- Banda, F. (2013). "Women, human rights and development", in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*.

- Barié, C. G. (2014). “Nuevas narrativas constitucionales en Bolivia y Ecuador: el buen vivir y los derechos de la naturaleza”, *Revista de Estudios Latinoamericanos*, Vol. 59.
- Charlesworth, H. Chiam, M., Hovell D., et al. (2005). “International Law and National Law: Fluid States” in Hilary Charlesworth et al. (eds), *The Fluid State: International Law and National Legal Systems*.
- Chassagne, N. (2018). “Sustaining the ‘Good Life’: Buen Vivir as an alternative to sustainable development”, *Community Development Journal*.
- Crenshaw, K. (1989). “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine”, *University Of Chicago Legal Forum* 139-167.
- (1991). “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, *Stanford Law Review*, 43(6), 1241-1299.
- Cubillo-Guevara, A. P. et al. (2016). “El Buen Vivir como alternativa al desarrollo para América Latina”, 5 *Revista Iberoamericana De Estudios De Desarrollo*, 30-57.
- Daes, Erica-Irene. (1997). *Preliminary working paper prepared by the Special Rapporteur: Indigenous People and their Relationship to Land*, E/CN.4/Sub.2/1997/17.
- Davies, M. (2008). “The Globalisation of International Human Rights Law, Aboriginal Women and the Practice of Aboriginal Customary Law”, in *Women, Crime and Social Harm: Towards a Criminology for the Global Age*. Cain, M. and A. Howe. Oxford & Portland, Or., Hart Pub.: 137-157.
- Diène, D. (2004). *Special Rapporteur On Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mission to Colombia*, E/CN.4/2004/18/Add.3.

Draft convention on the right to development (2020). Working Group on the Right to Development, Human Rights Council.

A/HRC/WG.2/21/2. <https://undocs.org/A/HRC/WG.2/21/2>

Escobar, A. (2016) "Thinking-feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South". *AIBR. Revista de Antropología Iberoamericana*, vol. 11, no. 1.

Escobar, A. (2018). *Designs for the Pluriverse: Radical Interdependence, Autonomy, and the Making of Worlds* (Illustrated edition). Duke University Press Books.

Estado Plurinacional de Bolivia, Constitución política del Estado Plurinacional de Bolivia. (2009).

Expert Mechanism on the Rights of Indigenous Peoples (2011), *Final study on Indigenous peoples and the right to participate in decision-making*, A/HRC/EMRIP/2011/2.

Gudynas, E. (2014). "Buen vivir: sobre secuestros, domesticaciones, rescates y alternativas", in: Atawallpa Oviedo Freire (comp.), Quito, Yachay.

Harcourt, W. (2014). "The future of capitalism: a consideration of alternatives", *Cambridge Journal of Economics*, Volume 38, Issue 6, November, p. 1307–1328.

IACHR. (2011). *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OAS/Ser.L/V/II. <https://www.cidh.oas.org/pdf%20files/POLITICAL%20PARTICIPATION.pdf>

IACHR. (2015). *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>.

- IACHR. (2017). *Indigenous Women and Their Human Rights in the Americas*. <https://www.iwgia.org/images/documents/popular-publications/indigenous-women-americas.pdf>.
- Jackson, T. (2009) *Prosperity without growth: economics for a Finite planet*, London, Earthscan.
- Mosquera, M. M., Rojas, C. M., Gómez, P. B., & Escobar, A. (2018). *Ubuntu: una invitación para comprender la acción política, cultural y ecológica de las resistencias afroandina y afropacífica*. CLACSO.
- Pinheiro, Paulo S. (2000) *Report Of The Sub-Commission On The Promotion And Protection of Human Rights on its Fifty-First Session*, Geneva, 2-27 August 1999. E/CN.4/2000/2 E/CN.2/1999/54.
- República de Ecuador, Constitución de la República del Ecuador. (2008).
- Rio Declaration on Environment and Development. (1992). A/CONF.151/26 (Vol. I), 12 August 1992.
- Rojas, Ch. M. et al. (2015). “Luchas del buen vivir por las mujeres negras del Alto Cauca”, *Nómadas (Col)* 167–183.
- Speed, S. & Leyva Solano, X. (2008). “Introduction: Human Rights and the Maya Region”, in *Human Rights in the Maya Region* (Pedro Pitarch et al. eds.).
- Stavenhagen, R. (2003). *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*. UN Doc. E/CN.4/2003/90.
- Tauli Corpuz, V. (2015) *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, A/HRC/30/41.
- Tortosa, J. M. (2011). *Vivir bien, buen vivir: caminar con los dos pies*, OBETS. Revista de Ciencias Sociales 6.
- UN-REDD Guidelines on Free, Prior and Informed Consent.

Walsh, C. (2010). "Development as Buen Vivir: Institutional arrangements and (de)colonial entanglements," 53 *Development* 15-21.