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# INTERNATIONAL LAW TO SAVE THE COMMONS

## THE INTERNATIONAL LEGAL PROTECTION OF THE COMMONS IN DEVELOPMENT

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# Contents

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# Abbreviations and acronyms

| | |
|---|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| ACHR | American Convention on Human Rights |
| AfCHPR | African Charter on Human and Peoples' Rights |
| AfCtHPR | African Court on Human and People's Rights |
| AFD | *Agence française de développement* [in French] |
| AfDB | African Development Bank |
| AHRC | Asian Human Rights Charter |
| ASEAN | Association of Southeast Asian Nations |
| CBD | Convention on Biological Diversity |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CEDAW Committee | United Nations Committee on the Elimination of Discrimination against Women |
| CERD | United Nations Committee on the Elimination of Racial Discrimination |
| CESCR | United Nations Committee on Economic, Social and Cultural Rights |
| CETIM | *Centre Europe Tiers Monde* [in French] |
| CFS | Committee on World Food Security |
| CGAP | Consultative Group to Assist the Poor |
| CGIAR | Consultative Group on International Agriculture and Research |
| CHM | Common heritage of mankind |
| CLEP | Commission on Legal Empowerment of the Poor |
| CPR | Common-pool resource |
| CRC | Convention on the Rights of the Child |
| CSG | Commons Strategies Group |
| CSOP | Commission to Study the Organization of Peace |
| DIFD | United Kingdom Department for International Development |
| EBRD | European Bank for Reconstruction and Development |
| ECA | European Commons Assembly |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |

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|---|---|
| ECOSOC | United Nations Economic and Social Council |
| EEZ | Exclusive Economic Zone |
| EIB | European Investment Bank |
| EIF | Enhanced Integrated Framework for Trade-Related Assistance for the Least Developed Countries |
| EJIL | European Journal of International Law |
| ESF | Environmental and Social Framework |
| EU | European Union |
| FAO | Food and Agriculture Organization of the United Nations |
| FLOK | Free-libre, Open Knowledge |
| GEF | Global Environmental Facility |
| GGS | Leuven Centre for Global Governance Studies |
| GPG | Global Public Good |
| HRBA | Human rights-based approaches to development |
| HRC | Human Rights Committee |
| | Human Rights Council |
| IACHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| IACommHR | Inter-American Commission on Human Rights |
| IAD | Institutional Analysis and Development |
| IBRD | International Bank for Reconstruction and Development |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| IEG | Independent Evaluation Group |
| IFIs | International Financial Institutions |
| ILC | International Land Coalition |
| | International Law Commission |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |
| IP | Intellectual Property |

| | |
|---|---|
| ISA | International Seabed Authority |
| ITLOS | International Tribunal on the Law of the Sea |
| IUC | International University College of Turin |
| KFS | Kenyan Forest Service |
| LabGov | Laboratory for the Governance of the City as a Commons |
| LDC | Least developed country |
| MDG | Millennium Development Goal |
| NAFTA | North American Free Trade Agreement |
| NGO | Non-Governmental Organization |
| NIE | New Institutional Economics |
| NIEO | New International Economic Order |
| NRMP | Natural Resource Management Project |
| ODA | Official Development Assistance |
| OHCHR | United Nations Human Rights Office of the High Commissioner for Human Rights |
| OECD | Organisation for Economic Coordination and Development |
| PCIJ | Permanent Court of International Justice |
| PSNR | Permanent Sovereignty over Natural Resources |
| P2P | Peer-to-peer |
| REDD | Reducing Emissions from Deforestation and Forest Degradation |
| RRI | Rights and Resources Initiative |
| SAPs | Structural Adjustment Programmes |
| SDG | Sustainable Development Goal |
| SIDA | Swedish International Development Agency |
| TWAIL | Third World approaches to international law |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UN Common Understanding | Statement of Common Understanding of the Human Rights-Based Approach to Development Cooperation and Programming |
| UNDG | United Nations Development Group |
| UNDP | United Nations Development Programme |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |

| | |
|---|---|
| UNDROP | United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas |
| UNEP | United Nations Environment Programme |
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children's Fund |
| UNIDO | United Nations Industrial Development Organization |
| UK | United Kingdom |
| US | United States |
| USAID | United States Agency for International Development |
| VCLT | Vienna Convention on the Law of Treaties |
| VOC | *Vereenigde Oostindische Compagnie* [in Dutch] |
| WCED | World Commission on Environment and Development |
| WDRs | World Development Reports (WDRs) |
| WHO | World Health Organization |
| WTO | World Trade Organization |
| ZAD | *Zone à défendre* [in French] |

# Figures

*[A] core goal of public policy should be to facilitate the development of institutions that bring out the best in humans.*[1]

Elinor Ostrom, 2009.

# Introduction

## 1. Background

This PhD thesis studies the complex relationship between the institution of the commons,[2] the field of development and the discipline of international law. In the Middle Ages, the commons would be pastures and woodlands that, by custom, could be accessed and jointly managed by a community of villagers. The commons were brought back to the attention of the scientific community in 1968 by the popular article of the American scientist Garrett Hardin, 'The Tragedy of the Commons'.[3] Hardin described an economic model devoid of any empirical evidence but based on rational choice theory, in which individual actors automatically tend to overexploit and plunder common-pool resources (CPRs) that are freely available to everyone. It was widely admitted that the twin features of CPRs, namely their difficulty to exclude and the rivalrous nature of the goods they either contained or produced, would lead to a collective action problem akin to the prisoner's dilemma.[4] Hardin's prediction of no cooperation is entirely consistent with this inexorable dilemma. He illustrated this conjecture with the example of an open-access pasture on which self-interested herders use as much grass as possible to rear their cattle. The commoners, assumed to be rational, incommunicative and selfish agents, are locked into short-term strategies and keep subtracting as much as possible from what Hardin mistakenly termed the 'commons'. The inevitable result is their degradation and depletion. According to Hardin, '[f]reedom in a commons brings ruin to all'.[5] To avoid the unconstrained overexploitation of natural resources by selfish individuals, Hardin only believed in two

[1] Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (8 December 2009) <https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2009/ostrom_lecture.pdf> (accessed 7 August 2018), 435-436.
[2] The same term 'commons' is used for both the singular and plural forms when speaking of the social institution of the commons, which is the main subject of this thesis.
[3] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243.
[4] Mancur Olson, *The Logic of Collective Action. Public Goods and the Theory of Groups* (Harvard University Press 1965).
[5] Hardin, *supra* n 3, 1244.

possible coercive arrangements: the enclosure of resources through private property or, failing that, public regulation.[6] Even though he admitted that the legal institution of private property was 'unjust', he claimed that there was no 'better system': '[t]he alternative of the commons is too horrifying to contemplate'.[7]

Even though Garrett Hardin's metaphor is still influential in mainstream political discourse, the debate around commons continued. In her landmark book *Governing the Commons*, Elinor Ostrom demonstrated, through various case studies, how local communities could develop autonomous institutions with their own *ad hoc* rules to govern the resource domains upon which they depend for their subsistence.[8] Her book soon became the standard reference in the study of the commons, as it examined the factors that lead self-governance mechanisms to succeed, for instance, in Swiss Alpine pastures, irrigation systems in Spain, Turkish or Sri Lankan fisheries. Commons have indeed existed over long periods of time, and one of the reasons for their long-enduring success is that commoners do not always act as *homines oeconomici*. Commoners are social actors embedded in tight-knit communities that communicate, observe social norms and judge their fellow members based on their reputation. Consequently, commoners are capable of collectively making some binding decisions that provide a regulatory framework (albeit unofficial), limit their individual consumption and preserve their resource domains in the long term. Despite the wide diversity of local arrangements, Ostrom identified eight 'design principles' for commons-based organizations that characterize sustainable institutions for collective action in the long term, among which well-defined jurisdictional boundaries, clear rules of access and use, conflict-resolution mechanisms that foster mutual trust, and sanctions to deter free riders.[9] In brief, in exploring the empirical realities behind the management of CPRs, Ostrom rebutted Hardin's assumption that commons equate open-access regimes. She proved that it was possible to prevent commons from collapsing through institutions that are neither 'all-private', nor 'all-public', but collectively owned. She convincingly showed that the pessimistic scenario set out by the prisoner's dilemma was misleading.

[6] ibid., 1247.
[7] ibid.
[8] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).
[9] ibid., 90.

Since the award of the Nobel Prize in Economic Sciences to Elinor Ostrom in 2009 'for her analysis of economic governance, especially the commons',[10] the commons as an alternative model of governance beyond market and state has been given worldwide exposure. Ostrom's acceptance speech on that occasion, entitled 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems', summarized neatly her lifelong effort to unearth the regulating principles and the institutional architecture that accounted for the success of innovative modes of decentralized and bottom-up governance, beyond the much-travelled paths of the exclusively public or exclusively private management solutions.[11] Her pioneering research, grounded in extensive fieldworks and relying on three decades spent refining her 'Institutional Analysis and Development' (IAD) framework, looks into the previously underestimated achievements of regimes of self-organization at all levels of governance. Her central claim overturned conventional wisdom: complex socio-ecological systems (in which goods are subtractable and beneficiaries are hard to exclude) can prove to be sustainable resource domains, granted that its stakeholders adopt a polycentric and self-regulated mode of governance.

Since *Governing the Commons* (1990), many researchers have adopted Ostrom's IAD framework to scrutinize the governance of CPRs, be they natural or subsistence commons, or more groundbreaking such as knowledge or cultural commons. There have been innumerable case studies assessing the robustness of the governance models suggested by Ostrom and refining her findings. Ostrom's design principles have been applied in vastly different contexts, beyond the sole issue of natural resource management. Her work persuaded many academics that CPRs were not doomed to a tragic fate unless they were either enclosed and commercialized or turned into public property and administered by the state. Seen in this light, the commons have been burdened by some authors with the responsibility of carving out an autonomous social space, independent from both the atomization of capitalist markets and the hierarchical structure of the state. What is more, the commons have been embraced by civil society and social activists as a new governance model to rethink the traditional public-private and market-state divides and to prioritize ecological and human needs of communities.[12] It is Ostrom's

[10] Together with Oliver E. Williamson 'for his analysis of economic governance, especially the boundaries of the firm'. The 'Sveriges Riksbank Prize in Economic Sciences' was established in 1968 in Memory of Alfred Nobel, and has been awarded since 1901 like other Nobel Prizes of Physics, Chemistry, Medicine, Literature and Peace. See Nobel Prize, 'The Sverigers Riksbank Prize in Economic Sciences in Memory of Alfred Nobel', <https://www.nobelprize.org/prizes/economic-sciences/> (10 January 2019).
[11] Ostrom, *supra* n 1.
[12] David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market and State* (Levellers Press 2012).

seminal work and the ensuing academic and political debates around the commons that laid the groundwork for this dissertation on the role of international law in the safeguard of the commons.

## 2. Problem statement

The commons are nowadays a pervasive topic. 'New' commons such as cohousing initiatives, community gardening, community land trusts, and open-source media like Wikipedia, are burgeoning all across the world. Yet, it is too often overlooked that millions of people, mostly living in the Global South, have actually been depending on commons, such as forests, pastures, grazing lands and fisheries, to meet their basic needs for far longer.[13] Because these commons are often left unrecognized, they face the threat of enclosure, which risks depriving small-scale farmers, pastoralists, forest dwellers, artisanal fishers and indigenous peoples of their most basic access to food, land, and other essential resources. This trend extends beyond the so-called 'global land grab',[14] and includes the commodification of many other natural resources in developing countries. Think of concessions for land mining in Peru or Colombia[15] and the privatization of water cooperatives in Bolivia,[16] which disrupt the communal self-organization of local populations. This movement is led by state and private investors – both domestic and foreign, but it is also facilitated by the dominant vision of economic development based on private property and wealth maximization.

In the face of this dramatic 'new wave of "enclosing the commons"',[17] legal scholars are called upon to rethink the prevailing private property narrative and the central role of the sovereign state in the Western legal culture. The commons have already caused much ink to flow in the legal literature. At the domestic level, legal scholars have devised new legal tools like collective property regimes and public trust doctrines. Some authors have even attempted to reframe the

[13] Oxfam, International Land Coalition, Rights and Resources Initiative, *Common Ground. Securing Land Rights and Safeguarding the Earth* (Oxfam 2016) ['*Securing Land Rights and Safeguarding the Earth*'].
[14] Liz Alden Wily, 'The Global Land Grab: The New Enclosures' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 132; Smita Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' (2013) 49(1) *Stanford Journal of International Law* 101.
[15] César Padilla, 'Mining as a Threat to the Commons: the Case of South America' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 157.
[16] Manuel de la Fuente, 'A Personal View: The Water War in Cochabamba, Bolivia: Privatization Triggers an Uprising' (2003) 23(1) *Mountain Research and Development* 98.
[17] David Harvey, *The New Imperialism* (Oxford University Press 2003) 148.

commons as a legal concept of its own.[18] The main challenge, it seems, is to halt the seemingly inexorable process of transformation of commons into capital. For that purpose, all legal disciplines, from legal theory and (intellectual) property law to constitutional and administrative law, have contributed to the current debates on the commons. However, surprisingly little has been said about the role that *international law* can play in the empowerment of communities in the self-management of their resources and in the resistance against the dispossession of the commons, notably in the Global South. Whereas *global* commons like outer space or the high seas are subject to special treaty regimes between states and international legal principles such as the common heritage of mankind (CHM), it remains particularly unclear if the commons exist as a 'social institution' in the realm of international law.[19]

## 3. Research questions and structure

My main endeavour throughout this PhD dissertation, which builds in part upon an earlier book which I co-edited with Professor Jan Wouters,[20] will be to assess to what extent international law can require states to recognize this polycentric and self-regulated mode of governance and to protect marginalized populations from enclosure and dispossession of their commons in the context of development policies. The research on the implications of the international legal system on the social institution of the commons is indeed still scarce.[21] My research goal is

[18] Maria Rosaria Marella, 'The Commons as a Legal Concept' (2017) 28(1) *Law and Critique* 61; Ugo Mattei and Alessandra Quarta, 'Principles of Legal Commoning' (2017) 49(1) *Revue juridique de l'environnement* 67.
[19] A typical definition of social institution is offered by Jonathan Turner: 'a complex of positions, roles, norms and values lodged in particular types of social structures and organising relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment.' See, Jonathan Turner, *The Institutional Order: Economy, Kinship, Religion, Polity, Law, and Education in Evolutionary and Comparative Perspective* (Longman 1997) 6.
[20] Samuel Cogolati and Jan Wouters (eds), *The Commons and a New Global Governance* (Edward Elgar 2019).
[21] See, Samuel Cogolati and Jan Wouters, 'International law to save the commons', in Samuel Cogolati and Jan Wouters (eds), *The Commons and a New Global Governance* (Edward Elgar 2019) 266-290; Olivier De Schutter, 'From Eroding to Enabling the Commons: The Dual Movement in International Law', in ibid., 231-265; Ugo Mattei, 'The ecology of international law: towards an internati(onal legal system in tune with nature and community?', in ibid., 212-230; Kathryn Milun, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons* (Ashgate 2011); Burns H. Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press 2013).

ultimately to elevate 'the commons as a legal institution'[22] of its own and get it firmly recognized in international law, notably by making positive use of international and regional human rights instruments[23] as stepping-stones toward the reconstruction of the commons under international law. This essay indeed supports the broad thesis that the 'social institution'[24] of the commons cannot survive in a legal or policy vacuum, and that, as such, some kind of international legal protection could be offered for the right to establish and manage the commons. The 'minimal recognition of rights to organize' represents the seventh design principle put forward by Elinor Ostrom to characterize a robust and sustainable commons-based institution. So, it is already clear from Ostrom's extensive empirical studies that external governmental authorities should give 'at least minimal recognition to the legitimacy of […] rules' created by commoners themselves.[25] In other words, my claim in this thesis is that international law could provide a legal basis for such legitimacy to devise commons-based institutions.

Attempting to provide a fully-fledged system of international legal protection for all kinds of commons, in any country, would be overly ambitious. Therefore, the scope of inquiry of this study is methodologically limited in two ways. First, notwithstanding the importance of other (urban, cultural, knowledge, or open) commons, such as Wikipedia or community gardening

[22] Fritjof Capra and Ugo Mattei, 'Chapter 9. The Commons as a Legal Institution' in *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Berrett-Koelher Publishers 2015) 149-167. See also, Marella, *supra* n 18.

[23] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted on 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 4; American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (signed on 17 November 1988, entered into force on 16 November 1999) OAS Treaty Series No 69, 28 *ILM* 156 ('San Salvador Protocol'); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 3 September 1981) 660 UNTS 195; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Convention on the Rights of the Child (adopted by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990) 15777 UNTS 3; Indigenous and Tribal Peoples Convention (No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383; CFS, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO 2012); UNGA, 'Declaration on the Rights of Indigenous Peoples' (13 September 2007) GA Res. 61/295, UN Doc. A/61/53; HRC, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (8 October 2018) Resolution adopted by the Human Rights Council on 28 September 2018, Resolution 39/12, UN Doc. A/HRC/RES/39/12.

[24] Beryl L. Crowe, 'The Tragedy of the Commons Revisited' (1969) 166(3909) *Science* 1103: 'The commons is a fundamental social institution that has a history going back through our own colonial experience to a body of English common law which antedates the Roman conquest'.

[25] See, Ostrom, *supra* n 8, 101.

initiatives in cities (see for a more detailed analysis of knowledge commons, *infra*, Chapter 2, Section 1.3), this dissertation narrows its research focus only on more traditional, ecological, subsistence commons governing shared natural resources such as forests, seeds, pastures, lands, water resources, on which communities depend for their survival throughout Latin America, Africa, and Asia.

Secondly, in an attempt to offer pathways in bridging the commons gap, our analysis is mainly centred on the field of *development*. According to the 2030 Agenda for Sustainable Development, which was adopted in 2015 by all member states of the UN General Assembly (UNGA) as the new roadmap of the development community, '[s]ustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent'.[26] It should be acknowledged that the concept of sustainable development, understood in this more holistic sense, is broad and encapsulates a wide variety of actors for bilateral and multilateral cooperation, good governance, technical assistance, international trust funds, and national development agencies (such as the Swedish International Development Agency (SIDA) or the UK Department for International Development (DFID) – see, *infra*, Chapter 3, Section 2.1.2). Yet, as Philipp Dann points out, the shared element among these actors is the transfer of official development assistance (ODA) funds.[27] Since 1969, ODA is defined by the Organisation for Economic Coordination and Development (OECD) as 'government aid that promotes and specifically targets the economic development and welfare of developing countries'.[28] According to the OECD's cumulative criteria, these financial flows should necessarily be 'provided by official agencies, including states and local governments, or by their executive agencies' and 'concessional (i.e. grants and soft loans) and administered with promotion of the economic development and welfare of developing countries as the main objective'.[29] This definition excludes military aid (which serves the donor's security interests) or export credits (which primarily serve commercial interests). In brief, development points in

[26] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc. A/RES/70/1, para. 13.
[27] Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013) 13.
[28] OECD, Official Development Assistance (ODA) <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm> (accessed 25 July 2020).
[29] ibid.

this thesis to the practice of both bilateral and multilateral development agencies, such as the World Bank, to promote 'economic development and welfare of developing countries'. It is in this specific policy context that I investigate the (fragile) role of the commons. Bilateral and multilateral development agencies, including International Financial Institutions (IFIs),[30] cover both states and international organizations which administer official development funds. In other words, although private enterprises and other non-state actors have an impact on the enclosure of commons in developing countries, the focus in this work is on bilateral and multilateral development agencies, which have international legal personality and are therefore subject to international rights and obligations. Indeed, as various legal scholars (in 'international development law'[31] or the 'law of development cooperation'[32] – see, *infra*, Section 5) have already shown, the field of development is not just a matter of politics or economics, but is structured by legal rules and obligations. The UN Sustainable Development Goals (SDGs), for instance, are grounded in human rights norms and 'seek to realize the human rights of all'.[33]

The overall objective of this thesis is to investigate whether international law can be part of the solution in saving the commons from enclosure in the field of development; if so, to what extent it does, and how it should look like in order to fully protect the commons from enclosure. The study seeks to elevate the commons as legal institution of its own, notably by reference to recent developments in international human rights law. To this end, this work is articulated around three main research questions, and a subsidiary one:

(i) How are the commons perceived in the field of development? How are they threatened by development projects and policies? What are the advantages, limitations, and distinctive features of a development approach that would recognize the commons as a social institution of its own for the management of shared natural resources?

(ii) Does international law not only recognize global commons, but also *local* commons managed directly by the communities, and if so, to what extent? Do concepts such

[30] IFIs can be defined as loan-giving financial institutions, and include the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB) or the Council of Europe Development Bank. Conditionalities imposed on borrowing countries serve to ensure reform in accordance with the IFI's model of development and may as such have an adverse impact on the maintenance of commons-based institutions in developing countries.

[31] See, Petra Minnerop, Rüdiger Wolfrum and Frauke Lachenmann, *International Development Law* (The Max Planck Encyclopedia of Public International Law, Vol. III, Oxford University Press 2019).

[32] See, Dann, *supra* n 27.

[33] UN 2030 Agenda, *supra* 26, preamble.

as *res communis*, *res nullius* or common heritage of mankind (at least implicitly) recognize or translate the notion of the commons in international law? If not, to what extend does international law represent a threat to the maintenance of commons-based institutions?

(iii) In legal terms, and from a human rights perspective, how could an approach to development based on the commons be conceptualized? What are the key international and regional human rights obligations that states and international organizations as development actors should respect, in order to recognize the commons and prevent enclosure?

A subsidiary question concerns the role played by the World Bank – the world's foremost development institution with near-global membership and the single largest source of net income: does it provide support for the establishment and protection of the commons in development projects? If so, how have its measures been implemented so far? And if not, why?

These three research questions shape the structure of this work, which is divided into three main chapters responding to this simple pattern: problem – cause – solution.

Chapter 1 ('The Commons and Development') discusses the various conceptions of the commons from Garrett Hardin to Elinor Ostrom and current political activists. The notion of the commons is by essence not legal. It has been seldom studied in the field of international law. Still, it has been addressed extensively in political economy, political theory and development studies. Therefore, it appears necessary to begin our investigation with an interdisciplinary introduction to the concept of 'commons', which will reveal the political and philosophical context wherein the notion has emerged, before proceeding with the legal aspects. However, this thesis will not provide an exhaustive study of all the types and schemes of governance applied to the commons; nor does it claim to present a perfect solution to change the current model of development. Its humbler objective is to understand the political and philosophical context from which the concept of commons emerged, before raising the question of the potential instrumental use of international law. The aim is to make clear how the prevailing model of development favoured by industrialized countries and grounded in individual private poverty and wealth maximization represents a threat to the commons around the world.

After this conceptual exercise, I dig deeper into the interconnection between the social institution of the commons and international law in Chapter 2 ('The Commons and International

Law'). Chapter 2 first examines, as an entry point, the growing engagement of legal scholarship with the commons in other fields of the law. It will be seen that, despite a growing interest in other areas of the law, scholarly debates about the commons, defined as institutions for self-governance, remain extremely rare within the field of international law. Indeed, while international law has long recognized areas and resources beyond state jurisdiction (like the high seas, deep seabed, Antarctica or outer space) as *global* commons, it has given much less attention to the commons defined in Ostrom's sense, as bottom-up institutions. This chapter, therefore, seeks to locate the exact role of the commons with a deconstructive analysis of the discipline of international law. I perform this disciplinary deconstruction by connecting some of the literature on the commons with the concepts of global commons, sovereignty and nature in international law. By offering a critical account of the origins of international law, I show how it essentially served as an instrument of commodification and enclosure of the commons from the colonial era onwards. After challenging the traditional foundations of international law, I argue that international law needs to be fundamentally rethought if it is to protect the commons around the globe.

Yet, I also try to go beyond this critical stance towards the discipline of international law. In Chapter 3 ('The Commons and Human Rights'), in a more reconstructive move, I explore the potentially pivotal role of international and regional human rights instruments in closing the gap of international legal protection for the institution of the commons. Instead of rejecting any kind of international law solution, this thesis suggests bridging the commons gap in international law and empower communities as key actors of their development by resorting to human rights. Existing human rights guarantees include the right to self-determination, the right of all peoples to freely dispose of their natural wealth and resources, the right to communal ownership, the right to environment, and indigenous rights. Likewise, I examine which community rights are currently emerging under international law to recognize the alternative autonomous management and governance mechanism of the commons. Among recent initiatives, the UN Declaration of the Rights of Peasants and Other People Working in Rural Areas (UNDROP), which was adopted on 28 September 2018 after 17 years of negotiations within the Human Rights Council (HRC) in Geneva[34] and on 17 December 2018 by the UN

[34] HRC, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (8 October 2018) Resolution adopted by the Human Rights Council on 28 September 2018, Resolution 39/12, UN Doc. A/HRC/RES/39/12 ('UNDROP').

General Assembly,[35] offers a window into the potential of generalizing the model of community rights for all people involved in small-scale food protection, including all those who depend on seed systems and the commons for their livelihood – that is around 45% of the world population. Interestingly, UNDROP finds its roots in the Indonesian peasant union *Serikat Petani Sumatera Utara* which reclaimed the land that had been seized as a result of the growth in oil palm plantations supported by international development funds. The fight for the recognition of peasant rights emerged worldwide through the work of transnational peasant movement *La Via Campesina*. The Declaration on the Rights of Peasants, which remains formally non-binding (like all UNGA resolutions) (see, for a discussion of the legal status of UNDROP, *infra*, Chapter 3, Section 3.7), represents a new international political commitment[36] and sets *new* human rights standards which re-appraise the role of peasants, among which the right to food sovereignty (Article 15), the right to land (Article 17), the right to seeds (Article 19) and the right to water (Article 21). Most importantly for this thesis, Article 17(3) UNDROP requests states to 'recognize and protect the natural *commons* and their related systems of collective use and management'.[37] After having observed in Geneva the last round of negotiations concerning the text of the Declaration in April 2018,[38] I explain in this thesis how this very first international law 'standard' to protect the commons came into being. Using UNDROP as a stepping-stone towards the international legal protection of the commons, I try to show how international law could now serve as a driver of change for reclaiming the commons. It should be stressed that my focus is on the 'normative' side of these human rights guarantees to recognize the commons in international law; the study of independent accountability mechanisms within multilateral development banks (like the World Bank's inspection panel) and other bilateral or multilateral development agencies in the implementation of specific in investment or development projects goes beyond the scope of this PhD.[39]

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[35] UNGA, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (17 December 2018) UN Doc. A/RES/73/165 ('UNDROP'). It was adopted by 121 votes in favour, 8 countries against (i.e. the United States, the United Kingdom, Hungary, Israel, Australia, New Zealand, Guatemala and Sweden), with 49 abstentions (among which Belgium).

[36] UNDROP, *supra* n 34, Article 2(1) : 'States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. They shall promptly take legislative, administrative and other appropriate steps to acheive progressively the full realization of the rights of the present Declaration that cannot be immediately guaranteed.'

[37] ibid. (emphasis added).

[38] I thank the *Centre Europe – Tiers Monde* (CETIM) and its director, Melik Özden, for accreditating me to participate in the last session of the working group on peasant's rights at the UN in Geneva from 10 to 12 April 2018. I am greatly indebted to Dr. Christophe Golay and Dr. Priscilla Claeys for their openness towards my questions about the process of adoption of UNDROP.

[39] See, e.g., Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law : Law, Procedures and Principles* (Intersentia 2016).

## 4. Focus on the World Bank

Each chapter dedicates a few paragraphs to illustrate how the World Bank's development policies represent a threat to the commons.[40] Originally known as the International Bank for Reconstruction and Development (IBRD), the Bank was created in 1945 in Bretton Woods as a 'brick-and-mortar financer',[41] along with the International Monetary Fund (IMF). The primary purpose of the Bank, as conceived by John Maynard Keynes and Harry Dexter White, respectively the British and American negotiators at the Bretton Woods conference, was indeed to finance the post-World War II reconstruction in Europe. It is only later that the Bank started financing loans to underdeveloped countries. The original mission of the Bank is reflected in its purposes as set forth in Article I of the IBRD Articles of Agreement,[42] which requires that all its investments be in principle 'for a productive purpose.'[43] The general rule on which the Bank may guarantee or make loans in the IBRD Articles is that, 'except in special

[40] The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). Together, IBRD and IDA make up the World Bank, hereafter referred to as 'Bank'.

[41] Sabine Schlemmer-Schulte, 'World Bank', in Jan Wouters (ed.), *Encyclopedia of Intergovernmental Organizations* (Kluwer Law International 2015) 50.

[42] See Articles of Agreement of the International Development Association (adopted on 24 September 1960) 439 UNTS 249 ('IDA Articles of Agreement'), Article I.

[43] Articles of Agreement of the International Bank for Reconstruction and Development (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 134 ('IBRD Articles of Agreement'), Article 1: 'The purposes of the Bank are:

> (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes […].
>
> (ii) To promote private foreign investment by means of guarantees of participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by its and its other resources.
>
> (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.
>
> (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.
>
> (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.'

circumstances', the Bank shall only finance '*specific* projects of reconstruction or development' (Article III, Section 4 (viii) IBRD Articles of Agreement[44]). The Bank's purposes have basically remained unchanged in its constitutional charter to date. The Articles of Agreement were only amended three times (i.e. in 1965, 1989 and 2012) and none of these amendments indicated the 'commons' as a specific purpose to be served by the institution.

The Bank's transformation from a specific lender/guarantor into a comprehensive development institution can be understood as the result of a broad and purposive interpretation of its founding document. Obviously, since the Bank's creation in 1944, economic and development challenges have changed considerably. As Ibrahim Shihata, former General Counsel of the Bank observed, 'the Bank has continuously developed its *functions* beyond the literal provisions of its Articles of Agreement while respecting the overall *purposes* stipulated in these Articles.'[45] This allowed the Bank to gradually cover in its operations 'numerous diverse issues including population, education, health, women in development, social security, privatization, the environment, health, women in development, social security, privatization, the environment and 'governance', none of which is mentioned by name in the Bank's Articles.'[46] The same could be said of the rise of challenges linked to commons-based institutions in developing countries. As Roberto Dañino, another former General Counsel noted, '[g]lobalization has forced us to broaden the range of issues that are of global concern.'[47]

Treaty provisions are indeed never carved in stone in international law. Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties (VCLT),[48] which forms part of customary international law,[49] provides that in interpreting a treaty, including the founding charter of an international organization,[50] there shall be taken into account, together with the context, '[a]ny

[44] (emphasis added). See Article V, Section 1(b) IDA Articles of Agreement.
[45] See Ibrahim F. I. Shihata, 'Democracy and Development' (1997) 46(3) *The International and Comparative Law Quarterly* 635, 639-640. See also Ibrahim F. I. Shihata, 'Techniques to Avoid Proliferation of International Organizations – The Experience of the World Bank', in Niels M. Blokker and Henry G. Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International 2001) 120.
[46] ibid., 340.
[47] Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights' (2007) 41(1) *The International Lawyer* 21, 24.
[48] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[49] As a treaty, the Vienna Convention is obviously not applicable to the Bank's Articles of Agreement, which preceded the former. Like many of the Vienna Convention's provisions, Article 31 is considered to be part of customary international law: see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1966, p. 6, para. 19.
[50] The Vienna Convention is as such applicable to 'any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any

subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' Thus, in delineating the area of competence of an international organization, the International Court of Justice (ICJ) has *inter alia* devoted 'special attention' to the organization's 'own practice' as a means of interpretation.[51] The ICJ has also held that 'each organ must, in the first place at least, determine its own jurisdiction.'[52] According to the International Law Commission (ILC) Special Rapporteur's third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, this reflects a general principle of the law of international organizations.[53] More specifically in the case of the Bank, it should be recalled that the IBRD Articles of Agreement vest all powers of authoritative interpretation in the Board of Executive Directors chaired by the President (IBRD Article IX).[54] This means concretely that it is for the Bank's own organs to decide whether its policies come within the confines of the Bank's purposes as stated in its Articles of Agreement.

Yet, this is not to say that the Bank's legal mandate is unlimited. The Bank also faces legal constraints as it searches to reorient its development programs toward new global challenges. It should be recalled that any kind of 'political' activity is in principle *ultra vires*. Article IV, Section 10, of the IBRD Articles of Agreement,[55] states that '[o]nly economic considerations shall be relevant to [its] decisions.' Article III, Section 5(b), of the IBRD Articles of Agreements[56] adds that the Bank's funds shall be used 'with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.' However, it should be acknowledged that the line between political intrusion and permissible action on the part of the Bank is increasingly blurred. Given the 'artificiality and falsity of the supposed divisions between "economic" (as defined from time to time) and "political" and other factors', this limitation caused much ink to flow in the academic

relevant rules of the organization' (Article 5). The specification at the end of this provision clarifies, though, that the Vienna Convention's application is of a subsidiary nature: see Kirsten Schmalenbach, 'Article 5', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012) 89.

[51] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, supra* n 49, para. 19.

[52] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151, p. 168.

[53] ILC, Georg Nolte, Special Rapporteur, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (7 April 2015) UN Doc. A/CN.4/683, para. 48.

[54] See, Article X IDA Articles of Agreement. See also Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd ed., 2005) 34-35.

[55] See Article V, Section 6 IDA Articles of Agreement.

[56] See Article V, Section 1(g) IDA Articles of Agreement.

literature.[57] Yet, the prevailing view of what amounts to political interference has also evolved within the institution, and a more permissive interpretation was adopted over time.[58] As Roberto Dañino, former General Counsel opined, 'it is consistent with the Articles that the decision-making processes of the Bank incorporate social, political, and any other relevant input that may have an impact on its economic decisions.'[59] Under this broader understanding, more and more global challenges will likely be considered as a legitimate area of competence of the Bank, just as environmental considerations (in the 1980s),[60] governance issues (by the early 1990s),[61] and human rights (over the last decade)[62] have also gradually become part of its mandate. As Rajagopal observes, the World Bank today has a significant impact on 'most domains of human activity in the Third World, including economic and social policy, urban and rural development, and even the very structure of the state'.[63] For Saki Bailey and Ugo Mattei, the transnational norms produced by the World Bank and other international economic institutions have reached the level of 'economic constitutions' as they are now capable of coercing weaker states to implement privatization policies in the form of loan conditioned structural adjustment programs (SAPs) ('top-down economic constitutionalism').[64]

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[57] Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart Publishing 2003) 192. See also Daniel D. Bradlow, 'The World Bank, the IMF, and Human Rights' (1996) 6(1) *Transnational Law & Contemporary* Problems 47; John D. Ciorciari, 'A Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations' (1998) 22 *Fordham International Law Journal* 292; Mac Darrow, 'World Bank and International Monetary Fund' in David P. Forsythe (ed.), *Encyclopedia of Human Rights* (Oxford University Press 2009) 378-379; Galit A. Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103(4) *American Journal of International Law* 647; Willem van Genugten, 'The World Bank Group, the IMF and human rights' in Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 48-52.

[58] See Hassane Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank' (2011) 3 *The World Bank Legal Review* 59; Ibrahim F.I. Shihata, 'Chapter 9. Political Activity Prohibited', in *The World Bank Legal Papers* (Martinus Nijhoff Publishers 2000) 219.

[59] Dañino, *supra* n 47, 23.

[60] See Operational Manual Statement 2.36, *Environmental Aspects of Bank Work* (May 1984). See also Ibrahim F. I. Shihata, 'The World Bank and the Environment: a Legal Perspective' (1992) 16(1) *Maryland Journal of International Law* 42.

[61] See World Bank, *Governance and Development* (The World Bank 1992); World Bank, *Governance: The World Bank's Experience* (The World Bank 1994).

[62] See Roberto Dañino, 'Legal Opinion on Human Rights and the Work of the World Bank' (27 January 2006), referred to in Ana Palacio, 'The Way Forward: Human Rights and the World Bank' (October 2006) Article on the World Bank Development Outreach, World Bank Institute, <http://go.worldbank.org/RR8FOU4RG0> (accessed 6 April 2020).

[63] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 95-96.

[64] Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: the Italian Struggle for the Commons' (2013) 20(2) *Indiana Journal of Global Legal Studies* 965, 1003.

## 5. Methodology

As previously mentioned, this dissertation assesses the relevance of the current state of international law when it comes to addressing the threats that the commons are facing in the context of development policies. However, our intention is not to describe a fully-fledged system of international law that would address all kinds of 'commons'. This would be overly ambitious for this thesis. Therefore, the scope of inquiry of this study is methodologically limited in three ways.

First, notwithstanding the importance of other commons (such as urban commons or knowledge commons), this dissertation operates on a narrower basis and focuses only on *subsistence commons* such as forests, pastures, communal lands, fisheries on which peasants and other people working in rural areas depend for their livelihood in the Global South.

Second, in order to comprehend the (intrinsically non-legal) notion of subsistence commons in international law, an *interdisciplinary view* across a narrow range of disciplines outside of the law is required: development studies, political theory, political science, political economy and critical geography. Subsistence or natural commons have indeed been studied through analytical frameworks that can be (and have been) applied to a variety of case studies emanating from multiple scientific disciplines, but rarely in the field of international law. Respectful of this diversity in the approaches, and in the objects of enquiry, I assume in this dissertation that the analytical frameworks associated with the governance of the commons can act as a conceptual bridge between the disciplines and allow for a mutually enriching dialogue across disciplinary boundaries. I also devote the entire first chapter to unravelling the conceptual foundations of the commons from these various disciplines.

Third, in this thesis, I specifically study the commons in the context of *development* and the current wave of enclosure in developing countries. As a matter of fact, the plunder of natural resources, land grabs and privatization of water systems, which all affect the commons as a model of community organization in the Global South, cannot be understood outside of the current development policies. Development discourses are important for the very formation of the law, for they influence possible legal responses to underdevelopment. Conversely, the law itself – through concepts such as good governance, human rights and the rule of law – has also been ascribed a central role in the process of development. The role of law in development has

been studied by at least two major legal schools of thought: on the one hand, the continental school of international development law ('*droit international du développement*'),[65] and, on the other hand, the Anglo-Saxon school of law and development.[66] Whereas the former reinterprets the sources, institutions, principles, and norms of international law order to foster development and strengthen global justice (see, notably, the demand for a New International Economic Order in Chapter 2, Section 2.3.3.1.), the latter focuses on reform of domestic legal systems in developing countries. In addition to these two schools, it should be conceded that a rising number of critical international legal scholars – especially from the Global South – view the very process of 'bringing development' as the cause of the problem of poverty, rather than its solution.[67] Third World Approaches to International Law (TWAIL) is the intellectual movement that perceives international law as a tool of oppression and exploitation of the Third World.[68] This PhD is not concerned with a specific development theory or legal school of thought; more simply, it is rather interested in the role of development in the commodification of the commons. As we shall see, while private property is a major legal institution, there are only a few studies on the legal aspects of commons enclosure in development. This dissertation will seek to close this gap by providing an analysis of international law in the commodification of commons in the context of development.

It should not surprise that, in reaction to Ostrom's narrow positivist approach, a new body of literature and practical experiences suggested that anything – not just CPRs – could become a commons if governed as such. This discourse on the commons as a new paradigm is explored at length under Chapter 1, Section 1.6. Here, it suffices to say that, for this more political school of thought, the natural properties of the resource to be shared – be it tangible or not – do not matter (anymore), as long as the community has decided to govern it in common. Accordingly, everything can be turned into a commons (*omnia sunt communia*).[69] The commons are indeed much more than mere resource management mechanisms to exclude competing users of shared resources and simply avoid the tragic consequences of economic rivalry. This thesis itself is not

[65] See, e.g., Minnerop, Wolfrum & Lachenmann, *supra* n 31, 353-361; Michel Virally, 'Vers un droit international du développement' (1965) 11 *Annuaires français de droit international* 3.
[66] David M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1; David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press 2006).
[67] Rajagopal, *supra* n 63, 3.
[68] Usha Natarajan, John Reynolds, Amar Bhatia and Sujith Xavier (eds), *Third World Approaches to International Law: On Praxis and the Intellectual* (Routledge 2017).
[69] Massimo De Angelis, *Omnia Sunt Communia: On the Commons and the Transformation to Postcapitalism* (Zed books 2017).

a sterile study of mechanistic legal rules of appropriation and use. In fact, to talk about the international legal protection of the commons is to help impoverished communities reassert control over their resources and reclaim sovereignty over an autonomous space of governance. In this sense, as two legal scholars have phrased it, 'the commons is less a *description* of the resource and its characteristics and more of a *normative claim* to the resource'; 'the claim is to open up (or to re-open) access to a good – i.e., to recognize the community's right to access and to use a resource which might otherwise be under exclusive private or public control – on account of the social value or utility that such access would generate or produce for the community'.[70] Outside of the internal link between a community and a shared resource, there is another important lesson to take from the more recent intellectual stream of works on the commons as a new paradigm: power relations between the commons and the market and state should not be overlooked, for they are the driving forces of the process of enclosure that started with the Industrial Revolution. As Jose Luis Vivero-Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei have summed up, what is essential is that:

> [f]rom the very moment that we accept that the community has an instituting power to create a commons (resource, property regime, governing institution and purpose), we accept that the community is bestowed with legal and political power to regulate the resources important to it, making communing transformational and counter-hegemonic, since the state aims to retain those instituting powers to issue policies and enact laws and the market aims to retain its supremacy to allocate and govern scarce resources.[71]

The law, in this sense, is not neutral. It would be artificial to study the commons as a mere management mechanism for natural resources in complete isolation from the threats of enclosure they face in current development policies, as promoted by the World Bank. Hence, the position I take in this thesis is that of a reflexive research-actor. I endeavour to discuss *critically* some fundamental principles of international law in the broader perspective offered by a full understanding of the commons as a social institution of its own. To paraphrase Mattei and Quarta, I would like to suggest a counter-hegemonic interpretation or more ecological reading of positive international law – that is 'a way of thinking about it that intrinsically and systematically connects it to the needs of reproduction of the commons rather than to production of capital'.[72] I wish to come to a more 'generative' – as opposed to 'extractive' (see *infra*

[70] Sheila R. Foster and Christian Iaone, 'The City as a Commons' (2016) 34(2) *Yale Law & Policy Review* 281, 288.
[71] Jose Luis Vivero-Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei, 'The food commons are coming…' in Jose Luis Vivero-Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei (eds), *Routledge Handbook of Food as a Commons* (Routledge 2019) 9.
[72] Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (Edward Elgar 2018) 28.

Chapter 2, Section 2.4) – body of international law. In this respect, this essay responds to a more normative interrogation around how international law *ought* to become to recognize and support the commons. It seeks to provide its reader with solid foundations to look further into the introduction of 'commoning' practices into development and international law. I indeed consider it as a duty and responsibility to reflect on how the current system of international law can serve to protect the commons as an institution of self-governance in developing countries, and turn words into deeds. Thus, I have been involved in the defence of the commons as an institution, for instance in the process of adoption of the UN Declaration on the Rights of Peasants. I have written op-eds to support its adoption by Belgium as a Member State of the UN HRC[73] and the General Assembly.[74] Before being elected in Belgium's House of Representatives, I drafted parliamentary questions to the Belgian Ministers of Foreign Affairs and Development Cooperation about the adoption of the said Declaration and, in particular, about the recognition of the commons as a fully-fledged system of natural resource governance.[75] After my election in the Parliament, I submitted a proposal of resolution seeking the (subsequent) adoption by the Belgian government of the UN Declaration on the Rights of Peasants; the proposal will soon be examined in the Committee on external relations.[76]

However, this does not imply that the commons are always a 'good' thing.[77] There is no moral judgment on my side on the concrete practice of every commons around the world. I agree with Charlotte Hess and Elinor Ostrom when they say that 'a commons is not value laden – its outcome can be good or bad, sustainable or not – which is why we need understanding and clarity, skilled decision-making abilities, and cooperative management strategies in order to

[73] Samuel Cogolati, 'Pour que la Belgique cultive les droits des paysans à l'Onu' (13 April 2018) *La Libre*, <http://www.lalibre.be/debats/opinions/pour-que-la-belgique-cultive-les-droits-des-paysans-a-l-onu-opinion-5acf75f8cd709bfa6b52fef7> (accessed 6 December 2018).

[74] Patrick Dupriez and Samuel Cogolati, 'Droits des paysans à l'Onu: la Belgique ne peut plus s'abstenir' (20 September 2018) *Le Soir*, <https://plus.lesoir.be/179559/article/2018-09-20/droits-des-paysans-lonu-la-belgique-ne-peut-plus-sabstenir> (accessed 6 December 2018).

[75] Belgian House of Representatives, Committee on External relations, 'Question de M. Benoit Hellings au vice-premier ministre et ministre des Affaires étrangères et européennes, chargé de Beliris et des Institutions culturelles fédérales, sur les "discussions en cours à l'ONU au sujet d'une possible déclaration sur les droits des paysannes et des paysans et leur impact sur l'aide belge au développement' (n° 24853) (18 April 2018) CRIV 54 – COM 0870.

[76] Belgian House of Representatives, Committee on External relations, 'Proposition de Résolution sur l'adoption de la Déclaration des Nations Unies du 17 décembre 2018 sur les droits des paysans et des autres personnes travaillant dans les zones rurales, déposée par MM. Samuel Cogolati et Wouter De Vriendt et consorts' (n° 24853) (22 Octobre 2019) DOC 55 0670/001, <https://www.lachambre.be/FLWB/PDF/55/0670/55K0670001.pdf> (accessed 18 December 2019).

[77] I make a strict distinction between the commons as a social institution and the common good as a normative ideal.

ensure durable, robust systems.'[78] I do not consider commons as a mere discourse of abstract ideas or political principles. My intent is not to 'assert a new grand narrative'[79] of the commons in international law. More modestly, I consider the commons just as an alternative model of community governance, as another experience of collaborative practice, today recognized as such in the field of economics, but that has gone unexamined for far too long under international law. Hence, I aim to show that the commons as social systems do exist, face the threat of enclosure throughout the world and therefore call for (international) legal protection. Nonetheless, I do not advocate that they are 'better' than any private or public arrangement. What I want to point out is just that this model of community governance ought to be recognized – next to public and private solutions – and that communities ought to be defended against the destructive phenomenon of enclosure. My contribution concerns the extent to which international law could and/or should recognize this legal power of communities to establish and maintain commons in the context of development.

This thesis is theoretical, rather than empirical. A significant part of commons studies over the last 25 years among social and natural scientists, economists and historians is made of empirical field studies of how commons *internally* work.[80] Commons scholars from various fields have indeed been paying attention to the internal functioning of communities of pastoralists in West-Africa,[81] urban commons in Brazil,[82] farmers in Cuba,[83] irrigations systems in Nepal[84] to respond to questions such as: how individual users of the commons interact with the group as members, what is the role of trust in coping with social dilemmas, what kind of sanctions and reciprocal rules the community established to prevent free-riding, how the prisoner's dilemma translates in practice, what are the main reasons for the malfunctioning of a commons, etc. The

[78] Charlotte Hess and Elinor Ostrom, 'Introduction: An Overview of the Knowledge Commons' in Charlotte Hess and Elinor Ostrom (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (MIT Press 2007) 11.
[79] David Bollier and Silke Helfrich, 'Introduction. The Commons as a Transformative Vision' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) xiv.
[80] Miguel Laborda-Pemán and Tine De Moor, 'History and the commons: a necessary conversation' (2016) 10(2) *International Journal of the Commons* 517, 519.
[81] Alexis Gonin, 'Des pâturages en partage : Territoires du pastoralisme en Afrique de l'Ouest' (2018) 233(1) *Revue internationale des études du développement* 33.
[82] Jérémie Cavé, 'En quête des communs urbains : La gestion conflictuelle des déchets au Brésil' (2018) 233(1) *Revue internationale des études du développement* 117.
[83] Peter M. Rosset and Valentin Val, 'The 'Campesino a Campesino' agroecology movement in Cuba: Food sovereignty and food as a commons' in Jose Luis Vivero-Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei (eds), *Routledge Handbook of Food as a Commons* (Routledge 2019) 251.
[84] Bhuwan Thapa and Christopher A. Scott, 'Institutional Strategies for Adaptation to Water Stress in Farmer-Managed Irrigation Systems of Nepal' (2019) 13(2) *International Journal of the Commons* 892.

great contribution of these analytical works was to show that commoners can indeed achieve sustainable bottom-up governance mechanisms and prevent overuse of natural resources. However, it is neither my expertise nor my aim to engage in fieldwork. I do not develop further experimental case studies of the internal conditions for a commons to flourish. I do not provide an exhaustive study of all the types and schemes of governance applied to the commons, nor do I claim to present a perfect formula to change the current model of development. My humbler objective is to illustrate, through a handful of carefully chosen examples in the field of development, that the articulation of the commons in international law constitutes a new possible avenue for recognition and legitimacy that calls for further elaboration.

This thesis rather departs from this 'microsituational'[85] level of study of the commons and focuses on international law as a possible *external* factor – be it of protection or destruction – in the wider context of the commons, especially in developing countries. To paraphrase Ostrom, I ask whether international law can represent one of the 'factors that enhance or detract from the emergence and robustness of self-organized efforts within multilevel, polycentric systems'.[86] In other words, the focus is not so much the economic efficiency of institutional arrangements in sustaining specific types of resources. This is notably why I do not dig deeper in case studies of specific governance or legal regimes for rivers, groundwater, land or forests. I do not study 'a' specific type of commons. The commons are 'an act of autonomy';[87] they should be regarded as a social fact. Again, what matters to me is not the nature of a resource, but the way it is produced, reproduced and managed collectively by a community – and more importantly, the extent to which international law (ought to) give recognition to this alternative regime of governance. Most commons scholars and activists aspire to a new system of (international) law – like Burns H. Weston and David Bollier, who call for the recognition of a right to commoning.[88] The prospect of this doctoral study is the promise of international human rights guarantees for communities of commoners faced with the destructive process of commodification and enclosure in the Global South.

More specifically regarding the purposes of this PhD dissertation, I investigated the implications of the policies of the World Bank on the commons by conducting semi-structured interviews with legal counsels and community rights experts based in Washington, D.C., during the Law, Justice and Development Weeks of 2015, 2016 and 2017. It will be seen that IFIs still

[85] Ostrom, supra n 1, 432.
[86] ibid., 409.
[87] Mattei & Quarta, *supra* n 72, 49.
[88] Weston & Bollier, *supra* n 21.

exercises a considerable influence on development policies, and incidentally, on the enclosure of the commons around the world. Since the 1970s, the institution is well-known as a fierce defender of privatization strategies in SAPs such as in Cochabamba, which coerce developing countries to convert untitled lands and other commons like water cooperatives into private property and private corporations on the markets. The World Bank does not yet recognize the commons as a governance model of its own in its land policies and World Development Reports (WDRs) – the annual flagship publications with policy recommendations on various aspects of development. Yet, external development interventions in the form of individual land titling and privatization programs, not only seem inappropriate where communal systems exist, but they also may destroy the traditional and communal way of life of people in developing countries. Consequently, I explore if and to what extent international human rights guarantees can secure the commons of small-scale farmers, pastoralists, forest dwellers, artisanal fishers and indigenous peoples in the face of development projects promoted by the Bank.

## 6. Definitions

Far from being a monolithic notion, the commons today evoke a wealth of (sometimes contradictory) meanings in the rich interdisciplinary literature on the topic. Whereas some authors focus on well-defined resource domains at the local or global levels, others insist that the commons are primarily about social and political movements against the top-down logic of market and states. While this diversity should be acknowledged, as it is inherent in the multifaceted nature of the commons as a new social imaginary, it also poses a dilemma for a thesis in international law. What do we exactly understand by 'commons' in this study? As an introduction, I attempt to outline below some definitions for the interconnected notions of commons (2.1), the common (2.2), global commons (2.3), and public goods (2.4). I also make clear that it is the first notion of the commons as a *social institution* which forms the main object of analysis of this essay.

### 6.1. Commons

To try to define more precisely the contemporary notion of 'commons', it may be good to resort first to the traditional classification of goods in economic theory. Contrary to public goods,

which are non-rival, CPRs are rival in consumption, and therefore vulnerable for depletion (see *infra* Chapter 1, Section 1.1). Yet, today, the commons do no longer exclusively refer to tangible CPRs like pastures, seeds, forests or water reserves, but include intangibles resources such as the Internet, software codes and human genes. Under Ostrom's influence, the commons have become more closely connected with the collective self-governance and participatory/collaborative/cooperative mechanisms they imply than with the strict category of (rivalrous and non-excludable) economic goods they once referred to. 'Knowledge commons' or 'informational commons' are for example different because they are non-rival, cumulative or incremental, abundant, easily reproducible, and intangible: their use certainly does not prevent anyone from using it – quite on the contrary, the value of knowledge may increase with the number of users.

Thus, what is so specific about the contemporary notion of the commons? The commons can no longer be abstracted from the social networks that participate in their production and protection: without communities, there are no commons. This is why we do not simply speak of common 'goods' in this dissertation, nor of 'global commons' as mere global resource areas. Instead, we define a commons as a *social institution* consisting of at least three cumulative elements:

(i) A common-pool *resource*, be it a tangible, natural, resource like pastures, lands, seeds, forests or water reserves, or intangible resources such as traditional knowledge or the Internet (the object);
(ii) A *community* of people (tribe, extended family, neighbourhood, village) that has exclusive (no free and open) access to the resource in question and that manages it in common (the subject);
(iii) The practice of *commoning*, that is the concrete activity of governing a resource through collective action and according to *ad hoc* rules (not under public or private property management) (the practice).

The rules constitutive of the practice of *commoning* are specific to each commons. It is therefore impossible to impose a unique and closed definition of the commons. Hybrid forms of commons-public or commons-private (e.g. cooperatives) partnerships are also possible. It is

rather in a very broad and plural sense, as an 'institution for collective action',[89] that the commons are understood in this dissertation. The commons represent grassroots institutions developed by communities, thereby creating a space of self-government beyond market and state, to share and govern resources horizontally and autonomously (see, for practical examples, Section 4 below). It is this institutional and social element for self-government that makes the commons so different from privately or publicly owned resources, and which therefore call for further research in international law.

### 6.2. The common

Over the last decade, the commons have also acquired a strong political dimension. This political dimension should not be neglected. Academics and social activists across the world have indeed united around the political idea that 'the world is not for sale', i.e. that not all commons are meant to be commodified, and that some areas of social life should remain governed as a 'common'. Ostrom's work has recently sparked a new wave of interest for the commons as a 'third way' to overcome the extractive forces of capitalism and the top-down logic of states. In this sense, the commons have evolved into an alternative 'paradigm' to resist the traditional private-public divide and prioritize the ecological and human needs of communities over market and state. More and more authors nowadays identify the commons with political strategies of resistance, like the commons movement in Italy (the Rodotà Commission that introduced into the Italian Civil Code the third category of *beni comuni* beyond the public/private goods, the 2011 Water Constitutional Referendum), the *indignados* in Spain, the water war in Cochabamba (Bolivia), or the Occupy movement in the United States (US) to overcome the extractive force of capitalism and the top-down logic of states.[90] They stress that the commons do not exist in a political vacuum of power relations; these are 'social systems' sustained in a competitive struggle against capitalist and state domination.

In their landmark book '*Commun: Essai sur la révolution au XXIe siècle*', Pierre Dardot and Christian Laval define the 'Common' as the political principle underlying social movements in opposition to the capitalist order and the entrepreneurial state.[91] In this sense, the common in

[89] Tine De Moor, 'From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons' (2011) 19(4) *Natures Sciences Sociétés* 422.
[90] See De Angelis, *supra* n 69.
[91] Pierre Dardot and Christian Laval, *Commun : Essai sur la révolution au XXIe siècle* (La Découverte 2014) 16.

the singular would refer to the emergence of a new way of challenging the extension of private property to all spheres of society, culture and ways of life, as well as contesting the totalitarian communist ideal in the context of concrete social struggles. For authors writing from this normative perspective, the common is not limited to marginal areas of natural resource management, but rather a much broader set of practices which represent more direct forms of democracy. Pierre Dardot claims that '[t]he very act of establishing a common is in and of itself a democratic act'.[92] Pierre Sauvêtre even goes as far as to suggest that Ostrom's commons have 'no connection whatsoever with the movements for the common that appear in the 2000s in the context of the wave of state neoliberalization'.[93] For him, the Italian *beni comuni* movement or the Catalonian *politica del comú* go beyond a mere collective mode of resource management and represent a true 'exercise of social sovereignty that comes into conflict with state and capitalist sovereignties'.[94] These authors lament that Ostrom's work does not sufficiently call into question the capitalist mode of production. They seem to be in line with what Michael Hardt and Antonio Negri wrote earlier in their book '*Commonwealth*' in defending a more encompassing notion of the common which does 'not position humanity separate from nature, as either its exploiter or its custodian, but focuses rather on the practices of interaction, care, and cohabitation in a common world, promoting the beneficial and limiting the detrimental forms of the common'.[95] In sum, this new wave of political activists who engage with the commons discourse criticizes Ostrom's notion for being apolitical – a system of resource management among others – and anthropocentric – for distinguishing between humans as exploiters and nature as a mere stock of resources.

There are difficulties, however, with this more normative approach of the common. In this PhD study, I resist the temptation to turn the commons into an institution that would be *ipso facto* democratic. The commons cannot be reduced to an abstract ideal or utopia of democracy. It is more modestly an alternative experiment of bottom-up governance, an autonomous space of collaborative practice, linked with a concrete community of people, which may indeed enact more direct forms of democracy, but also instigate other forms of injustice, like in any other sector of society. To give just one example, women – who are often the primary working force

[92] Pierre Dardot, 'What Democracy for the Global Commons?' in Samuel Cogolati and Jan Wouters (eds), *The Commons and A New Global Governance* (Edward Elgar 2019) 20-36.
[93] Pierre Sauvêtre, 'Forget Ostrom: From the Development Commons to the Common as Social Sovereignty' in Samuel Cogolati and Jan Wouters (eds), *The Commons and A New Global Governance* (Edward Elgar 2019) 80.
[94] ibid., 96.
[95] Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press 2009) viii.

in commons – may be adversely affected by their subordinate status and by discriminatory gender norms and cultural attitudes within the community itself.[96] Despite being the main contributors to, and the most dependent on, shared resources, there is now evidence that women are generally more likely to be excluded from leadership and decision-making positions in 'community-level discussions', 'in rural extension and water, forestry or fishery services, in cooperatives and in community or elders' councils' which often govern commons in rural areas.[97] This is another reason why this thesis investigates whether women's rights (see, *infra*, Chapter 3, Section 3.7), as enshrined in international and regional human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), can be part of the solution in protecting all commoners. For the same reason, I choose to define the commons in a more neutral sense as a social institution of self-governance.

### 6.3. Global commons

If we consider CPRs to be open-access and rivalrous goods, we must acknowledge that several of the resource domains on which we depend are to be found on a global scale. The atmosphere, the high seas, Antarctica, outer space, are all vast resource domains whose overexploitation or misuse could potentially have disastrous consequences for every single individual, regardless of his geographical location. Thus, the term 'global commons' has also been used in international law to include these open resources.[98] The United Nations Environment Programme (UNEP) has defined global commons as 'resource domains or areas that lie outside of the political reach of any one nation State'.[99] More recently, the term has come to include

[96] Most of the literature analyses the phenomenon of widespread commodification and dispossession of the commons in a gender-neutral way, besides a few exceptions: Anungla Aier, 'Women, Commons and Gender Justice', P2P Foundation <http://wiki.p2pfoundation.net/Women,_Commons_and_Gender_Justice> (accessed 17 June 2018); Elisabetta Cangelosi and Sabin Bieri, 'Women's land rights and community land rights: conflicting or converging claims', paper presented at the XVI Biennial IASC Conference 'Practicing the commons: self-governance, cooperation, and institutional change' (2017) <https://www.iasc2017.org/wp-content/uploads/2017/06/1E_Sabin-Bieri.pdf> (accessed 17 June 2017); Silvia Federici, 'Feminism and the Politics of the Commons', in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 45-54; Silvia Federici, *Re-enchanting the World: Feminism and the Politics of the Commons* (2019 PM Press).

[97] United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General recommendation No. 34 on the rights of rural women' (4 March 2016) CEDAW/C/GC/34, para 53.

[98] Susan J. Buck, *The Global Commons: An Introduction* (Island Press 1998); Nico Schrijver, 'Managing the global commons: common good or common sink?' (2016) 37(7) *Third World Quarterly* 1252.

[99] United Nations Environment Programme (UNEP), 'Global Commons' (2017) <http://staging.unep.org/delc/GlobalCommons/tabid/54404/Default.aspx> (accessed 20 November 2017).

common or global concerns of mankind such as biodiversity conservation and climate change.[100]

However, it should be stressed that, for global commons, the leap from the local to the global level implies a qualitative change due to the structural absence of a community and of a widely recognized and implemented set of social norms regarding global resource domains. There is a lot of literature on the precise mechanisms that helped commoners to function and to overcome local constraints.[101] One reason why small-scale commons have proven to be sustainable is that they relied on a community whose tight-knit relationships often allowed them to design self-governance schemes and curb egoistic behaviour, notably due to the reiterated nature of the social interactions and the actors' concerns for their reputation. In contrast, global commons are not managed by bottom-up institutions tailored by communities. As Tine De Moor already demonstrated, global commons 'lack two important attributes that are characteristic of the commons as they have existed for centuries in Europe and beyond […:] institutionalization and self-governance'.[102] This proves that scale matters,[103] also from an international legal perspective. Most global commons, indeed, lack effective rules of control, management, and access to regulate their use. In this sense, global commons seem to come more closely to the notion of common goods ('*res communes*'), or open-access resources depicted by Garrett Hardin. However, legal issues linked to the governance of communal lands or forests by a closed community of commoners, which are often subject to a risk of privatization, are obviously radically different. A clear distinction should be made between open access and self-government by a limited number of users actively involved in the management of the commons for their survival. Therefore, commons and global commons should never be confused (see on the distinction between commons and global commons under international law, *infra*, Chapter 2, Section 3.1).

This work seeks to show that areas labelled as 'global commons' under international law have little to do with the commons understood in Ostrom's sense and are, in fact, in dire need of a governance framework. Yet, even global collective action issues could possibly be overcome through reiterated interactions, the establishment of mutual trust and an institutional set-up entailing light monitoring and sanctioning mechanisms. The self-organization that is

[100] Surabhi Ranganathan, 'Global Commons' (2016) 27(3) *European Journal of International Law* 693.
[101] Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press 2005); Elinor Ostrom, 'A General Framework for Analyzing Sustainability of Social-Ecological Systems' (2009) 325 (5939) *Science* 419.
[102] De Moor, *supra* n 89.
[103] Fikret Berkes, 'From Community-Based Resource Management to Complex Systems: The Scale Issue and Marine Commons' (2006) 11(1) *Ecology and Society* 45.

quintessential to the commons model of governance could potentially be found in larger networks of actors, challenging the previously held assumptions that autonomous self-governance should be reserved for small and thick communities. Admittedly, the efforts to coordinate action on the international scene to preserve or develop global commons have had some limited successes (for instance regarding the mitigation of climate change). They nonetheless generated an exponentially growing literature on how to improve the design of their principles of governance.[104] The question as to whether it is possible to extrapolate the self-governance model of the commons to monitor the sustainability of wider shared resources at the global level, however, is not treated here, but elsewhere.[105]

### 6.4. Global public goods

Some authors use the concept of global public goods (GPGs) to address global issues such as climate change mitigation, the eradication of infectious diseases, the fight against corruption, or the protection of the ozone layer. Like the commons, the notion of GPG is grounded in economic theory. As opposed to a private good, such as a pie or a car, a public good is non-rival and non-excludable. Public goods represent a case of market failures – that is, goods and services that cannot be left to the invisible hand of the free market. By virtue of the inherent free-rider problem in the provision of public goods, coercive authority is deemed necessary to ensure, at the very least, a minimal contribution by all. Therefore, at the national level, state intervention is seen as indispensable in the financing and provision of public goods.[106] In a popular book published by the UN Development Programme (UNDP) Office of Development Studies in 1999, GPGs are defined as 'outcomes (or intermediate products) that tend towards universality in the sense that they benefit all countries, population groups, and generations'.[107]

This definition means that, in contrast to economic theory, the concept of 'goods', as reconstructed by Kaul et al., covers a quite vast spectrum of global issues. It should be stressed that, under this approach, there cannot be any fixed list of GPGs and the term 'good' should be

[104] Paul C. Stern, 'Design principles for global commons: Natural resources and emerging technologies' (2011) 5(2) *International Journal of the Commons* 213.
[105] See Cogolati & Wouters, *supra* n 20.
[106] Paul Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36(4) *The Review of Economics and Statistics* 387.
[107] Inge Kaul, Isabelle Grunberg and Marc A. Stern, 'Defining Global Public Goods' in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds) *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999) 2.

understood in the broadest possible sense – not solely as a tangible commodity. GPGs simply point to policy challenges that cannot be adequately resolved at the state level and therefore require collective action at the global level.[108] GPGs have gradually become a buzzword in the global policy discourse, evolving from a technical, economic concept to a powerful advocacy tool in favour of increased international cooperation and regulation in today's globalized world.[109] As a matter of fact, most goods cannot be inherently public: they normally become public through public provision. The choice for (or against) public provision is never a neutral one, as it is generally subject to diverging views. Even goods that are '*de facto* public', on account of their non-excludability and non-rivalry, such as the lighthouse, may, under certain circumstances, be considered unworthy of public provision. For instance, a society could very well decide that, since the lighthouse only benefits foreign ships, it will not bear the cost thereof.[110] The authors of the book also acknowledge this basic fact: '"[p]ublic" and "private" are in many – perhaps most – cases a matter of policy choice: a social construct'.[111]

Over the last 15 years, the concept of GPGs has permeated the policy discourse of a large number of development organizations as a new powerful rhetorical device to advocate more international cooperation on a number of cross-border issues such as economic governance and trade integration,[112] the eradication of communicable diseases,[113] environment and climate change,[114] and food security.[115] Institutions such as the United Nations Industrial Development Organization (UNIDO),[116] the Food and Agriculture Organization (FAO),[117] the World

[108] Samuel Cogolati, Linda Hamid and Nils Vanstappen, 'Global Public Goods and Democracy in International Legal Scholarship' (2016) 5(1) *Cambridge Journal of International and Comparative Law* 4.
[109] ibid., 11.
[110] ibid., 14.
[111] Inge Kaul and Ronald U. Mendoza, 'Advancing the Concept of Public Goods' in Inge Kaul, Pedro Conceição, Katell Le Goulven and Ronald U. Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, 2003) 104.
[112] Development Committee, 'Poverty Reduction and Global Public Goods: Issues for the World Bank in Supporting Global Collective Action' (2000) DC/2000-16, 5-8.
[113] WHO, 'Global Public Goods', <http://www.who.int/trade/glossary/story041/en/> (accessed 30 September 2016).
[114] Regulation 233/2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L 77/44.
[115] FAO, *The State of Food and Agriculture 2002. Agriculture and Global Public Goods Ten Years after the Earth Summit* (2002) <http://www.fao.org/tempref/docrep/fao/004/y6000e/y6000e.pdf> (accessed 30 September 2016).
[116] See UNIDO, 'Public goods for economic development' (2008) <https://www.unido.org/fileadmin/user_media/Publications/documents/Public%20goods%20for%20economic%20development_sale.pdf> (accessed 30 September 2016).
[117] See, FAO, *supra* n 115.

Bank,[118] the OECD,[119] the World Health Organization (WHO),[120] and the European Union (EU)[121] have all branded the provision of GPGs as a new policy challenge. Even private charities such as the Bill and Melinda Gates Foundation have borrowed this new label in their communication.[122]

What is, then, so distinctive about an approach to development based on GPGs? Development seen through the lens of GPGs is not just a matter of pure altruism or charity. Rather, based on this new economic rationale, it is now considered to be in the self-interest of donors to cooperate and to combat the negative externalities that could arise in the absence of climate change mitigation, prevention of armed conflicts, biodiversity protection or eradication of communicable diseases. Development aid can no longer be exclusively targeted 'at recipient countries or at specific sectors', but should cut across boundaries.[123] GPGs are now seen by various development actors as a cost-effective step towards meeting development objectives.[124] The French Government has been one of the first supporters of the '[GPGs] approach' as 'a new paradigm for aid'.[125] It has argued for the introduction of international taxation 'that would regulate the excesses of globalization and fund the production of [GPGs], to the advantage of the developing countries in particular'.[126] In the French government's view, the awareness for GPGs gives a radically new mission to ODA: it should serve to remedy global market

[118] See, Development Committee, *supra* n 112, 2.
[119] See the study on financing global public goods prepared for the OECD Development Centre: Helmut Reisen, Marcelo Soto and Thomas Weithöner, 'Financing Global and Regional Public Goods through ODA: Analysis and Evidence from the OECD Creditor Reporting System' (January 2004) *OECD Development Centre Working Paper*, DEV/DOC(2004)01, 11.
[120] See WHO, *supra* n 113.
[121] See European Commission, 'EU focus on global public goods' (2002) <http://ec.europa.eu/environment/archives/wssd/pdf/publicgoods.pdf> (accessed 30 September 2016); Regulation 233/2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L 77/44; European Report on Development, 'Combining Finance and Policies to Implement a Transformative Post-2015 Development Agenda' (2015) <http://ecdpm.org/wp-content/uploads/2015-European-Report-on-Development-English.pdf> (accessed 30 September 2016). See also Mikaela Gavas, 'The EU and Global Public Goods: Challenges and Opportunities' (2013) DIIS Report 2013:05, <http://um.dk/en/~/media/UM/English-site/Documents/Danida/Partners/Research-Org/Research-studies/EU-Global-Public-Goods.pdf> (accessed 30 September 2016).
[122] See, e.g., Bill & Melinda Gates Foundation, 'Innovation with Impact: Financing 21st Century Development' (November 2011) <https://www.gatesfoundation.org/~/media/GFO/Documents/2011%20G20%20Report%20PDFs/Executive%20Summary/execsummaryenglish.pdf> (accessed 11 April 2020), 10.
[123] Tommy Koh, 'Prologue', in Inge Kaul, Isabelle Grunberg and Marc Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford: Oxford University Press, 1999), p. x.
[124] Maurizio Carbone, 'Supporting or Resisting Global Public Goods? The Policy Dimension of a Contested Concept' (2007) 13(2) *Global Governance* 179.
[125] Directorate-General for Development and International Cooperation, Ministry of Foreign Affairs, and Treasury Directorate, Ministry of the Economy, Finance and Industry, 'Global Public Goods' <http://www.diplomatie.gouv.fr/en/IMG/pdf/biens_publ_gb.pdf> (accessed 30 September 2016) 15.
[126] ibid., 26.

failures.[127] A reasoning based on the provision of GPGs gives 'new legitimacy to ODA, by rooting it in purely economic arguments', and not only in 'considerations of ethics or international solidarity'.[128] This new approach offers 'fresh legitimacy to the need for public regulatory intervention'.[129]

Building upon an idea that emerged during the 2002 International Conference on Financing for Development and the 2002 World Summit on Sustainable Development, France[130] and Sweden[131] signed an agreement to initiate an International Task Force on GPGs. The Task Force, which was co-chaired by Ernesto Zedillo, former President of Mexico, and Tidjane Thiam, former Ivorian Minister of Development, was intended to translate the theoretical concept of GPGs as developed by Kaul and her colleagues into a more practical tool for policymakers. The Task Force published its final report in 2006 with a series of recommendations on the financing and production of GPGs, in particular poverty reduction.[132] The report specifically called for 'significant additional expenditures on [GPGs].'[133] Indeed, since greater financing for GPGs does not only benefit developing countries but also donors, GPGs need to be addressed separately and in addition to ODA.[134]

More recently, but still in line with this changed paradigm of development, the Addis Ababa Action Agenda (adopted in July 2015) stressed that the 'global partnership should reflect the fact that the post-2015 development agenda, including the SDGs, is global in nature and universally applicable to all countries.'[135] The new set of SDGs represents a shift from the prevailing approach to development 'assistance' to a sense of common and shared 'responsibility' for enabling sustained poverty reduction at the global level. In its 2013 report *A Renewed Global Partnership for Development*, the UN System Task Team on SDG 17 unambiguously criticised MDG 8 for perpetuating the model of 'donor-recipient' aid, 'rather

[127] ibid., 15.
[128] ibid.
[129] ibid., 19.
[130] ibid.
[131] See the study on development financing prepared for the Swedish Ministry for Foreign Affairs, Francisco Sagasti and Keith Bezanson, *Financing and Providing Global Public Goods: Expectations and Prospects* (Ministry for Foreign Affairs Sweden 2001).
[132] International Task Force on Global Public Goods, *Meeting Global Challenges: International Cooperation in the National Interest* (International Task Force on Global Public Goods 2006).
[133] ibid., 99.
[134] ibid., xxv and 110.
[135] Third International Conference on Financing for Development, 'Outcome document of the Third International Conference on Financing for Development: Addis Ababa Action Agenda' (15 July 2015) UN Doc. A/CONF.227/L.1, <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.227/L.1> (accessed 30 September 2016), para. 10.

than calling for collective action at the multilateral level to achieve a stable global economic environment.'[136] The report explicitly pleaded for mobilizing additional 'resources for [GPGs],'[137] and for including new actors to overcome 'the collective action problems in the supply of public goods which require internationally coordinated actions in order to ensure adequate provisioning.'[138] Inge Kaul also concluded that, in comparison to MDG 8, the global partnership for sustainable development in SDG 17 reflected a new awareness of '[GPGs].'[139] Similarly, the European Commission observed, in a Communication on the new global partnership in February 2015, that '[g]lobal public goods also need coordinated international policies and action, including through better implementation of international agreements that play a central role in achieving several SDGs.'[140] The Commission called on all countries to 'make commitments to mobilise and use domestic public finance effectively, including for [GPGs] such as climate and biodiversity.'[141] The Council of the EU noted in that regard that International Financial Institutions, such as the Bank, represent 'critical actors for reaching the SDGs' and for 'financing for the provision of [GPGs].'[142]

Interestingly for the focus of this thesis (see, *supra*, Section 4), from 2000 onwards, just after the publication of the first UNDP study, the World Bank has encouraged the supply of GPGs across all its development programs. This has been a recurring theme in the meetings of the joint World Bank/International Monetary Fund (IMF) Development Committee, which assists the Bank's Board of Governors with some of the most critical development issues.[143] The Bank also commissioned a significant number of studies and convened several workshops on its potential role in financing GPGs.[144] At the request of the Bank's Board of Directors, the

[136] UN System Task Team on the Post-2015 UN Development Agenda, *A renewed global partnership for development* (United Nations 2013) 5.
[137] ibid., 11.
[138] ibid., 18.
[139] Inge Kaul, 'Global Public Goods: A concept for framing the Post-2015 Agenda?' (2004) 2 *Discussion Paper / Deutsches Institut für Entwicklungspolitik*.
[140] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015' (2 February 2015) COM(2015) 44 final, 5.
[141] ibid., 7.
[142] Council Conclusions, 'A New Global Partnership for Poverty Eradication and Sustainable Development after 2015' (26 May 2015) 9241/15, para. 39.
[143] Known formally as 'Development Committee', the Development Committee consists of a Joint Meeting of twenty-five Ministers of Finance or Development and meets twice a year since 1974. See IBRD, Board of Governors, Resolution No. 294, 'Establishment of Development Committee' (2 October 1974).
[144] See, *inter alia*, Christopher D. Gerrard, Marco Ferroni and Ashoka Mody (eds), *Global Public Policies and Programs: Implications for Financing and Evaluation. Proceedings from a World Bank Workshop* (World Bank 2001); Marco Ferroni and Ashoka Mody (eds), *International Public Goods: Incentives, Measurement, and Financing* (World Bank 2002); Anders Hjorth Agerskov, 'Global Public Goods and Development – A Guide for Policy Makers' (12 May 2005) World Bank Seminar Series at Kobe and Hiroshima Universities, Seminar

Independent Evaluation Group (IEG)[145] finally conducted reviews of the Bank's GPGs strategy in various partnership programs.[146]

While outlining the same characteristics and challenges as in the UNDP studies, a staff report prepared for the Development Committee in 2000 redefined GPGs in the context of the Bank's policies as 'commodities, resources, services – and also systems of rules or policy regimes with substantial cross-border externalities that are important for development and poverty reduction, and that can be produced in sufficient supply only through cooperation and collective action by developed and developing countries.'[147] In 2006, at its Annual Meetings, the Committee again asked the Bank 'within its overall strategy, to develop a framework for its role in providing global and regional public goods.'[148] In response, a 2007 staff report entitled *Global Public Goods: A Framework for the Role of the World Bank* outlined criteria for the Bank's involvement and financing modalities in promoting GPGs.[149]

The staff reports described five GPGs priority areas for the Bank, which were endorsed by the Bank's management in a Strategic Directions Paper in 2001:[150] (i) 'protect environmental commons' (e.g. through the Global Environmental Facility (GEF)[151]), (ii) 'prevent the spread

Number 6; Randall Purcell, 'Delivering Global Public Goods Locally: Lessons Learned And Successful Approaches' (February 2003) The World Bank Development Grant Facility (DGF) Technical Note; J. Warren Evans and Robin Davies (eds), *Too Global to Fail: The World Bank at the Intersection of National and Global Public Policy in 2025* (World Bank 2015). See also World Bank, 'Collective Solutions 2025: Collaboration to help solve future sustainable development challenges', <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:23310120~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html> (accessed 30 September 2016).

[145] Formerly known as 'Operations Evaluation Department'.

[146] See, *inter alia*, Operations Evaluation Department, 'The World Bank's Approach to Global Programs: An Independent Evaluation' (1 August 2002) Phase 1 Report; Operations Evaluation Department, *The Global Development Network: Addressing Challenges of Globalization: An Independent Evaluation of the World Bank's Approach to Global Programs* (World Bank 2004); Operations Evaluation Department, *Strengthening the World Bank's Role in Global Programs and Partnerships* (World Bank, 2006); Independent Evaluation Group, 'Global Program Review: Consultative Group to Assist the Poor' (26 October 2008) 3(1); Independent Evaluation Group, *The World Bank's Involvement in Global and Regional Partnership Programs: An Independent Assessment* (World Bank 2010); Independent Evaluation Group, 'Global Program Review: The Global Fund to Fight AIDS, Tuberculosis and Malaria, and the World Bank's Engagement with the Global Fund' (8 February 2011) 6(1); Independent Evaluation Group, 'Results and Performance of the World Bank Group 2014: An Independent Evaluation' (World Bank 2014) vii. See also Uma Lele and Christopher Gerrard, 'Global Public Goods, Global Programs, and Global Policies: Some Initial Findings from a World Bank Evaluation' (2003) 85(3) *American Journal of Agricultural Economics* 686.

[147] Development Committee, *supra* n 112, 2. See also, Development Committee, 'Communiqué' (25 September 2000) para. 3.

[148] Development Committee, 'Communiqué' (18 September 2006) para. 3.

[149] Development Committee, 'Global Public Goods: A Framework for the Role of the World Bank' (28 September 2007) DC2007-0020, 13. See also, Development Committee, 'Communiqué' (21 October 2007) para. 4.

[150] World Bank, 'Strategic Directions Paper for FY2002-2004: Implementing the World Bank's Strategic Framework' (29 March 2001) SecM2001-0211.

[151] See GEF, 'What is the GEF?', <https://www.thegef.org/gef/whatisgef> (accessed 30 September 2016).

of communicable diseases' (e.g. through the Global Fund to Fight AIDS, Tuberculosis and Malaria[152]), (iii) 'strengthen the international financial architecture' (e.g. through the Consultative Group to Assist the Poor (CGAP)[153]), (iv) 'strengthen the global trade system' (e.g. through the Enhanced Integrated Framework (EIF) for Trade-Related Assistance for the Least Developed Countries[154]), and (v) 'disseminate knowledge for development' (e.g. through the Consultative Group on International Agriculture and Research (CGIAR)[155]).

In recent years, GPGs have become an important concept in the policy discourse of the Bank's management. For his maiden speech at the Annual Meeting in October 2007, the Bank's then President, Robert Zoellick, outlined six themes for the future strategic direction of the World Bank Group, among which the need 'to play a more active role in fostering regional and [GPGs] that transcend national boundaries and benefit multiple countries and citizens.'[156] At the Annual Meeting in October 2012, the Development Committee supported the vision of the new President, Dr Jim Yong Kim, centred on the promotion of GPGs.[157] In the 2014 Annual Review, the IEG concluded that, apart from pursuing MDGs, the provision of GPGs had become an important cross-sectoral mission of the Bank in its fight against poverty.[158]

While the Bank's partnership programmes proliferated in recent years,[159] it is important to be cautious when approaching the role which the concept of GPGs plays in the Bank's policies, for four reasons. First, as transpires from the above overview, some of the Bank's partnership programs have longer histories than the UNDP publications: an example is the aforementioned CGIAR, which was created in 1971. Second, while the 2007 staff report noted that the five aforesaid GPGs were 'anchored in international consensus for action',[160] it is not immediately obvious why these five specific issues rank as priorities over other GPGs that could also be relevant to the Bank's missions, such as post-conflict reconstruction or the fight against

[152] The Global Fund To Fight AIDS, Tuberculosis and Malaria, 'The Framework Document' (2001) <http://www.theglobalfund.org/en/documents/governance/> (accessed 30 September 2016) Section B.
[153] CGAP, 'Advancing financial inclusion to improve the lives of the poor', <www.cgap.org> (accessed 30 September 2016).
[154] WTO, 'Enhanced Integrated Framework', <https://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm> (accessed 30 September 2016).
[155] CGIAR, 'About Us', <http://www.cgiar.org/who-we-are/> (accessed 30 September 2016).
[156] Robert B. Zoellick, 'An Inclusive & Sustainable Globalization' (10 October 2007) <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21504730~pagePK:34370~piPK:42770~theSitePK:4607,00.html> (accessed 19 June 2016).
[157] Development Committee, 'Communiqué' (13 October 2012) para. 9.
[158] Independent Evaluation Group, *supra* n , vii.
[159] See Concessional Finance and Global Partnerships, *2013 Trust Fund Annual Report* (World Bank, 2013), 7.
[160] *Global Public Goods: A Framework for the Role of the World Bank*, *supra* n 149, 4.

malnutrition. Third, other Bank reports mention other priorities, which seems to suggest that the aforementioned list is not a closed one.[161] Last but not least, the use of the concept by the Bank is not without its critics. According to Devesh Kapur, 'seeking to reinvent the Bank's public image, its management and staff may tend to label all kinds of activities or "networks" as [GPGs], meriting involvement on the basis of the moral claims that public goods invoke, and their ready slogan-appeal for Northern taxpayers.'[162] It is true that the institution does not provide comprehensive and systematic data on the funds or exact programs it dedicates specifically to what it now refers to as 'GPGs'.[163]

In any case, a strict distinction should be drawn from the outset between the commons, on the one hand, and GPGs, on the other, as models of governance – or, indeed, development. Pierre Dardot, for example, claims that the commons implies a system of bottom-up governance, in contrast to GPGs theory, which is designed to promote more cooperation among existing private and state actors.[164] Certainly, the power of the commons discourse is to propose an alternative vocabulary and governance paradigm to that of the traditional market-state dichotomy. There are plenty of institutional arrangements that are formed by the communities themselves and often prove more effective than the typical 'all-public' and 'all-private' solutions in safeguarding shared resources. In contrast, the urgency to produce GPGs seems to justify a turn to the old public or private institutions that do not afford to communities the same right to participate and shape their own process of development. Thus, instead of assimilating commons to public goods or GPGs, both governance frameworks should be carefully distinguished to avoid that the powerful alternative force of community-driven initiatives conceals classic governance models.[165]

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[161] For example, the 2014 Report on financial intermediary funds mentions only three global public goods: 'preventing communicable diseases', 'responding to climate change' and 'ensuring food security'. See World Bank Group, 'Financial Intermediary Funds in the World Bank Group' (2014) 5. The 2013 Trust Fund Annual Report highlights 'the areas of global knowledge sharing, climate change, and access to water and sanitation'. See Concessional Finance and Global Partnerships, *2013 Trust Fund Annual Report*, p. 19.

[162] Devesh Kapur, 'The Common Pool Dilemma of Global Public Goods: Lessons from the World Bank's Net Income and Reserves' (2002) 30(3) *World Development* 337, 349.

[163] Nancy Birdsall and Anna Diofasi, 'Global Public Goods for Development: How Much and What For' (18 May 2015) *Center for Global Development* <http://www.cgdev.org/publication/global-public-goods-development-how-much-and-what> (accessed 30 September 2016) 5.

[164] Dardot, *supra* n 92.

[165] Samuel Cogolati, 'Global Public Goods or Commons as a Lens to Development ? A Legal Perspective' (November 2016) *Leuven Centre for Global Governance Studies Working Paper No. 179*, <https://ghum.kuleuven.be/ggs/publications/working_papers/2016/179cogolati> (accessed 25 January 2018).

## 7. Reclaiming the commons: cases from the Global South

This thesis is about the thousands of tribes, extended families, neighbourhoods, communities, villages that are still entertaining communal modes of management of the lands and natural resources upon which they depend. All across the world, the persistence of the commons faces the same challenge in the context of development: the risk of enclosure, be it in the form of land grabs or concessions for land mining, and the eradication of the vernacular and bottom-up system of governance developed by communities. This PhD dissertation seeks to reconnect these struggles to reclaim the commons with international law. Before turning to the substantive research questions of this thesis, it is worth to examine three recent examples of fights against the enclosure of the commons in developing countries: the Cochabamba Water War in Bolivia, the forceful eviction of the Sengwer people in Kenya, and the Wampis Nation in Peru.

The Cochabamba Water War is often cited as the quintessential example of a successful struggle to reclaim the commons.[166] Cochabamba is the fourth largest city in Bolivia. Before 1999, a large part of the population of Cochabamba used to depend on the public water supply company 'SEMAPA' (*Servicio Municipal de Agua Potable y Alcantarillado*), but the peasant irrigators and inhabitants of the poorer districts who remained unconnected to the municipal water service had dug their own wells and had built their own community water management systems. Such commons operated through traditional methods ('*usos y costumbres*', customs and traditions). However, in 1999, under the pressure of conditionality imposed in a World Bank SAP,[167] the Bolivian government passed Act No. 2029 to privatize the Cochabamba water utilities in a 40-year concession to the international consortium *Aguas del Tunari*, whose majority shareholder was the US engineering company Bechtel. As a result of the privatization, the water rates increased enormously, and – most critically – an access fee was imposed on every community water management system. Peasant irrigators and poor urban dwellers who kept managing these community systems suddenly lost their right to control their water sources and were now liable to prosecution and threatened with dispossession. Peasants and social movements started to organize themselves in '*La Coordinadora de Defensa del Agua y de la vida*' ('Coordination Committee for the Defence of Water and Life') under the motto 'Water is Ours'. The *Coordinadora* sought to preserve the communities' autonomy and own mode of collective

[166] See, e.g., Sauvêtre, *supra* n 93.
[167] World Bank, 'Bolivia Major Cities Water and Sewerage rehabilitation Project' (1 June 2000) Performance Audit Report, Credit 2187-BO.

decision-making in the management of their shared natural resource (water) against the attempt by the Bolivian government to enclose it. What is striking is that the actors of the mobilization went beyond the classic public-private opposition in debates about the privatization of public services; the people of Cochabamba, first and foremost, claimed their right to manage water as a commons ('*lo común*') at the community level. As a factory workers' manifesto stated: '*We don't want private property nor state property, but self-management and social ownership*'.[168] After massive protests, culminated in a state of emergency in the country, the concession to *Aguas del Tunari* was overturned in 2000 and inhabitants of Cochambamba gained the right to maintain their water cooperatives and committees.[169] It is notably in response to this uprising and to confront the neoliberal development model that the Bolivian government of Evo Morales enacted in 2010 the Law of the Rights of Mother Earth (or *Pachamama*).[170] In addition, the Bolivian government initiated the Declaration on the human right to water and sanitation, which was adopted on 28 June 2010 by the UN General Assembly.[171]

Not all battles have been so successful as the Cochabamba Water War. Since at least 1970, the Kenyan government considers the Sengwer forest dwellers (also known as the Cherangany, one of Kenya's last hunter-gatherer tribes) to be squatters occupying the Embout forests illegally. In 2007, Kenyan authorities used the World Bank-backed Natural Resource Management Project (NRMP) to evict the Sengwer from their ancestral land in the name of the fight against climate change and biodiversity protection. Since the beginning of the REDD (Reducing Emissions from Deforestation and Forest Degradation) programme, the Kenya Forest Service (KFS) guards – then funded by the World Bank – have burnt more than 1000 Sengwer homes and carried out large-scale forced evictions from their ancestral land. The Sengwer resorted then to international law fora to halt the forced evictions and protect their traditional and communal way of life. Subsequently, the then UN Special Rapporteur on the rights of indigenous peoples, James Anaya, referred to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to claim that the Sengwer shall not be forcibly relocated from their lands or territories without the free, prior and informed consent of the indigenous peoples concerned.[172]

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[168] Alexander Dwinell and Marcela Olivera, 'The water is ours damn it! Water communing in Bolivia' (2014) 49(SI) *Community Development Journal* 44, 47.
[169] Amy Booth, 'The communities of Cochabamba taking control of their own water supply' (9 June 2016) *The Guardian*, <https://www.theguardian.com/global-development-professionals-network/2016/jun/09/communities-cochabamba-taking-control-water-supply-bolivia> (accessed 16 October 2018).
[170] Bolivia, Law 071 of the Rights of Mother Earth (21 December 2010).
[171] UNGA, 'The human rights to water and sanitation' (28 July 2010) GA Res. 64/292, UN Doc. A/RES/64/292.
[172] UN Special Rapporteur on the rights of indigenous peoples, 'Kenya. Embobut Forest: UN rights expert calls for the protection of indigenous people facing eviction' (13 January 2014)

Additionally, the Chair of the UN Committee on the Elimination of Racial Discrimination recalled 'the rights of indigenous peoples to own, develop, control and use their communal lands, territories and natural resources' and urged Kenya 'to consult the Sengwer indigenous peoples'.[173] Following a request by the Sengwer to assess the impact of the Bank's funding of the project, the Bank's Inspection Panel issued a report on 22 May 2014, concluding that it had indeed violated the 'spirit and letter' of its own safeguards because the project was developed without prior consultation of the communities concerned.[174] Yet, the Bank's management decided to ignore most of the panel's recommendations.[175]

Other indigenous groups were more successful in formalizing the institution of the commons. In 2015, the Wampis, a community of roughly 10,000 people living for at least 7,000 years in the jungle along the Río Santiago and Río Morona, 15,000 km north-east of Lima, became the first indigenous peoples in Peru to declare their autonomy in the form of a 'pluri-national state'.[176] The historic move was primarily motivated by ecological reasons, allowing the protection and sustainable self-management of the Wampis' natural resources against oil and gold mining companies, as well as illegal logging and palm oil plantation. Up until then, the Wampis' communal territories were considered state property and could be transferred to extractive industries. As *Le Monde Diplomatique* reported in an article, 'the integration of communal spaces within a common jurisdiction is […] presented as the unique solution to preserve the ancestral territory against the extractive industry and the pollution which it can

<http://unsr.jamesanaya.org/statements/kenya-embobut-forest-un-rights-expert-calls-for-the-protection-of-indigenous-people-facing-eviction> (accessed 20 October 2018).

[173] José Francisco Calí Tzay, Chair of the Committee on the Elimination of Racial Discrimination, Letter to His Excellency Mr John Otachi Kakonge (7 March 2014) <https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Kenya7April2014.pdf> (accessed 20 October 2018).

[174] Inspection Panel, 'Kenya: Natural Resource Management Project' (22 May 2014) Investigation Report, Report No. 88065-KE, 62.

[175] IBRD/IDA, 'Kenya: Natural Resource Management Project (IDA Credit No. 42770' (7 July 2014) Management Report and Recommendation in response to the Inspection Panel Investigation Report, INSP/89369-KE.

[176] Paul Codjia and Raphaël Colliaux, 'Au Pérou, les Wampis déterminés à protéger leur territoire' (July 2018) 772 *Le Monde Diplomatique* 10. See also, Jacob Balzani Lööv and Chantal Da Silvia, 'Peru's first autonomous Indigenous government wins major victory taking on oil companies' (4 May 2017) *Independent*, <https://www.independent.co.uk/news/world/americas/peru-indigenous-tribe-amazon-protect-land-oil-drilling-land-a7716321.html> (accessed 26 July 2018); Jacob Balzani Lööv, '"Politicians only see gold and oil in our lands": the Wampis nation of Peru – photo essay' (4 July 2017) *The Guardian*, <https://www.theguardian.com/global-development/2017/jul/04/politicians-only-see-gold-and-oil-in-our-lands-the-wampis-nation-of-peru-photo-essay> (accessed 26 July 2018).

provoke'.[177] The Wampis seek to govern the forests, rivers, air, underground, upon which they depend according to their own holistic vision of nature and culture ('*buen vivir*'), not according to rigid official land titles that do not suit their mobile way of life.[178] This is reminiscent of the concept of *commoning*.[179] Nevertheless, Peruvian officials view the Wampis' collective and autonomous system of government as a threat not just to state sovereignty but also to private property rights – which would allegedly be detrimental to economic development. Most interestingly, the Wampis have reclaimed their commons by resorting not to abstract moral or political principles, but to human rights – in this case, the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention (No. 169)[180] and UNDRIP.[181]

From the water cooperatives of Cochabamba to the Sengwer forest dwellers and the Wampis' autonomous government, how can we explain the spark of hope kindled among these communities by the possible strategic use of international law? Would the international legal recognition of the commons as an institution of its own offer any added value in these communities' struggles to defend their collective modes of decision-making and way of life? Is there any real possibility that indigenous peoples, peasant groups, other communities who have faced various waves of dispossessions in the Global South, may now have some leverage to use legal instruments at the international level to reclaim their commons? Those cases of enclosure triggered the perceived need for in-depth research on the role of international law in the protection of the commons as a social institution of its own.

[177] ibid., free translation from French: '*L'intégration des espaces communaux au sein d'une juridiction commune est […] présentée comme l'unique solution pour préserver le territoire ancestral contre l'industrie extractive et la pollution qu'elle peut provoquer*'.
[178] ibid.
[179] Gustavo Soloto Santiesteban and Silke Helfrich, 'El Buen Vivir and The Commons: A Conversation between Gustavo Soto Santiesteban and Silke Helfrich' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market and State* (Levellers Press, 2012) 358.
[180] ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 ('ILO Convention No 169').
[181] UNGA, 'Declaration on the Rights of Indigenous Peoples' (13 September 2007) GA Res. 61/295, UN Doc. A/61/53 ['UNDRIP'].

# Chapter 1
# The Commons and Development

This thesis is about the commons in the field of development. While the latter notion is familiar to international legal scholars, the former is still a rather obscure idea to them. International lawyers have certainly already heard of '*global* commons' or of 'the tragedy of the commons', but rarely have they used the commons as a legally relevant institution. The notion of the commons does not originate from the field of international law – let alone the law. As said in the Introduction, the idea is still considered subversive in the legal discipline, since it puts into question the basic categories of private and public property. Thus, before taking any legal notion on board the analysis, it is crucial to understand the economic, historical, and philosophical contexts from which the concept of the commons emerged.

This first chapter will proceed in three steps: (i) first, it will present an in-depth study of the epistemological origins of the notion of 'commons' in various scientific disciplines (Section 1); (ii) second, it will describe out of this constellation of ideas from various academic fields the discourse of development, whose logic of wealth accumulation is governing the vast enclosure movement destroying and threatening subsistence commons around the globe (Section 2); (iii) finally, it will provide a definition of the notion of 'commons' for this study in international law (Section 3). In a nutshell, this chapter represents the conceptual foundations upon which the international legal analysis of this thesis is built.

## 1. Epistemological origins of the commons

As mentioned in the Introduction, the commons represent a rich and multifaceted notion. The purpose of this first section is to trace back the epistemological origins of the commons: how do we know and understand the commons today? Where do the different meanings of the commons come from? These are the questions that I will try to answer in this section.

I have already acknowledged that the field of commons studies is an 'epistemic community' that was predominantly formed in reaction to Hardin's 'Tragedy of the commons'.[182] Indeed,

[182] Pierre-Marie Aubert, *Action publique et société rurale dans la gestion des forêts marocaines : changement social et efficacité environnementale* (Sociologie, AgroParisTech 2010) <https://tel.archives-ouvertes.fr/tel-

even if commons scholars and activists come from a variety of disciplines and backgrounds, they form together a coherent network of knowledge referring to the same theoretical corpus.

My intention here is to provide the reader with a literature review of the commons across the disciplines of political economics, political theory, history, and social sciences. From this review, five diverging epistemological paths have been identified: the typology of goods in classic economic theory (1.1), Garrett Hardin's 'Tragedy of the commons' (1.2), the medieval commons in historic studies (1.3), Elinor Ostrom's groundbreaking work on the commons as institutions of collective action and governance (1.4), and, finally, a new critical intellectual steam in reaction to Ostrom's work (1.5).

### 1.1. The economic typology of goods

First, the notion of commons is grounded in classic economic theory.

There are four commonly recognized categories of goods, which are distinguished according to two criteria: (i) 'rivalry in consumption' or 'subtractability of use'[183] (i.e., the possibility of being overused) and (ii) 'excludability' (i.e., the possibility of excluding users). Both variables range on a spectrum from 'low' to 'high', as gradations may exist between the two poles.

00987319/file/these_PMA_pastel.pdf> (accessed 20 December 2018) 120, referring to the definition of epistemic communities in Peter M. Haas, 'Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1, 3: 'An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise, and (4) a common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.'

[183] This term was proposed by Vincent Ostrom and Elinor Ostrom, 'Public Goods and Public Choices' in Emanuel S. Savas (ed.), *Alternatives for Delivering Public Services: Toward Improved Performance* (Westview Press 1977) 7-49.

The table below (Figure 1) provides an overview of these four categories.

| | | Excludability | |
|---|---|---|---|
| | | High | Low |
| Rivalry/Subtractability | High | **Private goods** (e.g. food, cars) | **Common-pool resources (CPRs)** (e.g. fish stocks, timber) |
| | Low | **Club/Toll goods** (e.g. satellite television, toll roads) | **Public goods** (e.g. lighthouses, national security) |

**Figure 1 – Classic economic typology of goods**

On one end, there are *private goods*: those goods that are highly rivalrous and excludable. This means that they are highly vulnerable to overuse and that it is very easy to exclude users from their consumption. On the opposite end is the category of *public goods*. It includes goods that are non-rival and non-excludable.[184] Basically, everyone can enjoy them without having to risk congestion (think of sunlight that is available to everyone). In contrast, the *club* or *toll*[185] *goods* are easy to privatize but remain low in rivalry (such as toll roads). In this case, every user must pay to belong to the club and benefit from the non-rivalrous goods.[186] The most interesting category, for the purpose of this study, is that of *CPRs*. CPRs are available to everyone since access to them is difficult to restrict, but they are also highly subtractable.[187] This is the case, for example, of fish stocks in the ocean. There lies the problem of overuse. Without a resource management system (fishing quotas, for instance), CPRs remain used in open access and risk depletion.

The typology of economic goods is interesting for it frames the classic social dilemma in which rational individuals are traditionally supposed to be trapped. Given that public goods cause both low rivalry and low excludability, they are the quintessential example of a 'positive externality'. In economics, a positive externality is a benefit that affects people or a group of people who did not choose to incur that benefit, such as vaccination for the health market. The problem is that

[184] See the landmark article of Samuelson, *supra* n 106; see also Richard Abel Musgrave, *The theory of public finance* (McGraw-Hill 1959).
[185] Elinor Ostrom favoured the name 'toll' good over 'club' good 'since many goods that share these characteristics are provided by small-scale public as well as private associations': Ostrom, *supra* n 1, 412.
[186] James Buchanan, 'An Economic Theory of Clubs' (1965) 32(125) *Economica* 1.
[187] This last category was added by Vincent Ostrom and Elinor Ostrom, *supra* n 183.

individual agents have no incentives to fund them, since they indistinctly benefit to anyone. They will gain no profits to supply such goods; they will prefer that others pay for it instead. Because of rational and selfish strategies, public goods will most likely suffer from *underprovision*. Therefore, it has been argued that public goods are structurally affected by the 'free-rider problem', which can be summed up as follows: 'all of the individual members of a group can benefit from the efforts of each member and all can benefit substantially from collective action.'[188] As such, these goods represent a classic case of market failures: if they are left to the invisible hand of the free market, they will most likely not be efficiently provided. The economist Paul Samuelson affirmed, in his article 'The Pure Theory of Public Expenditure', that the best way to overcome this inherent free-rider problem in the provision of public goods, is to ensure minimal contribution by all through coercive authority.[189] At the national level, state intervention is perceived as indispensable in the financing and provision of public goods. They are usually financed from tax revenues. But at the global level, things get complicated. Inge Kaul and her colleagues have used the public goods theory to identify instances of underprovision of GPGs (see, *supra*, Introduction, Section 2.4), such as global climate protection, epidemics control and knowledge.[190] They have called for more international cooperation among public and private actors to ensure an adequate level of provision of GPGs. CPRs, however, will usually suffer from another kind of collective action problem linked to the high subtractability of these goods: the risk of overharvesting. Given the rival and non-excludable nature of CPRs, individual agents will indeed tend to overexploit them. Consequently, a governance arrangement for a CPR could be considered successful only if it stops the overuse of the resources it governs. Yet, opinions differ as to whether this requires privatization, the intervention of an external authority or the setting up of an effective community (a 'commons' – in this sense used to refer to a self-governing community rather than simply to a resource-area).[191]

It should be emphasised, however, that, for the purpose of this PhD thesis, the denomination 'public' or 'private' should not be confused with the way those goods are *produced, reproduced* and *managed* collectively. For instance, whereas public authorities ('the state') might very well

[188] Russell Hardin, 'The Free Rider Problem', in *The Stanford Encyclopedia of Philosophy* (2013) <https://plato.stanford.edu/entries/free-rider/> (4 April 2020).
[189] Samuelson, *supra* n 106.
[190] Kaul et al., supra n 107.
[191] This paragraph draws on: Christiaan Boonen, Nicolas Brando, Samuel Cogolati, Nils Vanstappen, Rutger Hagen and Jan Wouters, 'Governing as Commons or as Global Public Goods: Two Tales of Power' (2019) 13(1) *International Journal of the Commons* 552, 557.

possess private lands, private operators ('the market') might very well decide to provide public goods such as a lighthouse for sailors. In other words, the regime of governance is not necessarily linked to the intrinsic economic characteristics of each type of good. Groundwater deposits, for instance, are a good example of CPR. A given resource of water can be available to everyone (low level of excludability), but it will then be vulnerable to overuse (high level of rivalry). Even if water is often (mistakenly) described as a 'commons' in the public discourse,[192] it is rarely truly *managed as* a commons. A commons is simply one of the possible institutional arrangements for governing CPRs. Most often, water is either publicly (e.g. by municipalities in Belgium) or privately (e.g. by the transnational corporations Veolia or Suez in France) supplied. This is to say that CPRs *can* be managed as commons but are not always necessarily 'commons' – they can be owned as government property, private property, or owned by no one. As Lawrence Lessig explains:

> What has determined "the commons," […] is not the simple test of rivalrousness. What has determined the commons is the character of the resources *and how it relates to a community*. In theory, any resource might be held in common (whether it would survive is another question).[193]

In brief, there is no systematic link between types of economic goods and regimes of governance or property.

### 1.2. The tragedy of the commons

The depletion of rivalrous CPRs is at the core of the famous 'Tragedy of the commons'. The expression refers to the idea that the commons will always be overexploited due to the regime of open access, which (supposedly) characterizes them. The idea is as old as at least the 4th century BC. Aristotle (384-322 BC) observed at the time that:

> which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual.[194]

[192] See, John R. Wagner, 'Water and the Commons Imaginary' (2012) 53(5) *Current Anthropology* 617.
[193] Lawrence Lessig, *The future of ideas: the fate of the commons in a connected world* (Random House 2001) 21 (original emphasis?).
[194] Aristotle, 'Discussion of Ideal States', in Stephen Everson (ed.), *Aristotle. The Politics and The Constitution of Athens* (Cambridge University Press 1996) 33.

In 1833, William Forster Lloyd, a fellow of the Royal Society, noted a similar problem in 'a little-known pamphlet'[195] about population growth. He described a bleak situation when a resource was held in common:

> Why are the cattle in a common so puny and stunted? Why is the common itself so bare-worn and cropped differently from the adjoining enclosures? […] In an enclosed pasture, there is a point of saturation, if I may so call it, (by which, I mean a barrier depending on considerations of interest), beyond which no prudent man will add to his stock. In a common, also, there is in like manner a point of saturation. But the position of the point in the two cases is obviously different. Were a number of adjoining pastures, already fully stocked, to be at once thrown open, and converted into one vast common, the position of the point of saturation would immediately be changed. The stock would be increased, and would be made to press much more forcibly against the means of subsistence. [196]

Every rational herdsman would try to nurture its cattle on a common pasture open to all. The cumulative effects of the rational behaviour of these commoners would result in the ruin of the pasture. Lloyd, who was probably influenced by Malthus,[197] was a supporter of English enclosures (a phenomenon of his time: see *infra*, Section 1.3). He predicted that any kind of property owned in common or used collectively would eventually vanish because its tenants would systematically overuse it.

The same hypothesis appeared in other scholarly works before the landmark publication of Garrett Hardin. In 'The Economic Theory of a Common-Property Resource: The Fishery', H. Scott Gordon presented a similar dilemma where natural resources are owned in common.[198] Gordon asked his readers to consider the fishing industry:

> In the sea fisheries the natural resource is not private property; hence the rent it may yield is not capable of being appropriated by anyone. The individual fisherman has no legal title to a section of ocean bottom. Each fisherman is more or less free to fish wherever he pleases. The result is a pattern of competition among fishermen which culminates in the dissipation of the rent […].[199]

Clearly, Gordon leads from the common-property nature of natural resources an inefficient economic outcome. Interestingly, common-property is here placed on the same footing as open resource (which is not the same in practice since common-property arrangements are subject to

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[195] Hardin credits William Foster Lloyd in his article: see *supra* n 3, 1244.
[196] William Forster Lloyd, *Two Lectures on the Checks to Population* (Oxford 1832).
[197] Thomas Robert Malthus (1766-1834) was an English scholar who predicted that population growth would ultimately lead to depletion of common resources, and thus to famine and disease (the so-called 'Malthusian catastrophe').
[198] H. Scott Gordon, 'The Economic Theory of a Common-Property Resource: The Fishery' (1954) 62(2) *Journal of Political Economy* 124.
[199] ibid., 130-131.

rules of exclusion, see below). Thus, according to Gordon, any kind of such open resource must be converted into 'private property or public (government) property, in either case subject to a unified directing power.'[200]

If the microbiologist-ecologist Garrett Hardin cannot be said to be the first author to predict the overuse of the 'commons', his article published in the 13 December 1968 *Science* remains nonetheless one of the most famous and cited pieces of scientific literature on the commons.[201] It is still taught in most faculties of social sciences worldwide. The purpose of his article was also to warn about the disastrous effects of human overpopulation. The 'commons' that Hardin described were freely accessible to everyone, thus making it very vulnerable to overuse (and that is precisely the source of confusion with old medieval commons: see Section 1.3 below). Hardin presents the dilemma linked to the 'commons' in just a few lines to his readers, in the same way as Lloyd:

> Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy. […] Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[202]

Hardin's 'pasture open to all' is a powerful narrative, but it contains a number of flaws:[203]

(i) The pasture is a metaphor for all kinds of open-access natural resources, not for management systems governing CPRs like those found in history (see, *infra*, Section 1.3) or in contemporary field studies (see, *infra*, Section 1.4). This makes it easy for Hardin to argue that 'commons' will automatically be depleted since they essentially lack any form of governance or rules of exclusion. Hardin's 'commons' are unregulated and therefore seen as 'no man's land'. This confusion between open-access and commons is a source of tragedy in itself. As Eggertsson shows, 'well-functioning common property regimes do not create open access outcomes' because commoners have exclusion rights.[204]

[200] ibid., 135.
[201] Hardin, *supra* n 3, 1243-1248.
[202] Hardin, *supra* n 3, 1244.
[203] The same structure is suggested by Hess & Ostrom, *supra* n 78, 11.
[204] Thráinn Eggertsson, 'Chapter 3. Open Access versus Common Property', in Terry L. Anderson and Fred S. McChesney (eds), *Property Rights: Cooperation, Conflict, and Law* (Princeton University Press 2002) 123.

(ii) Second, like in the prisoner's dilemma, Hardin assumed little or no communication among herdsmen. If this non-cooperative approach may sound plausible in theory, it makes little sense in practice. If herdsmen are going to share the same piece of land, it may reasonably be expected that they communicate with each other to maintain a sufficient degree of carrying capacity on the common land.

(iii) Third, following his *homo oeconomicus* paradigm, he assumed that rational individuals who are only guided by their self-interest will always grab what they can before the others destroy the shared resource. He did not contemplate the possibility that herdsmen might actually gain more benefits by working together on the same piece of land (*homo reciprocans*). The 'commons' in Hardin's tragic fate constitute the quintessential example of an unsustainable governance mechanism, bound to destroy everything it controls.

(iv) Fourth, and this is probably the most interesting – and frightening – aspect of Hardin's tragedy, he proposes only two solutions to prevent the tragedy. Besides 'relinquishing the freedom to breed' (to avoid overpopulation),[205] Hardin straightforwardly states that only coercive arrangements of two kinds are capable of saving the 'commons': further enclosure through private property and/or allocation of the right of access by a leviathan state through public property.[206]

Published on the eve of a wave of deregulation of the world economy that would celebrate the 'self-made man', only the first option of privatization was later remembered as the most efficient to allocate resources. This is how Hardin's work became a sort of 'private-property manifesto'– including the field of development (see *infra*, Section 4).[207] Yet again, it also provided the impetus for countless studies that would challenge his model.

### 1.3. Historical commons

Hardin's argument was undoubtedly influential, but it was wrong. In the 50 years since the publication of Hardin's essay in *Science*,[208] considerable work has challenged it. Hardin's

[205] Hardin, *supra* n 3, 1248.
[206] Hardin, *supra* n 3, 1247.
[207] Ugo Mattei, 'Future generations now! A commons-based analysis' in Saki Bailey, Gilda Farrell and Ugo Mattei (eds), *Protecting future generations through commons* (Council of Europe Publishing 2013) 20.
[208] *Science* marked this anniversary with a special issue: Robert Boyd, Peter J. Richerson, Ruth Meinzen-Dick, Tine De Moor, Matthew O. Jackson, Kristina M. Gjerde, Harriet, Harden-Davies, Brett M. Frischmann, Michael J. Madison, Katherine J. Strandburg, Angela R. McLean and Christopher Dye, 'Tragedy Revisited' (2018) 362(6420) *Science* 1236-1241.

presumption has contradicted from at least two scientific perspectives. To dismantle the myth of the tragedy, we must first turn to the historical notion of the commons as it existed in medieval England (and the rest of western Europe). The commons, indeed, are far from new. The *English Oxford Dictionary* still defines the commons as the short form for 'House of Commons' in England or a 'historical' notion, that is '[t]he common people regarded as a part of a political system, especially in Britain – "*the state was divided into clergy, nobility, and commons*", "*both lords and commons won some important concessions*"'.[209] This refers to the English commons, which regulated and limited access to CPRs such as lands and pastures to a group of users (usually villagers) until the late Middle Ages. Marxist historian Peter Linebaugh has recently recalled this history in *The Magna Carta Manifesto*, an oft-cited book in the commons literature.[210] Linebaugh recounts that the *Magna Carta* of 1215 (which is about civil rights) was accompanied by the less known Charter of the Forest of 1217, which concerns subsistence rights and entitled villagers (notably, landless peasants and forest dwellers) to legal protection from 'intrusions by privatizers' in the form of rights of grazing, fishing in streams, and extracting timber from forests (see, *supra*, Chapter 3, Section 1.3.).[211] The forest constituted indeed a great source of food for humans and cattle, as well as wood fuel. Thus, in its very first clause, the Charter provided for 'the common (right) of pasturage, and other things […] to those who were formerly accustomed to have them' – a kind of collective right of land use by virtue of custom.[212] In other words, it 'gave to the commons and to the rights of the commoners constitutional dignity and legal protection, considering them on the same grounds as property and owners'.[213]

The 'Charter of the Forest' attests that the commons represented a widespread system of governance in the medieval period. These dynamic institutions have of course been the subject of a large body of historiographical studies since then. It would go beyond the scope of this thesis to analyse specific case studies of historical commons such as common pastures or woodlands.[214] For our purposes, it suffices to say that historical studies abound of

[209] English Oxford Living Dictionaries, 'commons' <https://en.oxforddictionaries.com/definition/commons> (accessed 10 December 2018).
[210] Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press 2008) 8.
[211] ibid., 7.
[212] Myriam-Isabelle Ducrocq, '*Magna Carta* et Charte de la Forêt (1215)' in Marie Cornu, Fabienne Orsi and Judith Rochfeld (eds), *Dictionnaire des biens communs* (Presse Universitaire Française 2017) 777-781.
[213] Mattei & Quarta, *supra* n 72, 16.
[214] See, for recent historical case-studies in Western Europe, see Maïka De Keyzer, *Inclusive Commons and the Sustainability of Peasant Communities in the Medieval Low Countries* (Routledge 2018); Tine De Moor, *The Dilemma of the Commoners. Understanding the Use of Common-Pool Resources in Long-Term Perspective*

counterexamples to Hardin's bleak forecasts. Tine De Moor, for instance, provides one of them. She defines the commons as 'a set of well-defined and circumscribed resources (usually land), with rules and sanctions attached to them'.[215] The crucial point in this definition is that the historical form of the commons were not open to everyone as Hardin suggested, but limited to certain villagers who inherited or were granted rights of use. Accordingly, most historical studies have confuted Hardin's argument through historical contextualization. Susan Cox, for example, recalled in 1985 in her unambiguous article 'No Tragedy of the Commons' that 'the common is *not* free and never was free'.[216] Hardin's presumption of open and free-access commons is inconsistent with the exclusive nature of collective institutions of the past. To be fair, Hardin avoided precise reference to the old English commons in his seminal article. But the historical model of the commons was inaccurately propagated in Hardin's memorable title.

The medieval commons were not simply available to the general public: they displayed sophisticated levels of cooperation, communication, management, and organization. The role of rules (of access, of use) was important. Contrary to the mainstream image of anarchy, commons-based institutions had a well-defined number of users and were regulated by strict rules to guarantee the sustainable management of the shared resources. Villagers organized themselves in cooperatives, administrative boards, guilds to manage their shared resources according to extensive rulebooks.[217] Said in economic terms, villagers were able to exclude users from CPRs and transform them into 'club goods'.[218] Hartmut Zückert explains how the commons used to operate:

> All of a village's cattle were herded on the pasture together, either by peasants taking turns or by a herdsman hired by the cooperative. It was his duty to ensure that the cattle did not go onto the fields. When the increasing number of cattle raised the risk of overgrazing the pasture, the cooperative issued an ordinance for the pasture in the form of a so-called *Weistum,* or bylaw. It limited the number of cattle ("stinting"), impounding them if necessary and levied fines and enforced their collection. There were similar arrangements for other rules and offenses. If too much wood was cut, allotments were set. Thus, cooperative institutions were required: firstly, an assembly of the cooperative that decided on the rules; secondly, a

(Cambridge University Press 2005); Tine De Moor, Leigh Shaw-Taylor and Paul Warde (eds), *The Management of Common Land in North West Europe, c. 1500-1850* (Brepols 2002); Christopher P. Rodgers, Eleanor A. Straughton, Angus J. L. Winchester, and Margherita Pieraccini (eds), *Contested Common Land. Environmental Governance Past and Present* (Earthscan 2011).

[215] De Moor, *supra* n 89, 423.

[216] Susan Jane Buck Cox, 'No tragedy of the commons' (1985) 7(1) *Environmental Ethics* 49, 61.

[217] De Moor, *supra* n 89, 423.

[218] ibid., 428.

> village mayor who implemented the bylaw of the commons; and thirdly, a village court that adjudicated disputes. In this way, dangers to the commons produced new competencies within the cooperative.[219]

Thus, access and use of the commons were regulated according to the carrying capacity of the common land. Each member received a right to pasture a certain number of cattle or collect a certain amount of wood. As Cox stressed, '[t]he commons were carefully and painstakingly regulated, and those instances in which the common deteriorated were most often due to lawbreaking and to oppression of the poorer tenant rather than to egoistic abuse of a common resource.'[220] In short, the commoner of the medieval era does not match in any way the self-interested rational herdsman Hardin described.

Nobody, however, can seriously dispute the fact that the commons slowly disappeared (or at least drastically curtailed) from the mid-18th century. Yet, contrary to what is most often assumed, the commons system did not vanish due to problems inherent to community organization, common property, or outdated agricultural practices. The commons system was rather put under severe stress by exogenous forces, namely the state and powerful landowners. It thus failed to survive the Agrarian Revolution (which was itself linked to the Industrial Revolution) and the vast enclosure movement in England[221] and elsewhere in Europe.[222] In England, the state started to act as the protector of the new property rights in passing acts of enclosure during what has become known as the period of Parliamentary Enclosures (1700-1850).[223] Lloyd's argument quoted above (and, indirectly, Hardin's negative depiction of the commons) is historically rooted in the emergence of enclosure from the mid-18th century in England. This phenomenon is precisely what Karl Marx (1818-1883) named 'The So-Called Primitive Accumulation' in Volume I, Part VIII, of his landmark series of books *Capital*:

> Communal property – which is entirely distinct from the state property […] – was an old Teutonic institution which lived on under the cover of feudalism. We have seen how its forcible usurpation, generally accompanied by the turning of arable into pasture land, begins at the end of the fifteenth century and extends

[219] Hartmut Zückert, 'The Commons – A Historical Concept of Property Rights' in in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 128.
[220] Cox, *supra* n 216, 53.
[221] See, for classic works on the process of enclosure in England: J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1830* (Cambridge University Press 1993); Joan Thirsk, 'Enclosing and Engrossing' in Joan Thirsk (ed.), *The Agrarian History of England and Wales* (Cambridge University Press 1967); Michael Turner, *Enclosures in Britain, 1750-1830* (Macmillan 1984); James Alfred Yelling, *Common Field and Enclosure in England, 1450-1850* (Archon Books 1977).
[222] See, e.g.: Marie-Danielle Demélas and Nadine Vivier (eds), *Les propriétés collectives face aux attaques libérales (1750-1914)* (Presses universitaires de Rennes 2015).
[223] Similar legislation was passed elsewhere in Europe, like in Prussia with the *Gemeinheitsteilungsordnungen*: see Zückert, *supra* n 219.

> into the sixteenth. But at that time the process was carried on by means of individual acts of violence against which legislation, for a hundred and fifty years, fought in vain. The advance made by the eighteenth century shows itself in this, that the law itself now becomes the instrument by which the people's land is stolen, although the big farmers made use of their little independent methods as well. The Parliamentary form of the robbery is that of 'Bills for Inclosure of Commons', in other words decrees by which the landowners grant themselves the people's land as private property, decrees of expropriation of the people.[224]

The transformation of commons into capital is now widely seen as the origin of capitalism and the motor of modern history. The privatization of necessary means of production (including nature and commons) forced the rural population to depend on wage labour to survive.[225] Commoners became squatters. Open pastures were substituted by enclosed fields. Common pastures were no longer needed to feed livestock since people started to grow forage crops for the farms. The common woodlands were also privatized and transformed into forest lots for timber production. Once the commons were enclosed by lords and nobles, peasants could no longer farm for themselves. By the mid-19th century, most commons in England and Western Europe had already been enclosed. Besides, law reforms made the emergence of new commons exceedingly difficult, if not impossible, and private property arrangements became dominant.

Remarkably, contrary to popular arguments in favour of enclosure, historians have demonstrated that agricultural productivity did *not* improve *as a result of* the process of enclosure.[226] Conversely, the gradual collapse of the commons was certainly not due to the internal characteristics of the historical commons in medieval and post-medieval England. In fact, most historical studies of the earliest forms of commons document *efficient* and *resilient* management systems – in many cases enduring over several generations.[227] The system of governance of the commons succeeded in its time. Rich and powerful landowners, of course, benefited from the replacement of common fields by large farms concentrating the lands, but at the expense of poor and powerless peasants – especially peasant women, who used to be the primary exploiters of common rights to rural resources (like the rights of grazing, gathering or gleaning).[228] This was 'a revolution of the right against the poor' to say it in Karl Polanyi's

[224] Karl Marx, *Capital. A Critique of Political Economy* (Vol. I, Penguin Classics 1990 [1867]) 885.
[225] See, Massimo De Angelis, 'Marx and primitive accumulation: The continuous character of capital's "enclosures"' (2001) 2 *The Commoner* <http://www.commoner.org.uk/02deangelis.pdf> (accessed 19 December 2018).
[226] Robert C. Allen, *Enclosure and the Yeoman: The Agricultural Development of the South Midlands 1450-1850* (Clarendon Press Oxford 1992).
[227] Tine De Moor, 'Revealing historical resilience' (2018) 362(6420) *Science* 1238.
[228] Jane Humphries, 'Enclosures, Common Rights, and Women: The Proletarianization of Families in the Late Eighteenth and Early Nineteenth Centuries' (2009) 50(1) *The Journal of Economic History* 17.

words.[229] To sum up, historically the real tragedy of the commons was not about the system of governance itself, but rather the external process of enclosure.

### 1.4. Ostrom's commons

Empirical field studies of contemporary commons also testify against Hardin's thesis. After his publication, social and natural scientists showed – not from the perspective of an imaginary story of *homo economicus*, but grounded in the data collected through fieldwork – a more realistic perception of the governance of CPRs.[230] In the social dilemma that Hardin described, entirely self-interested individuals were not able to communicate with one another and thus could not develop rules to preserve their shared resources. Helpless rational users were trapped in a non-cooperative game akin to the prisoner's dilemma. In empirical case studies, however, social and natural scientists found significant levels of cooperation among the users of CPRs. They proved that, in different parts of the world, communities succeeded in limiting the depletion of CPRs by adopting rules to regulate overconsumption, contrary to Hardin's game-theoretical predictions. In other words, users of a commons are perfectly able to prevent free-riding – a risk always present in the use of resources in common – with the right incentives, such as restrictions to limit the use of the shared resource, monitoring mechanisms and appropriate sanctions. Obviously, these institutional arrangements vary from situation to situation. In short, empirical field studies documented how, despite some failures, CPR users could overcome social dilemmas. The earlier prediction of Hardin based on rational-choice theory does not hold.

Among social scientists who engaged in field studies of the commons, the most prominent scholar is undoubtedly Elinor (Lin) Ostrom (1933-2012). Ostrom was an American political scientist associated with the neo-institutional school of thought in economics.[231] Her original

[229] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press, 2001 [1957]) 35.
[230] See, e.g., Robert Axelrod, 'The Emergence of Cooperation Among Egoists' (1981) 75 *American Political Science Review* 306; David M. Kreps and Robert Wilson, 'Reputation and Imperfect Information' (1982) 27 *Journal of Economic Theory* 253.
[231] New institutionalism or neo-institutionalism is a methodological approach that became prominent in the 1970-80s in the fields of political science, economics, and sociology. Neo-institutionalism amends standard models neo-classical models and focuses on the way institutions (rules, norms, and structures) affect the behaviour of rational individuals. Famous neo-institutional authors are Ronald Coase, Douglass North and Oliver Williamson. See, James G. March and Johan P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life' (1983) 78(3) *The American Political Science Review* 734.

work was basically a branch of public choice theory, associated with the debates on collective action.[232] In 1973, she co-founded with her husband Vincent Ostrom the 'Workshop in Political Theory and Policy Analysis' (the 'Ostrom Workshop'[233]) at the University of Indiana. The Ostrom Workshop created a network of scholars from economics, political sciences, and other disciplines, to better understand how institutional arrangements in diverse ecological and social settings can constrain human behaviour and produce policy recommendations based on empirical studies. In the course of the Workshop's work, Ostrom conducted highly specific field studies on how communities maintain long-term sustainable institutions ('commons') for the management of CPRs such as forest, fisheries and irrigation systems. Challenging the popular approach to historical commons as archaic institutions, Ostrom showed that commons represent efficient contemporary resource management systems beyond traditional private and public arrangements. Among many other books and articles, she published, in 1990, *Governing the Commons: The Evolution of Institutions for Collective Action*, which is now widely seen as the reference for the academic literature on the commons.[234] In 2009, she was awarded the Nobel Prize in Economic Sciences 'for her analysis of economic governance, especially the commons' – becoming the first woman to win this prize, which only added credit to her symbolic authority in the community of commons studies.

When Ostrom received the Nobel Prize, she made it clear in her acceptance speech that her perception of the commons conflicted with that of Hardin:

> Garrett Hardin's (1968) portrayal of the users of a [CPR] – a pasture open to all – being trapped in an inexorable tragedy of overuse and destruction has been widely accepted since it was consistent with the prediction of no cooperation in a Prisoner's Dilemma or other social dilemma games. It captured the attention of scholars and policymakers across the world. Many presumed that all [CPRs] were owned by no one. Thus, it was thought that government officials had to impose new external variables (e.g., new policies) to prevent destruction by users who could not do anything other than destroy the resources on which their own future (as well as the rest of our futures) depended.[235]

Contrary to the idea that collective action could not be achieved without external constraints, Ostrom argued that individuals were capable of implementing new rules, as well as monitoring and sanctioning mechanisms to prevent the possibility of free-riding. Through self-organized

[232] See Olson, *supra* n 4.
[233] See, <https://ostromworkshop.indiana.edu/>. See also, for a collection of major works of the Bloomington School of Political Economy: Daniel H. Cole and Michael D. McGinnis (eds), *Elinor Ostrom and the Bloomington School of Political Economy* (Lexington Books 2014).
[234] Ostrom, *supra* n 8.
[235] Ostrom, *supra* n 1, 417.

action, users of CPRs are able to sustain shared resources over long periods of time, without having recourse to the coercive mechanisms of private property or state regulation. Ostrom makes her position explicit in the opening of her book *Governing the Commons*:

> Instead of presuming that the individuals sharing a commons are inevitably caught in a trap from which they cannot escape, I argue that the capacity of individuals to extricate themselves from various types of dilemmas situations *varies* from situation to situation. […] To open up the discussion of institutional options for solving commons dilemmas, I want now to present [another] game in which the herders themselves can make a binding contract to commit themselves to a cooperative strategy that they themselves will work out.[236]

In short, she does not abandon the game theory or the individual economic rationality. A commons remains a 'governance model that facilitates cooperation between individuals who see the benefit of working together, creating a (modest) economy of scale.'[237] Yet, her conclusions oppose the idea that collective action is impossible without private or public arrangements: governing the commons is perfectly attainable.

From the start, Ostrom emphasizes the concept of institutional diversity ('*varies*'), 'rather than a logical universality'.[238] Accordingly, her method is based on an empirical analysis of collective arrangements that succeed, in practice, in governing CPRs in very specific contexts and overcoming the limits of privatization or bureaucratic government (the two then-dominant models of enforcement). She examined the cases of the high mountain meadows of a Swiss village, common lands in Japan and irrigation systems in Spain and in the Philippines (see Chapter 3 of her book *Governing the Commons*).[239] As she later put it, 'there is no one solution to all commons dilemmas'.[240] The Ostrom Workshop studied a wide diversity of institutional arrangements and developed on that basis the so-called IAD framework' to understand human behaviour and outcomes across various empirical case studies.[241] The IAD framework offers a toolbox or 'metatheoretical synthesis' of building blocks[242] which researchers may use to

[236] Ostrom, *supra* n 8, 28-29 (original emphasis).
[237] Tine De Moor, 'The Time Is Now. Commons from Past to Present' (2016) 14 *Green European Journal* 6.
[238] Ostrom, *supra* n 1, 416.
[239] ibid., 58-102.
[240] Hess and Ostrom, *supra* n 78, 11.
[241] See, Larry L. Kiser and Elinor Ostrom, 'The Three Worlds of Action: A Metatheoretical Synthesis of Institutional Approaches' in Elinor Ostrom (ed.), *Strategies of Political Inquiry* (Sage 1982) 179-222; Michael McGinnis (ed.), *Polycentric Governance and Development: Readings from the Workshop in Political Theory and Policy Analysis* (University of Michigan Press 1999); Ostrom, *supra* n 101; Vincent Ostrom, 'Language, Theory and Empirical Research in Policy Analysis' (1975) 3 *Policy Studies Journal* 274.
[242] *External variables*: biophysical conditions, attributes of a community, rules-in-use; *internal variables*: characteristics of the actors involved, positions they hold, set of actions that actors can take at specific nodes in a decision tree, amount of information available at a decision node, outcomes that actors jointly affect, set of

examine and compare different institutional arrangements at multiple levels and scales. It also helps to understand how diverse rules may affect the likelihood of safeguarding or overusing a CPR.

Despite the wide diversity of local arrangements, Ostrom examines the factors that lead self-governance mechanisms to succeed. After conducting a wide range of field studies on CPR governance, she identifies eight *design principles* (meaning 'essential elements' or 'necessary conditions') for commons-based institutions to be sustainable in the long term:

(i) Clearly defined boundaries: Individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself.
(ii) Congruence between appropriation and provision rules and local conditions: Appropriation rules restricting time, place, technology, and/or quantity of the resource units are related to locale conditions and to provision rules requiring labor, material, and/or money.
(iii) Collective-choice arrangements: Most individuals affected by the operational rules can participate in modifying the operational rules.
(iv) Monitoring: Monitors, who actively audit CPR conditions and appropriator behaviour, are accountable to the appropriators or are the appropriators.
(v) Graduated sanctions: Appropriators who violate operational rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offense) by other appropriators, by official accountable to these appropriators, or by both.
(vi) Conflict-resolution mechanisms: Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials.
(vii) Minimal recognition of rights to organize: The rights of appropriators to devise their own institutions are not challenged by external governmental authorities.

*For CPRs that are parts of larger systems:*

(viii) Nested enterprises: Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises.[243]

This is probably the most oft-quoted excerpt from Ostrom's work. It is striking that, as in the case of historical commons,[244] commons do not appear to be 'no-law' zones owned by 'nobody' where resources are simply allocated on a 'first come, first served' basis. Instead, in documenting examples in Kenya, Guatemala or Nepal – where communities effectively cooperate to protect their shared resources from depletion, heeding the needs of future

functions that map actors and actions at decision nodes into intermediate or final outcomes, benefits and costs assigned to the linkage of actions chosen and outcomes obtained. See, Ostrom, *supra* n 1, 414-15.
[243] ibid., 90. This list was more recently updated on the basis of 100 case studies by Michael Cox, Gwen Arnold and Sergio Villamayor-Tomás, 'A Review and Reassessment of Design Principles for Community-Based Natural Resource Management' (2010) 15(4) *Ecology and Society* 38.
[244] Tine De Moor states that the 'rule books' of historical commons in England and Western Europe 'provide essentially the same type of data as collected through fieldwork by Ostrom and colleagues, but whereas Ostrom's list of design principles is the common denominator of a large set of commons studied at a specific moment in time, the historical data allow for a longitudinal study of the temporal dynamics of a common, of governance that needed to adapt or else collapse': see, De Moor, *supra* n 227.

generations – Ostrom shows that the commons amount to management mechanisms with extremely extensive and specific regulations on restricted membership, boundaries and sanctions. There is no single set of specific rules; there is no 'model commons'. The eight factors simply appear as general principles in robust and sustainable commons – while they are lacking in the unsuccessful cases.

Ostrom's work undoubtedly marked a critical point in economic theory. Her first important contribution was to identify the commons with a critical level of *institutionalization* in combination with collective self-organization. Moreover, the same institutions could be found in the historical context of the English commons.[245] Ostrom defines institutions in a very broad sense, as 'the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sport leagues, churches, private associations, and governments at all scales.'[246] The presence of 'prescriptions' or 'rules' plays a major role in this definition. Whereas the 'commons' that Hardin described had no clear governance structure, the examples of commons described by Ostrom display complex rules of resource management. The peculiarity is that in a commons these social norms are crafted by the users themselves, as co-producers based on reciprocity to prevent free-riding and promote collective action. In that respect, Tine De Moor proposed to use the term 'institution for collective action'.[247] In this sense, the commons is not naturally given; it is a *social construct*.[248] This institutional dimension of self-government was entirely absent in Hardin's tragedy, but it cannot be overlooked anymore. The issue becomes one of *governing* adequately and sustainably scare resources.

The second (and related) message of Ostrom's work that should be highlighted is that institutions, when governing CPRs, do not always fit 'in a dichotomous world of "the market" and "the state"'.[249] Lawyers, namely those from the civil law tradition inherited from the Napoleonic code, are fixated on the basic division between private and public law. While the former regulates horizontal relations among individuals (contract, torts, property), the latter pertains to government. The same is true in the field of international law, where the division between private and public international law has become pivotal. In spite of that, Ostrom

[245] De Moor, *supra* n 89, 426.
[246] Ostrom, *supra* n 101, 3.
[247] De Moor, *supra* n 89, 430.
[248] See, Jean-Marie Harribey, 'Le bien commun est une construction sociale. Apports et limites d'Elinor Ostrom' (2011) 49(1) *L'Economie politique* 98; Martin Deleixhe, 'Conflicts in common(s)? Radical democracy and the governance of the commons' (2018) 144(1) *Thesis Eleven* 59, 62.
[249] Ostrom, *supra* n 1, 408.

pragmatically shows that the world of human relations is more complex: there is a wide diversity of complex self-governing arrangements, beyond all-private and all-public solutions, that can lead to equivalent or even more efficient outcomes. It is not necessary to enclose the commons, as Hardin prescribed, in imposing exclusive rules of property to the shared resource (Locke's rights of individual private property); nor is it necessary to rely on the coercive power of the state (Hobbes's Leviathan) to preserve the CPRs from overexploitation – and this has been empirically proven. As Ostrom later claimed when receiving the Nobel Prize: '"One-size-fits-all" policies are not effective.'[250]

This does not imply that commons eschew the market or the state. Rather, common resources can be managed in a 'polycentric' manner – neither exclusively owned by a private dominium nor centrally regulated by the state. Polycentricity was first defined in 1961 by Vincent Ostrom, Charles Tiebout and Robert Warren:

> 'Polycentric' connotes many centers of decision making that are formally independent of each other. Whether they actually function independently, or instead constitute an independent system of relations, is an empirical question in particular cases. To the extent that they take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior. To the extent that is so, they may be said to function as a 'system'.[251]

Elinor Ostrom relies on this polycentric approach to governance in her studies of commons-based institutions for the management of natural resources. She shows that the two dominant organizational forms, market and state, are simply not enough to comprehend the wide diversity of institutional arrangements that communities create to manage CPRs. What characterizes the co-existence of commons-based institutions with market and state is that these 'independent and interdependent' units of governance cooperate and interact together.[252] The authorization of public authorities to develop autonomous arrangements at the local level is even a crucial element to enable more sustainable self-governance practices.

To conclude, Hardin's tragedy was not only ahistorical but inconsistent with contemporary commoning practices around the world. The double question that guides this thesis revolves around the relevance of international law toward the issues of commodification and enclosure

[250] Ostrom, *supra* n 1, 408.
[251] Vincent Ostrom, Charles M. Tiebout and Robert Warren, 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55(4) *American Political Science Review* 831, 831-32.
[252] Daniel H. Cole, 'From Global to Polycentric Climate Governance' (2011) 2(3) *Climate Law* 395, 396.

currently faced by the commons. Has international law participated to that movement of enclosure? Or can it be used to protect the commons against this phenomenon?

### 1.5. Critique on Ostrom

Our perception of the commons would be too narrow if it were merely restricted to Ostrom's neo-institutional approach of the commons as management mechanisms for natural resources. While there is consensus to praise Ostrom's legacy for contradicting Hardin's pessimistic model, some scholars have criticized her work – on at least three counts. First, a new stream of critical scholars has denounced the domestication of the commons in the modern *positivist* approach of economists and other social scientists. Ugo Mattei blamed 'the dominant academic discourse grounded in scientific positivism' for 'burying' the commons.[253] What is at stake? Positivism draws a distinction between the facts (what 'is') and values (what 'ought to be'). Consequently, a positivist approach tends to view the commons as a 'thing' (the domain of facts) and ignores to what extent the commons are being threatened by the dominant model of economic development or bring about social and political change (the domain of values). In Chapter 4 ('*Critique de l'économie politique des communs*') of their landmark book *Commun*, Pierre Dardot and Christian Laval warned against succumbing to the 'reification' of the commons: the commons are not physical things which would pre-exist the human practice of commoning.[254] Dardot and Laval proposed instead to represent the common (in the singular) as a political principle going beyond the natural properties of the resources to be shared. Undeniably, Ostrom nuanced the strict economic variables of rivalry and excludability, but she never completely abandoned them.[255] Ostrom did not address the central issue as to whether the collaborative and horizontal decision-making structures of the commons could extend beyond CPRs, which fulfil the twin criteria of rivalry and non-excludability. The same is true of rational choice and game theory: Ostrom views the individual user of the commons as a rational actor

[253] Ugo Mattei, 'First Thoughts for a Phenomenology of the Commons' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 37.
[254] Dardot & Laval, *supra* n 91, 32 and 137-187.
[255] See, e.g., Ostrom, *supra* n 8, 33: 'The decisions and actions of CPR appropriators to appropriate from and provide a CPR are those of broadly rational individuals who find themselves in complex and uncertain situations. An individual's choice of behavior in any particular situation will depend on how the individual learns about, views, and weighs the benefits and costs of actions and their perceived linkage to outcomes that also involve a mixture of benefits and costs.'

operating according to the expected benefits from a given set of rules.[256] After all, she was, with her husband Vincent Ostrom, a founding member and past president of the Public Choice Society, which still aims at applying economic methods to solve problems of public action from a cost-benefit perspective.[257] However, according to critical scholars, the institution of the commons cannot be defined ontologically as 'material things' out of a set of natural characteristics; the institution of the commons is a 'social fact' determined by a community of people. The commons is not the aggregate sum of individual decisions, but the result of a social process with its own logic.[258]

Additionally, in Ostrom's work, the commons as institutions for collective action seem to co-exist peacefully with(in) neoliberal markets and governments. Ostrom mostly leaves out the unequal *power* structure and phenomenon of *exploitation* between and within these spheres of decision-making. Yet, as Marx and Polanyi have shown,[259] the history of interactions between the commons, on the one hand, and the alliance between the market and state, on the other, is one of deep power struggles. How could one realistically imagine that in a globalized economy self-governance arrangements would not be subject to particular constraints originating from the market and the state? The movement of enclosure facing the traditional commons is still ongoing.[260] The commons of Cochabamba in Bolivia or the Sengwer people in Kenya (presented in the Introduction) find their roots in the confrontation and resistance against neoliberal policies implemented by state governments. In Ostrom's work, the lack of analysis of private or public enclosure as exogenous factors affecting the very survival of the commons creates the false illusion of a small, isolated, self-sustaining, peaceful commons, living side-by-side with market and state. In this sense, one of the sharpest criticisms of Ostrom's work was raised by Ugo Mattei who considered that:

> [t]he focus on co-operative management of resources outside market mechanisms ends up letting the corporation off the hook and out of the analysis. It is impossible in the current globalized setting to explain anything economically relevant (especially in often powerless local communities) without considering the relentless impact of the corporate *homo oeconomicus*. While it was certainly not Ostrom's intention, the failure to analyse the role of the corporation, combined with the institutionalization of her approach, has led to sheltering of the corporation by removing academic attention from the global impact of corporate

[256] Ostrom, *supra* n 8, 194.
[257] Public Choice Society, 'Executive Committee', <https://publicchoicesociety.org/about> (3 January 2019). See also, James M. Buchanan, 'Public Choice: The Origins and Development of a Research Program' (Center for the Study of Public Choice 2003) <https://publicchoicesociety.org/content/general/PublicChoiceBooklet.pdf> (3 January 2019).
[258] Dardot and Laval, *supra* n 91, 158.
[259] Marx, *supra* n 224; Polanyi, *supra* n 229.
[260] See James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66(33) *Law and Contemporary Problems* 33.

> plunder. Plunder carried out by the state-corporate duopoly has produced a global tragedy of the commons.[261]

In the face of this 'corporate plunder', Mattei and other commons scholars went as far as to reinstate the validity of Hardin's tragedy of the commons. It is true that the short-term profit maximization that guided Hardin's herdsmen can today be found in some transnational corporations or national governments. For many commons around the world, the tragedy is real and still happening: commodification. At the global level, private enterprises and states seem indeed free to transform commons into capital. The Earth now resembles an open-access good where individual actors use as many resources as they can (the cause). The process of 'accumulation by dispossession'[262] was so long and so violent that it even produced a new planetary epoch, now referred to by geologists as the '*Anthropocene*' (or the 'Age of Humans'), the era beginning from the 18th century and the invention of the steam engine marking the dramatic intensification of the negative human impact, most notably in the form of greenhouse gases ($CO_2$, $CH_4$ and $H_2O$), on the Earth's ecosystems.[263] The ecological footprint of humans on Earth (1.5) is today 50% higher than the available planetary resources. The unlimited *extraction* (see, *infra*, the distinction between generative and extractive ownership, Chapter 2, 2.3) of planetary resources has produced a serious threat to the survival of civilization and future generations. Just think of climate change. For many, the Anthropocene is likely to result in a global 'tragedy of the commons', with famine, drought, migration, death as consequences. What can we learn from this? For Hardin, the issue is not so much about the commons itself, but rather the lack of rules of access and use governing what he calls the 'commons' ('*Freedom* in a commons brings ruin to all'[264]). The point is the limitless freedom to overexploit shared resources. Therein lies the fallacy of Hardin's tale: confusing the institution of the commons with a regime of *laissez-faire*. As it has been said above, the institution of the commons has proven successful over the centuries in safeguarding shared resources. Yet, the selfish and predatory behaviour of markets and states remains real and should not be too quickly dismissed. That is why authors such as Donna Haraway and Andreas Malm prefer the term '*Capitalocene*' over 'Anthropocene' to describe the period characterised by 'primitive accumulations and

[261] Mattei, *supra* n 207, 20-21.
[262] Harvey, *supra* n 17.
[263] The term was first suggested by Paul Crutzen and Eugene F. Stoemer, 'The "Anthropocene"' (2000) 41 *Global Change Newsletter* 17. See also, Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Harvard University Press 2015).
[264] Hardin, *supra* n 3, 1244 (emphasis added).

extractions, organizations of labour and productions of technology of particular kinds for the extraction and maldistribution of profit.'[265]

Let us, however, be careful. Unequal power structures may also be existing *within* a commons, for example between women and men. It is unfortunate that Ostrom's work[266] and, besides a few exceptions,[267] most of the commons literature studies the commons in a gender-neutral way. Despite women being the main contributors to and the most dependent on shared resources, their position is often weakened by their subordinate status and by formal or informal discriminatory gender norms and cultural attitudes within the community itself. While the specific term 'commons' is rarely explicitly mentioned in the literature, there is now evidence that women are generally more likely to be excluded from leadership and decision-making positions in 'community-level discussions', 'in rural extension and water, forestry or fishery services, in cooperatives and in community or elders' councils' that often govern commons in rural areas.[268] A report of the International Land Coalition (ILC) on 41 case studies on common property regimes shows that women's participation in decisions concerning land and collectively managed natural resources remains a concern.[269] In the Naga tribes in the North-Eastern part of India, for example, a case study indicates that whereas 'women are the "true managers" of the resources – they are the tillers, gatherers, seeders and harvesters of the land', 'they have no right to own, sell and inherit any portion of the land they tend'.[270] In forest communities, another report recalls that whereas 'women generate more than half of their income from forests, compared with one-third for men', 'their role and rights are rarely recognized; their voices too often go unheard when a decision is made'.[271] A case study

[265] See, Donna Haraway, 'Anthropocene, Capitolocene, Chthulucene: Staying with the Trouble' (5 September 2014) lecture given at the University of California, Santa Cruz, at 14:02 quoted in Anna Grear, '"Anthropocene, Capitalocene, Chthulucene": Re-encountering Environmental Law and its "Subject" with Haraway and New Materialism' in Louis J. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017) 83; Andreas Malm, *L'Anthropocène contre l'Histoire. Le réchauffement climatique à l'ère du capital* (La fabrique 2017).

[266] See, Harribey, *supra* n 248, 112 : 'la faille de la thèse d'Ostrom est de rester prisionnière de la croyance que les systèmes de règles sont le produit de délibérations entre des acteurs à égalité à l'intérieur d'une communauté.'

[267] Aier, *supra* n 96; Cangelosi & Bieri, *supra* n 96; Federici, *supra* n 96.

[268] General recommendation No. 34 on the rights of rural women, *supra* n 97, para. 53.

[269] Andrew Fuys, Esther Mwangi and Stephan Dohrn, *Securing Common Property Regimes in a Globalizing World. Synthesis of 41 Case Studies on Common Property Regimes from Asia, Africa, Europe and Latin America*, International Land Coalition (2008), 29, <http://www.landcoalition.org/sites/default/files/documents/resources/ilc_securing_common_property_regimes_e.pdf> (10 January 2019).

[270] Aier, *supra* n 96.

[271] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13, 33.

developed by custodians of the tradition in Cameroon similarly acknowledges that 'the starting point of injustices in management of the commons often lies with the Traditional Rulers' responsibilities as commons managers, including the exclusion of women'.[272] Gender roles may also be very different in the transmission of traditional knowledge about the management of crops and preservation of seeds, which can be hegemonically patriarchal in certain indigenous and rural communities.[273] Globally, despite the major contribution of women to agricultural labour and food production, customary land tenure and other commons-based systems – which women rely on as their primary source of livelihood – are still largely controlled by men.[274]

Finally, Elinor Ostrom does not intend to elevate the commons as a general 'model' of governance or reorganization of society – this would contradict her premise of institutional diversity. She's not 'anti-capitalist', nor 'anti-state'. In her view, different situations simply demand different types of social organization. However, for many people around the world today, the commons cannot be reduced anymore to one efficient model of resource management among others. The commons are also about building different, more collaborative, horizontal, democratic relationships.[275] People now join together and engage in creating new commons, not merely for the sake of maintaining a resource based on a dry cost-benefit analysis but to develop another kind of cooperation beyond the prevailing individualistic ideology of the market. The positivist approach to the commons as an 'object' misses this *transformative potential* of collective value-based arrangements formed by communities as an alternative to the market-state duopoly. By managing something in common, communities indeed seek to develop a more democratic form of decision-making, that is self-regulation. This is why some commons scholars have called for a new 'phenomenological' social theory or 'epistemological revolution' of the commons as a transformative device, and not simply as a resource – that is, in Mattei's words, as 'an institutional structure that genuinely questions the domains of private property, its ideological apparatuses and the state'.[276] Dardot and Laval have for the same

[272] FAO, *Governing Tenure Rights to Commons: A guide to support the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Governance of Tenure Technical Guide No. 8 (FAO 2016) 43.
[273] Aier, *supra* n 96.
[274] John W. Bruce, Renée Giovarelli, Leonard Jr. Rolfes, David Bledsoe and Robert Mitchell, *Land Law Reform: Achieving Development Policy Objectives* (2006) Law, Justice, and Development, World Bank, <https://openknowledge.worldbank.org/handle/10986/7198> (10 January 2019).
[275] Bollier and Helfrich, *supra* n 280, xiv.
[276] Mattei, *supra* n 253, 37 and 43.

reason proposed to move from Ostrom's commons (in the plural) to the common (in the singular) as a generalized principle of self-government.[277]

### 1.6. The commons as a new paradigm

From the 1990s onwards, and particularly since the award of the Nobel Prize of economics to Elinor Ostrom in 2009, there has been a proliferation of publications and practical experiences based on the commons. While the commons were long seen as a relic of a bygone era, it is now accurate to speak of a real 'comeback of the commons'.[278] It is fair to say that this rich literature has given rise to a more comprehensive phenomenon of the commons as a new *paradigm*[279] – that is an overarching worldview and broad theoretical framework shared by a scientific community. David Bollier and Silke Helfrich, for instance, talk about the commons as 'a *paradigm* that embodies its own logic and patterns of behaviour, functioning as a *different* kind of operating system for society'.[280] The propagation of the commons as a new paradigm is mainly active on two fronts. First, the commons have reappeared as a popular subject of academic inquiry, which now serves to recast the traditional foundations of a wide array of disciplines such as political theory, sociology, economics, history and, indeed, development (see *infra*, Section 3) and the law (see *infra*, Chapter 2).

Then, the commons are not just about tangible CPRs such as communal lands, water reserves, fisheries, or forests (the 'natural commons' or 'traditional commons') – which were the subject of Ostrom's first field studies. Nowadays, the commons also cover knowledge, digital activities and information (the 'knowledge commons', 'digital commons' or 'information commons'): think of free software or free online encyclopaedias such as Wikipedia[281] (see *infra* Chapter 2,

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[277] Dardot and Laval, *supra* n 91, 156.

[278] Nathan Schneider, 'The commons are making a comeback' (2 November 2014) Al Jazeera, <http://america.aljazeera.com/opinions/2014/11/commons-environmentalismeconomicsinequality.html> (accessed 9 August 2018). See also Benjamin Coriat (ed.), *Le Retour des Communs : La Crise de l'Idéologie Propriétaire* (Les Liens qui Libèrent 2015).

[279] The term 'paradigm' is now accepted and used by many commons scholars: see, e.g., David Bollier, 'The Growth of the Commons Paradigm' in Charlotte Hess and Elinor Ostrom (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (MIT Press 2007) 27-40; Dardot and Laval, *supra* n 91, 187; Mattei, *supra* n 207, 20-21; Sauvêtre, *supra* n 93, 304.

[280] Bollier & Helfrich, *supra* n 79, xi (emphasis added). This section has the same title of the first part of their book: 'The Commons as a New Paradigm'.

[281] See, e.g., f 7-8: '[*k*]*nowledge* […] refers to all intelligible ideas, information, and date in whatever form in which it is expressed or obtained. […] *Knowledge* as employed in this book refers to all types of understanding gained through experience or study, whether indigenous, scientific, scholarly, or otherwise nonacademic. It also includes creative works, such as music and the visual and theatrical arts.' (original emphasis). See, also: Lessig, *supra* n 193.

Section 2.1.2.). Even the concepts of market,[282] property,[283] city,[284] food,[285] global governance,[286] to name just a few, have been reinterpreted in the light of the commons. Since 1989, there is even an International Association for the Study of the Commons (IASC),[287] organizing a series of international conferences and workshops[288] and publishing the *International Journal of the Commons*.[289] While the Ostrom Workshop is still attracting hundreds of commons scholars from all over the world at Indiana University with its outstanding library on the commons,[290] other research programmes, such as Institutions for Collective Action at Utrecht University,[291] LabGov (Laboratory for the Governance of the City as a Commons) based at LUISS University in Rome,[292] International University College of Turin (IUC)[293], or my own research unit at the Leuven Centre for Global Governance Studies (GGS)[294], are exclusively dedicated to the study of the commons. The epistemological community of the commons now has its own *Handbook of the Study of the Commons*[295] and *Dictionnaire des biens communs* (in French).[296]

Besides, beyond academic walls, a striking brand of political momentum is now building around the commons as a 'new praxis'.[297] This broader movement cannot be overlooked

[282] See, e.g., Yann Benkler, 'Commons and growth: The essential role of open commons in market economies' (2013) 80(3) *University of Chicago Law Review* 1499.
[283] See, e.g., Alessandra Quarta and Tomaso Ferrando, 'Italian property outlaws: From the theory of the commons to the praxis of occupation' (2015) 15(3) *Global Jurist* 261.
[284] See, e.g., Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City (Space, Materiality and the Normative)* (Routledge 2015); Foster & Iaone, *supra* n 70; Stavros Stavrides, *Common Space: The City as Commons (In Common)* (Zed Books 2016); Ugo Mattei and Alessandra Quarta, 'Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law' (2015) 1(2) *The Italian Law Journal* 303.
[285] Vivero-Pol et al., *supra* n 71, 4.
[286] Cogolati & Wouters, *supra* n 20.
[287] Formerly known as the International Association for the Study of Common Property (IASCP). The International Association for the Study of the Commons (IASC), <https://www.iasc-commons.org/> (accessed 3 January 2019).
[288] The IASC organizes global biennial, regional (focused on e.g. Africa, South-America, the Arctic, and thematic (focused on e.g. urban or knowledge commons) conferences and workshops.
[289] The International Journal of the Commons, <https://www.thecommonsjournal.org/> (accessed 3 January 2019).
[290] Ostrom Workshop, <https://ostromworkshop.indiana.edu> (accessed 9 January 2019).
[291] Institutions for Collective Action, <http://www.collective-action.info/> (accessed 9 January 2019).
[292] LabGov, <labgov.city/> (accessed 9 January 2019).
[293] International University College of Turin (IUC), <http://www.iuctorino.it/home/> (accessed 9 January 2019).
[294] Research Programme Global Governance and Democratic Government, <https://ghum.kuleuven.be/ggs/research/research_programme> (accessed 9 January 2019).
[295] Blake Hudson, Jonathan Rosenbloom and Dan Cole (eds), *Routledge Handbook of the Study of the Commons* (Routledge 2019).
[296] Marie Cornu, Fabienne Orsi and Judith Rochfeld (eds), *Dictionnaire des biens communs* (Presse Universitaire Française 2017).
[297] Quarta & Ferrando, *supra* n 283.

anymore. The commons have indeed been embraced by grassroots activists – self-proclaimed 'commoners' – as an innovative experience of horizontal self-governance. In this sense, Serge Gutwirth and Isabelle Stengers point to 'a new generation of new makers of history, of "storytellers", for whom the eradication of the commons is not a violence historically given […] but a persisting violence'.[298] The commons are not just about theory; the commons have become a concrete activity – which some have coined in the verb of 'commoning'.[299] The commons seem to spring up everywhere: shared garden projects, free software, Wikipedia, cohousing initiatives, repair cafés and so on. The commons now serve as a new social imaginary, a platform, a language that speaks to very diverse communities, either struggling to defend and reclaim their commons against enclosure for private profit or re-creating and inventing new commons. Various civil, social and political movements have been emerging from the 1990s onwards to react to the wave of state neoliberalization and have become the flag-bearers of the common as a political principle. This is a non-exhaustive list of groups or initiatives which have 'reclaimed the commons':

- the rebellion of the Zapatista autonomous municipalities calling to recognize the integrity of their commons in Chiapas (Mexico) on 1 January 1994, and the entry into force of the North American Free Trade Agreement (NAFTA),[300]
- the Water War in Cochabamba, Bolivia, in 1999-2000 to reclaim water commons (see *supra*, Introduction),
- social innovators on the Internet, like the 'On the Commons' movement (www.onthecommons.org), founded in 2001 to 'foster a commons-based society',
- the 'Reclaim the Commons' manifesto launched at the World Social Forum held in Brazil in 2009,[301]
- the series of demonstration known as 'Occupy Wall Street' started in September 2011 in New York City to protest against economic inequality (under the slogan 'We are the 99%') and 'reclaim the commons',[302]

[298] Serge Gutwirth and Isabelle Stengers, 'Le droit à l'épreuve de la résurgence des *commons*' (2016) 41(2) *Revue juridique de l'environnement* 306, 312.
[299] David Bollier and Silke Helfrich (eds), *Patterns of Commoning* (Levellers Press 2015).
[300] See, Kamala Visweswaran, *Un/common Cultures: Racism and the Rearticulation of Cultural Difference* (Duke University Press, 2010) 221; Gustava Esteva, 'Hope from the Margins' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press, 2012) p. xi.
[301] Réseau francophone autour des biens communs, <http://bienscommuns.org/> (accessed 9 August 2018).
[302] See Nathan Schneider, *Thank You, Anarchy* (University of California Press 2013).

- the Italian commons (*beni comuni*) movement, which culminated on 14 June 2011 in a national referendum with over 95% of voters opposing the privatization of public water services (and abrogating article 23-bis of the Ronchi Decree),[303]
- the Catalonian politics of the common (*politica del comú*), which is promoted since 2015 by the Mayor of Barcelona, Ada Colau, and her citizens' platform 'Barcelona in Common') (*Barcelona en comú*) as a new municipalist paradigm,[304]
- the French 'ZAD' ('*zone à défendre*' or zone to be defended against the construction of a new international airport): 4,000 acres of autonomous territory organized as a commons at Notre-Dame-des-Landes in 2018.[305]

Far from being isolated, commons activists and thinkers are extending and consolidating their networks in the form of partnerships or non-profit organizations, such as the P2P Foundation[306], which runs the Commons Transition Primer website,[307] the Commons Strategies Group (CSG)[308] and the European Commons Assembly (ECA).[309] Remarkably, even public authorities are now undertaking to enable and promote the commons. In 2014, the City of Bologna, in Italy, adopted a formal regulation on public collaboration for urban commons ('*Regolamento sulla collaborzatione per la cura e rigenerazione dei beni comuni*').[310] The Bologna Regulation is a 30-page charter outlining how local authorities can collaborate with commons-based initiatives with a polycentric approach. In 2015, the European Parliament established an Intergroup on Common Goods and Public Services.[311] In 2013, the Government of Ecuador commissioned

[303] Bailey & Mattei, *supra* n 64, 965; Quarta & Ferrando, *supra* n 283.
[304] Pierre Sauvêtre, 'Le nouveau paradigme politique du commun à Barcelone et en Catalogne : un municipalisme des communs' in Nicole Alix, Jean-Louis Bancel, Benjamin Coriat and Frédéric Sultan (eds), *Vers Une République des Biens Communs?* (Editions Les Liens qui Libèrent 2018) 185-194. See also, Pierre Sauvêtre, *supra* n 93.
[305] Zad For Ever, 'The Revenge Against the Commons' (24 April 2018) <https://zadforever.blog/2018/04/24/the-revenge-against-the-commons/> (accessed 10 August 2018); François de Beaulieu, 'Usage of the Commons at Notre-Dame-des-Landes, Yesterday and Today' (25 June 2015) <http://www.notbored.org/Beaulieu.pdf> (accessed 2 January 2019). See also 'ZAD (Zone à Défendre)' in *Dictionnaire des biens communs*, *supra* n 296, 1231-1234.
[306] P2P Foundation, <https://p2pfoundation.net/> (accessed 9 January 2019).
[307] The Commons Transition Primer, <https://primer.commonstransition.org/> (accessed 9 January 2019).
[308] Commons Strategies Group (CSG), <http://commonsstrategies.org/> (accessed 9 January 2019).
[309] European Commons Assembly (ECA), <http://europeancommonsassembly.eu/> (accessed 8 January 2019).
[310] City of Bologna, 'Regulation on Collaboration Between Citizens and the City for the Care and Regeneration of Urban Commons' (31 October 2014) <http://www.comune.bo.it/media/files/bolognaregulation.pdf> (accessed 9 January 2019).
[311] Intergroup on Common Goods and Public Services, <http://ep-publicservices.eu/en/> (accessed 9 January 2019). Note, however, that according to the European Parliament's website, 'Intergroups can be formed by Members from any political group and any committee, with a view to holding informal exchanges of views on particular subjects and promoting contact between Members and civil society. Intergroups are not Parliament bodies and therefore may not express Parliament's opinion.': European Parliament, 'The intergroups of the

the FLOK Society (Free-Libre, Open Knowledge) to design a transition plan toward a commons-based economy.[312] In 2017, a similar research project, 'Commons Transition Plan for the City of Ghent', was conducted in Ghent, Belgium, by one of the co-authors of the FLOK project, Michel Bauwens, and identified around 500 commons-oriented projects.[313] These public initiatives show the growing interest for the commons as a new paradigm of governance at city, state or regional levels.

These concrete experiences may not strictly operate as commons in the institutional sense of Elinor Ostrom, even if they may display self-governing practices. Still, they provide a new discourse of the commons. They fight on behalf of 'the common' as a political principle. They claim that 'The World is Not for Sale'.[314] David Bollier writes that '[w]hat unites these different invocations of the commons is their appeal to a fundamental social ethic that is morally binding on everyone'.[315] Pierre Sauvêtre identifies these initiatives as 'pro common(s) (goods) politics', that is 'practical and theoretical ensembles produced by the mutual constitution between theoretic research on common(s) (goods) and the discursive or non-discursive practice of actors (social movements, political organizations, institutional actors) who claim to follow these principles, and that have taken the form of organized movements aiming at the implementation of the common(s) (goods).'[316] Pierre Dardot and Christian Laval phrase it as follows: 'Whether as an adjective or a noun, singular or plural, the term "common" became a movement flag, a watchword of resistance, and a guiding principle for almost every alternative to neoliberal capitalism'.[317] Harvard Law professor Yochai Benkler speaks of a 'third school of commons studies', 'as a critique of capitalism', in addition to Ostrom's commons and new knowledge commons.[318]

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European Parliament', <http://www.europarl.europa.eu/about-parliament/en/organisation-and-rules/organisation/intergroups> (accessed 9 January 2019).

[312] Xabier E. Barandiaran and Daniel Vázquez, 'Devenir Sociedad del Conocimiento Común y Abierto' (2013) <https://floksociety.org/docs/Espanol/0.1.pdf> (accessed 9 January 2019). See, in English, Commons Transition, 'FLOK Society', <http://commonstransition.org/flok-society/> (accessed 9 January 2019).

[313] Michel Bauwens and Yurek Onzia, 'Commons Transition Plan for the City of Ghent' (June 2017) <https://stad.gent/sites/default/files/page/documents/Commons%20Transition%20Plan%20-%20under%20revision.pdf> (accessed 9 January 2017).

[314] Naomi Klein, 'Reclaiming the Commons' (2001) 9 *New Left Review* 81, 83.

[315] Bollier, *supra* n 279, 33.

[316] See, on the distinction between Ostrom's commons and the common, Sauvêtre, *supra* n 93, 79.

[317] Dardot & Laval, *supra* n 91, 59.

[318] Benkler, *supra* n 282, 1520.

The political message behind the broad thematic diffusion of the commons at both theoretical and practical levels seems clear. The common thread among the growing body of scholarship and citizens-led endeavours is the reference to the common(s) as an inspirational counter-hegemonic narrative and alternative praxis to contest the dominant neoliberal worldview based on rational choice, individualism, private property and the hegemony of the market. Together, commons theory and activism form what David Bollier called a 'silent revolution' against all forms of 'propertization' and 'commodification'.[319] As a result, the commons have been redefined as a strategy of resistance against the political discourse of *neoliberalism*.[320] The rebirth of the commons as a reaction to the abuses of neoliberalism should not astonish, since the rights to the commons were precisely eliminated during the rise of capitalism in the historical process of enclosure (see *supra* 1.3). Yet, commoners do not focus only on corporations or private actors. Commoners are not calling for 'more state'. On the contrary, the common resists the statist model of revolution inspired by communism.[321] It rejects the total omnipotence of both the market and the state. Hence the popularity of the common as a new political principle going beyond the traditional political divide between right (market) and left (state) political divide. However, it is not just about a 'third force'.[322] The commons reintroduce the idea of a shared space of custody of nature and a more collaborative organization of social life.[323] From small-scale institutions to govern natural resources, the commons are now building political momentum towards a more resilient, cooperative and ecological system of governance.

There are difficulties, however, with this more normative approach of the 'common' in the singular. In this PhD study, I resist the temptation to turn the commons into an institution that would be *ipso facto* democratic. The commons cannot be reduced to an abstract ideal or utopia of democracy. The commons respond to empirical realities and are first and foremost a source of food, culture, spirituality, for communities across the world. In these conditions, it would be a mistake to reduce the commons to a utopian political strategy. Each commons is uniquely grounded in local circumstances. It is more modestly an alternative experiment of bottom-up

[319] Bollier, *supra* n 279, 27-40.
[320] David Harvey defined neoliberalism as 'a theory of political economic practices proposing that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade': David Harvey, 'Neoliberalism as creative destruction' (2007) 610(1) *The Annals of the American Academy of Political and Social Science* 21, 22.
[321] See Dardot & Laval, *supra* n 91, Chapter 2 ('L'hypothèque communiste, ou le communisme contre le commun') 59-93.
[322] Bollier, *supra* n 279, 33.
[323] Beatrice White and Laurent Standaert, 'The Commons. A Quiet Revolution' (2016) 14 *Green European Journal* 1.

governance, an autonomous space of collaborative practice, linked with a concrete community of people, which may indeed enact more direct forms of democracy, but also instigate other forms of injustice, like in any other sector of society. To give just one example, women – who are often the primary working force in commons – may be adversely affected by their subordinate status and by discriminatory gender norms and cultural attitudes within the community itself. This is another reason why this thesis investigates whether women's rights (see, *infra*, Chapter 3, Section 3.7), as enshrined in international and regional human rights instruments, can be part of the solution in protecting all commoners. For the same reason, I choose to define the commons in a more neutral sense as a social institution of self-governance.

## 2. The marginal role of the commons in development

Th more comprehensive overview of the commons is instrumental to address the key issue of this PhD, enclosure. The enclosure of the commons – that is the process of fencing off what is held in common and converting it into individual private property (see *supra*, Section 1.3) – is not an isolated or recent phenomenon. The first movement of enclosure dates back from the late Middle Ages and comprises the seizure of natural resources such as forests, water and lands during the period between the fifteenth and nineteenth centuries in England, continental Europe, in the New World and other colonies (see, *supra*, Section 1.3). The second enclosure movement repeats the same process of 'great appropriation' in the domains of biodiversity and intellectual creation (see, *infra*, Chapter 2, Section 1.2.2).[324] Above all, the phenomenon of enclosure is a long and systemic cycle of appropriation which continues today and finds its source in theories of (economic) development and policies of development institutions. Thus, this second section starts by reviewing development theories of modernization, neoclassical economics, and new institutional economics (NIE), which have had an impact on the commons as a model of (natural) resource management in developing countries (2.1). It then digs deeper into the writings of lawyers and economists to show that the institution of private property has been considered superior to any form of communal ownership as an instrument to foster development since at least the 18th century (2.2). Subsequently, this section illustrates the depreciation of the commons in the currently dominant model of development by focusing on official reports of

[324] See Boyle, *supra* n 260.

the World Bank on land policies and property security (2.3). Finally, it shows why the commons as model of self-governance increasingly represent a new way of analysing and doing development based on economic effectiveness, subsistence needs and legitimacy interests (2.4). It is indeed crucial to understand the marginal role of the commons in the current model of development before turning to the core analysis of international law (see, *infra*, Chapter 2), for development, in a way, precedes the law. The law only plays an auxiliary role in securing individual private property rights over the protection of the commons. Growth and wealth accumulation are, in this sense, the end purpose; the law only represents one of the means to commodify the commons. Even after colonialism, within the field of international law, the pursuit of development has been waved as a *raison d'être* for more than six decades. Before being a legal process, enclosure is an act of appropriation over scarce resources, concentration of power and economic expansion. Therefore, it is worthy to explore development before international law.

### 2.1. Theories of development

Traditionally, at least since the post-World War II and the decolonization era, international legal scholars have seen 'development' in a positive light, as the noble endeavour to combat poverty, cut violence and promote wealth. International legal scholars have often seen their discipline as a tool to achieve the humanitarian ideal of development. In this sense, development can be defined as the public goal of enabling better living conditions and more freedoms for those affected by poverty.[325] In the past seventy years, however, various development theories have offered different answers as to the same fundamental question of fighting poverty and reaching prosperity.[326] The political foundations of ODA have indeed always been, and continue to be, the subject of debate among multilateral donors like the World Bank or the EU, influential bilateral donors like France or Sweden and even civil society and charity organizations like Oxfam or the Bill and Melinda Gates Foundation.[327] Suffering from underinvestment and accused of inefficiency, development aid institutions have constantly sought to provide stronger ideological justification for their mission. The ideas of good governance, sustainable

[325] Such a definition accepts that there may be various – even conflicting – public interventions and methods to achieve the same goal. Development is inherently a political process which involves different ideologies and can lead to diverging outcomes.
[326] See, e.g., Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Profile Books, 2012).
[327] Jean-Michel Severino, 'Refonder l'aide au développement au XXIe siècle' (2001) 10(1) *Critique internationale* 75.

development, or effectiveness all stem from the same concern to re-legitimize development programs in the eyes of both decision-makers and public opinion. Among the dominant theories of development in the post-colonial era, at least three have had an (at least indirect) impact on the commons.

First, the modernization theory, which was popular in the 1950s and 1960s, perceived economic development as an evolutionary process (through 'stages') whereby 'backward' and agrarian societies (notably based on traditional commons) in developing countries gradually transformed into more complex and advanced social and political systems similar to the bureaucracies or private corporations in developed countries.[328] Poverty was considered to be the result of the endogenous defects of indigenous institutions in Africa, Asia and Latin America. The set standard was that of Western societies in which the accumulation of capital would allow a shift from agriculture to manufacturing and service industries. There is no need to say that in this intellectual framework, in order to climb up the 'stages' of societal development, commons-based natural resource management systems should give place to market-based property and industrialized agricultural production systems (which would then make them competitive on export markets). Modernization, in that sense, involved a transformation in the agricultural sector of the least developed countries (LDCs)[329] from generative commons to an extractive enterprise of commodity exchange on global markets. This model of growth based on theoretical reproducibility of the Western experience, built upon the control of nature through science and technology, has been hugely influential, at least implicitly, in development policies and programmes.

Second, neoclassical economic theory dates back from the 1970s and indeed hypothesizes that all individuals – wherever the place they are born – act like rational utility maximizers.[330] In this mathematical model of bargain-driven welfare, the best way to address market failures in developing countries is to enable instrumental market efficiency.[331] Well-functioning markets

[328] Walt Whitman Rostow, *The Stages of Growth: A Non-Communist Manifesto* (Cambridge University Press 1960); Walt Whitman Rostow, *Politics and the stages of growth* (Cambridge University Press 1971). These 'stages' of development passing from 'barbarism' to 'civilization' echo the evolution of civilizations in the stadial theory of Adam Smith (see, *infra*, 2.2).
[329] The United Nations Economic and Social Council (ECOSOC) and its subsidiary body, the Committee for Development Policy (CDP), designate every three years a list of LDCS. There are currently 47 countries defined as 'confronting severe structural impediments to sustainable development'. See UN, 'Least Developed Countries (LDCs)', <https://www.un.org/development/desa/dpad/least-developed-country-category.html> (accessed 11 December 2019). The World Bank speaks about 'low-income countries'.
[330] Ian Little, *Economic Development: Theory, Policy and International Relations* (Basic Book 1982).
[331] Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26(4) *The Journal of Interdisciplinary History* 639, 642.

must ensure the production and consumption of goods at optimal equilibrium levels. In order to achieve the most efficient allocation of resources and minimize externalities, neoclassical economists promote private property and market mechanisms. Other alternatives, like public intervention, result in less optimal allocations of resources. Private property is considered the prerequisite of a free market. Neoclassical economics is still dominant in the policies of the World Bank[332] and other major development institutions. In the post-Cold War 'Washington Consensus', theorized by John Williamson and characterized by neoclassic orthodoxy,[333] privatisation of state enterprises or monopolies and protection of private property rights. including intellectual property (IP), represent the necessary condition for growth, innovation, efficiency – in brief, for development. As Kerry Rittich critically asserts, the Washington Consensus assumes 'that the implementation of efficiency-enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements'.[334]

Third, the work of Elinor Ostrom – including the concepts of 'institutional diversity' and 'polycentric government' (see, *supra*, Section 1.4) – is associated with the NIE school.[335] The NIE approach does not seek to replace neoclassical economics, it emphasizes instead the significance of having effective institutions under a rational choice model for long term economic development. It views high-quality organizational arrangements such as property rights and autonomous modes of governance as important mechanisms to foster development. The term 'new institutional economics' was first coined by Oliver Williamson in 1975.[336] Major institutional analysts such as Ronald Coase[337] and Douglass North,[338] who both received the Nobel Prize in economics, sought to answer questions as to the existence of specific forms of

[332] The neoclassical turn of the Bank was most visible in the policy lending and SAPs. See, e.g., Bentley B. Allan, 'Paradigm and nexus : neoclassical economics and the growth imperative in the World Bank, 1948-2000' (2019) 26(1) *Review of International Political Economy* 183.
[333] The set of development prescriptions for liberalization and privatization promoted together by the Bank, the International Monetary Fund (IMF) and the US Department of the Treasury became known as the 'Washington Consensus' since the three institutions were based in Washington, DC. See, for the original mention, John Williamson, 'What Washington Means by Policy Reform', in John Williamson (ed.), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990).
[334] Kerry Rittich, 'Enchantments of Reason/Coercions of Law' (2003) 57 *University of Miami Law Review* 727, 739-40.
[335] See, e.g., Elinor Ostrom, 'Challenges and growth: the development of the interdisciplinary field of institutional analysis' (2007) 3(3) *Journal of Institutional Economics* 239.
[336] Oliver E. Williamson, *Markets and Hiérarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (Free Press 1975).
[337] See, e.g., Ronald Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.
[338] See, e.g., Douglass C. North, *Structure and Change in Economic History* (Norton 1981); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990).

institutions and organizations, including the evolution of property rights, for delivering certain types of goods (see, *supra*, Section 1.1) throughout history. Elinor Ostrom drew more attention to the variety of self-organized institutions beyond private and public property forms of managements. Institutional analysts show that the strict dichotomy between 'the market' and 'the state' is not warranted anymore. Yet, institutional studies still frame every problem of collective action in terms of economic cost-benefit analysis for resource users. Ostrom's approach to the commons as effective resource management systems was criticized by Pierre Sauvêtre as being part of a 'developmentalist' agenda generalizing economic rationality to all spheres of action:

> [Ostrom] considers [the commons] through the prism of the interests of individuals within community management systems, which are based on a cost-benefit analysis. It is the efficiency of the commons in terms of costs and benefits that determines their legitimacy. Commons are both *community-based* resource management systems, because they rely on local communities, and *efficient* economic solutions within the framework of a market economy that can serve as benchmarks for rural community development policies. Ostrom's contribution is not only to have made traditional communal property rights systems fashionable again, but also to have modelled the economic rationalization of traditional commons. She invented *efficient commons*, as opposed to the classical approach to historical commons […].[339]

### 2.2. The hegemony of private property in development

An account of the role of the commons in development should start with acknowledging the hegemony of private property over communal management systems. Even long before the modern discipline of development was shaped, private property seems to have been considered superior to any form of communal ownership. In the fourth century BC, Aristotle already stated that

> [p]roperty should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business. […] [H]ow immeasurably greater is the pleasure, when a man feels a thing to be his own; for surely the love of self is a feeling implanted by nature and not given in vain […].[340]

Private property, in opposition to 'what is left in common', has been presented as a hallmark of productive efficiency for centuries. Yet, the right to exclude others has especially been central to the promotion of economic prosperity during the Enlightenment period. It should not surprise that legal scholars, especially in the common law tradition, use a classic quote from the 18th

[339] Sauvêtre, *supra* n 93, 83 (original emphasis).
[340] Aristotle, *supra* n 194, 36.

century, attributed to William Blackstone (1723-1780), to describe the right of property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'[341] Yet, it is less often mentioned that Blackstone also considered that '[i]n the beginning of the world', 'all was in *common* among [all mankind]' and that 'every one took from the *public stock* to his own use such things as his immediate necessities required'.[342] This 'communion of goods', however, was considered barbarian and primitive, like 'the manners of many American nations when first discovered by the Europeans'.[343] According to Blackstone, 'when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used'.[344] This passage illustrates how private property is deeply entrenched in modern European legal thought as a necessity for societal development and 'progress'.

The legal view of property as the right to exclude was supplemented by the classical economic argument of property as the necessary precondition for enabling owners to conserve their resources, use their full assets, exchange the fruits of their labours and *develop* other resources to the greatest advantage of everybody.[345] Adam Smith (1723-1790) considered in his *Wealth of Nations* that private property rights encourage possession, control, and more efficient allocation of resources through a capitalist market.[346] He showed that property law was more advanced in 'civilized' countries than in any other 'primitive' or 'barbarian' society. In his *Lectures on Jurisprudence*, Smith neatly distinguished between four stages (or 'ages') of development of humanity: hunters, shepherds, agriculture, and commerce. Each stage represented progress over the previous one. But the crucial determinant in his view was the development of private property: 'The more improved any society is and the greater length the several means of supporting the inhabitants are carried, the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of

[341] William Blackstone, 'Chapter 1. Of Property, In General' in *Commentaries on the Laws of England. Book II. Of The Rights of Things* (Oxford University Press 2016 [1766]) 1.
[342] ibid., 1-2 (emphasis added).
[343] ibid., 2.
[344] ibid. (original emphasis).
[345] Getzler, *supra* n 331, 642.
[346] Adam Smith, *The Wealth of Nations. Books I-III* (Penguin Classics [1776] 1999); Adam Smith, *The Wealth of Nations. Books IV-V* (Penguin Classics [1776] 1999).

property.'[347] Put differently, the more a society develops, the more competition over resources increases and regulation of property becomes indispensable. This 'stadial' model of societal development looks similar to William Blackstone's account of private property, which is still greatly influential on modern property theory.[348]

Admittedly, most contemporary economists and lawyers still assume that, without the institution of private property, rational self-interested individuals will have no incentive to protect their resources and accumulate wealth in a classic process of development.[349] Interestingly, modern economic and legal theories about the commons are reminiscent of the civilizational stages of stadial theory.[350] When writing about the commons, most authors tend to focus on 'primitive' stages of hunting, pastoralism or agriculture to stress that commons represent 'backwards' institutions. The best and most famous example of negative narrative about communal systems of resource management is the 'The Tragedy of the Commons' by American ecologist Garrett Hardin (see *supra*, Section 1.2).[351] Hardin illustrates his argument against commons with the myth of a common pasture that is not owned by anyone and left in open access. Even though Hardin does not touch upon any specific historical period, the shepherds in his story are reminiscent of an ancient time lacking any kind of property or even collective management system. For Hardin, the commons 'is justifiable only under conditions of low-population density'.[352] As the population increased, the civilization was compelled to enclose farmland and restrict access to pastures with clear private property rights. This is how private property was portrayed as the legal institution avoiding the depletion of scarce natural resources and providing enough incentives to individuals to protect them.[353]

Hardin was not the only theorist emphasizing the importance of securing private property rights to avoid the 'barbaric' tragedy of the commons. In his seminal 1954 'Economic Theory of a

[347] Adam Smith, *Lecture on Jurisprudence* (Ronald L. Meek, David D. Raphael, Peter G. Stein, eds., Liberty Fund Inc, 1982) quoted in David B. Schorr, 'Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory' (2018) 19(2) *Theoretical Inquiries in Law* 507, 512.
[348] Scott J. Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 *Stanford Environmental Law Journal* 109, 114.
[349] Gershon Feder and David Feeny, 'Land Tenure and Property Rights: Theory and Implications for Development Policy' (1991) 5(1) *World Bank Economic Review* 135; Daniel Fitzpatrick, 'Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access' (2006) 115(5) *Yale Law Journal* 996.
[350] Schorr, *supra* n 347, 515.
[351] Hardin, *supra* n 3, 1243.
[352] Hardin, *supra* n 3, 1243.
[353] Mattei & Quarta, *supra* n 72, 38-39.

Common-Property Resource', the economist H. Scott Gordon relied on so-called 'anthropological' research of land tenure regime 'among primitive people' to prove his anti-common-property thesis:

> the older anthropological study was prone to regard *resource tenure in common*, with unrestricted exploitation, *as a "lower" stage of development* comparative with private and group property rights. However, more complete annals of primitive cultures reveal common tenure to be quite rare, even in hunting and gathering societies. Property rights in some form predominate by far, and, more important, their existence may be easily explained in terms of the necessity for orderly exploitation and conservation of the resource. Environmental conditions make necessary some vehicle which will prevent the resources of the community at large from being destroyed by excessive exploitation. Private or group land tenure accomplishes this end in an easily understandable fashion.[354]

The inefficiency of common-property regimes led Gordon to state, in Darwinian terms, that 'only those primitive cultures have survived which succeeded in developing such institutions'.[355] Again, as in Hardin's parable, the confusion between common-property and open access ('unrestricted exploitation') is unfortunate. Interestingly, both private and group property rights are mentioned on an equal footing as solutions to the overexploitation dilemma. Nonetheless, even though communal arrangements equally involve exclusive rights to protect the shared resource, the commons remain depicted as backwards and in need of enclosure.

In the neo-institutional tradition of development, the classic social dilemma surrounding the use of common resources has been resolved through a framework developed by Nobel laureate Ronald H. Coase (1910-2013). In his renowned 1960 article 'The Problem of Social Cost', Coase does not resort to the theory of social cost and externalities but defines environmental problems of congestion as simple bargaining for the use of a scarce resource.[356] The Coase theorem indicates that competition over conflicting resource uses can only be resolved through well-defined private property rights. In Coase's own terms, 'the immediate question […] is not what shall be done by whom but who has the legal right to do what',[357] for private property determines who has the legal right to use the resources and derive value from them. Consider two parties competing over the use of the same piece of land: the party who gives the land use the highest rate will also pay the best price to the owner, thereby obtaining the right to use the land in question. Said differently, development problems are due to ill-defined property

[354] Gordon, *supra* n 198, 134 (emphasis added).
[355] ibid., 135.
[356] Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.
[357] ibid., 15.

rights.[358] Initial allocation of property rights does not matter for efficiency because parties will always reach an agreement through a market transaction.

As economics professor Harold Demsetz famously explained in 1967 in his *Toward a Theory of Property Rights*, a world without private property resembles that of Robinson Crusoe.[359] Here again, the similarities to older, less advanced 'stages' of societal development are striking.[360] Demsetz defined private ownership in a strict sense as 'the right of the owner to exclude others from exercising the owner's private rights'.[361] He recognized the alternative model of 'communal ownership', yet he viewed it as less efficient and more primitive. His presentation of communal ownership,[362] relying on anthropological studies of Native American tribes documenting the shift from collective ownership to private property, foreshadows the tragedy of the commons:

> Suppose that land is communally owned. Every person has the right to hunt, till, or mine the land. This form of ownership fails to concentrate the cost associated with any person's exercise of his communal right on that person. If a person seeks to maximize the value of his communal rights, he will tend to overhunt and overwork the land because some of the costs of his doing so are borne by others. The stock of game and the richness of the soil will be diminished too quickly.[363]

Yet, unlike Hardin who assumed little or no communication among herdsmen, Demsetz more realistically considered the possibility that community members communicate among themselves and reach an agreement on the carrying capacity of the common land:

> It is conceivable that those who own these rights, i.e., every member of the community, can agree to curtail the rate at which they work the lands if negotiating and policing costs are zero. Each can agree to abridge his rights. It is obvious that the costs of reaching such an agreement will not be zero. What is not obvious is just how large these costs may be.
>
> Negotiating costs will be large because it is difficult for many persons to reach a mutually satisfactory agreement, especially when each hold-out has the right to work the land as fast as he pleases. But, even if an agreement among all can be reached, we must yet take account of the costs of policing the agreements,

[358] ibid., 19.
[359] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347.
[360] Schorr, supra n 347, 516.
[361] Demsetz, *supra* n 359, 354.
[362] See, for a more recent account of his view of collective ownership in socialist systems in opposition to private ownership in capitalism, Harold Demsetz, 'Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership' (2002) 31(2) *The Journal of Legal Studies* 653.
[363] Demsetz, *supra* n 359, 354.

> and these may be large, also. After such an agreement is reached, no one will privately own the right to work the land; all can work the land but at an agreed upon shorter workweek. Negotiating costs are increased even further because it is not possible under this system to bring the full expected benefits and expected costs of future generations to bear on current users.[364]

In other words, even when community members decide on a common work plan, the value of the land will not be maximized by such agreement, because the efforts of each community members will benefit others indistinctly and the interests of neighbours and subsequent generations will (supposedly) not be taken into account. As the population increases, so does the pressure on shared resources. Only private ownership will, according to Demsetz, allow individuals to maximize the present value of their own privately-owned land rights – while taking into account the needs and costs of future generations. The 'concentration of benefits and costs on owners creates incentives to utilize resources more efficiently'.[365]

Even though numerous scholars have challenged Demsetz's insights and have shown that the tragedy predicted by Hardin never occurred in reality, it is still the idea that the current and dominant model of development spreads.[366] Development policy-makers have rarely gone beyond the public-private and state-market dichotomies[367] and have often considered local forms of communal ownership as 'archaic and in need of modernization via privatization and market integration'.[368] Since the movement of enclosure, private property is presented as the sole institution capable of avoiding the tragedies of overuse and underinvestment. As a commentator writes, legal and economic theorists 'seem to accept […] that private property represents a more advanced stage of civilization than does the commons.'[369] This bias 'lies at the root of many neoliberal policy prescriptions, from the importance of secure private property regimes to developing countries to the salience of cap-and-trade as a solution for climate change and other environmental problems.'[370] In *The Mystery of Capital*, Hernando de Soto (1941- ) famously writes that, whereas in developed countries like the US land can be used for credit

[364] Demsetz, *supra* n 359, 354-355.
[365] Demsetz, *supra* n 359, 356.
[366] See, e.g., James E. Krier, 'Evolutionary Theory and the Origin of Property Rights' (2009) 95 *Cornell Law Review* 139.
[367] Ioannis Glinavos, 'Transition or development? Reassessing priorities for law reform' (2010) 10(1) *Progress in Development Studies* 59, 72.
[368] Ismael Vaccaro, Laura C. Zanotti, Jennifer Sepez, 'Commons and markets: opportunities for development of local sustainability' (2009) 18(4) *Environmental Politics* 522, 523.
[369] Schorr, *supra* n 347, 531.
[370] ibid.

and sold in secondary markets, land in many developing countries is 'dead capital'.[371] The problem of underdevelopment, according to de Soto, finds its source in the lack of respect for formal private property rights. Without secure property rights, one cannot obtain credit to generate further investment. So, according to him, '[g]overnments in developing countries need to stop living on the prejudices of Westerners hung up on the cruelty of *enclosure* and the creation of property in Britain centuries ago or on the bloody dispossession of Native Americans throughout America.'[372] In fact, de Soto argues that the enclosure of 'extralegal' and 'informal' common lands into formal private property in the 19th century led to the Industrial Revolution and 'the economic progress that is the hallmark of Western society'.[373]

Olivier De Schutter critically spells out how commons have today been replaced by a Western conception of property rights in the endless extractive process of natural resource extraction to reach the 'highest' stage of economic growth and investment:

> the 'commons' – the communal ownership of pastures, fishing grounds or forests, allowing all community members to enjoy access to shared natural resources – are perceived not as an essential safeguard against extreme deprivation for those who are landless or land-poor, but instead as an obstacle to development. Development, in turn, is understood as the maximization of wealth creation, inter alia by favouring the exploitation of natural resources, which – precisely because we are facing the threat of scarcity – should be turned into economic assets, tradeable if possible, in order to ensure that they shall benefit the most efficient users. The prescription is clear: to strengthen private property rights wherever possible, and where this cannot be done, to ensure that natural resources shall be used rationally by establishing strong state control.[374]

From the review of the aforementioned economic and legal writings, it arises that the current system of (economic) development, favoured by industrialized countries and grounded in growth and wealth maximization, represents a threat to the commons in developing countries. As Ugo Mattei and Alessandra Quarta have ironically phrased it, private property is seen 'as a fundamental right of extractive development'.[375] This is the background against which we should understand the limited role of the commons in today's development programmes and policies. In that sense, development (and the growth is it supposed to boost) is in itself ecologically unsustainable.

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[371] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000) 7.
[372] ibid., 132.
[373] Hernando de Soto, *The Other Path* (Basic Books 2000) 52.
[374] De Schutter, *supra* n 21, 237.
[375] Mattei & Quarta, *supra* n 72, 30.

### 2.3. The depreciation of the commons by the World Bank

The hegemony of private property and depreciation of the commons is reflected in the development policies of the World Bank. The Bank welcomed the ideas of Hernando de Soto, who had been working for the Bank in Central and Eastern Europe. Since the 1970s, the institution is well-known as a fierce defender of privatization strategies in SAPs, which coerce developing countries to convert untitled lands like the commons into private property to make available on the markets. SAPs consists of loans to debt-strapped governments, conditioned upon the achievement of a number of policy reforms, among which privatization of government-held enterprises, liberalization of public services and greater efficiency of the free market. The term 'SAP' acquired such a negative connotation that it was abandoned by the institution in the 1990s.

In a 1975 land policy reform paper, the Bank went as far as advocating the abandonment of 'backward' customary tenure arrangements and the subdivision of the commons into plots over which 'modern' freehold titles would be granted.[376] Enforcement of property rights became a desirable standard economic reform supported by the Bank, in what was called the 'Washington consensus'. In the 1990s, the Bank further established this policy in helping post-Soviet states to make the transition from state to private ownership of lands and services. This strategy was aimed at facilitating the integration of developing and post-Soviet countries into the world economy and the global supply chains of agricultural commodities. The Bank's land and agricultural policies, prescribed as conditionalities, were then directed at securing land tenure and transferability of private property rights through 'free' land markets, at the expense of informal and customary institutions governing communal rights of use. Under this market-based approach, the role of the state was reduced to protecting and enforcing private rights to property, in order to create an enabling environment for economic growth.

The Bank has demonstrated more openness for the commons in a 2003 comprehensive report on its *Land Policies for Growth and Poverty Reduction*.[377] It acknowledges therein that '[f]orests and other common property resources contribute significantly to people's welfare,

[376] Karl Deininger, *Land Policies for Growth and Poverty Reduction: A World Bank Policy Research Report* (World Bank, 2003) 62; World Bank, *Land Reform: Sector Policy Paper* (World Bank, 1975).
[377] Deininger, *supra* n 376.

especially of the poor'[378] and that 'in most situations simply introducing private property rights will be neither feasible nor cost-effective'.[379] However, even though the Bank recognizes customary rights, the institution of the commons as such is not regarded as an optimal solution. On the contrary, the 2003 report recommends formalizing customary rights to integrate them 'into more formal systems'.[380] Ultimately, individual ownership is still considered to be 'the arrangement that provides the greatest incentives for efficient resource use'.[381] Commons are said to be warranted primarily in situations with 'limited economic development'.[382] As a land expert commented, '[w]hile it is significant that the Bank has recognized the need to respect customary rights, it nevertheless sees individualistic rights of ownership of land as those which represent the most "modern" form of landholding'.[383]

The Bank's WDRs – the annual flagship publications with policy recommendations on various aspects of development – confirm this:

- In its 2005 WDR on *A Better Investment Climate for Everyone*, the Bank advocates enhancing the security of private property rights as a means to create a better investment climate and foster economic growth: '[t]he better protected these rights, the stronger the link between effort and reward and hence the greater the incentives to open new businesses, to invest more in existing ones, and simply to work harder' (World Bank, 2005: p. 79).[384] It is striking how the WDR's vision of property echoes Hardin's 'Tragedy of the Commons'.[385] The WDR straightforwardly states that registered titles to lands encourage investment, improve access to loans and enhance environmental stewardship. It affirms that, in the absence of clear property rights, those in control of a natural resource will use it as much as possible, since 'they are not sure the resource will be theirs tomorrow'.[386] While the 2005 WDR does not rule out the existence of 'community-wide agreements on the use of resources', it explicitly assumes that when

[378] ibid., 66.
[379] ibid., 68.
[380] ibid., 63.
[381] ibid., 28.
[382] ibid., 29.
[383] Elizabeth Fortin, 'Reforming Land Rights: The World Bank and the Globalization of Agriculture' (2005) 14(2) *Social & Legal Studies* 147, 170.
[384] World Bank, 'Chapter 4: Stability and security' in *World Development Report 2005: A Better Investment Climate for Everyone* (World Bank/Oxford University Press 2005) 79.
[385] Hardin, *supra* n 3, 1243.
[386] ibid. 81.

natural resources are 'held collectively' individuals have fewer incentives to protect them against depletion.[387]

- The 2008 WDR on *Agriculture for Development* has brought some nuance to this individualistic vision of property. It warns that while '[e]arlier interventions to improve tenure security focused almost exclusively on individual titling, […] this can weaken or leave out communal, secondary, or women's rights'.[388]

- The 2017 WDR on *Governance and the Law* refers to Ostrom's book *Governing the Commons*,[389] but it fails to present the commons as an institution for collective action. It simply restates, at an abstract level, the tragic fate of unregulated commons depicted earlier by Garrett Hardin.[390] The report repeats that '[c]onflict over the mismanagement and overuse of common pool (or open access) resources is ubiquitous',[391] but it omits to present successful and sustainable management processes of shared resources as a commons.

At this stage, even though the Bank has admittedly organized seminars in the 1990s on common property and community-based natural resource management to which Elinor Ostrom was associated,[392] it has not adopted any comprehensive policy recognizing the commons as a governance system of its own. Some critics have accused the Bank of appropriating the language of the commons and putting it 'at the service of privatization',[393] but in reality the Bank has never promoted, in its official publications, the commons as a sustainable resource management mechanism. Worse still, traditional and customary land and other natural resources tenure systems have been privatized throughout Africa, Latin America, and Southeast Asia as a direct result of the Bank's SAPs. The World Bank's little support for communal and customary systems of tenure has not been without criticism. In fact, the IEG report itself noted that most of the Bank's land administration projects did not aim to include the poor or vulnerable groups (such as women or ethnic minorities) in their objectives. As a former General

[387] ibid. 82, Box 4.4.
[388] World Bank, 'Chapter 6: Supporting Smallholder competitiveness through institutional innovations' in *World Development Report 2008: Agriculture for Development* (World Bank 2007) 139.
[389] Ostrom, *supra* n 8.
[390] Hardin, *supra* n 3, 1243.
[391] World Bank, *World Development Report 2017: Governance and the Law* (World Bank 2017) 115, Box 4.3.
[392] Sauvêtre, *supra* n 93, 86.
[393] Federici, *supra* n 96, 46.

Counsel observed, conventional private land titling 'is not the only way to improve security of tenure'. Actually, communal land tenure may already be recognized under customary law in some rural areas, which then renders individual land titling programmes inappropriate as development interventions.[394]

### 2.4. The commons as new vector of development

The marginal role of the commons in official development policies of the Bank may appear astonishing, given the unprecedented interest for the commons in field studies on natural resource management in developing countries across Asia, Africa, or South America. Some critical observers have even talked about Ostrom's work as 'developmentalist policy' which 'aimed at structuring the community-based management of resources in the Global South'.[395] Without overstating the impact of Ostrom's work in official development policies of multilateral development banks and other agencies, it should be admitted that the context-specific and empirically grounded approach of the Bloomington school involves major policy reorientations for the field of development. The sole recognition of the commons as a self-governing resource management system conflicts fundamentally with the dominant privatization dogma in development. The tragedies of ecological, financial, and social crises have also shown the limits of this standard vision of development based on privatisation, exploitation of nature and extractivism. The critique of commons scholars and activists upon the developmentalist model should therefore not come as a surprise. Fritjof Capra and Ugo Mattei, for instance, vigorously denounce an 'idea of "development"' as 'fundamentally quantitative' and 'rooted in seventeenth-century notions of "improvement"', which fails to recognize 'that unrestrained extraction and exploitation of natural and human resources is at odds with the fundamental principles of ecology'.[396] For Mattei, 'the line promoted by the international financial institutions is that the Global South can emerge from the past (its primitivism) and reach a brilliant future provided it follows the path already walked by the

[394] Ana Palacio, 'Legal Empowerment of the Poor: An Action Agenda for the World Bank' (March 2006) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalEmpowermentofthePoor.pdf> (accessed 12 April 2020).
[395] Sauvêtre, *supra* n 93, 80.
[396] Capra & Mattei, *supra* n 22, 9.

present "more advanced" economies. This illusion requires a vision, itself patently absurd but sponsored in the name of scientific progress: the possibility of infinite growth in a finite planet.'[397] David Bollier proposes to 'abandon the whole mindset of "development" itself' and, instead, to start talking about 'human flourishing'.[398] Dirk Löhr suggests that '[i]f community interests in shared natural resources are to survive, a new development agenda will need to be advanced, and it will need to sail against the wind'.[399] For others, the notion of the commons 'has the ambition to ground a counter-narrative and a political and institutional organization capable of shifting our pattern of development from an extractive and individual into a generative and collective mode'.[400]

Interestingly, outside the academic circle, some civil society and development organizations have also seized the commons as a new theme for the development agenda. Non-governmental organizations (NGOs) like Oxfam, the ILC, and the Rights and Resources Initiative (RRI), have launched a global call for action to endorse Ostrom's assertion 'that communities should have better control of their customary lands rather than having them taken away'.[401] For its 75th birthday, the *Agence française de développement* (AFD) organized in December 2016 its 12th international conference on development in Paris on the theme of 'Commons and Development'[402] with both prominent commons and development scholars, which resulted in the publication of two special issues in peer-review journals on development studies.[403] Stéphanie Leyronas, from the AFD research department, proposed in that respect to reinvent the narrative of ODA through the prism of the commons and lean towards an alternative and plural model of development building on collective modes of fulfilment, more concerned with

[397] Mattei, *supra* n 207, 14-15.
[398] David Bollier, 'Beyond Development: The Commons as a New/Old Paradigm of Human Flourishing' (25 June 2016) <http://www.bollier.org/blog/beyond-development-commons-newold-paradigm-human-flourishing> (accessed 17 May 2018).
[399] Dirk Löhr, 'The Failure of Land Privatization: On the Need for New Development Policies' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press 2012) 414.
[400] Vivero-Pol et al., *supra* n 71, 1.
[401] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13, 25.
[402] See, 'Commons and Development Dynamics' (2016) <https://www.afd.fr/en/ressources/commons-and-development-dynamics> (accessed 17 December 2019).
[403] Gaël Giraud, Stéphanie Leyronas and Grégoire Rota-Graziosi (eds), 'Le développement au prisme des communs' (2016) 24(3) *Revue d'économie du développement* 5-148; Stéphanie Leyronas and Tamatoa Bambridge (eds), 'Lecture croisée de la gouvernance des communs' (2018) 233(1) *Revue internationale des études du développement* 5-215.

the environment and social cohesion.[404] AFD's chief economist, Gaël Giraud, also considered the commons as an unavoidable concept to address climate change and rethink the future of development: '[d]evelopment must involve a renewed understanding by institutions which have already allowed communities in the past, and will allow them in the future, to preserve, develop and promote common, cultural or natural resources.'[405]

Numerous development projects have been analysed through the prism of the commons and the eight criteria for self-governance developed by Elinor Ostrom. In the Sudano-Sahelian zone of Cameroon, collective and autonomous (non-state) forms of agricultural food storage facilities, which re-emerged to improve the food security of communities, were examined in the light of Ostrom's design principles.[406] Development studies have reported cases of sustainable and resilient commons-based institutions, but also failures due to the reluctance of public authorities to empower autonomous groups of resource users. For example, in La Paz, Bolivia, peri-urban communities succeeded in putting in place small cooperatives to supply water as 'genuine commons in Ostrom's original sense'.[407] Yet, in a now-arid desert of Jordan, in Azraq, the decentralised management of water resources faced the refusal of the national, central authority to make local resource users genuine managers and co-deciders.[408] Commons-based institutions in developing countries can sometimes involve the technical and financial assistance of external donors. This was the case, for example, in Peru, where the US Agency for International Development (USAID) participated in the creation of an indigenous communal forestry enterprise which was said to meet most of Ostrom's design principles.[409] Similarly, in the outskirts of Kinshasa, a local NGO supported by international donors promoted decentralised water systems that were managed at the local level by the users themselves, in order to respond

[404] Stéphanie Leyronas, 'Repenser l'Aide publique au développement au prisme des communs' in Nicole Alix, Jean-Louis Bancel, Benjamin Coriat and Frédéric Sultan (eds), *Vers une République des Biens Communs?* (Les Liens qui Libèrent 2018) 205.
[405] Gaël Giraud, 'The Commons, a Key Concept for the Future of Development' (25 October 2016) ID4D, <https://ideas4development.org/en/commons-development/> (accessed 17 December 2019).
[406] Eric Joel Fofiri Nzossie, Ludovic Temple and Joseph Pierre Ndamé, 'Infrastructures de stockage agricole (ISAC) dans la zone soudano-sahélienne du Cameroun : conditions de gouvernance d'un bien commun pour la sécurisation alimentaire' (2016) 24(3) *Revue d'économie du développement* 107.
[407] Sarah Botton, Sébastien Hardy and Franck Poupeau, 'Water from the heights, water from the grassroots: the Governance of common dynamics and public services in La Pas-El Alto' (2016) 27 *AFD Research Paper Series*, 17.
[408] Stéphanie Leyronas, Dominique Rojat, Frédéric Maurel and Gaël Giraud, 'Un cadre d'analyse pour la gouvernance des ressources naturelles. Le cas des eaux souterraines' (2016) 24(3) *Revue d'économie du développement* 129.
[409] Christopher E. Morrow and Rebecca Watts Hull, 'Donor-Initiated Common Pool Resource Institutions: The Case of the Yanesha Forestry Cooperative' (1996) 24(10) *World Development* 1641.

to deficient water services.[410] In a country where public authority is weak and private investors are absent, these autonomous water governance systems proved more effective than traditional public or private water supply services. In brief, the commons approach seems to have gained some momentum as an alternative way of analysing and fostering development projects.

It now seems possible to talk about commons as an emerging 'approach' that can complement (not necessarily replace) that of market and state in the field of development cooperation. Such a polycentric approach seems to present at least three distinctive principles. First, purely in terms of economic efficiency, the institutional analysis of Elinor Ostrom shows that the degree of effectiveness of a governance system is associated with active user involvement in the management of CPRs. In the case of nationalization of natural resources, Ostrom and Hess have explained how enclosure may lead to a tragedy in the development context:

> As concern for the protection of natural resources mounted during the second half of the last century, many developing countries nationalized all land and water resources that had not yet been recorded as private property. The institutional arrangements that many local users had devised to limit entry and use frequently lost legal standing. The national governments that declared ownership of these natural resources, however, frequently lacked monetary resources and personnel to exclude users or to monitor the harvesting activities of users. Thus, resources that had been under a *de facto* common-property regime enforced by local users were converted to a *de jure* government-property regime, but reverted to a *de facto* open-access regime. When resources that were previously controlled by local participants have been nationalized, state control has usually proven to be less effective and efficient than control by those directly affected, if not disastrous in its consequences.[411]

The commons as alternative forms of resource management can prove more effective than the market and the state in building long-lasting trust and a deep feeling of responsibility among people involved.[412] As Yochai Benkler puts it, 'in the management of resources, introducing a government management policy intended to rationalize use of a system, *either by direct regulation or by parcelling out the property to more classically defined property rights*, will undermine a well-functioning, collectively created system better tailored to local conditions than either standardized institutional framework (property or regulation).'[413] No one knows

[410] Florent Bédécarrats, Oriane Lafuente-Sampietro, Martin Leménager, and Dominique Lukono Sowa, 'Building commons to cope with chaotic urbanization? Performance and sustainability of decentralized water services in the outskirts of Kinshasa' (2019) 573 *Journal of Hydrology* 1096.
[411] Charlotte Hess and Elinor Ostrom, 'Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource' (2003) 66 *Law and Contemporary Problems* 111, 123.
[412] Bollier, *supra* n 398.
[413] Benkler, *supra* n 282, 1508 (original emphasis).

local conditions better than the community itself involved in the management of a shared resource. No one has more incentives to protect that shared resource over the long term than the ruling community – which often depends upon it for its survival.

Second, and beyond the mere point of view of economic rationality of resource users, in most developing countries the commons are, in practice, already recognized by local populations as fully-fledged management mechanisms of natural and other CPRs, such as grazing lands, forests, water and fisheries – which represent nothing less than primary means of subsistence. The commons may not merely represent an 'effective' way – in the economic sense – to ensure the management of shared natural resources, but millions of small-scale farmers, pastoralists, forest dwellers, artisanal fishers and indigenous peoples also rely on them for their subsistence. In that light, the process of 'modernization' promoted by some development actors, and based on a conception of individual private property imported from the West, is likely to fail in securing the rights of communities and preventing conflicts over land and other natural resources in the Global South.[414] External development interventions in the form of individual land titling and privatization programmes, not only seem inappropriate where communal systems exist,[415] but they also may destroy the traditional and communal way of life in developing countries. In this regard, the Commission on Legal Empowerment of the Poor (CLEP)[416] pointed out the recurrent mistake of development actors, inspired by the 'tragedy of the commons', of transforming customary tenure and interests in commons into private property rights, instead of registering these as the group-owned property of communities.[417] Instead, the Commission recommends that '[t]he state should enhance the asset base of the poor by enabling community-based ownership' and that commons 'should be recognised and fully protected against arbitrary seizure'.[418] Ignoring such realities by enclosing these resources through either public or private property may have disastrous consequences. The former UN Special Rapporteur on the right to food, Olivier De Schutter, in a report of 2010 similarly observed that 'the formalization of property rights and the establishment of land registries may be the problem, not the solution: it may cause [herders, pastoralists and fisherfolk] to be fenced off

[414] Fortin, *supra* n 383, 170.
[415] Palacio, *supra* n 394.
[416] The Commission on Legal Empowerment of the Poor (CLEP) is an independent working group established in 2005, hosted by UNDP and co-chaired by former US Secretary of State Madeleine Albright and Peruvian economist Hernando de Soto. The Commission published its final report in 2008.
[417] Commission on Legal Empowerment of Poor, *Making the Law Work for Everyone*, Vol II (Commission on Legal Empowerment of the Poor and UNDP 2008) 83.
[418] ibid., 65.

from the resources on which they depend, making them victims of the vast enclosure movement that may result from titling'.[419] The Special Rapporteur emphasized that 'while security of tenure is important and should be seen as crucial for the realization of the right to food, individual titling and the creating of a market for land rights may not be the most appropriate means to achieve it'.[420] In his view, users' rights should instead be supported based on customary forms of tenure. He cited the examples of Kenya, where pastoralists were excluded from some land titling programmes, and Tanzania, where herdsmen had been deprived access to so-called 'unused' common grazing areas.

Third, in terms of legitimacy, the role of the state and the international community is not simply to provide public goods, but also to recognize the right of communities to organize themselves and govern commons in an autonomous and democratic fashion. As social activist Naomi Klein writes:

> struggles for self-determination and sustainability are being waged against World Bank dams, clear-cut logging, cash-crop factory farming, and resource extraction on contested indigenous lands. Most people in these movements are not against trade or industrial development. What they are fighting for is the right of local communities to have a say in how their resources are used, to make sure that the people who live on the land benefit directly from its development. These campaigns are a response to trade but to a trade-off that is now five hundred years old: the sacrifice of democratic control and self-determination to foreign investment and the panacea of economic growth. The challenge they now face is to shift a discourse around the vague notion of globalization into a specific debate about democracy.[421]

The two top-down enforcement mechanisms of public or private ownership may also display structural disadvantages in comparison to bottom-up self-organization: 'individual private property regimes enforceable by general courts of law, just like administrative regulation, require a degree of abstraction from local conditions, and […] this abstraction can lead to substantial knowledge and motivational loss, which, in turn, may lead to lower performance for the resource system governed by either one of these more "rationalized" forms.'[422] Other commons advocates consider that '[commons social] movements may provide the much-needed institutional "imagination" necessary to formulate true alternatives to the development, rights, and private property packages promoted by the modern liberal state and international

[419] UNGA, 'Report of the Special Rapporteur on the right to food' (11 August 2010) UN Doc. A/HRC/36/L.29, para. 25.
[420] ibid., para. 10.
[421] Klein, *supra* n 314, 88.
[422] ibid., 1509.

economic institutions.'[423] Indeed, '[c]ommons social movements are demanding that property relations are exposed to political contestation in the public sphere through the political process, but – primarily in the Global South – they are also demanding through the political process that the state respect existing traditional communal forms of property.'[424] This implies that the commons are not only a factor of social cohesion but also of respect for the communities' ecosystem. The development process based on commons is locally owned; communities are empowered as key actors in the governance of their own shared resources, rather than passive recipients of GPGs. It reflects, according to some authors,[425] the principles of 'participation' and 'country ownership over development' brought forward in the OECD Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008).[426] The commons approach promotes democratic and participatory methods which allow communities to claim their rights in development projects.

## 3. A definition of the commons for development and international law

Let us be clear: the political echo of the commons as a new strategy of resistance against neoliberalism is far remote from the neo-institutional studies of Elinor Ostrom. When reading the rich literature on the commons, one cannot avoid concluding that the same term can mean different things to different people. The great diversity of normative, ideological, and political implications of the same notion in diverse academic disciplines and grassroots movements make it impossible to talk about the commons in a uniform way. The critique on Ostrom shows that there are vehement discussions even among the commons scholars about the definition of 'common goods' or '*beni comuni*' (Mattei[427]), 'commons' (Ostrom[428]) or the 'common' in the

[423] Bailey & Mattei, *supra* n 64, 1006.
[424] ibid., 978.
[425] Leyronas & Bambridge, *supra* n 403, 23.
[426] OECD, 'The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action' (2005/2008) <http://www.oecd.org/dac/effectiveness/34428351.pdf> (accessed 18 December 2019) 3: '14. Partner countries commit to:
- Exercise leadership in developing and implementing their national development strategies through broad consultative process.
- Translate these national development strategies into prioritised results-oriented operational programmes as expressed in medium-term expenditure frameworks and annual budgets (Indicator 1).
- Take the least in co-ordinating aid at all levels in conjunction with other development resources in dialogue with donors and encouraging the participation of civil society and the private sector.
15. Donors commit to:
- Respect partner country leadership and help strengthen the capacity to exercise it.'
[427] Ugo Mattei, *Beni comuni. Un manifesto* (Editori Laterza 2012).
[428] Ostrom, *supra* n 8.

singular (Hardt and Negri;[429] Dardot and Laval[430]). The same is true of the various versions of the commons that have emerged over the last decade from grassroots movements, for instance, at the city level or on the Internet. Under the same 'slogan' throughout the world, there are now various types of engagements and more radical connotations of commons. This comes with a caveat. As the historian Tine De Moor warned, 'now that "commons" has become a buzzword […] the term is used for so many ideas that it threatens to become an empty concept.'[431] What should we do to prevent that the commons become an empty concept in this study of development and international law? Which definition of the commons should we retain from the constellation of ideas presented above? Should we 'forget Ostrom', as Sauvêtre boldly suggested?[432] Or should we instead return to the economic definition of the commons proposed by Ostrom herself?

As I have already highlighted in the Introduction, there is no single recognized definition of commons – let alone a legal definition. The rules constitutive of the practice of *commoning* are specific to each commons (which is to be expected in a management system characterized by self-governance). Yet, for the purpose of studying the commons in the specific context of development and from the perspective of international law, the commons can be said to meet three cumulative criteria (see *supra*, Introduction, Section 3):[433]

(i) A common-pool *resource*, be it a tangible, natural resource like pastures, lands, seeds, forests or water reserves, or intangible such as traditional knowledge (the object). While acknowledging the rich multi-faceted nature of the commons as a broad theme for academic research and political action, this work focuses on a specific type of commons: traditional or natural commons on which rural communities in developing countries rely for their livelihood. It does not matter if those resources are material or immaterial. Yet, the intrinsic rivalry of water, fisheries or pastures as essential resources on which people depend for their living does have an impact, for rules of use and access of such commons aim at sharing scare resources equitably and collectively over the long term. In this sense, the economic typology of goods remains relevant.

[429] Michael Hardt and Antonio Negri, *Multitude. War and Democracy in the Age of Empire* (Penguin Books 2005).
[430] Dardot & Laval, *supra* n 91.
[431] De Moor, *supra* n 89, 424.
[432] Sauvêtre, *supra* n 93.
[433] These three elements most often come back in the legal definitions of the commons: see, e.g., Marella, *supra* n 18.

(ii) A narrowly defined and circumscribed *community* of people (guild, tribe, extended family, neighbourhood, village) that has exclusive (rather than free and open) access to the resource in question and that manages it in common (the subject). This is not to say that the community is merely spatially defined (in terms of access to a CPR). I do not focus solely on the natural properties of CPRs. The commons are not simply defined by the twin features of rivalry and non-excludability. A community is a more or less dynamic and heterogenous social unit. What is an important criterion to determine the community is to be able to define a group of legitimate resource-users (who may participate in decision-making and manage the CPR) vs. non-members.[434] That is why commons are here defined as a *social construct*: without communities, no commons. For this reason, I do not simply speak of common 'goods', nor of 'global commons' as mere global resource areas.

(iii) The practice of *commoning*, that is the concrete activity of governing a resource through collective action and according to *ad hoc* rules (not under public or private property management) (the practice). Commons should, therefore, reach a certain threshold of institutionalization.

In this working definition of the commons, the object (the 'resource') is inseparably linked to the subject (the 'community') and the practice ('commoning'). Indeed, the commons are much more than just material or immaterial resources ('things', '*choses*' in French). The commons should be seen as 'social facts'; they represent social systems of governance. In this sense, the (admittedly, positivistic) distinction used in this section between the object, subject, and practice is inevitably artificial. It is impossible to observe a commons from one of these perspectives only. The three aspects are cumulative criteria of one single social phenomenon.

## 4. Summary

This first Chapter described the system of commons-based governance in the field of development. This was necessary as most international legal scholars remain unfamiliar with the institution of the commons, at least understood in Ostrom's sense. Yet, the overview of the epistemological origins of the commons in Section 1 made it clear that various definitions of the same term coexist. The commons can first be traced back to the classic division of goods in

[434] Brett M. Frischmann, Alain Marciano and Giovanni Battista Ramello, 'Tragedy of the Commons after 50 Years' (2019) 33(4) *Journal of Economic Perspectives* 211, 221.

economic theory and the notion of common-pool resources (CPRs). Given the rival and non-excludable nature of CPRs, individual agents will indeed tend to overexploit them. Consequently, a governance arrangement for a CPR could be considered successful only if it stops the overuse of the resources it governs (for example, fish stocks or timber). Yet, opinions differ as to whether this requires privatization, the intervention of an external (public) authority or the setting up of an effective (autonomous) community. In this sense, a 'commons' used to refer to a self-governing community rather than simply to a resource-area.

Next, the depletion of rivalrous CPRs is at the core of the famous 'Tragedy of the commons'. The expression refers to the idea that the commons will always be overexploited due to the regime of open access, which (supposedly) characterizes them. If the microbiologist-ecologist Garrett Hardin cannot be said to be the first author to predict the overuse of the 'commons', his article published in the 13 December 1968 *Science* remains nonetheless one of the most famous and cited pieces of scientific literature on the commons. The false but influential tragedy of the commons was also constructed to convince us of the compelling need to enclose the commons – either through private property or through public regulation.

Hardin's argument was first rebutted by historical works pointing to the commons as they existed in medieval England and the rest of western Europe to regulate lands, forests and pastures. The Charter of the Forest, for example, situates the current private property paradigm in a broader perspective and shows that alternatives to the market-state dichotomy have already existed. Hardin's Tragedy was also challenged by Elinor Ostrom's empirical field studies of contemporary commons. She proved that, in different parts of the world, communities succeeded in cooperating and in limiting the depletion of CPRs by adopting rules to regulate overconsumption, contrary to pessimistic game-theoretical predictions. In brief, commons are not 'no-law' zones owned by 'nobody' where resources are simply allocated on a 'first come, first served' basis. Quite the contrary is true: communities around the word can build up very complex systems of collective action with rules on restricted membership, boundaries and sanctions. The use, access and management of forests, pastures, grazing lands and fisheries is socially defined and organized, collectively and autonomously, aside from the state and the market. This means that communities of herders, fishermen, pastoralists, indigenous peoples are perfectly able to limit the depletion of CPRs by self-regulating to prevent free-riding. Through self-organized action, commoners sustain shared resources over long periods of time without having recourse to the coercive mechanisms of private property or state regulation. It

is the customary practice that defines them as such: 'no commons without commoning'. Those natural resources are effectively governed as commons.

Nowadays, the notion of the commons goes beyond natural resource management mechanisms. According to critical scholars, the institution of the commons cannot be defined ontologically as 'material things' out of a set of natural characteristics; the institution of the commons is a counter-hegemonic experience of direct democracy determined by a community of people and challenging the neoliberal worldview based on rational choice, individualism, private property and the hegemony of the market. What I take from this more critical stream of literature in this thesis is the acknowledgment of the asymmetrical power relations between the commons, on the one hand, and the (neoliberal) markets and governments, on the other. The commons are indeed not just another form of social institutions, living peacefully side by side with the market and the state; the commons are being threatened by the dominant model of economic development. The movement of enclosure facing the rural commons (that started in medieval England) is still ongoing.

The table below (figure 2) provides an overview of these various definitions.

| Epistemological origin | Definition of the commons |
|---|---|
| **Economics** | Self-governing community governing a *common-pool resource* (CPR), that is rival and non-excludable, and therefore risks being overused. |
| **Tragedy of the commons** | *Open access regime*, that is e.g. a pasture freely accessible to everyone, which will automatically deplete the common resource (without external constraints). |
| **Historical perspective** | In *medieval England* (and the rest of western Europe), the commons regulated and limited access to CPRs such as lands, forests and pastures to a group of users. |
| **Ostrom** | *Institutional arrangements* which communities establish to prevent free-riding and overconsumption of CPRs without having recourse to private or public property. |
| **Critical theory** | The *common* (in the singular) is a political principle of direct democracy challenging private property and going beyond the natural properties of the resources to be shared. |

**Figure 3 – Definitions of the commons**

The overview of commons scholarship brought me to dig deeper in Section 2 in the contemporary phenomenon of enclosure of the commons and the hegemony of private property in the field of development. Despite the expansion of predatory activities of private investors and states, some traditional communities, mostly living in the Global South, have hitherto resisted the enclosure movement. They still depend upon subsistence commons to meet their basic needs. According to a recent report by Oxfam, ILC and RRI, 2.5 billion people, including 370 million indigenous people, rely on communal land and natural resources around the world,

which represent approximately 50% of the global landmass.[435] According to another assessment by ILC and Cirad,[436] over 8.54 billion hectares of 'commons' around the world can be categorized as 'property of rural communities under customary norms, this is not endorsed in national statutory laws'.[437] Ostrom's work made that abundantly clear. However, although Ostrom's work was primarily addressed to the development community (she mostly documented case-studies in developing countries like Kenya, Guatemala, and Nepal),[438] this collective model of bottom-up governance is still far from being generally accepted in the field. Private property, in opposition to 'what is left in common', has been presented as a hallmark of productive efficiency for centuries. Commodification was for long thought to be inevitable. As Blackstone wrote already in the 18th century, the 'communion of goods' was considered retrograde and in need of modernization through privatization.[439]

For the sake of clarity and legal certainty, I proposed in Section 3 a definition of the commons studied in this work. The commons represent social systems of governance which meet three cumulative criteria. Commons can be defined on the basis of (i) a common-pool resource, be it tangible (e.g. pastures, lands, seeds, water) or intangible (e.g. traditional knowledge), (ii) which is exclusively managed in common by a community of people (e.g. tribe, extended family, neighbourhood, village), (iii) and which is governed through collective action and according to *ad hoc* rules (the practice of commoning) separate from the market and the state. The three aspects represent one and the same phenomenon of institutions of collective action.

However, today, echoing Garrett Hardin's 'Tragedy of the Commons', development actors like the World Bank still seem to assume that the commons should be commodified and privatized to secure land tenure and ensure their transferability in markets. Because so many commons are based on traditional usage and customary practice and are still considered 'backward' by development institutions, these communal systems tend to be highly vulnerable to state and corporate enclosure in the Global South. To date, only one-fifth of the communal lands around the world would be legally recognized.[440] This explains why local communities face the threat

[435] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13.
[436] Cirad is the French agency for agronomical and development research in tropical and Mediterranean areas: see <https://www.cirad.fr/> (accessed 1 February 2020).
[437] Alden Wily, *supra* n 1167.
[438] Recall that Pierre Sauvêtre, *supra* n 93, spoke of 'the Ostromian *developmentalist* policy of the commons' (p. 79, emphasis added). According to him, '[t]he historical roots of the commons paradigm and common-pool resources (CPR) analysis are inseparable from a change in the United States (US) development policies and doctrine, with the replacement, during the 1970s and 1980s, of a state-centred development model with a model combining markets with forms of community governance' (p. 81).
[439] Blackstone, *supra* n 341, 1.
[440] ibid.

of being deprived of their most basic access to food, land, and other essential resources. This is exactly what triggers me to look in the next chapter into the role of the commons in international law. The challenge in this PhD is therefore to create the legal conditions for enabling and protecting the collective experience of autonomous, participatory and collaborative institutions as a new vector of development, distinct from both market and state. Hence, this study strives to present a different view of international law, as a legal system enabling and protecting commons, instead of transforming them into commodities.

# Chapter 2
# The Commons and International Law

The rebirth of the commons has permeated virtually all fields of natural and social sciences and layers of civil society movements. Interestingly, however, while the commons are now being debated in some legal disciplines like property and IP law, the notion largely remains under the radar of international law. It is true that international legal scholars have already devoted much attention to 'global commons' – designating the vast natural resource domains lying outside national jurisdiction, such as the oceans or the outer space. Yet, as we shall see, global commons have little to do with the social *institution* of the commons. What international lawyers immediately associate with the term 'commons' is not the small-scale community building up self-governance mechanisms, but vast global resource domains mostly lacking regulatory control.

Despite Elinor Ostrom's Nobel Prize-winning work on governing CPRs as well as its growing appeal to scholars from multiple legal disciplines, the commons have attracted (very) little attention in public international law. I emphasize the aspect of governance of the commons because it remains a challenge to transpose its insights into the international legal framework in a way that clearly marks boundaries with the biased – yet, hugely influential[441] – tragedy of the commons of Garrett Hardin. If international legal scholars take Hardin's definition of commons as unrestricted and unregulated open-access resources as their starting point, there is little hope that alternate governance mechanisms beyond private and public property solutions such as the commons be put forward in the international legal system.

Yet, I believe international law can have both positive and negative effects on the commons. This thesis aims to open that discussion in the belief that international law can be de-constructed and re-constructed as a negative and positive factor on the survival of the commons in the context of development. Before delving into the specific discipline of international law, this chapter first examines, as an entry point, the growing engagement of legal scholarship with the

[441] See, e.g., for international law articles which use the notion of 'commons' in the sense of Hardin's tragedy, Bryan H. Druzin, 'The Parched Earth of Cooperation: How to Solve the Tragedy of the Commons in International Environnemental Governance' (2016) 33 *Duke Journal of Comparative & International Law* 73; Kim Hyun Jung, 'Governing Fishing Stocks in Northeast Asia's Disputed Waters: Preventing a "Tragedy of the Commons"?' (2018) 33(3) *The International Journal of Marine and Coastal Law* 495; Ranganathan, *supra* n 100; Shackelford, *supra* n 348; Jared B. Taylor, 'Tragedy of the Space Commons: A Market Mechanism Solution to the Space Debris Problem' (2011) 50(1) *Columbia Journal of Transnational Law* 253.

commons. I show that academic contributions have so far focused on revisiting property and IP law (Section 1). It will be seen that despite a growing interest in other areas of the law, scholarly debates about the commons, defined as bottom-up institutions for self-governance, remain extremely rare within the field of international law (Section 2). This chapter then seeks to locate the exact role of the commons with a deconstructive analysis of the discipline of international law itself (Section 3). This disciplinary deconstruction is achieved by bringing some of the literature on the commons into conversation with the concepts of global commons, sovereignty and nature in international law. By offering a critical account of its origins, I explain how international law essentially served as an instrument of colonization and commodification of the commons. After challenging the traditional foundations of international law, I argue that international law needs to be fundamentally rethought if it is to protect the commons around the globe. In a more reconstructive attempt, I try to demonstrate how international law could now serve as a driver of change for reclaiming the commons. To uncover the former aspect, Chapter 3 digs deeper into the field of international human rights law.

## 1. The commons and the law

### 1.1. Emergence of the commons in legal scholarship

The commons, understood in Ostrom's sense as an institution of collective action, has long been ignored in the law. However, over the last decade, following the comeback in other scientific disciplines, the practice of commoning sparked a new wave of academic interest among legal scholars looking for alternative models of governance and political economy. The legal recourse should not be too surprising, since it has already been established that commons cannot survive in a legal vacuum. Indeed, if we go back to Ostrom's seminal book *Governing the Commons*, the 'minimal recognition of rights to organize' is one of the eight design principles proposed to characterize a robust and sustainable commons-based institution.[442] Ostrom summarized this principle as follows: '[t]he rights of appropriators to devise their own institutions [should not be] challenged by external governmental authorities'.[443] She observed, on the basis of her case-studies, that 'if external governmental officials presume that only they

[442] Ostrom, *supra* n 8, 90.
[443] ibid.

have the authority to set the rules, then it will be very difficult for local appropriators to sustain a rule-governed [CPR] over the long run'.[444] This principle is well supported empirically: commoners should be able to enjoy a minimum level of self-determination in order to organize local and small-scale governance systems with *ad hoc* rules. Commons scholars regularly emphasize that this right to self-government needs to be respected by the state and public authorities.

Legal scholars have followed in the footsteps of the approach pioneered by Elinor Ostrom and her colleagues. In their imaginative book '*Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*', human rights scholar Burns H. Weston and commons activist David Bollier consider that 'free-market economics (in both its classical and neoliberal guises) has given rise to a legal apparatus and political system that elevates territorial sovereignty and material accumulation over shared stewardship of the natural environment.'[445] If we want to make any sense of the commons as 'vehicles of green governance', they argue, '[t]his will require […] innovative legal and policy norms, institutions, and procedures to recognize and support commons *as a matter of law*.'[446] The authors thus propose a new legal paradigm of governance based on the commons – what they call 'the Law of the Commons'.[447] In the same vein, Alden Wily states that '[o]nly legal recognition […] is sufficient to afford real protection'.[448] Ugo Mattei states that the phenomenological revolution of the commons 'require the jurists to address the difficult and urgent task of constructing the foundations of a new legal order capable of transcending the dualisms (property/State, subject/object, public/private) inherent in the current order.'[449] The law has therefore an important role to play in securing the commoners' right to self-government.

The reclamation of shared resources as 'commons', however, is not a neutral topic in the law. Legal scholars writing from a commons perspective are part of a broader intellectual and social movement reclaiming control over decisions about how resources are shared, promoting direct participation of resource users in their management, and rejecting the forces of individualisation, marketization, and unsustainable exploitation. As Maria Rosaria Marella

[444] ibid., 101.
[445] Weston & Bollier, *supra* n 21, xix.
[446] ibid., xx.
[447] See, also, Antonius Broumas, 'Movements, Constitutability, Commons: Towards a *Ius Communis*' (2015) 26 *Law and Critique* 11.
[448] Weston & Bollier, *supra* n 21, 26.
[449] Mattei, *supra* n 253, 43.

writes, commons mirror 'a subversive site in the legal order'.[450] For legal scholars, the main challenge, it seems, is indeed to halt the seemingly inexorable process of transformation of commons into capital. For '[i]t is through the *abstraction* of private law that lawyers have contributed to legitimizing plunder and extraction of the magnitude as that carried out during primitive accumulation (enclosure of the commons and colonization)'.[451] Indeed, it appears that the law, as it was conceived in the Anthropocene since the development of the modern sovereign state, is fundamentally biased against the commons. As Serge Gutwirth and Isabelle Stengers write, '[t]he difficulty to imagine today how to extract from the law the possibilities of satisfactory 'qualifications' of *commoning*, is not at all surprising since the law in force since the Enlightenment has always translated its process of eradication.'[452] It is important to emphasize that the law is not just an outside phenomenon from which commons can be observed and analysed. The law is itself part of the problem. Since the Industrial Revolution, the law serves as the tool of eradication and enclosure of the commons. In some cases, the commons have been invoked to recognize some actions of constitutional or civil disobedience, like, for example, occupations of abandoned private and public spaces (think of the famous occupation of the national Valle Theatre in Rome, Italy).[453] Alessandra Quarta and Tomaso Ferrando explain, in that respect, that '[l]egality and legitimacy are […] the two sides of the same coin, where the latter that can be used to redefine the former and advance a legal reallocation of property through acts of disobedience.'[454]

Nowadays, the growing evidence from empirical studies in social sciences and history about the 'validity' of self-governance mechanisms calls for a fundamental rethinking of the basic categories of ownership in the law. For centuries, the imposition of private property rights and the centralized system of public regulation have been considered the two most obvious legal options to avoid the destruction of CPRs and give enough incentives to individuals to use them efficiently. However, the language of the 'commons' is now increasingly being invoked in legal scholarship to look beyond privatization or monopolistic public regulatory control over shared

[450] Marella, *supra* n 18, 63.
[451] Mattei & Quarta, *supra* n 72, x.
[452] Gutwirth & Stengers, *supra* n 298, 330: 'La difficulté à imaginer aujourd'hui comment extraire du droit des possibilités de "qualification" satisfaisante du *commoning*, n'est, rappelons-le, pas du tout surprenante, car la législation en vigueur depuis les Lumières a toujours traduit le processus de son éradication' (free translation).
[453] The grand public theatre, which risked being privatised as a result of austerity policies of the Ministry of Culture, was occupied during three years by students and artists in order to establish a new 'theatre commons'. Many other cultural institutions in Venice, Naples and Milan started being occupied to reclaim culture as a 'common good'.
[454] See, Quarta & Ferrando, *supra* n 283.

resources. Autonomous and bottom-up commons recast the dichotomy between public and private ownership as major normative frameworks. Legal scholars defending the commons as a category of its own pioneer the creation of a new legal and institutional environment to enable the commons to flourish. They investigate new pathways in law and public regulation to reclaim, protect, and manage the commons as an alternative governance model. In this sense, whereas the law has usually served in the process of private enclosure as an authoritative instrument to transform commons into capital, it is now called upon to protect communal lies over individual freedoms, and to use value over exchange value.

As Ugo Mattei and Alessandra Quarta observed, 'legal scholars interested in commons can use the existing rules and fill them with a new "generative" meaning, or try completely new proposals, which however require […] quite a mighty political force to be put in place'. Such acts of legal resistance can be found *in theory* to reinterpret existing legal institutions, like private or IP. The language of the commons is then used as a 'counter-hegemonic tool'.[455] Yet, the commons can also be used *in practice* for analysing the construction of sharing and pooling institutions for specific types of resources. An emerging field of legal study in this respect concerns the 'urban commons' (community gardens, urban farms, neighbourhood foot patrols, citizens park conservancies, abandoned public spaces managed by the public) which provide a new 'framework and set of tools to open up the possibility of more inclusive and equitable forms of "city-making"'.[456] The resource to be shared in this case is the city space. Other legal scholars have adapted Ostrom's approach from the natural to the cultural environment in relation to 'cultural commons'.[457] The resource to be produced and conserved in this other case concerns information and knowledge – think of open-source operating systems like Linux, platforms like Wikipedia, academic articles. To accommodate the commons, legal scholars have devised new legal tools, such as collective property regimes, IP regimes (e.g. the 'Creative Commons License' that protects shared resources, the copyleft, or even the denial of IP rights), cooperatives, community land trusts and public trust doctrines (e.g. rivers, shorelines and parks protected by the state for future generations). Yet, as we shall see below, legal contributions identifying the commons as an institution of its own, including the most innovative applications of urban or cultural commons, have so far remained limited to the fields of property and IP law,

[455] Mattei & Quarta, *supra* n 72, viii; Mattei & Quarta, *supra* n 18, 79.
[456] Foster & Iaione, *supra* n 70, 285. See also, Christian Iaione and Elena De Nictolis, 'Urban Pooling' (2017) 44(3) *Fordham Urban Law Journal* 665; Mattei & Quarta, *supra* n 284.
[457] Michael J. Madison, Brett M. Firschmann and Katherine J. Strandburg, 'Constructing Commons in the Cultural Environment' (2010) 95(4) *Cornell Law Review* 657.

at the domestic level. International law has not yet been part of the picture in this emerging body of literature.

### 1.2.The commons and property law

Predictably, the first area of legal study of the commons has speculated upon property – the dominant legal institution in any market economy. As Sheila R. Foster and Christian Iaione stressed in their specific study of the city as a commons, 'any articulation of the urban commons needs to be grounded in a theory of property […] given the centrality of property law in resource allocation decisions that affect owners, non-owners and the community as a whole'.[458] Translating the multi-stakeholder and bottom-up commons into a property concept is not easy. Traditionally, most property scholars cite Blackstone at the beginning of their works – the owner has 'sole and despotic dominion' over property (*see* supra, Chapter 1, Section 2.1).[459] It is also as a 'natural' right that the institution of property should be understood in Article 17 of the 1789 Declaration of the Rights of Man and of the Citizen:

> Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.[460]

Property has therefore long been seen as the power to exclude others from a parcel of land – that is the individual sovereignty or absolute, autonomous and perpetual *dominium* over nature.[461] Beyond the accepted power of public ownership, other forms of collective ownership were marginalized (see *supra*). The only possible form of common ownership was for a long time 'co-ownership' (*indivision*) with equal rights of participation, alienability and management among co-owners. However, this dominant[462] model of property is today being challenged by legal scholars in light of the commons. Not only may commons represent other, valid, forms of property, but users in a commons do not have such absolute power of alienation over a 'thing'. This subsection briefly reviews how property law opened up other forms of ownership to accommodate the commons. I see at least six ways of revisiting property law and recognizing new forms of ownership: (i) Duguit's social function of property and Gurvitch's *droit social*,

[458] Foster & Iaione, *supra* n 70, 285-286.
[459] Blackstone, *supra* n 341, 1.
[460] Yale Law School, Lillian Goldman Law Library, Documents in Law, History and Diplomacy, 'Declaration of the Rights of Man – 1789' <https://avalon.law.yale.edu/18th_century/rightsof.asp> (accessed 2 August 2019).
[461] Mattei & Quarta, *supra* n 72, 15.
[462] Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) *Harvard Law Review* 1089.

(ii) property as a bundle of rights, (iii) the tragedy of anticommons, (iv) inherently public property, (v) unappropriability and (vi) the commons as a new type of property. At the same time, this subsection also shows why these renewed theories of property law seem insufficient, as such, to empower communities in the Global South and protect them against enclosure of vital commons in the context of development.

First, one of the earliest reinterpretations of property in the Western world is often ascribed by commons scholars[463] to the French legal theorist Léon Duguit (1859-1928). Duguit wrote in his famous lectures of Buenos Aires that '[p]roperty is not a right; it is a social function'.[464] The 'social function' of property (or the 'social-obligation norm') involves that private owners should have the obligation to use their goods for the satisfaction of their needs and the collective need of society.[465] Property does not exist in a societal vacuum. According to Duguit, if a private owner does not fulfil his social mission (e.g. he omits to cultivate his lands or lets his house deteriorate), public authorities should be entitled to coerce him to do it to reach a minimum level of social utility. Certainly, Duguit was radically opposing the idea of property of his time and inherited from the Napoleonic Civil Code of 1804 as an absolute right.[466] Nowadays, some European and Latin American constitutions include a reference to the social function of

[463] See, Dardot & Laval, *supra* n 91, 50, 499, 508, 517-520; Foster and Iaone, *supra* n 70, 307-311; Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press 2000) 33; Fabienne Orsi, 'Réhabiliter la propriété comme *bundle of rights*: des origines à Elinor Ostrom, et au-delà ?' (2014) XXVIII(3) *Revue internationale de droit économique* 371, 374-376; Judith Rochfeld, 'Penser autrement la propriété : la propriété s'oppose-t-elle aux "communs"?' (2014) 3 *Revue internationale de droit économique* 351, 356, note 20.

[464] Léon Duguit, *Les Transformations Générales du Droit Privé Depuis le Code Napoléon* (Librarie Félix Alcan 1912) 21 (free translation : 'la propriété n'est pas un droit ; elle est une fonction sociale').

[465] See Thomas Boccon-Gibod, 'Duguit, et Après ? Droit, Propriété et Rapports Sociaux' (2014) 3 *Revue internationale de droit économique* 285.

[466] Article 544 of the French Civil Code: 'la propriété est le droit de jouir et disposer des choses *de la manière la plus absolue*, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements' (free translation : 'property is the right to enjoy and dispose of things *in the most absolute way*, as long as the use made of it is not prohibited by law or regulation') (emphasis added). See Legifrance, *Civil Code* (1 July 2013) <https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_civil_20130701_EN> (accessed 12 April 2020).

property.[467] Duguit's ideas even found their way in American jurisprudence.[468] However, it would be wrong to stop at a short citation of his seminal book and conceive Duguit's social function of property as an apology of the commons. Right after the same oft-quoted passage, he wrote for instance that property was the indispensable condition of progress and that 'collectivist doctrines' were a 'return to barbarism'.[469] Whatever he may have understood under the term of 'collectivist doctrines', his more relative understanding of property does not seem to encompass the social construction of the commons as an institution of its own.

Georges Gurvitch, another French anti-formalist (French school of legal objectivism) who, like Duguit, rejected the 19th-century positivistic idea of an autonomous, individualistic and abstract legal system, looked more specifically at entities without legal personality governing social relationships.[470] Gurvitch is indeed passionate about the revolutionary idea (emanating from the early Soviet Union) of a free civil society forging its own '*droit social*', separate and independent from the state and its legal apparel.[471] In his 1931 book entitled *Le temps present et l'idée de droit social*, he write that the '*droit social*' spontaneously flourishes from a group in order to unite its members.[472] Like in what today would be called a commons, the norms (e.g. a collective bargaining agreement or workers' council) are defined by the members themselves and not by external governmental authorities (self-governance). It is in this way that the unofficial '*droit social*' emerges as a counterpower to the state (legal pluralism).[473] Even if we may want to avoid disorder, Gurvitch emphasizes that this collective autonomy should not be subordinated to, and dominated by the state. Gurvitch's idea of social self-determination is far remote from the individualistic conception of private property in the French civil code, but it

[467] See, e.g., Article 42 of the Italian Constitution which provides that '[p]rivate property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its *social function* and make it accessible to all': Senato della Repubblica, *Constitution of the Italian Republic* (27 December 1947) <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> (accessed 22 December 2019) (emphasis added); Article 56(I) of the Bolivian Constitution of 1993: 'Toda persona tiene derecho a la propiedad privada individual o colectiva, siempre que ésta cumpla una *función social*' (emphasis added) (free translation: 'Everyone has the right to private, individual or collective, provided that it serves a social function'). Constituteproject.org, *Bolivia (Plurinational State of)'s Constitution of 2009* (4 February 2020) <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> (accessed 12 April 2020).
[468] See, Gregory S. Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745; M. C. Mirow, 'The Social-obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22(2) *Florida Journal of International Law* 191; see also, Sheila R. Foster and Daniel Bonilla (eds), 'The Social Function of Property: A Comparative Perspective' (2011) 80 *Fordham Law Review* 1003.
[469] Léon Duguit, *supra* n 464, 21 (free translation : 'retour à la barbarie').
[470] Georges Gurvitch, *Le temps présent et l'idée du droit social* (Librairie Vrin 1931).
[471] Jacques Le Goff, *Georges Gurvitch. Le pluralisme créateur* (Michalon 2012) 38.
[472] Gurvitch, *supra* n 470, 39.
[473] Michel Coutu, 'Autonomie collective et pluralisme juridique : Georges Gurvitch, Hugo Sinzheimer et le droit du travail' (2015) 90(2) *Droit et Société* 351.

does not translate the concept of the commons in legal terms. Quite the contrary, since it would be, for him, a contradiction in terms to use a legal framework to restrict the constituting power of an institution of self-governance.

Second, more recently, based on the earlier work of the economist John R. Commons,[474] Edella Schlager and Elinor Ostrom herself contributed to an important renewal of the legal approach to property as a '*bundle of rights*' (in French, '*faisceau de droits*'[475]) rather than a single right of alienation.[476] It was already clear in *Governing the Commons* (see *supra*, Section 1.4) that Ostrom accepted the possibility of governing CPRs without exclusive property rights and a 'Leviathan'-type of public authority or private dominium. Yet, what marked Ostrom's work was not the absence of proprietary rights as such, but 'the absence of a state-created property system'.[477] Otherwise stated, the system of exclusion, use, and disposition of CPRs was never enforced by the state directly, but by a community through *ad hoc* rules. Rather than the annihilation of property as a whole, the bundle of rights is a renewed conception of it. Following their institutionalist method, Shlager and Ostrom dismantled property-rights systems into five kinds of resource control rights which can simultaneously be claimed by different CPR users with different titles:

(i) Access: 'authorized entrants' have the right to enter a specified property and enjoy non-rival resources (e.g. walking through a forest or swimming in a lake);
(ii) Withdrawal or extraction: 'authorized users' have the above right plus the right to harvest specific products from a rival resource (e.g. collecting fruits in a forest or fishing in a lake);
(iii) Management: 'claimants' possess both the rights to access and withdrawal, plus the right to transform the resource by making improvements and regulate internal use patterns (e.g. strengthening the forest tracks or building maintenance facilities in the lake);
(iv) Exclusion: 'proprietors' hold the four aforementioned rights plus the right to decide who will have access, withdrawal, or management rights (that is most often the case in common-property regimes);

[474] John R. Commons, *Legal Foundations of Capitalism* (University of Wisconsin Press 1968).
[475] See Orsi, *supra* n 463.
[476] Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) *Land Economics* 249.
[477] Benkler, *supra* n 282, 1508.

(v) Alienation: 'full owners' also possess the right to lease or sell any of the other four rights.[478]

Economists and lawyers have long assumed that the hallmark of private property was only this last right of alienation. Shlager and Ostrom, however, showed that property-rights systems could be more complex: '[w]hile not the conventional view of lawyers, analysis of resources can benefit from viewing these rights bundles as diverse forms of property rights.'[479] According to the situation, a specific social arrangement will combine a set of titles/privileges, but not others. Different circumstances will simply call for different privileges and types of property rights.[480] As Lee Anne Fennel summarizes 'Ostrom's law', '[a] a resource arrangement that works in practice can work in theory.'[481] There are more property rights systems than simply public, private and (even) common property. These rights are independent of each other, but they are often exercised cumulatively by CPR users. Any single individual or community may hold one or all of these rights. Typically, however, CPR users lack the right of alienation of their set of privileges over the shared resource to someone outside the commons. This distinguishes a commons from joint ownership or group property arrangement: joint owners (for instance, in a corporation) may perfectly alienate their parts and transfer titles, but not commoners. Conversely, field studies have shown that proprietors (possessing the first four kinds of property rights, but not the right of alienation) have sufficient rights to sustain a CPR over the long term. Every textbook of property law in the US nowadays mentions Ostrom's bundle of rights. Property law theorists now also regularly refer to Ostrom's bundle idea when framing the commons in terms of legal rights: simply because the right of exclusion or alienation is not enough to understand a commons.[482] Ostrom's bundle of rights shows that the set of freedoms a user may enjoy in relation with a shared resource is immensely richer than the single right of alienation of a private dominium.

Third, in a seminal *Harvard Law Review* article entitled 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets', American law professor Michael A. Heller again nuanced the standard solution of privatization to solve the classic dilemma of the tragedy

[478] ibid., 252.
[479] Hess & Ostrom, *supra* n 411, 125.
[480] Eggertsson, *supra* n 204, 123.
[481] Lee Anne Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 *International Journal of the Commons* 9 (emphasis omitted).
[482] Orsi, *supra* n 463; Fennell, *supra* n 481.

of the commons.[483] For Heller, when too many owners hold rights of exclusion over a single resource, the fragmentation can have counterproductive effects and limit innovation and cooperation. Consider a family of several children inheriting the same house from their parents but refusing to agree on the same destiny for the house: the house will never be sold or leased. Every child will lose. The same is true in a private corporation if too many separate owners fail to cooperate. The problem becomes even more acute when it concerns the privatization of biomedical research, the proliferation of fragmented and overlapping patents and the ensuing lack of useful products for improving human health.[484] To characterize this dilemma of 'underuse' or 'underutilization' of common assets, Heller coined the term 'tragedy of the anticommons'. Heller states that:

> [p]rivate property can no longer be seen as the end point of ownership. Privatization can go too far, to the point where it destroys rather than creates wealth. Too many owners paralyze markets because everyone blocks everyone else. Well-functioning private property is a fragile balance poised between the extremes of overuse and underuse.[485]

The tragedies of the commons and anticommons correspond to both extremes of overuse and underuse: the critical factor is the absence or overabundance of rights to exclude. Yet, it also proves that the proliferation of property rights may bring costs – 'privatization can overshoot'.[486] Heller is also one of the first property lawyers to highlight the commons as a basic type of ownership of its own: '[g]roup access is often overlooked even though it is the predominant form of commons ownership, and is often not tragic at all'.[487] Heller's anticommons tragedy gained much credit after it was formalized in an economic model by Nobel Prize laureate James Buchanan and his colleague Yong Yoon.[488] However, it is critical to understand that the tragedy of anticommons in itself is not a plea for the commons as a legal institution. It is just the recognition that property rights may be better defined.

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[483] Michael A. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard Law Review* 621. See also, Lee Anne Fennell, 'Common Interest Tragedies' (2004) 98(3) *Nortwestern University Law Review* 907.
[484] Michael A. Heller and Rebecca S. Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research' (1998) 280(5364) *Science* 698.
[485] Michael A. Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books 2010) 19.
[486] Michael A. Heller, 'The Tragedy of the Anticommons' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market and State* (Levellers Press, 2012) 68.
[487] ibid., 69.
[488] James M. Buchanan and Yong J. Yoon, 'Symmetric Tragedies: Commons and Anticommons' (2000) 34(1) *The Journal of Law & Economics* 1.

Fourth, the notion of 'inherently public property' denotes certain kinds of property that should remain open to the public – for instance, roadways and navigable waterways. The concept was developed in Carol Rose's 1986 seminal article on the 'Comedy of the Commons' – the opposite of Hardin's tragedy.[489] Rose screened an impressive array of case-law to show that private power could be reduced and that use rights could be created for general public – that is society at large, not a specific community of users. She also made clear that 'inherently public property' (*jus publicum*) goes beyond the public-private dichotomy:

> This standard paradigm of neoclassical economics and modern microeconomic theory recognizes only two property regimes: either ownership is vested in private parties or it resides with an organized state. The usual economic approach to property law suggests that productive efficiency will be enhanced when private property is the norm, but government intervenes in recognized instances of market failure.
>
> Thus in the conventional lore, markets are based on private rights or, when markets fail, property may be governmentally managed in the interests of aggregate efficiency. Yet these two options do not logically exhaust all the possible solutions. Neither can they adequately describe all that one finds in the recorded history of property in the Anglo-American universe. In particular, there lies outside purely private property and government-controlled "public property" a distinct class of "inherently public property" which is fully controlled by neither government nor private agents. Since the Middle Ages this category of "inherently public property" has provided each member of some "public" with a bundle of rights, neither entirely alienable by state or other collective action, nor necessary "managed" in any explicitly organized manner.[490]

In those cases, contrary to neoclassical economic thinking, the right to access is deemed superior to the right to exclude; public rather than private use generates enhanced social value for the resource in question. That is an important contribution to property law: in those situations, the solution to overexploitation of scarce resources is not to grant private property rights, but to set up alternative 'public rights' to limit the privileges of private owners; the known figure of public good absorbs the notion of common goods. However, this category of inherently public property has important limits. Contrary to Ostrom's commons, Rose's 'public' remains unorganized, open-ended, indefinite. Inherently public property remains a public good. Contrary to CPRs, a public good is non-rival (anyone can use it without reducing its quantity for others) ('the more the merrier'). It comes very close to the category of *open* commons in IP law (see *infra*, 1.2.2), which seems inappropriate to protect scarce natural resources.

[489] Carol M. Rose, 'The Comedy of the Commons: Customs, Commerce and Inherently Public Property' (1986) 53 *The University of Chicago Law Review* 711.
[490] ibid., 720.

This category of inherently public property is not entirely new. Roman law already knew the notion of *res publicae in uso publico* – public goods intended to be used by everybody, like roads, waterways, or public parks. Beyond what is 'inherently' public, it is possible to imagine a category of goods which *ought* (normatively) to remain public (like water for human consumption, for example). Many environmental law scholars have already insisted on the responsibility of the state to step in and defend 'ecological assets' such as lakes, rivers and forests as a public trustee – that is in public trust protection.[491] For instance, in *Nature's Trust*, Mary Wood endeavoured to reconceive the role of government as a fiduciary of nature to reverse the destruction of the environment.[492] Mary Wood claimed that we need to resort to the 'strong hand of government'[493] to allocate responsibility for the protection of public natural assets 'from damage, as well as from dangerous privatization'.[494] However, nature is again indistinctly seen as 'common property of all citizens'.[495] Like in Roman law, such 'things' ought to remain available to all mankind. The power or control of nature is then lodged in the state as a trustee from the top (since it is deemed to derive its authority from the people it represents) – not in the hands of a community that develops its own rules of safeguard from below. Thus, the public trust doctrine fails to break free from the binary choice of public or private *dominium*. Quite the contrary, sovereignty even seems reinforced: 'The trust is of such a nature that it can be held only by the sovereign, and only be destroyed by the destruction of the sovereign'.[496] Yet, in the case of the current wave of enclosure of the commons in the Global South, the state has not always been the strongest ally in the fight against land grabs, expropriations and extractivism in the context of economic development and globalization.

Fifth, faced with the limits of both public/private property doctrines, other scholars associated with the more activist school of political commons pleaded for rejecting any kind of property whatsoever on the commons: 'the common can only be instituted on the basis of complete unappropriability; under no circumstance can the common be the object of the law of

[491] See, Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471.
[492] Mary Christina Wood, *Nature's Trust. Environmental Law for a New Ecological Age* (Cambridge University Press 2014).
[493] Mary Christina Wood, 'Nature's trust: reclaiming and environmental discourse' (2007) 25(2) *Virginia Environmental Law Journal* 243, 250.
[494] Wood, *supra* n 492, xviii.
[495] ibid., 125.
[496] Quoted in ibid., 129.

property.'[497] After all, appropriability also forms the basis of the legal definition of *res communis omnium* (property not capable of being owned by anyone, like seawater or the air) in Article 714(1) of the French Civil Code: 'There are things which belong to nobody and whose usage is *common* to all'.[498] No one, whether individual or state, is entitled to own *res communes*. Open access is, in this case, to some extent akin to what some IP scholars have defended for the world of ideas, knowledge and science (see *infra*, Section 1.2.2.) – or indeed international scholars for the CHM (see *infra*, Chapter 2, Section 2.1.3). However, freedom of use and access in the theory of unappropriability seem to bring us back to the doctrine of inherently public property or – more dangerously – to Hardin's tragedy. Indeed, the absence of any kind of governance is not effective – quite the contrary – in a context where natural resources are rival and in danger of overexploitation. Therefore, if we wish to overcome the limits of open and free access and save the commons in the Global South, we must look in another direction. Sixth and lastly, an increasing number of property scholars, especially in France[499] and Italy,[500] are calling for recognizing the *biens communs* or *beni comuni* as a new type of property. A 'common good' is then recognized to be owned collectively by a community and to go beyond private or public property. Indeed, a major initiative to redefine the legal taxonomy of goods was the *Rodotà Commission* in Italy. The Commission was established by the Prodi government and chaired by one of the most prominent Italian property scholars, Stefano Rodotà (1933-2017). Its mission was to revise the existing regime of 'public goods' in Italy. It concluded its works in 2008 with a proposal to redefine the 1942 Italian Civil Code's rules on public ownership and recognize the notion of *beni comuni* defined as '"goods that provide utilities essential to the satisfaction of *fundamental rights* of the person" and access to such good remains no matter if the formal title of ownership is public or private and in all cases must be protected in the "interest of future generations"'.[501] The Commission did not so much focus on the status of the good itself, but rather on its social function and necessary access to the

[497] Pierre Dardot and Christian Laval, *Common. On Revolution in the 21st Century* (Bloomsbury 2019) 161 (emphasis in the original text removed).
[498] Free translation from: 'Il est des choses qui n'appartiennent à personne et dont l'usage est *commun* à tous' (emphasis added). See, French Civil Code, *supra* n 466.
[499] Conseil d'Etat, *L'Eau et son droit* (2010) <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/104000255.pdf> (accessed 5 August 2019) 41-44.
[500] See Bailey & Mattei, *supra* n 64; Anna Di Robilant, 'Property and deliberation : a new type of common ownership' in Saki Bailey, Gilda Farrell and Ugo Mattei (eds), *Protecting future generations through commons* (Council of Europe Publishing 2013) 61-80; Maria Rosaria Marella, *Oltre il pubblico e il private. Per un diritto dei beni comuni* (Ombre Corte 2012); Mattei, *supra* n 427.
[501] Saki Bailey, 'The architecture of commons legal institutions for future generations' in Saki Bailey, Gilda Farrell and Ugo Mattei (eds), *Protecting future generations through commons* (Council of Europe Publishing 2013) 126 (emphasis added).

community. According to the Commission's proposal, the community (public at large) would not only use the common good (water, parks, forests, theatres) but also oversee (public or private) decisions over its management – that is citizens' self-governance in contrast to top-down governance. Any individual may, therefore, seek injunctive relief against management decisions of the state or a private entity over *beni comuni*, like water for example. Importantly, the owner would have no right to transfer/alienate *beni comuni*. Even though the Rodotà definition highlights the link between the commons and fundamental rights, it remains embedded in a domestic legal context to oppose the phenomenon of privatization of public goods. Moreover, despite the great impact of the Rodotà report on the diffusion of the commons vocabulary throughout Italy and the organization of the water referendum in 2011, the *beni comuni* bill was never approved by the Italian Parliament.

All the aforementioned works have rejected the neoclassical model of property, dating back from the 17th and 18th century and founded upon the individual and absolute right to exclude others as a necessary component of modern capitalist expansion. The aforesaid legal scholars have all revisited the ideological foundations of private property and have highlighted its 'social function'. Step by step, the concept of property was broadened and property was deemed as a 'generative' tool, as Mattei argues:

> The 'commons' in this context can act to overcome such logic, as it is not only a type of more deliberative and participatory form of property, but also represents a new set of alternative values of collective interests, participation and diffusion of power in the control and management of fundamental resources.[502]

In this light, Ostrom's bundle of rights represented a true revolution in US legal thought. Several innovative legal strategies sought to implement a new 'right to include'[503] – or, as Jeremy Rifkin put it, the individual 'right *not* to be excluded from the use or benefit of something'.[504] The right to access shared resources became the new principle of an interconnected and interdependent society. However, (i) the social function of property, (ii) property as a bundle of rights, (iii) the tragedy of anticommons, (iv) inherently public property, (v) unappropriability and (vi) the commons as a new type of property are aspects that only give more nuance and complexity to our current understanding of private property. These relative and functional facets of property are only the recognition of the new links that a community of users is able to

[502] Mattei, *supra* n 207, 12.
[503] Rochfeld, *supra* n 463, 366.
[504] Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism* (Tarcher/Putnam 2000) 200.

establish with a shared resource in a domestic legal system, not the recognition of a fundamental right for a community to establish / institute / preserve a commons. Incidentally, the creation of a new mandatory form of property would be at odds with the *numerus clausus* principle in civil law. Simply put, while these new legal notions help us to understand how a commons can work in terms of property rights, they do not yet enshrine a universal right to the commons.

### 1.3. The commons and intellectual property law

The second and probably most vibrant area of legal study of the commons has been IP law. Before the mid-1990s, the overwhelming majority of commons studies concerned physical and natural resources such as lands, water, forests and fisheries. The development of new intangible forms of ownership in the intellectual and cultural environment was particularly welcome with the rise and spread of digital communications technologies. This new wave of academic interest thus concerns information,[505] knowledge,[506] open,[507] cultural[508] commons. In IP law too, (intangible) commons are generally deemed inefficient and tragic by nature. Expansion of private property (or governments subsidies) to the world of intangible commons is there too considered a necessity for economic development. Since information is *non-excludable* (it is hard, if not impossible, to exclude users from listening to the same song or using the same medicine recipe), IP lawyers generally plead for creating limited monopolies in the form of IP rights and encourage creation. The right to exclude is at the core of IP law to serve as an incentive to invest in the production and development of new forms of knowledge and information. Increasingly, genes, source codes, software or scientific knowledge are being patented and taken away from the public domain. The challenge, however, is radically different when it comes to information commons in the digital environment, for information remains *non-rival*. The more access to information is limited (for example, with a price), the less it is used and the less new information is produced. That is why some legal scholars have argued

[505] See, e.g., Anthony McCann, 'Enclosure without and within the "information commons"' (2005) 14(3) *Information & Communications Technology Law* 217.
[506] See, e.g., Charlotte Hess and Elinor Ostrom (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (MIT Press 2007); Brett M. Frischmann, Michael J. Madison, and Katherine J. Strandburg (eds), *Governing Knowledge Commons* (Oxford University Press 2014): these authors defined 'knowledge commons' as 'the institutionalized community governance of the sharing and, in some cases, creation, of information, science, knowledge, data, and other types of intellectual and cultural resources' (at p. 3).
[507] See, e.g., Benkler, *supra* n 282.
[508] See, e.g., Madison et al., *supra* n 457.

that patents and copyrights limit creation and innovation.[509] For the same reason, the bulk of knowledge commons theory was essentially developed by IP lawyers themselves (often based in the US) rather than economists or political scientists, as in the case of natural commons.

James Boyle was one of the first IP scholars to claim that the true 'tragedy of the commons' in the 21st century was the massive ongoing privatization of the intellectual public domain.[510] If the first enclosures concerned the waves of expropriation of English common pastures, the 'second enclosure movement' threatened the 'commons of the mind' with newly extended property rights.[511] Think of human genes, songs, codes, images, cultural references: supporters of patents and copyrights, among which economists, argue that IP rights are a necessary incentive to innovation. Yet, as Boyle argues, enclosure of that information limits the audience and may slow down creativity. To make the connection with the previous section, it leads to the now well-known tragic phenomenon of the 'anticommons'. Property also has its flaws in the digital world. To avoid this other tragedy, Boyle supported the emergence of a 'public domain' ineligible for private ownership, in which any member of the public at large can fish. He drew from the intellectual construct of the 'environment' to argue that the public domain should be saved.

Building on that work, Harvard Law Professor Yochai Benkler expanded the role of commons beyond the public domain to a wider set of resources defined as:

> institutional devices that entail government abstention from designating anyone as having primary decision-making power over use of a resource. A commons-based information policy relies on the observation that some resources that serve as inputs for information production and exchange have economic or technological characteristics that make them susceptible to be allocated without requiring that any single organization, regulatory agency, or property owner clear conflicting uses of the resource.[512]

Interestingly, Benkler identified commons not simply by reference to the type of resource, but first and foremost with the kind of horizontal and decentralized institution it represents. He

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[509] See, e.g., Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008).
[510] See, James Boyle, *Shamans, Software, & Spleens: Law and the Construction of the Information Society* (Harvard University Press 1997).
[511] Boyle, *supra* n 509.
[512] Yochai Benkler, 'The Commons as a Neglected Factor of Information Policy' (speech presented at the 26th Annual Telecommunications Research Conference) <http://www.benkler.org/commons.pdf>; See also, Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *New York University Law Review* 354.

emphasized the free and open dynamic of the commons in opposition to the system of private property. The latter, he argued, is completely 'asymmetric' in nature in the sense that a single entity (for instance, an individual) is entitled to determine the access and use of a given resource.[513] By contrast, in a commons, power about access, use and management is 'symmetric': diverse users have an equal claim and title to use and access the same resource.[514] This led Benkler to consider the water flow in any bathroom, any sidewalk or street as free and open-access commons: '[t]he legal system is available to all on non-discriminatory terms and no person has the right to exclude anyone else from using it'.[515] In *The Future of Ideas: The Fate of the Commons in a Connected World*, Lawrence Lessig went even further in expanding this definition by promoting nonexclusive rights for free and open creative commons on the Internet as a whole.[516] For Lessig, commons mean freedom for all to express themselves on the Internet. The commons represent that part of the world that is universal and open to all.

Elinor Ostrom herself with Charlotte Hess also captured the notion of 'knowledge commons' to rethink the protection of local knowledge, urban knowledge commons, culture and scientific research against privatization through IP mechanisms.[517] They did not hide their discontent with the inflation of legal definitions of the same 'commons' concept:

> We feel there needs to be clarity, shared meanings, and a common language to research this area better. In the legal arena, the term "commons" is often used synonymously with the term public domain. Is it a given right, a nonassigned right, an unclaimed right, an unmanaged resource, or something that should just be there in a democracy?[518]

For Ostrom and Hess, there was just too much confusion about what the intellectual public domain exactly entailed. They pleaded for a more careful analysis of digital information from the perspective of the bundles of rights (see *supra*), and for a distinction between the system itself and its flow of units (like we separate a forest as a resource system from timber as a resource unit).[519] Following the hundreds of detailed field studies of diverse institutional arrangements for diverse resources, Hess and Ostrom pointed that information 'often has complex tangible and tangible attributes: fuzzy boundaries, a diverse community of users on

[513] Benkler, *supra* n 282, 1534.
[514] ibid., 1534.
[515] ibid., 1538.
[516] Lessig, *supra* n 193.
[517] Hess & Ostrom, *supra* n 506.
[518] Hess & Ostrom, *supra* n 411, 114.
[519] ibid., 114 and 126.

local, regional, national, and international levels, and multiple layers of rule-making institutions'.[520] In *Mapping the New Commons*, Charlotte Hess produced an impressive survey of the new commons literature and movement.[521] After all, she showed that the *way* a resource is captured can actually 'change the nature of that resource from a pure public good to a [CPR], or more generally to a commons where the resource needs to be monitored, protected, and managed by a group in order to sustain it.'[522] Thus, Ostrom and Hess went back to the economic characteristics of diverse types of resources and the kind of social dilemmas they may involve, but they did not create a new commons institution of its own. Subsequently, IP scholars adopted Ostrom and Hess' IAD approach to study particular knowledge commons. Frischmann, Madison and Strandburg, for instance, found that the traditional IP property paradigm – based on exclusionary rights – was misplaced to encourage innovation.[523] They thus went beyond the binary private-public approach in IP law (privatization vs. public domain) and adapted the IAD framework into a systematic legal method for assessing empirical case studies of community knowledge production in complex formal and informal structures.

The concerns behind the protection of 'new' commons may be related to that of traditional commons in the Global South. Undeniably, as Boyle argues, there are similarities between the enclosures of pastures in the Middle Ages and what he now calls 'the second enclosure movement'.[524] Not only the problems, but even the proposed solutions may look much the same. Keith Aoki, for example, referred to Elinor Ostrom and Carol Rose when considered some 'categories of information as possessing characteristics of public trust property'.[525] Aoki suggested that some types of information, like basic scientific research, new medical techniques, or even human genomic material should not be protected by copyrights, but in kept openly available so that they can benefit the greatest number of people. What he proposed was the creation of an 'intellectual public domain or commons'.[526] Aoki was actually concerned about cross-cultural appropriations in the form of IP of the developing and least developed

[520] ibid., 132.
[521] Charlotte Hess, 'Mapping the New Commons' (July 2008) *Syracuse University Working Paper*, available from: http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/304/Mapping_the_NewCommons.pdf (accessed 1 August 2019).
[522] ibid., 40.
[523] Brett M. Frischmann, Michael J. Madison, and Katherine J. Strandburg, 'Governing Knowledge Commons' in Frischmann, Madison & Strandburg, *supra* n 506, 1-43.
[524] Boyle, *supra* n 260.
[525] Keith Aoki, 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) 6(1) *Indiana Journal of Global Legal Studies* 11, 41.
[526] ibid., 57.

nations of the South: '[w]e need to be careful about constructing the public domain to avoid conceiving of the biological and cultural resources of the Third World as belonging to the "common heritage of humanity," [(see *infra*)] thereby effectively putting them up for grabs by entrepreneurs from the developed countries eager to turn such public domain items into private [IP].'[527] For the same reason, drawing on the considerations of anthropologist Stephen Gudeman, Rosemary Coombe further warns against the risk that IP rights may threaten 'an already endangered commons':

> in a community economy (one that is only partially integrated into a market economy and governed by communal orientations toward sharing, reciprocity, and the maintenance of social solidarity) innovations are cultural in nature. They are products of the group that emerge from practices of trial and error to meet practical shared needs. Holding a "commons" of land, material resources, knowledge, ancestors, animate and inanimate beings, and practices with respect thereto is what a community shares and is the source of its maintenance *as a* community (or a "culture"). This commons is built up of prior innovations and provides the means for developing new ones.[528]

In other words, IP lawyers have already long acknowledged the limits of IP rights to protect (knowledge) commons and have brought forward alternative solutions. New commons like Wikipedia, GNU, Linux, creative commons, scientific journals in open access, are being instituted as alternatives to the old IP logic. These collaborative (non-competitive) and generative (non-extractive) initiatives today encounter a growing success across the world. They are what Yochai Benkler calls 'commons-based peer production'.[529] Knowledge commons remain in principle in the 'public domain' – that is, ineligible for private ownership.

Yet, as such, free and open-access commons or the 'intellectual public domain' may not bring about the solutions that are needed to halt the enclosure of more traditional subsistence commons, for two reasons. First, knowledge commons are mostly non-rival. Since there cannot be any threat of overuse, IP lawyers may very well propose solutions of open and free access. Note that Boyle was interested in the protection of the 'common heritage of humankind'[530] – something that, in his view, should belong to everyone. This is not the same, however, as commons in Ostrom's sense. Yochai Benkler himself admits that the 'open commons' he writes

[527] ibid., 46.
[528] Rosemary J. Coombe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6(1) *Indiana Journal of Global Legal Studies* 59.
[529] Benkler, *supra* n 282, 1499 and 1505.
[530] Boyle, *supra* n 260, 37.

about 'are not commons on the model of the centuries-old irrigation districts or pastures that inspired and shaped three decades of the study of the commons, pioneered by Elinor Ostrom': '[open commons] are oriented toward optimizing freedom of diverse and uncoordinated action, rather than coordination among known, sustainable practices that fit a highly refined understanding of the local context.'[531] By contrast, the community in Ostrom's commons is not indefinite. Rules of access and use may, on the contrary, be very precise. Such complex systems of self-governance should precisely be protected against appropriation.

Second, while IP lawyers and other activists take part in the fight against the 'second enclosure movement',[532] their leitmotiv remains *open and free access* because they logically focus on dissemination and development of information. To enrich knowledge, IP scholars plead for the largest possible participation of users-creators. This perspective seems less helpful and appropriate in the case of material commons, on which communities depend for their subsistence in developing countries. Indeed, Benlker's symmetry of access to open commons very much resembles the old economic characteristic of non-excludability, which does not tell us anything about the type of institution needed to govern a given type of resource. For instance, the water or the Internet may be publicly or privately provided, or even managed as a commons. Naming the water or the Internet as free and open commons does not make them self-governance mechanisms – let alone protect them against appropriation. Legal protection of earthy commons should precisely limit availability to all. Traditional commons such as communal lands or water reserves should not remain free of access like ideas or intellectual productions. The first wave of enclosure of lands and forests, which started in the 17th and 18th centuries and which today continues across the Global South, arguably presents us with a different set of legal challenges. For these reasons, this thesis does not resort further to IP law solutions for open-access commons.

## 2. Deconstructing the commons in international law

When it comes to the fight against the current wave of enclosure in developing countries lacking sufficient resources to enforce property rights, international law may appear as an alternative strategy than property or IP law, to which indigenous and peasants communities could resort to reclaim their commons. Surprisingly, however, very little has been said about the role that

[531] Benkler, *supra* n 282, 1499 and 1505.
[532] See Boyle, *supra* n 260.

international law could play in the empowerment of local communities in the self-management of their resources and in the resistance against the dispossession of traditional and ecological commons. Whereas *global* commons like outer space or the high seas are subject to special treaty regimes between states and international legal principles such as the CHM, it remains mostly unclear to what extent international law can require states to recognize the local commons as a social institution and protect marginalized populations from enclosure and dispossession. This is what I call the 'commons gap' in international law – the gap of adequate international legal recognition or protection for the social institution of the commons. As Kathryn Milun states:

> International law is like a radar system. It creates a gridded screen where certain peoples and cultures appear and others disappear. They disappear because they fall under the radar: they have no standing in the jurisdictional radar system and therefore cannot be seen on the grid. Along with Indigenous peoples, many nonstate entities have fallen under the legitimizing radar of international law in the modern period. *Commons* are one of them. When Indigenous peoples and commons vaguely appear as indistinct spots on the screen, it is only because they have persisted in the modern legal order in some residual way: a treaty that was never abrogated by the state; a common law tradition like 'estovers,' (the amount of free wood a commoner can gather in the forests) whose premodern lifeworld (a pre-fossil fuel economy) no longer exists.[533]

The conclusion is clear: the notion of the commons is inadequately theorized under international law in comparison with other fields of the law, and this thesis aims to rectify this.

The 'commons gap' is not as trivial or innocuous as it may sound. The fact that international law has so far not been able to recognize or protect the commons as a social institution of its own is probably not a coincidence. My overall argument is that there is a structural link between international law's disregard of the commons and the discipline's origins, assumptions, foundational principles. This section offers a limited exercise of deconstruction, by confronting some doctrines of international law with the three aspects described in the basic definition of the commons – the object (the CPRs), the subject (the communities), and the practice (commoning). From these three perspectives, I identify three kinds of tensions between the basic tenets of the institution of the commons, on the one hand, and the discipline of international law, on the other:

[533] Milun, *supra* n 21.

(i) from the perspective of the object of the commons, the tension between the exhaustibility, the need for preservation and the exclusive rules of access to CPRs and global commons governed by the principles of *res communis*, *res nullius* and CHM (2.1);

(ii) from the perspective of the subject, the tension between the bottom-up space of governance communities create in establishing a commons and the top-down state-centric bias of international law (2.2);

(iii) from the perspective of the practice, the tension between generative commons and the extractive nature of international law (2.3).

The table below (figure 3) provides an overview of these three tensions.

| | Commons | International law |
|---|---|---|
| Object | **Exhaustibility** | **Inexhaustibility** |
| Subject | **Bottom-up** | **Top-down** |
| Practice | **Generative practice** | **Extractive practice** |

**Figure 3 – Tensions between the commons and international law**

Of course, I do not pretend to offer an all-encompassing account of these international law doctrines; I just intend to highlight some flagrant contrasts in the normative approaches which underlie both the commons and international law. Indeed, some of the principles upon which international law is founded – which will be disentangled below – reveal radically different ideological and epistemological assumptions than the commons as an institution for collective action – and as a new social imaginary. It will be contented that these basic doctrines of international law are not only different, but they have also been complicit in the attempt to enclose the commons in developing countries over the last centuries.

## 2.1. Commons versus global commons

First, let me consider the discipline of international law from the perspective of the object of the commons: a CPR, especially natural resources like pastures, lands, seeds, forests or water reserves on which communities in developing countries depend for their livelihood. It is evident than when it comes to the governance of the commons at the interstate level, international legal scholars immediately think of 'global commons'. Global commons *stricto sensu* depict, under international law, physical resources lying outside of the control of any state – that is beyond territories subject to the sovereign jurisdiction of a state. International law typically recognizes four global commons: the high seas, the deep seabed, the outer space, the Moon and other

celestial bodies, and Antarctica.[534] Those global commons do not belong to any of the 192 Member States of the UN, nor are they in principle subject to national appropriation. As UNEP stresses, '[d]espite efforts by governments or individuals to establish property rights or other forms of control over most natural resources, the Global Commons have remained an exception'.[535] More recently, the atmosphere has also been qualified as a global commons *sensu lato* since air pollution knows no borders.[536] Its management under international law indeed presents the same problems of collective action and free-riding as traditional global commons – think of the depletion of the ozone layer.[537] This is how more recently the concept of global commons also came to include 'common concerns of humankind' such as biodiversity conservation[538] and climate change.[539]

International legal scholars generally conflate the international law concept of global commons (identified as areas beyond national state jurisdiction) with the notion of the commons, defined in this thesis in Ostrom's sense as institutions for the collective management of shared resources.[540] For example, in her article entitled 'Global Commons', Surabhi Ranganathan does not draw any distinction between the two terms.[541] Instead, the author considers that both Hardin's tragedy of the commons and international law concept of CHM are two 'comprehensive imaginaries of the commons' and 'address the same subject – commons'.[542] In opening their symposium on 'International law and economic exploitation in the global commons' in the *European Journal of International Law* (EJIL), Isabel Feichtner and Surabhi Ranganathan rightly identify the 'commons' as an alternative political economy built on

[534] Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71. Pursuant to Article IV(2), the Treaty suspended all existing and precluded new claims of states to territorial jurisdiction over parts of the South Pole. Antarctica is designated 'as a natural reserve, devoted to peace and science'.
[535] UNEP, 'Global Commons' <http://staging.unep.org/delc/GlobalCommons/tabid/54404/Default.aspx> (accessed 17 May 2018).
[536] See, e.g., Nico Schrijver and Vid Prislan, 'From *Mare Liberum* to the Global Commons: Building on the Grotian Heritage' (2009) 30 *Grotiana* 168, 196.
[537] See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.
[538] See, Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, preamble, para. 3.
[539] See, United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble, para. 1; The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc. FCCC/CP/2015/L.9, preamble, para. 11.
[540] See, e.g., Shackelford, *supra* n 348. *Contra*, Margaret A. Young, 'International Adjudication and the Commons' (2019) 41(2) *University of Hawai'i Law Review* 353, 355-356.
[541] See Ranganathan, *supra* n 100.
[542] ibid., 695 and 714.

solidarity,[543] but inevitably focus their international law attention on 'global commons' such as the oceans and outer space.[544] In the same issue, Matt Craven declares that international law 'configured outer space as a "commons"' – that is, in his view, a 'domain of peace', 'of collaborative endeavour', 'of the future', 'entirely beyond the order of sovereignty and the atmospheric conditions that enable it'.[545] However, this domain 'open to free and equal use'[546] has nothing to do with Ostrom's heritage. Quite the contrary, as Anna Grear critically argues, the 'global commons' is just another expression 'deployed in service of the Capitalocene'.[547]

A similar lack of terminological accuracy can be found in official documents. So, for instance, the Brundtland report, which stands famous for introducing and defining the concept of sustainable development, devotes an entire Chapter to 'Managing the Commons'.[548] Even if the report uses both terms of 'commons' and 'global commons' interchangeably, in reality, it only refers to 'those parts of the planet that fall outside national jurisdictions' – namely 'the oceans, outer space, and Antarctica'.[549] As Burns Weston and David Bollier show, however, the category of global commons 'tends to be more aspirational than juridical at this point in history, and thus be thought of as CPRs in need of governance structure'.[550] It should indeed be emphasized that the high seas, the outer space or Antarctica have never been truly managed as commons in Ostrom's sense: 'such planetary resources remain [CPRs], not commons, until they are subject to a viable governance regime that benefits all relevant commoners and draws upon their participatory "communing" practices.'[551] This terminological confusion between 'commons 'and 'global commons' is less likely to arise in French, where the notions of '*patrimoine commun de l'humanité*' or '*biens communs mondiaux*' more clearly point to resource domains and not to the social institution or bottom-up system of governance of the commons. I will argue that not only do global commons differ from the commons as a system

[543] Feichtner and Ranganathan even refer to the work of a prominent commons activist: David Bollier, *Think like a Commoner. A Short Introduction to the Life of the Commons* (New Society Publishers, Gabriola Island, 2014).
[544] Isabel Feichtner and Surabhi Ranganathan, 'International law and economic exploitation in the global commons: introduction' (2019) 30(2) *European Journal of International Law* 541.
[545] Matt Craven, '"Other Spaces": Constructing the Legal Architecture of a Cold War Commons and the Scientific-Technical Imaginary of Outer Space' (2019) 30(2) *European Journal of International Law* 547, 548, 556.
[546] ibid., 563.
[547] Grear, *supra* n 265, 89.
[548] World Commission on Environment and Development (WCED), *Report of the World Commission on Environment and Development: Our Common Future* (1982) <http://www.un-documents.net/our-common-future.pdf> (accessed 13 July 2018) Chapter 10 ('Brundtland Report').
[549] ibid., 216.
[550] Weston & Bollier, *supra* n 21, 126.
[551] ibid., 129, at footnote 11.

of governance, but that their governing principles under international law may, in fact, be conducive to the enclosure of the commons.

This section compares the notion of the commons with three international law doctrines that underlie the governance of global commons: *res communis* (2.1.1.), *res nullius* (2.1.2.) and CHM (2.1.3.).[552] Each of these terms has different legal connotations and reflect different imaginaries of global commons under international law. Consequently, each doctrine will be examined separately. It should also be conceded that this section does not delve into the specifics of the substantive rules of the management of each type of areas and resources beyond state jurisdiction in international law. It is not the purpose to review each international legal instrument relating to the governance of global commons. Rather, I offer a more limited and critical account of these doctrines from the specific viewpoint of the commons. My aim is to demonstrate that global commons do not simply amount to an extension of the commons in the domain of interstate relations. By resorting to the ideological foundations of these three doctrines, I want to show that the analogy between the two terms of the commons and global commons is nonsensical, as it reduces the social institution of the commons to an empty space made accessible for exploitation and dispossession. Not only have these categories failed to protect the commons as a social institution of its own, but perhaps they might have lent legal force to legitimate the enclosure of the commons.

### *2.1.1. Res communis*

One basic principle remains of particular interest in the contemporary international legal discourse on the management of global commons: the idea of *res communis (omnium)*, common ownership for everyone. The idea originates from Greek philosophy and Roman law. It refers to common things like water or the sea, which cannot be appropriated and belong to everyone.[553] Yet, the first coherent articulation of the concept of *res communis* in international law is to be found in the primitive[554] texts of natural law thinkers like Francisco de Vitoria and Hugo Grotius, who sought to justify the colonial expansion of European powers, and as a

[552] These categories have been presented as '[t]he classic bases of territorial claims to the commons': Shackelford, *supra* n 348, 115.
[553] Martin J. Schermaier, 'Res Communes Omnium: The History of an Idea from Greek Philosophy to Grotian Jurisprudence', 30 *Grotiana* 20.
[554] See, David Kennedy, 'Primitive Legal Scholarship' (1986) 27(1) *Harvard International Law Journal* 1; Benedict Kingsbury, 'A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull' (1997) 17(3) *Quinnipiac Law Review* 3; James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press 1934).

corollary, the enclosure of the 'commons' in the New World. As Olivier De Schutter today notes, '[t]he idea that the territories to be "civilized" and converted to Christianism were functioning as a "*commons*", in which land was neither subject to property rights nor controlled by a political sovereign deserving to be called a "state" (since the control over a territory was seen as a defining characteristic of state sovereignty), was central to this project.'[555] The analogy between commons-based institutions and *res communis* is problematic, because these two concepts, as we shall see below, are quite remote from each other.

2.1.1.1. Francisco de Vitoria

Francisco de Vitoria (c.1492-1546) was a Spanish Dominican theologian. Often described, with Hugo Grotius, as one of the two 'fathers' of international law, and rather known for defending the rights of conquered people, he was also one of the first legal writers to provide the justification for the Spanish colonization of lands and other natural resources in the New World. The notion of *res communis* is central to his famous lectures (*Relectiones Theologicae*) in Salamanca *On the American Indians* (*De Indis*),[556] where he resorts to the theological scholastic style of St Thomas Aquinas. These lectures, separated into three sections, address questions submitted by Charles V about the Indies. Given Aquinas' influence on Vitoria's work, it is noteworthy here to mention Aquinas' pragmatic and utilitarian perception of common property as compared to individual private property:

> […] it is lawful for man to possess property. Indeed, this is necessary to human life, for three reasons. First, because everyone is more diligent in procuring something for himself than something which is to belong to all or many; for each one, avoiding labour, would leave to someone else [the procuring of] that which was to belong to all in common, which is what happens where there is a multitude of servants. Second, because human affairs are conducted in a more orderly manner if each man is responsible for the care of something which is his own, whereas there would be confusion if everyone were responsible for everything in general. Third, because a more peaceful state of things is preserved for mankind if each is contented with his own. Hence we see that quarrels arise more frequently between those who hold property in common and where there is no division of the things possessed.[557]

[555] De Schutter, *supra* n 21, 231 (emphasis added).
[556] Francisco de Vitoria, *De Indis et De Ivre Belli Relectiones* (Ernest Nys ed., John Pawley Bate trans., Carnegie Institution of Washington, 1917).
[557] St Thomas Aquinas, *Political Writings*, translated and edited by Robert W. Dyson (Cambridge University Press 2002) 208, quoted in Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) *University of Toronto Law Journal* 1, 17.

Following Aquinas, Vitoria discerned 'from the beginning of the world', an original community of mankind which, by virtue of natural law, owned everything 'in common'.[558] Vitoria accepted that 'there is a certain method in [the Indians'] affairs, for they have polities which are orderly arranged', but he did not point to the social institution of the commons as a way of organizing social life among them.[559] Common ownership for him only represented an abstract state of nature, consistently with the conception of the Church Fathers, like Basilius and Ambrosius, that everything is common property (*omnia sunt communia*) 'as the paradisiacal order, confirming with divine will'[560] before it was divided into polities and plots of individual property (the *divisio rerum*). In Vitoria's view, natural law does not prevent human law from developing an order of private property by a consensus that deviates from the ideal of common ownership.[561] All human beings have a potential claim to 'ownership' (*dominium*) over the Earth's surface – and this also includes, in his humanitarian[562] view, 'the Indians' who were born free in 'the image of God'.[563] This right of *dominium* has been enacted not through natural law, but decided by human communities for their own benefit through the law of nations (*ius gentium*), which gives it a universal scope. In this sense, Martti Koskenniemi suggests that Vitoria and other Spanish scholastics represent the early 'articulators and ideologists of a global structure of horizontal relationships between holders of the subjective rights of *dominium* – a structure of human relationships that we have been accustomed to label "capitalism."'[564]

Regarding the reduction of the aborigines of the New World into the power of the Spaniards, the question was whether the lands, rivers, seas, harbours, that the Spanish sought to conquer in the New World were already subject to the *dominium* of any state or individual. If the resources were *not* subject to any kind of property, the Spaniards could claim possession of a *res nullius*. Surprisingly, the answer was positive: it appeared clear to Vitoria that the aborigines possessed title to the lands lately discovered by Columbus. They 'were the true owners, before

[558] Vitoria, *supra* n 556, 151.
[559] Vitoria, *supra* n 556, 127.
[560] Schermaier, *supra* n 553, 30.
[561] Vitoria, *supra* n 556, 122, para. 320.
[562] See, on Vitoria's so-called humanitarian reputation and good intentions vis-à-vis the conquered people, Andrew Fitzmaurice, 'The Problem of Eurocentrism in the Thought of Francisco de Vitoria' in José María Beneyto and Justo Corti Varela (eds) *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law* (Springer, 2017) 77-93; Koskenniemi, *supra* n 557.
[563] Vitoria, *supra* n 556, at 122, para. 320, and 125, para. 328. See ibid., 128, para. 334: 'the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and […] neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners'.
[564] Koskenniemi, *supra* n 557, 32.

the Spaniards came among them, both from the public and private point of view'.[565] Vitoria, however, accepted that 'in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly *for their benefit*'.[566] Having determined that the Indians possessed title to the discovered lands, Vitoria sought to examine the nature of Spanish rights and duties. According to him, the lands and natural resources retained by virtue of the law of nature their original status of *res communis* and could be appropriated by the Spaniards. Indeed, the division of property did not take away in the law of nations the right of the Spaniards to travel (*ius pergrinandi*) and trade (*ius negotiandi*) in the Indies, as long as they did not harm indigenous peoples.[567] This even led him to assert that '[i]f there are among the Indians any things which are treated as *common* both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them.'[568]

The notion of *res communis* is therefore central in Vitoria's justification of the conquest of the New World, but it has been interpreted differently by legal scholars. Johannes Thumfart, for instance, concludes that 'the *commons*' – Thumfart's proposed translation of *res communes* by reference to Hardin's Tragedy – 'are the moral fixed points starting from which all normative demands are developed in Vitoria's Thomistic thought' and 'are also the base of Vitoria's strongest just title in favour of conquest'.[569] This assimilation of Vitoria's notion of *res communis* with the commons established by local communities is somewhat unfortunate. More accurately, Ileana Porras describes Vitoria's *res communes* as open-access resources:

> fish, along with pearls and gold, stand in as examples of things (natural resources) that natural law decrees may be freely appropriated by the first taker from the *commonly held* rivers and oceans where they are found. In other words, in the few instances when something we might consider a reference to the natural world intrudes in the text, it does so as an abstract object of property, *common property* in the case of rivers and oceans, and individual property, in the case of fish, gold and pearls, in the moment they are appropriated from the *common access resource*. Vitoria's concern is not with the natural world as such, but with

[565] Vitoria, *supra* n 556, 128.
[566] ibid., 161.
[567] ibid., 151.
[568] ibid., 153-4.
[569] Johannes Thumfart, 'Francisco de Vitoria and the Nomos of the Code: The Digital Commons and Natural Law, Digital Communication as a Human Rights, Just Cyber-Warfare' in José María Beneyto and Justo Corti Varela (eds) *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law* (Springer 2017) 199 and 203 (emphasis added).

> establishing the legal foundations for how things located in distant places might be appropriated, reduced to property, placed in the stream of commerce, and made available for consumption in Spain.[570]

In my view, Porras is right not to assimilate Vitoria's doctrine of *res communes* with the social institution of the commons, but only to 'common access resources'. As a matter of fact, Vitoria only uses the concept of *res communis* instrumentally, to illustrate something that belongs to everyone and therefore remains free for appropriation by *conquistadores*. Vitoria did not touch upon the question as to how 'the Indians' might actually have been depending on those lands for centuries, or how the medieval commons organized social life in Europe. In the end, Vitoria's idea of *res communis* only served to legitimize the enclosure of what we today call the commons – not directly through territorial annexations by powerful states, but, as Koskenniemi notes, through a more 'informal [type of] imperial domination that is achieved through a worldwide pattern of acquisition and exchange of private property by which […] formal state policies are also controlled, enabled, or undermined, as befits the global market.'[571]

2.1.1.2. Hugo Grotius

Building upon Vitoria's analysis, the international law doctrine of *res communis* was further developed in the seminal work of Hugo Grotius (1583-1645) as a concept of common ownership to all human beings. Of a different nationality and religion than Vitoria, Hugo Grotius was a Dutch Protestant. Yet, his work is also said to have legitimated the European powers' 'business of trade, plunder, and settlement in both the new world and the East Indies'.[572] It is true that Grotius was hired as a legal advocate by the United Dutch East India Company ('*Vereenigde Oostindische Compagnie*', VOC) to defend the seizure in 1603 of a Portuguese boat in the high seas by a merchant vessel of the company. The VOC was a company akin to a contemporary 'transnational corporation', seeking to operate business across different state jurisdictions without barriers. At the time, several states like Portugal[573] and Spain[574] invoked sovereignty and exclusive access over the Atlantic and the Indian oceans, which prevented this 'early transnational capitalist entity' to travel the seas as it wished.[575] Grotius

[570] Ileana Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations' (2014) 27 *Leiden Journal of International Law* 641, 646-647.
[571] Koskenniemi, *supra* n 557, 32.
[572] Porras, *supra* n 570, 652; see also Ileana M. Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae* – The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"' (2006) 31(3) *Brooklyn Journal of International Law* 741.
[573] Portugal had claimed sovereignty over the Indian Ocean and the Atlantic Ocean south of Morocco.
[574] Spain had claimed sovereignty over the Pacific Ocean and the Gulf of Mexico.
[575] Capra & Mattei, *supra* n 22, 83.

skilfully refuted the claims of exclusivity and sovereignty by resorting to the concept of *res communis* to reserve those waters for every nation – including his employer's trade. In other words, Grotius's legal brief was not of purely academic interest; it was patently guided by commercial and political goals to win trading rights for the emerging Dutch empire in the middle of conflict against the Portuguese.[576] His articulation of the principle of *res communis* was thus not immune to this expansionist and imperialist worldview.

The doctrine of *res communis* plays at least two roles in Grotius' work. First, Grotius begins with a detailed account of the contractual emergence of state and private property out of the ancient world as *res communis*. Exactly like Vitoria, he traces the evolution through the course of history from common ownership (in the original state of nature but also in those indigenous lands in the New World) into individual property rights (in the post-division world):

> God gave to mankind in general, dominion over all the creatures of the Earth, from the first creation of the world; a grant which was renewed upon the restoration of the world after the deluge. All things […] formed a common stock for all mankind, as the inheritors of one general patrimony. From hence it happened, that every man seized to his own use or consumption whatever he met with; a general exercise of a right, which supplied the place of private property. So that to deprive any one of what he had thus seized, became an act of injustice. [This state of affairs however] could not subsist but in the greatest simplicity of manners, and under the mutual forbearance and good-will of mankind. An example of a community of goods, arising from extreme simplicity of manners, may be seen in some nations of America, who for many ages have subsisted in this manner without inconvenience […] [A 'community of lands for pasture' continued even after the destruction of the tower of Babel and the subsequent 'dispersion of mankind, who took possession of different parts of the earth'.] For the great extent of land was sufficient for the use of all occupants, as yet but few in number, without their incommoding each other […], it was deemed unlawful to fix a land mark on the plain, or to apportion it out in stated limits. But as men increased in numbers and their flocks in the same proportion, they could no longer with convenience enjoy the use of lands in common, and it became necessary to divide them into allotments for each family.[577]

Drawing upon this gradual development, Grotius concludes that whereas everything like water and lands was originally – in an (ideal) natural state – held in common, human beings consented over time – in a post-division world – to allow each other individual rights over movable and immovable property. As in Vitoria's theory, *res communis* remains an idealistic concept and

[576] See, for a historical study on the role of war in a just world order in the work of Hugo Grotius who is described as 'corporate lawyer', Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster 2017), Part I ('Old World Order').
[577] Hugo Grotius, *The Rights of War and Peace* (B. Boothroyd 1814 [1625]) 216-222.

serves, as a natural law assumption, to justify the subsequent acquisition of individual property through occupation.[578] However, Grotius also stipulates that, even in the post-division world, 'all that has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, it today and ought in perpetuity to remain in the same condition as when it was first created by nature.'[579] He points out that, in opposition to *res nullius* (see *infra*, Section 2.1.2.1.), *res communes* 'are forever exempt from […] private ownership on account of their susceptibility to universal use; and as they belong to all they cannot be taken away from all by any one person any more than what is mine can be taken away from me by you.'[580]

Second, the concept of *res communis* helps Grotius to make the case for the principle of the freedom of the sea. The idea of freedom of the sea was developed in his treatise entitled '*Mare Liberum: Sive de Iure quod Batavis Competit ad Indicana Commercia Dissertatio*' – 'The Freedom of the Seas, or the Right which Belongs to the Dutch to Take Part in the East Indian Trade' (1609).[581] Grotius's starting point in Chapter V of *Mare liberum* ('*Mare ad Indos aut ius eo navigandi non esse proprium Lusitanorum titulo occupationis*') was that the seas could not be occupied and therefore belong to everyone. The sea still represented, in his view, a residual form of the ancient *res communis*: 'the sea is one of those things which is not an article of merchandise', 'no part of the sea can be considered as the territory of any people whatsoever'.[582] Grotius claimed that the sea was 'common to all, because it is so *limitless* that it cannot become a possession of any one, and because it is adapted for the *use of all*, whether we consider it from the point of view of navigation or of fisheries'.[583]

From an economic perspective, this argument seems to suggest that the use of the seas would be non-rival and therefore openly accessible to all humans.[584] In Grotius's view, if something like the sea cannot be appropriated, it should remain in the original state of nature as *res*

[578] Schermaier, *supra* n 553, 36.
[579] Hugo Grotius, *The Freedom of the Seas, or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (translated with a revision of the Latin text of 1633 by Ralph Van Deman Magoffin, Oxford University Press 1916) 27.
[580] ibid., 29.
[581] ibid.
[582] ibid., 34.
[583] ibid. 28 (emphasis added).
[584] ibid., 37: Grotius defines the ocean as 'that expanse of water which antiquity describes as the immense, the infinite, bounded only by the heavens'.

*communis*.[585] Navigation and fishing should remain 'free and open to all'.[586] Every state should thus be able, by virtue of natural law, to travel the seas to engage in trade with other nations, 'the Portuguese have not established private ownership over the sea by which people go to the East Indies'.[587] As a result, a state or private entity could resist, even by resorting to the use of force, any infringement of this right to roam the (global) commons.[588] This view of *res communis* as open-access regime[589] – in which everyone can fish what he wants *à la* Hardin, as long as he does not prevent others from doing the same – markedly differs from Ostrom's complex rules of access and use of the commons as an institution of collective action.

2.1.1.3. Contemporary international law

Even though the Grotian heritage of *res communis* has later been restrained by the expansion of state sovereignty over global commons and complemented with other duties of conservation (see *infra*), it should not be too quickly dismissed as a relic of a bygone era. Four hundred years later, it remains central to the governance of global commons under international law, from the high seas to outer space. As a result, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) codified the centuries-old Grotian principle that beyond the limits of national jurisdiction, '[t]he high seas are open to all States, whether coastal or land-locked' (Article 87(1)) and '[n]o State shall claim or exercise sovereignty or sovereign rights over any part of [the deep sea bed] or its resources' (Article 137(1)).[590] So even though a 200 nautical miles Exclusive Economic Zone (EEZ) beyond and adjacent to a 12 nautical miles territorial sea came under the jurisdiction of coastal states (Articles 55 and 3), UNCLOS left the living resources of the high seas beyond the jurisdiction of any state as *res communes*. International law thus preserved Grotius' 'natural right' of states and corporations to exploit those natural resources. Similarly, the Outer Space Treaty today provides that the 'Outer space, including the Moon and

[585] See, Schermaier, *supra* n 553, 34.
[586] Grotius, *supra* n 579, 33.
[587] ibid., 37.
[588] ibid., 38: 'If in a thing so vast as the sea a man were to reserve to himself from general use nothing more than mere sovereignty, still he would be considered a seeker after unreasonable power. If a man were to enjoin other people from fishing, he would not escape the reproach of monstrous greed. But the man who even prevents navigation, a thing which means no loss to himself, what are we to say of him?'
[589] See also, ibid., 28 (emphasis added) : '[the air and water] are not by nature private possession, but […] they are by nature things open to the use of all, both because in the first place they were produced by nature, and have never yet come under the sovereignty of any one […] ; and in the second place because […] they seem to have been created by nature for commun use. […] that is to say, things which are called 'public' are, according to the Laws of the law of nations, the *common property of all*, and the *private property of none*.'
[590] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 ('UNCLOS').

other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be *free access* to all areas of celestial bodies' (Article I(2)).[591] Beyond the vast domains defined as global commons, Fritjof Capra and Ugo Mattei notice that the same Grotian heritage of open access today founds the rights established by the World Trade Organization (WTO): 'no public power can limit the corporate right to roam the global to acquire control over natural or human resources'.[592]

2.1.1.4. Distinction

How is this doctrine of *res communis*, that retains some relevance in today's international law management of global commons, different from the commons? For two reasons. On the one hand, the inexhaustibility of *res communes*, as depicted in the work of early international legal scholars, has nothing to do with the intrinsic rivalry of CPRs which are at the centre of commons-based institutions. The very idea of establishing a commons – from premodern English pastures to the communal governance of indigenous lands in Africa or South America – is triggered by the exhaustibility of CPRs. Ileana Porras explored at length the underlying assumption of 'abundance' of what was held in common in the work of the fathers of international law.[593] It appears in her study that scarcity of natural resources is completely unknown in the early stream of international legal thought. Kathryn Milun reaches the same conclusion as to Grotius' work on *res communis*, and suggests one possible explanation as to why it contrasts with the commons understood as an institution for collective action:

> Grotius avoided any mention of real historical commons tenure systems of premodern Europe in his work on the global maritime commons. When Grotius sought an analogy for limited sovereignty on a *res communis* sea, he did not turn to the landed commons of premodern feudal Europe. Instead he relied on an imaginary description of commons from a "mythic" age, a golden period of pre-state commons that he derived from Greek and Latin mythology. Indeed there is a good reason why Grotius would want to avoid reference to medieval European commons traditions in his work. Primarily, Grotius' work sought an alternative paradigm to the legal arguments about property and sovereignty that were dominant in his day: it sought to replace the feudal model based in traditional commons and divine right with a legal system based on natural rights. […] The view of Nature obeying laws of reason is the underlying premise of neoclassical economic theory which trusted that the free market would always balance social welfare as

[591] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967), 610 UNTS 205 (emphasis added) ('Outer Space Treaty').
[592] Capra & Mattei, *supra* n 22, 84.
[593] Porras, *supra* n 570, 648-659.

> long as it had open access to what it saw as an unlimited supply of nature's resources. And the seas, so apparently *limitless, inexhaustible and ungovernable*, provided the perfect spatial image for nature as an unlimited resource. The image of the domesticated pasturage of pre-modern England and continental Europe would not have lent itself to the open access policy which Grotius argued was a just manner of conceptualizing shared use of common space between the emergent nation-stations of Europe.[594]

It is this depiction of *res communes* as inexhaustible which foreshadows, in Milun's view, the enclosure of the commons either by the state or private entities under international law:

> The high seas provide the perfect spatial imaginary behind a social economic paradigm new in the sixteenth century and continuing strongly today. Grotius' conception of the modern global commons as a nonexcludable, open access domain has provided the right spatial thinking for modern international law and policies of deregulated global capitalism. Its maritime spatial imaginary is consistent with the governance of the commons as ungovernable space, without restrictions to the boundless agency of free market capitalism and the exploitation of the state. Moreover, arguments for international law to restrict global commons by privatizing or centralizing the governance of commons space also rely on the same spatial imaginary which persists in the cultural logic of tragedy of the commons.[595]

Of course, it should be conceded that this argument of inexhaustibility of global commons would call for some serious qualifications nowadays, for example in light of today's fishing techniques and overexploitation of marine resources.[596] Yet, this old belief reveals a fundamental difference of thinking. Whereas Vitoria and Grotius assumed that the consumption of the air and the sea would not be detrimental to others, Ostrom, and even Hardin, started from the premise that CPRs ought to be preserved – because they are rival, scarce and exhaustible resources. The perception of *res communes* as inexhaustible and non-excludable resources portends to the enclosure of the commons under international law in a context of open access regime – and deregulated capitalism.

On the other hand, even if the free-for-all exploitation of *res communes* resembles Hardin's parable of unregulated commons, it is diametrically opposed to the complex rules of access and use established by communities themselves and aimed at the preservation of CPRs. In fact, Grotius treats *res communes* as 'nobody's property'.[597] As the ICJ determined in the 1974 *Fisheries Jurisdiction* cases, the freedom of fishing in the high seas (slightly amended in the

[594] Milun, *supra* n 21, 104 (emphasis added).
[595] ibid.
[596] Schrijver & Prislan, *supra* n 536, 176.
[597] Schermaier, *supra* n 553, 25.

1982 Convention) was essentially a regime of '*laissez-faire*'.[598] As Nico Schrijver and Prislan state, Grotius's idea of *Mare liberum* 'later digressed into "first come, first served" advantages for industrialized nations'.[599] At present, despite encouraging states to have 'due regard for the interests of other States in their exercise of the freedom of the high seas' (Article 87 UNCLOS) and despite restrictions to be found in more recent international agreements,[600] international law still maintains the principle of open access to high seas fisheries and still significantly falls short of preventing the overexploitation of these living resources.[601] The lack of cooperation between states is still what characterizes most of the global commons. In these circumstances, like Garrett Hardin, it would be tempting to plead in favour of privatization or territorial sovereignty to respond to the problem of unchecked freedom in global commons. Yet, neither private nor public property would ensure preservation and sharing, overexploitation and over-extraction.[602]

### *2.1.2. Res nullius*

The definition and imagery of areas beyond national jurisdiction under international law are also informed by the more controversial – if today revoked – doctrine of *res nullius*. In the age of colonial expansion, the discovery of the New World forced the European powers to generate new theories of territorial appropriation – as alternatives to feudal and local customary laws which formed the basis of territorial divisions in Europe but were naturally unknown to the natives.[603] The doctrine of *res* (or *terra*) *nullius* was central in the justification by European powers of their assertion of jurisdiction over new territories. In the law of acquisition of territory, discovery and occupation of *terra nullius* represented an original mode of acquisition of sovereignty under the law of nations – otherwise than by (i) cession,[604] (ii) accretion,[605] (iii)

[598] *Fisheries Jurisdiction cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, Merits, Judgments of 25 July 1974, ICJ Reports 1974, 3, para. 72, and ICJ Reports 1974, p. 175, para. 64.
[599] Schrijver & Prislan, *supra* n 536, 206.
[600] See, e.g., Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force 11 December 2011) 2167 UNTS 3 ('UN Fish Stocks Agreement').
[601] Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 *Leiden Journal of International Law* 621, 631; Schrijver & Prislan, *supra* n 536, 182.
[602] Charlotte Ku, 'The Concept of Res Communis in International Law' (1990) 12(4) *History of European Ideas* 459, 470.
[603] Randall Lesaffer, 'Argument from Roman Law: Occupation and Acquisitive Prescription' (2005) 16(1) *European Journal of International Law* 25, 41.
[604] *Cession* is the transfer of treaty by treaty from one state to another, be it voluntarily or as a result of war.
[605] *Accretion* is the acquisition of new territory by physical expansion of an existing territory through natural causes.

conquest or subjugation[606] and (iv) prescription.[607] As Ugo Mattei and Laura Nader recall in their book *Plunder*, 'throughout the American continent, the "lack" of individual ownership […] justified the taking of Indian lands deemed vacant by the Western "discovery" principle'.[608]

*Res nullius* indeed depicted a domain unclaimed by any state, which belongs to no one, empty of legitimate sovereignty, and therefore open to lawful appropriation to states through discovery or occupation. The 'vacant' territory could very well already be inhabited by indigenous people; yet indigenous people did not constitute in the eyes of colonial powers political societies deserving to be called sovereign states, nor did they use the land in the sense that it had become 'their' private property. The translation of the term *terrae nullius* in the other dominant language of international law, French – '*territoires sans maître*'[609] – unambiguously reflects the idea that the territory is not subject to any authority whatsoever. The issue then, for our purposes, is that when it came to applying to territories or natural resources which were managed as commons by native people, the principle of *res nullius* also nullified the existence of the commons under international law. In other words, according to the 'civilized' standards of colonial powers, the commons simply amounted to no one's land in international law.

2.1.2.1. Primitive international law

This precept of territorial acquisition was reflected in primitive international legal writings. Vitoria was the first legal writer to relate the idea of *terra nullius* to natural law. As a corollary to the idea that God had given the world as *res communis* in the original state of nature (see *supra*), the land found vacant remained open for appropriation. Vitoria thus accepted (in theory) that the title of discovery could be a valid legal method to assert sovereignty over a new territory. In an oft-quoted passage, he stated that:

> [i]n the law of nations (*ius gentium*) a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker …; therefore, if gold in the ground [taken by the Spanish *conquistadores*] or pearls in the sea or anything else in the rivers had not been appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea.[610]

[606] *Subjugation* means the conquest of an entire enemy territory in war and its annexation by the conquering state.
[607] *Prescription* refers to the acquisition by one state of a territory originally belonging to another state by way of the actual and peaceful exercise of sovereignty over a long period of time.
[608] Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell Publishing 2008) 16.
[609] Charles Salomon, *L'occupation des territoires sans maître* (A. Giard 1889).
[610] Francisco de Vitoria, 'On the American Indians', in Anthony Pagden and Jeremy Lawrance, *Francisco de Vitoria. Political Writings* (Cambridge University Press 1991) 280.

However, even though the Spanish authorities claimed that their territorial rights over the New World stemmed from this precept, Vitoria unambiguously excluded that the lands of the 'barbarians' in the New World amounted to *terrae nullius*. In Vitoria's view, the indigenous peoples possessed a right of *dominium* over the territories they inhabited, like any other rational human being made in God's image. As a result, the right of discovery could not apply to the territories seized in the New World. Nonetheless, in discussing '[t]he just titles by which the barbarians of the New World passed under the rule of the Spaniards', Vitoria did not exclude the possibility of 'mental incapacity of the barbarians':

> these barbarians, though not totally mad […] are nevertheless so close to being mad that *they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms*. Hence they have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households (*res familiaris*); hence their lack of letters, of arts and crafts (not merely liberal, but also mechanical), of systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use. It might therefore be argued that for their own benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest.[611]

Like Vitoria, Grotius also accepted that occupation could be a valid way of acquiring *res nullius*. In his opinion, everyone had a natural right to appropriate vacant territory. In contrast to Vitoria though, he considered that the lands in the New World could have been *terra nullius* before their acquisition by the Spanish. For Grotius, it is the 'susceptibility to universal use' that distinguished *res communes* (not susceptible for appropriation) from *res nullius* (that can be occupied and seized):[612]

> [The air, the sea, and the shore] are with reason said to be *res nullius*, so far as private ownership is concerned, still they differ very much from those things which, though also *res nullius*, have not been marked out for common use, such for example as wild animals, fish, and birds. For if any one seizes those things and assumes possession of them, they can become objects of private ownership, but the things in the former category [i.e. marked out for common use] by the consensus of opinion of all mankind are forever exempt from such private ownership.[613]

As alluded to above, Grotius' doctrine of *res nullius* in combination with *res communis* was important to his Dutch clients as it allowed them to claim the natural right to take vacant land

[611] ibid., 290, para. 18 (emphasis added).
[612] See, Schrijver & Prislan, *supra* n 536.
[613] Grotius, *supra* n 579, 36-37.

and to extract untapped mineral and other resources – which included hunting grounds of local communities and pastures of nomadic peoples[614] – in the discovered territories.

2.1.2.2. John Locke

Like the Spanish and the Dutch, the English also sought to legitimize their colonialization of America by resorting to the doctrine of *res nullius*. Writing almost a hundred and fifty years later, political philosopher John Locke (1632-1704) reproduced the Grotian understanding of the New World. Like him, Locke based his theory of private property on the law of nature, but he prescribed a more explicit *duty* (not just a right) to exploit (work) and cultivate the land for nourishment (productivity). According to Locke, the institution of private property represents a reward for the work of the man who modifies and transforms the land. In his 1690 classic book *Two Treatises of Government*, Locke formulated this duty as follows:

> God gave the world to men in *common*, but […] it cannot be supposed that He meant it should always remain *common* and uncultivated. He gave it to the use of the industrious and rational (and labour was his title to it) […].[615]

In Locke's view, the native North American Indians failed to respect this duty of God and left their territory 'empty', as *terra nullius* – uncultivated by agricultural labour. As a result, they had a duty to relinquish their land to the first takers. As Camilla Boisen today explains, 'Indians as hunters/gatherers were deemed insufficient and were considered to be parasitic on the land'.[616] Areas lying outside the national jurisdiction of a European state amounted to *terrae nullius*, in Lock's perspective. These empty lands were free for appropriation. The agricultural labour of Europeans added a 'surplus value missing in the culture of the Indigenous inhabitants.'[617] It is this surplus value, this 'improvement' of the land, this commodification of natural resources, which founded Locke's natural right to property:

> Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and

[614] Lesaffer, *supra* n 603, 43-44.
[615] John Locke, *Two Treatises of Government* (prepared by Rod Hay for the McMaster University Archive of the History of Economic Thought [1823]) 118, para. 33 (emphasis added).
[616] Camilla Boisen, 'The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise' (2013) 39(3) *History of European Ideas* 335, 341-242.
[617] Milun, *supra* n 21, 11.

> thereby makes it his property. It being by him removed from the *common state Nature* placed it in, it hath by this labour something annexed to it that excludes the *common right of other men*. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others*.[618]

This is what justified the occupation by colonial powers of lands which were previously only 'used' and not truly 'owned', 'cultivated' through the real 'labour' of indigenous peoples.

Yet, remarkably, even though Locke did not expound further on it, at the end of the previous quote he seems to deem this private appropriation subject to the availability of enough resources 'left in common for others'. For Weston and Bollier, Locke 'did raise the issue, doubtless because it simply could not be ignored: the exercise of private property rights can encroach on and even destroy resources that belong to everyone.'[619]

2.1.2.3. Emmerich de Vattel

Locke's obligation to cultivate the land and own it has found resonance in later international legal writings. Swiss international legal scholar Emmerich de Vattel (1714-1767) still justified the colonial appropriation of lands previously occupied by native tribes (in other words, not entirely 'vacant') on the same ground:

> The earth belongs to mankind in general; destined by the creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might […] apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of *property* and *dominion* […]. […]
>
> All mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. […]
>
> It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed […], in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able

[618] Locke, *supra* n 615, 116, para. 26 (emphasis added).
[619] Weston & Bollier, *supra* n 21, 128, quoting Locke, *supra* n 615, 329.

> to settle and cultivate. Their *unsettled habitation* in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding *land of which the savages stood in no particular need, and of which they made no actual and constant use*, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. […] We do not therefore deviate from the views of nature in confining the Indians within narrower limits.[620]

This is how the international law doctrine of *res nullius*, which proved to be so central in the expansion of colonial powers, arguably resulted in the enclosure of the commons. Indigenous inhabitants depended on the commons for their livelihood, but they could not account as 'true and legal possession' in the eyes of the people of Europe. Consequently, the territory of the 'savages' could be further reduced.

#### 2.1.2.4. Colonization in the 18th and 19th centuries

Legal historians have evinced that the doctrine of *res nullius* also laid down the legal basis for the annexation of 'empty' territories (that were actually all but empty) in the 18th and 19th centuries.[621] During this period, however, the legitimating reasoning of *terra nullius* gradually evolved into the idea of 'trusteeship' of European nations as a moral foundation of colonialism: the 'duty to hold the land in trust for the indigenous peoples, until they had reached a stage of civilization at which self-determination was appropriate'.[622] This is how the British Crown upheld its annexation of the Australian territory in the 18th century,[623] thereby disregarding the political and social organization of the aboriginal peoples.[624]

The Berlin Conference of 1884-5, where imperial powers negotiated the division of the African continent, had, as Antony Anghie noted, the 'effect […] to transform Africa into a conceptual *terra nullius*' by denying the subjectivity of the Africans who were neither consulted nor invited

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[620] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (edited and with an Introduction by Béla Kapossy and Richard Whitmore, Liberty Fund 2008 [1797]), Chapter XVIII : *Of the Establishment of a Nation in a Country*, paras 213-216 (emphasis added).
[621] Lesaffer, *supra* n 603, 44; *Contra*, Andrew Fitzmaurice, 'The Genealogy of *Terra Nullius*' (2007) 38(129) *Australian Historical Studies* 1.
[622] Boisen, *supra* n 616, 336.
[623] High Court of Australia, *Mabo v Queensland (No 2)* (3 June 1992) HCA 23.
[624] See, e.g., Peter Larmour (ed.), *The Governance of Common Property in the Pacific Region* (Australian National University E Press 2013).

to provide their views over their continent.[625] The General Act of the Conference established the rule of 'effective occupation' in order for colonial powers to assert sovereignty over the coastal areas of Africa.[626] The Act also called all powers exercising sovereignty to increase 'the moral and material well-being of the indigenous populations', but – apart from this rhetoric of 'civilization' – there was no mention whatsoever of the institutions that could have been established by the native communities to manage their territories and resources.[627] As Robert A. Williams concludes, 'for purposes of international law, indigenously occupied territories can be regarded as terra nullius – that is, as lands without a recognized owner and available for occupation by a civilized member of the Western family of nations.'[628]

2.1.2.5. Contemporary international law

While *res nullius* has now been revoked and no portion of the globe can still legally be categorized as such, it has had an enduring influence on contemporary international law. In the early 20th century, international legal scholars still identified the polar regions as *terrae nullius*.[629] In the case concerning the *Legal Status of Eastern Greenland* (1931), the Permanent Court of International Justice (PCIJ) recognized the occupation of *terra nullius* as 'an original means of peaceably acquiring sovereignty'.[630] In contrast, the *Western Sahara* case of 1975 is often cited as proof of the obsolete character of this doctrine. The ICJ indeed answered in the negative the practical question as to whether Western Sahara was 'at the time of colonization by Spain a territory belonging to no one (*terra nullius*)'.[631] Yet, the Court did not reject the principle itself as obsolete, or racist. Instead, it left it in theory untouched as a valid mode of

[625] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 91.
[626] General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo (adopted 26 February 1885) *Consolidated Treaty Series* 486, Chapter VI, para. 35 ('Act of the Berlin Conference'): '*Les Puissances Signataires du present Acte reconnaissent l'obligation d'assurer, dans les territoires occupés par elles, sur les côtés du Continent Africain, l'existence d'une autorité suffisante pour faire respecter les droits acquis et, le cas échéant, la liberté du commerce et du transit dans les conditions où elle serait stipulée*'.
[627] ibid., Chapter I, para. 6.
[628] Robert A. Williams, Jr., 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660, 675.
[629] See, e.g., James Brown Scott, 'Arctic Exploration and International Law' (1909) 3(4) *American Journal of International Law* 928, 941
[630] PCIJ, *Legal Status of Eastern Greenland, Denmark v. Norway*, Judgment of 5 September 1933, PCIJ Series A/B, No. 53, pp. 44 and 63.
[631] *Western Sahara,* Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 12, para. 75.

acquisition of territory in the 19th century – provided that the territory effectively belonged to 'no one'.[632] It specified that

> the State practice of the relevant period [that is, in 1884 when Spain proclaimed a protectorate over the area] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' or *terra nullius* by original title but through agreements concluded with local rulers.[633]

The Court conceded that the territory of Western Sahara was at the time of Spanish colonization 'inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.'[634] Therefore, Western Sahara could not be regarded as *terra nullius.* However, the concept as such was not regarded as invalid, nor dismissed as an anachronistic relic of international law. Moreover, it should be noted that regarding the legal ties between this territory and Morocco or Mauritania – the second question put before the Court, the European notion of 'exercise and display of political authority' eventually prevailed as the only valid criterion of acquisition of the title of territorial sovereignty.[635] Even though the Western Sahara case could be celebrated for recognizing 'a theory of international land tenure based on a non-European conception of title as generative of "legal ties"', it should be conceded with Michael Reisman that '[b]y insisting on the application of the Western concept [of political authority], the potential legal force of the indigenous form of *political* organization was drained'.[636]

2.1.2.6. Distinction

Predictably, even if the doctrine of *res* (or *terra*) *nullius* used to qualify global commons and CPRs under international law, the commons literature already have rejected it as an instrument of enclosure of 'mainstream political culture'.[637] The criticism of food sovereignty advocate Vandana Shiva levelled at the concept of *terra nullius* merits to be quoted here at full length:

[632] ibid., para. 79.
[633] ibid., para. 80.
[634] ibid., para. 81.
[635] ibid., para. 95.
[636] Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' (1995) 89(2) *American Journal of International Law* 350, 354.
[637] Weston & Bollier, *supra* n 21, 127.

> The colonial construct of the passivity of the earth, and the consequent creation of the colonial category of land as *terra nullius* (empty land), served two purposes: it denied the existence and prior rights of original inhabitants, and it obscured the regenerative capacity and processes of the earth. It therefore allowed the emergence of private property from enclosure of the commons, and allowed non-sustainable use of resources to be considered 'development' and 'progress'. For the privateer and the coloniser, enclosure was improvement.[638]

Indeed, the notions of *res nullius* and the commons markedly differ on three counts. Firstly, like *res communis*, the notion of *res nullius* again suggests the underlying abundance and inexhaustibility of nature. This is the contrary of a subsistence commons, precisely aimed at managing and sustaining limited ecosystems such as rainforests, lakes, fisheries, lands, pastures or drinking water. Secondly, *res nullius* accepts like *res communis* the unlimited exploitation of CPRs, but it entails the opposite outcome: *res nullius* remains up to appropriation by any state or individual. Historians, however, have already shown that even the premodern English commons were never a *res nullius*; unlimited access to local commons never existed.[639] The concept of *res nullius* is, in reality, the opposite of a successful local commons, which imposes clear rules of access to its users and sanctions on free riders. As Ostrom and Hess stated, '[l]egal doctrine has long considered open-access regimes (*res nullius*) – including the classic cases of the open seas and the atmosphere – to involve no limits on who has authorized use.'[640] Thirdly, and more importantly, *res nullius* generates the perception of the commons as a 'void' belonging to nobody. It perpetuates the idea of an ungovernable and unregulated commons, akin to Hardin's tragedy. It nullifies the existence of the commons, on which indigenous and peasant communities have however been depending from time immemorial. It dispossesses communities, regardless of their customs, solely on account of their different way of life and absence of *dominium* or formal title of state sovereignty or private ownership in the Western sense.

For this last reason, legal scholars criticized the *terra nullius* doctrine for its 'overt racism and […] denigration of other cultures and peoples'.[641] For Arnulf Becker Lorca, this theory was used by western international lawyers and diplomats to '[deploy] the idea of an exclusively European international law' and 'to justify the exclusion of non-European entities from the

[638] Vandana Shiva, 'Foreword. The Commons: The Ground of Democracy and Sustenance' in Giovanna Ricoveri, *Nature for Sale: The Commons versus Commodities* (PlutoPress 2013) viii.
[639] Milun, *supra* n 21, 101-102, citing Cox, *supra* n 216.
[640] Hess & Ostrom, *supra* n 411, 122.
[641] Mickelson, *supra* n 601, 626.

privileges of an international legal order based on sovereign equality.'[642] As Kathryn Milun states, '[h]istorical references to both *terra nullius* and *res nullius* domains show that global commons and Indigenous peoples are caught in an epistemic imaginary where metaphors of vacant, empty space support a legal rhetoric that legitimates dispossession.'[643] In *Plunder*, Ugo Mattei and Laura Nader also consider that Locke's 'natural law justifications of individual ownership […] granted legitimacy to early genocides and looting in the "vacant" Native Indian lands of North America':

> Nobody would have incentives to create if there were no [IP] rules granting a monopoly on the benefits of his/her creativity. Nobody would genetically modify seeds without guarantee that the legal system would help impose such technology on farmers worldwide, forcing them to abandon communitarian practices of seed sharing and swapping. Such eighteenth-century rhetoric, reinforced today by simplistic neo-classical legal and economic models, denies notions of alienation and exploitation […].[644]

Likewise, Burns Weston and David Bollier confirm that '[q]uite literally, the law has no way of representing the commons or enclosure within its epistemological framework':[645]

> [T]he State/Market even today tries hard to disguise this hidden tripwire in the Lockean theory of private property rights. It has become accustomed to talking about oceans, outer space, biodiversity, and the Internet as resources that belong to no one, or as *res nullius*, therefore justifying unchecked private exploitation in the Lockean tradition, while simultaneously calling such resources 'global commons' that belong to everyone, or are *res communes*. This rhetorical feint allows the State/Market to have it both ways: it can plunder planetary CPRs in an imperialistic, free-market tradition (ignoring the sovereign needs of Nature and extraterritorial human beings) and yet imply that these planetary resources are being managed as a commons for the benefit of everyone and nonmarket purposes, when, in fact, they are not.[646]

Besides the criticism voiced in the academic literature, this doctrine sparked condemnation also from indigenous peoples themselves. In the Permanent Forum on Indigenous Peoples, representatives of indigenous and native groups spoke out 'against continued use of the internationally recognized principle of "terra nullius"' which served 'to justify the "theft" of native lands, territories or natural resources'.[647] The delegate from the Indigenous Peoples of

[642] Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51(2) *Harvard International Law Journal* 475, 479-480.
[643] Milun, *supra* n 21, 8.
[644] Mattei & Nader, *supra* n 608, 84.
[645] Weston & Bollier, *supra* n 21, 128.
[646] ibid., 129.
[647] Permanent Forum on Indigenous Issues, '"Doctrine of Discovery", Used for Centuries to Justify Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, Permanent Forum Told' (8 May

Africa Coordinating Committee deplored that most indigenous people, as 'mobile land users', had been unable to prove that they were 'permanent residents on their land, even if they had used, or lived on, it for centuries'.[648] The commons can no longer be regarded as a nullity under international law. Indigenous lands, territories and resources should be recognized with due respect to the customs, traditions and land tenure systems of indigenous peoples.

### 2.1.3. Common heritage of mankind

As has already been alluded to above, the two characteristics that underlie both *res communes* and *res nullius* – the inexhaustibility and free-for-all exploitation – have become less pertinent under the current day management of global commons in international law. By the 1960s, international law had to respond to different challenges, among which the decolonization and preservation of natural resources around the globe. The ancient ideas of *res communes* and *res nullius* were therefore gradually supplemented by both extended areas of exclusive national jurisdiction and more complex law of international cooperation aimed at the sustainable management of areas beyond national jurisdiction.

This is notably how – from the late 1960s, at around the same time Garrett Hardin published his famous 'Tragedy of the Commons'[649] – the principle of CHM came to dominate the international legal regimes for the outer space, the Moon, and the deep seabed. Like *res communis*, the principle reflects the idea that global commons and their resources should not be appropriated by states – especially the richest ones – and should belong to us all, including future generations.

Yet, whereas a *res communis* regime permits free-for-all exploitation of CPRs, a regime based on the CHM establishes management mechanisms on behalf of the international community as a whole, devoting special attention to the equitable distribution of benefits among both developed and developing states.

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2012) Eleventh Session, 3rd & 4th Meetings (AM & PM), HR/5088, <https://www.un.org/press/en/2012/hr5088.doc.htm> (accessed 13 July 2018).

[648] ibid.

[649] See, for a comparison of both discourses on the 'tragedy of the commons' and 'CHM', Ranganathan, *supra* n 100.

2.1.3.1. Origins

The principle of CHM emerged in the middle of post-colonial efforts in the 1969s to repudiate the logic of unbridled exploitation of global commons by Western powers. Scientific and technological developments had then shown the potential of exploring and exploiting areas beyond jurisdiction like outer space and the deep seabed.

For instance, in 1945, President Truman proclaimed that, 'aware of the long range world-wide need for new sources of petroleum and other minerals', the US government 'regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to [its] coasts […] as appertaining to the [US], subject to its jurisdiction and control'.[650]

CHM is often said to have taken place in the broader developing states' movement for a New International Economic Order (NIEO) challenging the then prevailing system of international law and relations biased towards developed nations and their corporations.[651]

The first (if wrongly)[652] mention of the term 'CHM' is generally attributed to Arvid Pardo (1914-1999), Malta's permanent representative to the UN, in a declaration made on 1 November 1967 to the First Committee of the General Assembly, regarding the seabed and ocean floor beyond the limits of national jurisdiction.[653] Pardo's speech should be read in light of the Truman Proclamation. It was a significant event that later influenced Part XI of UNCLOS (see *infra*, Section 2.1.3.2) and it is generally recalled in any legal discussion of CHM. Pardo's main concerns seem to have been the risk that 'technologically advanced States […] appropriate

[650] Harry S. Truman, 'United States: Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf' (1946) 40(1) *American Journal of International Law* 45, 45-46.
[651] See UNCLOS, *supra* n 590, preambular para. 5: '*Bearing in mind* that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked'. See, also, e.g., Boleslaw Adam Boczek, 'Ideology and the Law of the Sea: The Challenge of the New International Economic Order' (1984) 7(1) *Boston College International and Comparative Law Review* 1; Karin Mickelson, 'Common heritage of mankind as a limit to exploitation of the global commons' 30(2) *European Journal of International Law* 635, 640; Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573, 580. See, *contra*, Ranganathan, *supra* n 100, 709-711, who shows that Pardo's proposal was not entirely aligned in time and substance with the developing states' claims for, notably, extended national and exclusive jurisdiction over the seabed.
[652] See, e.g., Commission to Study the Organization of Peace (CSOP), 'Draft Resolution and Working Paper' (21 August 1967) file S-0858-0005-03, UNA, USA, which called three months before Pardo's intervention for the establishment of a legal regime based on the common heritage of mankind for not only the seabed, but also high seas, cited in Ranganathan, *supra* n 100, 708.
[653] UN General Assembly, 'First Committee 1515th Meeting' (1 November 1967) UN Doc. A/C.1/PV.1515-1516.

the sea-bed and the ocean floor beyond the 200-metre isobaths for their own use' and the need for environmental preservation of the 'dark oceans [which] are the womb of life' (sic).[654] In contrast to the logic of *laissez-faire* of the freedom of the high seas, but also to the expanding claims to state sovereignty over the oceans, Pardo's project was to subject the seabed and its resources to international administration and management to prevent their monopolisation by the most advanced states and ensure the equitable distribution of the benefits. Truthfully, Pardo saw in the deep seabed almost inexhaustible reserves of highly valuable minerals,[655] which contrasts with the perceived need to preserve a CPR that is by definition limited in availability.

2.1.3.2. Contemporary international law

*Outer space*

The principle of common heritage is not just about rhetoric. Despite its aspirational character, the concept was given concrete legal content in a number of international legal agreements governing global commons – even though the term of 'global commons', let alone the 'commons', is never mentioned as such.[656]

This was first the case of the 1967 Outer Space Treaty,[657] which incorporated the principles laid out in the 1962 UN General Assembly Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[658] Article I(1) of the Outer Space Treaty provided some elements of CHM in declaring that '[t]he exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the *province of all mankind*.'[659] This implies that 'Outer space, including the Moon

[654] ibid., paras 64 and 7.
[655] See, e.g., ibid., para. 26, Pardo citing the 'conservative' approximations of John L. Mero in his book *The Mineral Resources of the Sea*, although virtually nothing was known about deep seabed mining in 1967 : 'The nodules contain 43 billion tons of aluminium equivalent to reserves for 20,000 years at the 1960 world rate of consumption as compared to known land reserves for 100 years; 358 billion tons of manganese equivalent to reserves for 400,999 years as compared to known land reserves of only 100 years […]'. These estimates are today deemed to be speculative and, in fact, highly optimistic : see, Ranganathan, *supra* n 100, 713.
[656] See, Kemal Baslar, *The Concept of the Common Heritage of Mankind in International* Law (Martinus Nijhoff Publishers 1998).
[657] Outer Space Treaty, *supra* n 591.
[658] UNGA, 'Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space' (13 December 1963) UN Doc. GA Res 1962 (XVIII). The preamble already recognized 'the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes' and the first principle provided that '[t]he exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind.'
[659] ibid. (emphasis added).

and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be *free access* to all areas of celestial bodies' (Article I(2)). Article II states that 'Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of *sovereignty*, by means of use or occupation, or by any other means', but it does not explicitly rule out private appropriation[660] which is today problematic in the light of commercial projects like asteroid and lunar mining. According to the common interest of all mankind, exploration and use of outer space should remain 'for peaceful purposes only'.[661] Despite the significance of this international agreement concluded in the middle of the Cold War and today ratified by 107 states, the Outer Space Treaty does not prescribe more specific substantive rules relating to the exploitation of natural resources.[662] In practice, China's missile tests in the Outer Space[663] and President Trump's recent launch of a sixth military branch of 'US Space Force'[664] seem to stand in stark contrast with the CHM principle of peaceful purposes.

*Moon*

It was not until 1979 that an unambiguous statement on the exploitation and management of the natural resources of the outer space appeared in the Moon Treaty.[665] Article XI(1) closes any possible discussion as to the legal status of natural resources in the outer space*:* 'The Moon and its natural resources are the *common heritage of mankind*.'[666] It reaffirms that '[t]he Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means' (Article XI(2)) and that '[n]either the surface nor the

[660] See, *contra*, Rolando Quadri, 'Droit International Cosmique' (1960) 98 *Académie de droit international, Recueil des cours* 505, 596-597: '*Dans la mesure où un Etat ne peut contrôler la disposition des ressources cosmiques, ces ressources ne sont pas juridiquement des choses: ells échappent au domaine du droit qui n'est pas infini*' quoted in Craven, *supra* n 545, at note 106.
[661] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* n 658, preambular para. 3; Articles IV(2), IX, XI; Annex, preambular paras 2 and 5.
[662] Schrijver & Prislan, *supra* n 536, 188.
[663] Dan Glaister, 'Junk from China missile test raises fear of satellite collision' (7 February 2007) *The Guardian* <https://www.theguardian.com/science/2007/feb/07/spaceexploration.weekendmagazinespacesection> (accessed 30 December 2019); Harsh Vasani, 'How China Is Weaponizing Outer Space' (19 January 2017) *The Diplomat* <https://thediplomat.com/2017/01/how-china-is-weaponizing-outer-space/> (accessed 30 December 2019).
[664] AP, 'Donald Trump officially launches US space force' (21 December 2019) *The Guardian* <https://www.theguardian.com/us-news/2019/dec/21/donald-trump-officially-launches-us-space-force> (accessed 30 December 2019).
[665] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 ('Moon Treaty').
[666] ibid. (emphasis added).

subsurface of the Moon, nor any part thereof or natural resources in place, shall become the property of any State, international intergovernmental or [NGO], national organization or non-governmental entity or of any natural person' (Article XI(3)). While the Moon Treaty clearly deviates from the *res communis* regime of 'first come, first served', the agreement does not lay down how the 'international regime' of safe, rational and equitable management of the natural resources of the Moon should be established. It defers the outline of this regime for the future, 'as such exploitation is about to become feasible'.[667] The outer space still lacks an international authority. The actual impact of the Moon Treaty on the space regime should be relativized as it has been ratified by a very small number of states (18), only one of which has truly ever been engaged in space exploration. Even the relevance of the emblematic principle of non-appropriation of the Moon and its natural resources can today be doubted as the US[668] and Luxembourg[669] – unilaterally[670] – enacted bills in 2015, resp. 2017, granting property rights to private companies exploiting space resources.[671]

*Deep seabed*

Part XI of UNCLOS elaborates a more complex international legal regime ('the Area') governing the deep seabed according to the common heritage principle. While opposing the extension of national jurisdiction in declarations like the Truman Proclamation and reiterating the 1970 Declaration of Principles Governing the Seabed and Ocean Floor,[672] Article 136 UNCLOS proclaimed that '[t]he Area' – defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Article 1(1)(1)) – and 'its resources' – meaning all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the

[667] ibid. (emphasis added).
[668] H.R.2262, U.S. Commercial Space Launch Competitiveness Act, 114th Congress (2015-2016) <https://www.congress.gov/bill/114th-congress/house-bill/2262> (accessed 1 August 2018).
[669] Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace, Journal Officiel du Grand-Duché de Luxembourg (28 July 2017) <https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=F87C15C952374776C6DAC8ACA6C4AF66F84F15311BB3830DADB04DEF112C1CF526B29E9788FED4AE381D80B436418E21$87A23BDC6CD591A5DE5D35884112790F> (accessed 1 August 2018).
[670] For all clarity, unilateral acts of states do not, as such, make the private appropriation of space resources lawful; yet, they challenge the contours of the international law principle of non-appropriation.
[671] Craven, *supra* n 545.
[672] UNGA, 'Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction' (12 December 1970) UN Doc. A/RES/25/2749, which solemnly declares that 'The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction […], as well as the resources of the area, are the *common heritage of mankind*' (emphasis added).

seabed, including polymetallic nodules' (Article 133(b)) – to be the '*common heritage of mankind*'.[673] Article 137 then specifies as follows:

> 1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
>
> 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the [International Sea-Bed] Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with [Part XI] and the rules, regulations and procedures of the Authority.
>
> 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights hall be recognized.

The rest of Part XI operationalizes the conceptual principle of CHM in relation to coastal states, marine scientific research, protection of the environment, the participation of developing states, etc. Article 311(6) UNCLOS underlines the foundational character of the CHM principle in providing that 'States Parties agree that there shall be no amendments to the *basic principle* relating to [CHM] […] and that they shall not be party to any agreement in derogation thereof.'[674]

Article 150 emphasizes the goal of 'development of the world economy' through the exploitation of the minerals in the deep seabed.[675] However, at the time of the Convention's adoption in 1982, the provisions on common heritage proved to remain one of the most controversial ones and the Part on the deep seabed served as a reason for the US (at the time under Ronald Reagan's presidency) not to ratify the text. Like other industrialized states (namely the United Kingdom and the Federal Republic of Germany), the US fiercely negotiated to leave the possibility open for commercial deep seabed mining and other market incentives like property rights, which the common heritage principle seemed to hinder. The western states' resistance against the deep seabed mining regime led to the adjustment of Part XI of UNCLOS

[673] UNCLOS, *supra* n 651 (emphasis added).
[674] Emphasis added: that is to say that other provisions of Part XI operationalizing the CHM 'basic principle' may perfectly be amended.
[675] See, about the controversy behind the drafting of Article 150: Mickelson, *supra* n 651, 643-645.

in 1994.[676] The 1994 amendment did not touch upon the principle of common heritage as such[677] (at least explicitly), but it unambiguously restrained its implications by eroding the more distributive provisions of UNCLOS on compensation to land-based producing countries and by restricting the role of the International Seabed Authority (ISA) charged with the administration of the resources in the Area.[678] With this 'market-oriented'[679] or 'more capitalist'[680] amendment in 1994, the 1982 Convention was saved and could finally enter into force, but the ultimate outcome of the allegedly revolutionary principle of CHM seemed more limited than expected.

Nonetheless, it would be wrong to state that the CHM has no legal relevance at all. In 2011, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS) issued an advisory opinion in which the CHM implies several obligations and responsibilities for the state sponsoring commercial mining activities in the deep seabed.[681] The Chamber first stipulates that the role of sponsoring state is to '[contribute] to the realization of the common interest of all States in the proper application of the principles of the [CHM]'.[682] This means that 'while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole'.[683] It should also 'act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole'.[684] The CHM principle also forbids developed sponsoring states from establishing companies in developing states ('of convenience') in order to evade burdensome regulations and controls; the protection of the CHM requires equality of treatment between all nations.[685] It dictates, still according to the Chamber, that national measures to be taken by the sponsoring state 'should be kept under

[676] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 17 August 1994, entered into force 16 November 1994) UN Doc. A/RES/48/263, 33 ILM 1309.
[677] ibid., preambular para. 2: 'Reaffirming that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as 'the Area'), as well as the resources of the Area, are the common heritage of mankind'.
[678] Mickelson, *supra* n 601, 636.
[679] 1994 Agreement on the Implementation of Part XI of UNCLOS, *supra* n 676, preambular para. 5. See also, ibid., Annex, Section 6(1)(a) : 'Development of the resources of the Area shall take place in accordance with *sound commerical principles*' (emphasis added).
[680] Shackelford, *supra* n 348, 155.
[681] Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (1 February 2011) Advisory Opinion <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf> (accessed 30 December 2019).
[682] ibid., para. 76.
[683] ibid., para. 230.
[684] ibid.
[685] ibid., para. 159.

review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the [CHM]'.[686] Still in accordance with the same normative principle, the international of regulatory oversight by the sponsoring state should take precedence over its contractual liability under domestic law 'with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining'.[687]

Notwithstanding the precautionary approach taken by the Chamber, which decided to make of CHM an important element of its interpretative framework, in practice, as in the case of space resources, it should be acknowledged that valuable deep seabed minerals (like silver, gold, copper, nickel, manganese, zinc) lying beyond national jurisdiction are nowadays increasingly subject to commercial exploitation. The extraction has even intensified in the last decade, due to high technological developments, making deep seabed mining economically viable, and the booming demand for critical minerals used in electronics.[688] In recent years, the ISA[689] – the institution supposedly acting on behalf of 'mankind as a whole' (Article 136(2) UNCLOS) or 'as a trustee for the world community'[690] – has issued 30 contracts for exploration for polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts in the deep seabed in the Atlantic, Indian and Pacific Oceans.[691] It is expected to grant exploitation permits in the years to come, too.

At the time of Pardo's speech at the UN, the extraction of minerals was only a hypothesis. Today, the 'new gold rush'[692] is a reality with potentially disastrous impacts on biodiversity

[686] ibid., para. 222.
[687] ibid., para. 226.
[688] Ben Doherty, 'Deep-sea mining possibly as damaging as land mining, lawyers say' (18 April 2018) <https://www.theguardian.com/environment/2018/apr/18/deep-sea-mining-possibly-as-damaging-as-land-mining-lawyers-say> (accessed 29 December 2019). See, regarding the international legal implications of such investments, Alberto Pecoraro, 'Deep Seabed Mining in the Area: is international investment law relevant?' (10 July 2019) EJIL: *Talk!* <https://www.ejiltalk.org/deep-seabed-mining-in-the-area-is-international-investment-law-relevant/> (accessed 29 December 2019).
[689] See Aline E. Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Publications on Ocean Development, Vol. 83, 2017).
[690] Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 312.
[691] International Seabed Authority, 'Deep Seabed Minerals Contractors', <https://www.isa.org.jm/deep-seabed-minerals-contractors> (accessed 29 December 2019).
[692] Brian Clark Howard, 'The Ocean Could Be the New Gold Rush' (13 July 2016) National Geographic <https://www.nationalgeographic.com/news/2016/07/deep-sea-mining-five-facts/> (accessed 29 December 2019).

and climate regulation.[693] The question is then whether CHM really imposes strict limits to the exploitation of natural resources lying beyond state jurisdiction. As Karen Mickelson notes, '[w]hile it is impossible to deny that the ISA's contemporary understanding of its mandate to act in the interests of humankind as a whole recognizes the critical importance of environmental considerations, the imperative of development remains very much in play.'[694] More specifically, even though the ISA has adopted rules, regulations and procedures in accordance with Article 145 and Part XII UNCLOS[695] to protect and preserve the marine environment (the whole set of standards is referred to as the 'Mining Code'),[696] the imperative of commercial exploitation has taken the place over the prevention of environmental damage and socially adverse impacts inevitably caused by any operation of deep seabed mining, for example, on indigenous communities (think of those living in the Pacific Islands).[697] Put differently, international law, at least in this case of deep seabed mining, has – at best – only sought to mitigate, not to stop, the extractive force inherent in the dominant model of economic development.

Thus, for the purposes of the present inquiry into the relevance of the commons as an institution of its own for development under international law, it may be concluded that the CHM concept is indeed very weak.

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[693] Julie Hunter, Pradeep Singh and Julian Aguon, 'Broadening Common Heritage: Addressing Gaps in the Deep Sea Mining Regulatory Regime' (16 April 2018) Harvard Environmental Law Review blog <https://harvardelr.com/2018/04/16/broadening-common-heritage/> (16 April 2018).

[694] Mickelson, *supra* n 651, 660. Mickelson also considers that '[i]n the years to come, there might be a willingness to again readjust and reduce the emphasis on exploitation based on an enhanced global awareness and appreciation of environmental and ethical concerns, and I would argue that such a shift would in fact be easier to reconcile with CHM's underlying values.'

[695] See also, 1994 Agreement on the Implementation of Part XI of UNCLOS, *supra* n 676, Annex, Section 1(5)(g) : 'Between the entry into force of the Convention and the approval of the first plan of work for exploitation, the Authority shall concentrate on: (g) Adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment.'

[696] To date, the ISA has issued three sets of Regulations on the exploration of the deep seabed, which all reaffirm the CHM principle in the preamble (https://www.isa.org.jm/mining-code): ISA, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* (25 July 2013) Doc. ISBA/19/C/17; ISA, *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* (17 May 2010) Doc. ISBA/16/A/12/Rev; ISA, *Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area* (27 July 2012) Doc. ISBA/18/A/11. It is expected that the ISA develops other sets of Regulations regarding other types of minerals in the deep seabed.

[697] See also, Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30(2) *European Journal of International Law* 573, 596-597: 'The possibility of "better" exploitation forestalls the question as to whether the seabed should be mined at all. This is a question that deserves greater prominence, with scientists pointing out the serious harm, including a net loss of marine biodiversity, which may be cause by seabed mining. Yet it is not a question that the ISA was set up to ask or will be encouraged to ask by states.'

*Other global commons and common concerns*

Several attempts have been made to proclaim a regime based on common heritage for the resources located in the Antarctic, the atmosphere and even natural and cultural heritage, but they have all faded away. The 'only operational version of CHM to date' concerns the deep seabed regime under UNCLOS.[698] It is therefore fair to say that the concept of common heritage itself today remains highly controversial in scope and content – if not outdated. Since then, other international environmental treaties have instead used the more ambiguous concept of 'common *concern* of mankind' to describe biodiversity conservation[699] and climate change.[700] Instead of regulating as the CHM the exploitation of global commons for the sake of the international community, the concept of common concern emphasizes that biodiversity and the atmosphere should be protected from destruction by human activities. Yet, in reality, it is because the Maltese proposal in the UNGA to define the global climate as common *heritage* failed, that it was replaced with the less far-reaching notion of common *concern*.[701] The notion of common *concern* seems closely related to that of common *interest* already referred to above in the UN Declaration on the Exploration and Use of Outer Space,[702] in this sense that it calls for 'some kind' of international governance.[703] The UNFCCC indeed 'calls for the widest possible cooperation by all countries'.[704] However, it remains silent as to the specific international legal status or legal implications to be conferred on biodiversity or the atmosphere for the international community. It does not imply the same institutional implications of an international regime of collective management and sharing as under CHM. Concretely speaking, the concept of common concern, which has not reached the level of customary international law, does not say how responsibilities regarding emissions of greenhouse gases

[698] Mickelson, *supra* n 651, 637.
[699] See, CBD, *supra* n 538, preamble, para. 3.
[700] See, UNFCCC, *supra* n 539, preamble, para. 1; The Paris Agreement (12 December 2015) UN Doc. FCCC/CP/2015/L.9, preamble, para. 11.
[701] UNGA, 'Protection of global climate for present and future generations of mankind' (6 December 1988) GA Res 43/53, UN Doc. A/RES/43/53, preamble and para. 1: 'Welcoming with appreciation the initiative taken by the Government of Malta in proposing for consideration by the Assembly the item entitled "Conservation of climate as part of the common *heritage* of mankind", […] 1. Recognizes that climate change is a common *concern* of mankind, since climate is an essential condition which sustains life on earth' (emphasis added).
[702] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* n 658, preambular para. 3: '*Recognizing* the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes'.
[703] See, on community interests in international environmental law, Jutta Brunnée, 'Procedure and substance in international environmental law and the protection of the global commons' in Samuel Cogolati and Jan Wouters (eds), *The Commons and a New Global Governance* (Edward Elgar 2019) 291-321.
[704] UNFCCC, *supra* n 539, preamble, para. 1.

should be differentiated, for example. Hence, the concept of common concern of mankind is not explored further in this thesis.[705]

2.1.3.3. Distinction

Regardless of its disputed legal status, the CHM principle seems to reflect the cosmopolitan idea under international law of an interdependent world that should be peacefully managed by all nations and transmitted to future generations. It also articulates key components of sustainability, which of course resemble the commons' concern to preserve CPRs.

It is therefore not surprising that the principle of common heritage sparked some enthusiasm among proponents of the commons framework, who saw it as 'the only current alternative to either freedom of use by all states or the acquisition and exercise of sovereign rights'.[706] The same optimism is shared by international legal scholars. Isabel Feichtner and Surabhi Ranganathan expressed their 'hope that the common heritage principle might indicate a potential path to pursue both ecological concerns and redistributive aims'.[707] Karin Mickelson, while commenting on CHM, confirms that 'we are currently facing challenges in terms of the regulation of *common spaces* that may disrupt traditional categories still further'.[708] By referring to Weston and Bollier's book on the Law of the Commons,[709] she admits that '[t]here have also been a number of attempts to shift our understanding of common spaces towards sustainability'.[710] In another contribution, she points to the commons as an alternative 'visionary ideal' which could inform debates around the global commons, but remains convinced of the added value of CHM:

> There are […] good reasons to have a bit of historical humility, and to pay serious attention to the delicate balance struck by those in previous generations tasked with translating new visions regarding the *commons* into reality. It is worth recalling that CHM already represents a negotiated balance between

[705] See, for a more extensive study of the legal implications of the common concern of mankind, Thomas Cottier and Sofya Matteotti-Berkutova, 'International environmental law and the evolving concept of "common concern of mankind"' in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press 2009) 21-47.
[706] Prue Taylor, 'The Common Heritage of Mankind: A Bold Doctrine Kept Within Strict Boundaries' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market and State* (Levellers Press, 2012) 358.
[707] Feichtner & Ranganathan, *supra* n 543, 546.
[708] Mickelson, *supra* n 601, 638 (emphasis added).
[709] Weston & Bollier, *supra* n 21.
[710] Mickelson, *supra* n 601, 638.

> pragmatism and idealism, both in how it was originally envisaged and how it had come to be operationalized.[711]

However, I argue that there remains an unbridgeable conceptual and normative divide between the commons and principle of CHM.

To start with, even if common heritage spaces or resources can in principle not be owned or appropriated, their resources still can be used and exploited without clear limitations. Nowadays, the economic exploitation of the outer space and deep seabed is not only a distant prospect anymore; it has become a reality supported by domestic legislation and even international regulation (as the growing number of ISA permits for commercial deep seabed mining shows). Regardless of the label of CHM, both the outer space and deep seabed have become intensive sites of commercial extractive activity. It remains true that access to global commons is in principle reserved to the international entity in charge of common management, but that joint management is intended for the benefit of all states – which, in turn, sponsor private commercial entities.[712] Common heritage, in other terms, institutes an open regime, which stands in contrast to the strict rules of access and uses established in a commons. As Surabhi Ranganathan phrases it, free access becomes a normative principle with common heritage: 'no member of a community should be excluded from a commons'.[713] This free access may admittedly be subject to certain responsibilities to preserve the ecological resource, but should first and foremost ensure the equitable sharing of *benefits* of use among both developed and developing states.[714] In fact, even with CHM, there is no prohibition on the freedom of exploration and exploitation of a global commons for the benefit of some states and private corporations – quite the contrary. In an article titled 'The Tragedy of the Common Heritage of Mankind', Scott Shackleford went as far as to suggest that 'privatization' could represent 'a strategy to avoid a tragedy of the commons'.[715] He thus proposed to reinterpret the CHM principle so as to allow the exercise of limited private property rights over global commons.[716] This would otherwise, according to the author, curtail economic growth and 'development in

[711] Mickelson, *supra* n 651, 661 (emphasis added).
[712] Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge University Press 2015) 84.
[713] Ranganathan, *supra* n 100, 694.
[714] See, e.g., the emphasis on the equitable sharing of benefits under UNCLOS: Articles 136 and 140.
[715] Shackelford, *supra* n 348, 114.
[716] ibid., 117.

the commons'.[717] To sum up, the CHM does not prevent the (public or private) appropriation and enclosure of the commons.

Next, depending on each legal regime pertaining to the outer space, the Moon or to the seabed, the CHM principle places the exploitation of the resource under joint management. That is to say that all rights in common heritage are abstractly vested in 'mankind as a whole' – not in a well-defined community of people with exclusive access. As Surabhi Ranganathan states, '"mankind" is the ultimate subject of law-making'.[718] This means that only the international community of sovereign states is entitled to administer CHM. In contrast to the commons, which represent a regime distinct from both market and state, the principle of CHM 'supports *public* regulation to distribute costs and benefits'.[719] Moreover, the international management of the CHM is not expected to preserve CPRs in the long term like in a commons by forbidding seabed mining or outer space exploitation. On the contrary, this jurisdictional principle is thought to facilitate the effective economic exploitation of resources lying in these vast domains. As an international environmental lawyer bleakly summarized more than two decades ago:

> The essential feature of CHM, whether based on *res communis* or *res* publica, is the entitlement of the entire international community to exploit the sea bed and share the fruits of exploitation. CHM is not a conservationist principle because it is directed at maximizing resource exploitation and economic returns.[720]

In short, even with the most sophisticated form of international management in the case of the ISA with its Mining Code for the exploration and exploitation of the deep seabed, we are still far away from the autonomous space of bottom-up governance created by the commons for the sustainable management of CPRs. Even the international law principle of CHM currently accords primacy to economic exploitation over commons preservation.

Finally, the CHM principle, and its core element of non-appropriation, has never been applied to areas *within* national jurisdiction, not even to those which are said to be globally relevant such as rainforests or lakes and their flora and fauna. It does not play any distributive role in

[717] ibid., 151.
[718] Ranganathan, *supra* n 100, 714.
[719] ibid., 694 (emphasis added).
[720] Lakshman Guruswamy, 'International Environmental Law: Boundaries, Landmarks, and Realities' (1995) 10(2) *Natural Resources & Environment* 43, 48, quoted in Mickelson, Mickelson, *supra* n 651, 636.

the allocation of rights over the use or management of land or natural resources in an intrastate context. This is allegedly due to the 'fear of infringements on national sovereignty'.[721] Developing states especially were 'suspicious of interference under the guise of environmental protection or via the acquisition of [IP] rights'.[722] Whatever commentators may say about the potential of this international law principle to protect common goods, most commons in the world are today simply not subject to it.

### 2.2. Bottom-up commons versus top-down international law

There is a second kind of tension between the institution of the commons, on the one hand, and the discipline of international law, on the other hand. For this second tension, I focus on the *subject* of the commons: a *community* of users (not necessarily owners) that has exclusive access to a CPR and that manages it in common according to its own rules, with minimal (or without) involvement of public authorities. Following the traditional understanding of international law, however, only a few actors on the international scene are recognized as 'subjects of international law' – meaning entities which are capable of holding international rights or of being made subject to international duties.[723] Could any role be reserved for self-organized communities of commoners as subjects of international law?

The quick answer is that international law has never been concerned primarily with communities of commoners. Since the Treaty of Westphalia in 1648, sovereign nation states are the most obvious and universally accepted subjects of international law.[724] Even if major exceptions developed over time with the more active participation of non-state actors[725] and the recognition of individual human rights (see Chapter 3), states undoubtedly remain the basic units of the international legal system, and as such, are considered autonomous, independent,

[721] Schrijver, *supra* n 98, 1258.
[722] Taylor, *supra* n 706, 357.
[723] Christian Walter, 'Subjects of International Law' (May 2007) *Max Planck Encyclopedia of Public International Law*.
[724] See, e.g., Matthew Craven, 'Chapter 8. Statehood, Self-determination and Recognition' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 3rd edn, 2010) 203: 'The proposition that international law is largely concerned with States – what they do and how they behave in relation to one another – has long been one of the most axiomatic features of international legal thought'; Louis Henkin, *International Law: Politics, Values and Functions* (Brill 1989) 21: 'International law is the normative expression of the international polity which has States as its basic constituent entities'; Malcolm N. Shaw, *International Law* (Cambridge University Press, 6th edn, 2008) 1: 'the principal subjects of international law are nation-states, not individual citizens'.
[725] See, e.g., Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Bloomsbury 2017).

and equal. International law is the body of law to which states consented. So, there is an obvious tension between the space of self-governance created by communities of commoners and the state-centric nature of international law.

To frame this dissension between the subjects of the commons and international law, I use the distinction between 'bottom-up' and 'top-down' approaches in international law. As Janet Koven Levit wrote in her seminal article in the *Yale Journal of International Law*, the 'traditional, *top-down* international lawmaking story tells of state actors making international law and imposing it on others who may have been quite removed, geographically and politically, from the entire lawmaking process', whereas 'in the *bottom-up* approach, the practices and behaviors of various actors inform and constitute the rules, which, in turn, govern the practices and behaviors of those very same actors'.[726] Balakrishnan Rajagopal, the author of *International Law from Below*, similarly observed that '[t]here are two ways of seeing and interpreting international legal transformation – *from above* as most lawyers do when they focus on formal sources, judicial opinion, and treaties exclusively – or *from below* when we focus on the lived experience of ordinary people with international law when they […] frame their demands in international legal terms'.[727] Even more fittingly, Terry L. Anderson and J. Bishop Grewell distinguished between '*top-down*' property rights created under international law and '*bottom-up*' customary and shared common property rights defined over time by communities themselves.[728] Commons scholars Fritjof Capra and Ugo Mattei use the same terms to express their mistrust of the top-down international legal system in their book *The Ecology of Law*:

> A global, top-down, eco-friendly enforcement system at this point is impossible to conceive of. It would be ineffective because powerful policy-makers and their allied corporate lawyers have global jurisdiction and are bound to uphold the existing system. Consequently, seeking the use of 'top-down' international law to protect the commons is like trying to employ a fox to protect a chicken house.[729]

What hides behind these terms when it comes to talking about subjects of the commons and international law? This subsection first seeks to demonstrate that the traditional framework of international law has been centred on state sovereignty and, as such, has failed to understand and recognize alternative forms of self-governance such as the commons (1.4.1). It then details

[726] Janet Koven Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 *Yale Journal of International Law* 125, 126-127.
[727] Rajagopal, *supra* n 63, xiii (emphasis added).
[728] Terry L. Anderson and J. Bishop Grewell, 'Property Rights Solutions for the Global Commons: Bottom-up or Top-down?' (1999) 10(1) *Duke Environmental Law & Policy Forum* 73.
[729] Capra & Mattei, *supra* n 22, 159.

the theoretical and practical challenges that commons from below may involve in international law (1.4.2). Finally, by resorting to the popular concept of GPGs recently adopted by a growing number of international development agencies, this subsection shows how international legal scholarship is primarily concerned with output efficiency and top-down global regulation, rather than informal norms developed autonomously from below (1.4.3).

### 2.2.1. Top-down international law

Since the 17th century and the Peace of Westphalia (1648), state sovereignty (*imperium*) and private property (*dominium*) are viewed as the two foundational structures of (capitalist) development in international law.[730] In 1789, Jeremy Bentham defined international law as the law related to 'the mutual transactions between sovereigns as such'.[731] The growth of positivist theories in the 18th and 19th centuries transformed the law of nations (*ius gentium*) into 'public' versus 'private' international law. Whereas the former was deemed to apply to sovereign states exclusively, the latter was understood to cover a limited set of rules and procedures regulating relations between domestic systems of private law. This basic dichotomy under international law underlines the importance of the two foundational myths of Western social contract theory: the 'Leviathan' by Thomas Hobbes (1588-1679), that is the rule by an absolute sovereign to avoid the 'war of all against all', and the institution of individual and exclusive property by John Locke (1632-1704). Both institutions asymmetrically concentrate all power in the hands of a single agency.

For positivists, international law knows of no other *dominium* beyond the state and private property. The two components are central to the enterprise of development. As David Stewart explains, 'states with little or no experience in private international law matters, and those that lack the necessary legal infrastructure to participate actively and effectively in the globalized economy, tend to be severely disadvantaged in international trade, investment, and capital markets'.[732] In this sense, private international law is viewed as 'an important – even essential – tool of international economic development and progress.'[733] As Martti Koskenniemi concludes, the distinction between public power (in the form of conquest and settlement) and

[730] Mattei & Quarta, *supra* n 72, 18.
[731] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Hart 1970) 296.
[732] David P. Stewart, 'Private International Law, the Rule of Law, and Economic Development' (2011) 56 *Villanova Law Review* 607, 611.
[733] ibid.

private power (in the form of free trade through private corporations) essentially comes down to the same enterprise of imperialism:

> There is no doubt on which side imperialism has gained its greatest victories: since decolonization, Western domination of the 'people without history' has returned to its classical mainstay, informal empire, the creation of wealth and influence and the distribution of material and spiritual resources through the exercise of private power. Today's *ius gentium* continues to be divided into the law of treaties, on the one side, and the law of contract, on the other. There is no doubt on which side the most significant aspect of *dominium* – that is, the power of human beings over other human beings – is exercised.[734]

The division of the world of international law into two separate areas of public and private concern indeed drastically circumscribes other possible options, for example as those developed by 'people without history', such as alternative forms of self-governance. More specifically, the binary choice between 'the intrusive hand of the State' and the 'invisible hand of the market' omits a third party that has however been present in Europe's history until the 18th century and elsewhere until now: the institution of the commons.[735] The omission is intentional. Whether power is controlled solely by the sovereign state – as used to be the case in the Soviet Union, or shared with private owners, it has at its core the eradication of the commons as archaic forms of customary governance, representing a hurdle to development and modernization.

To be more precise European states, not sovereign states in general, are the cornerstone of the evolution of the Westphalian system. For too long, international law considered essential, to be recognized as a sovereign state, a certain level of 'civilization' imposed also on native peoples and other forms of social organization. This could still be seen at the end of World War I in the Mandate System of the League of Nations. Article 22(1)-(3) of the Covenant of the League of Nations provided for an infantilizing tutelage system for the colonies of the defeated powers:

> 1. To those colonies and territories which as a consequence of the late war have ceased to be *under the sovereignty* of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> 2. The best method of giving practical effect to this principle is that the *tutelage of such peoples* should be entrusted to advanced nations who by reason of their resources, their experience or their geographical

[734] Koskenniemi, *supra* n 557, 32.
[735] Gutwirth & Stengers, *supra* n 298, 312.

> position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> 3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.[736]

The principle of 'sacred trust of civilisation' is reminiscent of the aforementioned General Act of the Berlin Conference of 1885, which also promised to 'care for the improvement of the conditions of [the native tribes'] moral and material well-being'.[737] Regardless of the move from imperialism to a more nuanced and humanitarian language, the effect was still the same: to exclude 'uncivilized' tribes and keep non-Western forms of governance, such as communal forms of social organization, out of the realm of international law.[738] In this sense, the very idea of civilization and development amounted to the subjugation of the communal way of life of native tribes to the exploitation of nature of the West.[739] Think of the decision by the British-American arbitration tribunal in 1926 in the *Cayuga Indians* case, which asserted that the Cayuga Nation had no legal status whatsoever under international law.[740] In other words, there was no place for the bottom-up recognition of native communities of commoners; only for the top-down 'tutelage of such peoples' by Western states on behalf of the League. After World War II, the tutelage system was replaced with the United Nations 'International Trusteeship System'.[741] Since the independence of Palau in 1994, all mandated and trusteeship territories have either become independent states or joined other states.

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[736] Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 13 *American Journal of International Law Supp*. 128 (emphasis added).
[737] Act of the Berlin Conference, *supra* n 626, para. 35.
[738] Rajagopal, *supra* n 63, 56.
[739] De Schutter, *supra* n 21, 231-265.
[740] *Cayuga Indians (Great Britain) v. United States (Awards)* (22 January 1926) VI *Reports of International Arbitral Awards* 173, 176: 'Such a tribe is not a legal unit of international law. The American Indians have never been so regarded. […] From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. […] The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by disovery have been held exclusive. […] So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.'
[741] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapters XII and XIII.

Today, even if other entities such as international governmental organizations,[742] individuals[743] and even multinational enterprises[744] or NGOs[745] are accepted as capable of possessing certain international rights and duties, nation-states still dominate the international legal system as subjects having exclusive autonomy over their territories. Such non-state actors 'derive their subjectivity from states and are dependent on their recognition'.[746] Even the UN Friendly Relations Declaration of 1970, which formulated the groundbreaking principle of self-determination and core demands of self-government and racial equality stated that the rights of 'peoples' shall not be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples […] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[747] Even the governance of global commons was historically crafted by (European) states – without small-scale communities of commoners in mind. The Brundtland report (1987) stated that 'sustainable development can be secured *only through international cooperation* and agreed regimes for surveillance, development, and management in the common interest' and that

[742] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *supra* n 49, p. 75: 'the constituent instruments of international organizations are also treaties of a particular type; their object is to create *new subjects of law* endowed with a certain autonomy, to which the parties entrust the task of realizing common goals' (emphasis added).

[743] See, e.g., Article 304(b) of the Treaty of Versailles: 'all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between *nationals* of the Allied and Associated Powers and German nationals shall be decided by the Mixed Arbitral Tribunal' (emphasis added), in Treaty of Peace with Germany (adopted on 28 June 1919, entered into force 10 January 1920) 225 CTS 188. The expansion of individual rights in international law has mainly occurred in the field of human rights law: see, e.g., Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted on 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('ECHR'): 'The Court may receive applications from *any person,* [NGO] *or group of individuals* claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto' (emphasis added).

[744] See, in the field of human rights law, e.g., Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) 213 UNTS 262: 'Every natural or *legal person* is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law' (emphasis added).

[745] See, e.g. Article 71 of the UN Charter, *supra* n 741: 'The Economic and Social Council may make suitable arrangements for consultation with *[NGO]* which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned' (emphasis added).

[746] Jan Wouters and Anna-Luise Chané, 'Multinational Corporations in International Law', Working Paper No. 129 (December 2013) <https://lirias.kuleuven.be/retrieve/433606> (accessed 8 August 2019) 6.

[747] UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc. GA Res 2625 (XXV).

'without agreed, equitable, and enforceable rules governing the rights and duties *of states* in respect of the global commons, the pressure of demands on finite resources [would] destroy their ecological integrity over time'.[748] This is to say that global commons are to be managed from the top (and not from below). Reminding us of Hardin, two economists argued that '[w]here competition for resources can create a tragedy of global commons, the top-down creation of property rights [under international law] may be necessary.'[749] More recently, with regard to indigenous peoples, sovereign states took care to specify in Article 1(3) of the Indigenous and Tribal Peoples Convention No. 169 that '[t]he use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to term under international law'.[750] In short, international law, even in its most recent and cosmopolitan forms, still falls short of providing a viable framework for formally recognizing the commons. At best, the issue in question is considered purely domestic ('*domaine réservé*').[751]

Now, having outlined the centrality of state sovereignty, this conventional vision of international subjectivity should be nuanced as an increasing number of international legal scholars today conceive its process and effective exercise as a more complex and dynamic set of social relations including local, subaltern, non-state actors. According to McCreary and Lamb, sovereignty should not be represented as 'coherent and bounded', since 'this process enrols and engages multiple actors in authorizing the sovereign to speak on behalf of nature and people'.[752] The state itself is not a monolithic block; it should not be reified as an absolute and coherent authority independent from its complex process of relationships involving a plural political and civil society. What if commons were in effect 'co-producers' of sovereignty as trustees of lands and other natural resources?[753] Malcolm Shaw has described the theory of legal personality as 'of limited value'.[754] Rosalyn Higgins similarly rejected the distinction, which positivists used to make, between subjects and objects of international law, famously calling it

[748] Brundtland Report, *supra* n 548, Chapter 10.
[749] Anderson & Grewell, *supra* n 728.
[750] ILO Convention No 169, *supra* n 180.
[751] That is 'the areas of State activity that are internal or domestic affairs of a State and are therefore within its domestic jurisdiction or competence'. See Katja S. Ziegler, 'Domaine Réservé' (April 2013) *Max Planck Encyclopedia of Public International Law*.
[752] Tyler McCreary and Vanessa Lamb, 'A Political Ecology of Sovereignty in Practice and on the Map: The Technicalities of Law, Participatory Mapping, and Environmental Governance' (2014) 27 *Leiden Journal of International Law* 595, 597 and 618.
[753] ibid., 616.
[754] Shaw, *supra* n 724, 258.

'an intellectual prison of our own choosing'.[755] In her view, international law-making is a dynamic process and involves a wide diversity of 'participants'.[756] When international law is viewed as a process, it becomes clear that many actors, including local communities, may interact together to produce new legal instruments.

Notwithstanding this more flexible school of international law as a process, it should be admitted that international lawyers have mainly been studying the new roles as non-state actors of 'international organizations',[757] 'multinational corporations',[758] 'the individual',[759] 'regulating agencies',[760] but never the commons. Why then is the role of commons still largely ignored by international lawyers, even as mere 'participants' of the international legal system? Balakrishnan Rajagopal, the author of *International Law from Below*, outlined at least three barriers in international legal scholarship that 'prevent a real engagement' with local social movements resisting against international economic institutions in the Third World – other than through states or private individuals.[761] First, as a result of professional training and disciplinary tradition, international lawyers tend to focus on texts entirely decontextualized and published by statist institutions, which prevents the inclusion of 'texts of resistance' (including 'illegal interpretive acts') of mass action and other laypeople (juro-centric approach).[762] Second, whereas social movements emphasize extra-institutional forms of resistance, scholars remain focused on narrowly defined institutional practices like legislation and case-law (institutionalist bias).[763] Third, legal scholars assume that their theories and general conceptions of the law already accommodate the role of subaltern communities. So they tend to ignore the contributions of the voiceless/powerless masses like peasants or indigenous peoples to account for their interests (elitist bias).[764] Even though Rajagopal mainly focuses on mass actions of

[755] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 49-50.
[756] ibid.
[757] See, e.g., A. A. Cançado Trindade, 'Chapter VIII. International Organizations As Subjects Of International Law' in *International Law for Humankind. Towards a New* Jus Gentium (Brill 2010) 181.
[758] See, e.g., Karsten Nowrot, 'Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?' (2011) 18(2) *Indiana Journal of Global Legal Studies* 803.
[759] See, e.g., Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21(1) *European Journal of International Law* 25.
[760] See, e.g., the global administrative law (GAL) project at NYU Law School: Benedict Kingsbury, Nico Krisch and Richard Steward, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15.
[761] Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance' (2003) 41 *Colombia Journal of Transnational Law* 397.
[762] ibid., 402.
[763] ibid., 405-6.
[764] ibid., 403-4.

resistance, and not institutions of self-governance (as I do here),[765] his analysis may help explain why commons remain a blind spot in international legal scholarship. His conclusion is also interesting: Rajagopal claims that '[i]nternational law needs to de-center itself from the unitary conception of the political sphere on which it is based, which takes the state [(as realists/positivists do)] or the individual [(as liberals/naturalists do)] as the principal political actor.'[766]

### 2.2.2. Bottom-up commons

Existing commons-based institutions challenge international law from the bottom up on at least three counts. Commons indeed share three characteristics of democratic self-governance that set them apart from the classic tenets of international law: polycentricity, horizontal subsidiarity and informality. First, as it is clear from the start of this thesis (see, *supra*, Chapter 1, Section 1.4), instead of a top-down, vertical process of decision-making, commons bring about a 'polycentric' model of governance. Polycentricity was first defined by Vincent Ostrom, Charles Tiebout, and Robert Warren in 1961 as 'many centers of decision-making which are formally independent of each other' but which 'may function in a coherent manner with consistent and predictable patterns of interacting behavior'.[767] By disavowing the traditional public-private ownership dichotomy, commons tend to dilute the central authority of sovereign states in managing collective resources over a multitude of autonomous and interdependent centres of decision. Ostrom has focused on local empowerment of small-scale communities (50 to 15.000 people) who depend on shared resources for their livelihood.[768] Departing from this microsituational level of study, commons legal scholars Saki Bailey and Ugo Mattei have framed the commons as emerging constituent powers from below. According to them, 'the global commons movement [is] engaged in a form of bottom-up constitutionalism [and] an emerging form of *pouvoir constituant* in a supranational constituent process of reclaiming commons from predatory multinational actors through bottom-up societal constitutionalism.'[769] As the French philosopher Pierre Dardot states, 'whereas the logic of the commons is fundamentally plural, polymorphic, non-centred in nature, the logic of state sovereignty as it

[765] It should be noted that Saiki Bailey and Ugo Mattei locate the commons within the wave of 'antiglobalization' social movements 'characterized as the struggle of local communities to reclaim access and governance to common resources from collusive state and market actors'. Bailey & Mattei, *supra* n 64, 977.
[766] ibid., 401.
[767] Ostrom, Tiebout & Warren, *supra* n 251, 831.
[768] Ostrom, *supra* n 8, 26.
[769] Bailey & Mattei, *supra* n 64, 966.

was constructed in the West is intrinsically linked to an indivisible and absolute centre of power'.[770] In this sense, commons represent a 'counter-hegemonic' phenomenon – in the sense of confronting the dominant powers, forces and institutions of development and international law too.[771] By resisting against the centrality of sovereign states, commons generate an alternative discourse and practice of horizontal self-governance and empowerment. In reasserting collective rights to govern the resources upon which the lives of so many communities in the Global South depend, they defy the supremacy of sovereign nation states and the 'paternalistic' approach that characterized older principles of international law.[772] Following this polycentric approach, the recognition of the commons under international law would have the potential to rearticulate territorial sovereignty from below in making many local centres of decision-making function in a coherent, interdependent and collaborative manner.

Second, commons governance challenges the so-called 'top-down economic constitutionalism'[773] of states and development agencies, such as the World Bank. As Saky Bailey and Ugo Mattei again write, communities engaged in self-governance of lands and other natural resources in the Global South are questioning not only the sovereignty of states, 'but the very concept of development as the domain of the state, and instead compelling recognition of local ownership and communal forms of property'.[774] This contested idea that the state represents the only legitimate form of exercise of power, in democratic terms and as a necessary condition for economic development, is hardly new. It refers to the model of the 'developmental state' originating from the work of John Maynard Keynes (1883-1946) who suggested that during recessions, governments should intervene (through public spending) to increase the demand for products, services and employment.[775] The developmental state approach was particularly influential until the late 1970s among international political economy scholars.[776]

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[770] Dardot, *supra* n 92, 35.
[771] See, Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (Lawrence & Wishart 1971) 12. See also, Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17(3) *Journal of Law and Society* 309.
[772] See, e.g., Evan Fox-Decent and Ian Dahlman, 'Sovereignty as Trusteeship and Indigenous Peoples' (2015) 16 *Theoretical Inquiries in Law* 507.
[773] ibid., 965.
[774] ibid., 978.
[775] See, John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Macmillan London 1936).
[776] See, e.g., Alexander Gerschenkron, *Economic Backwardness in Historical Perspective: A Book of Essays* (The Belknap Press of Harvard University Press 1962); Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford University Press 1982); Paul N. Rosenstein-Rodan, 'Problems of Industrialization of Eastern and South-Eastern Europe' (1943) 53(210/211) *The Economic Journal* 202; Tibor Scitovsky, 'Two Concepts of External Economies' (1954) 62(2) *Journal of Political Economy* 143.

In this approach, the central state bureaucracy is vertically in full control over collective resources; the international community provides large amounts of ODA to support developing countries in their active regulation and planning of the economy. The critique of the 'developmental state', in turn, originates from the Indian political scientist and anthropologist Partha Chatterjee, who denounced the reduction of citizens of the Global South to mere 'consumers of modernity' rather than its producers.[777] Nowadays, not only does commons governance challenge this developmental state ideology, but it also builds – in theory and practice – more horizontal and inclusive models of resource management. The international legal recognition of commons could force states to lose their monopoly over CPRs and develop alternative conceptions of use and access to collective assets. Empowering and engaging commons in international law would mean that local resource users, including the poor and most vulnerable, become able to participate not only in the decision-making process of development but also in taking direct care of the resources upon which they depend the most for the long term. From being governed, resource users would become resource managers governing crucial assets for their livelihood. In other words, powers should be shared with, and assigned to the lowest practicable level of resource management. Sheila R. Foster and Christian Iaone coined the term of 'horizontal subsidiarity' as 'democratic design principle' for such 'bottom-up strategies' that conceptualize 'the citizen as an active citizen and [encourage] local officials to put in place appropriate public policies that foster the activation and empowerment of citizens in managing and caring for shared resources'.[778]

Third, whereas international lawyers 'remain committed to highly formalistic and statists analysis of the international order',[779] commons rule themselves with *ad hoc* rules, outside of formal sources, structures and processes of (international) law.[780] Informality and the ensuing inability of public authorities to effectively enforce informal rights of use and access often make natural resources managed as commons vulnerable and 'up for grabs' to private appropriators. From a strictly legal perspective, informal rules of management often amount to an unregulated

[777] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton University Press 1993) 202.
[778] Foster & Iaone, *supra* n 70, 327.
[779] Rajagopal, *supra* n 761, 429.
[780] Weston & Bollier, *supra* n 21, xx: 'A commons is generally governed by what we call *Vernacular Law*, the "unofficial" norms, institutions, and procedures that a peer community devises to manage its resources on its own, and typically democratically. State law and action may set the parameters within which Vernacular Law operates, but the State does not directly control how a given commons is organized and managed.' See, in the urban context of informal settlements in poor countries, Sheila R. Foster, 'Urban Informality as a Commons Dilemma' (2009) 40(2) *The University of Miami Inter-American Law Review* 261.

state *à la* Hardin. The question hence becomes: how to constrain individual predators from consuming the resource in question absent a robust system of private property right or a central government capable of regulating its use? Ostrom found that many local communities had effectively succeeded in constraining individual behaviours through informal mechanisms of reciprocity – that is, through norms which diverge from those of the domestic legal ordering. As so many other field studies of the institutional school have shown, these 'informal' rules can be enforced by the community itself, notably through graduated sanctions, and they mostly remain customary by nature. In this sense, commons may also seem to represent a threat to the universality of international law: 'it is the localized and contextual nature of the commons which presents a tremendous challenge for unity as global constituency united against top-down economic constitutionalism; but this very fragmentation may catalyse a truly open deliberative process that provides a natural limit to the possibly destructive tendencies of each site of societal constitutionalism.'[781] Commons-based initiatives represent, in this sense, democratic innovations and challenges for how we use, manage and distribute common assets at the international level.

It should be noted that the recognition of commons-based institutions should not be understood as a rejection of international law. Nor are commons pursuing absolute authority over lands, forests, waters and natural resources. In fact, it would be mistaken to affirm that commons (ultimately) aspire to 'replace' sovereign states in taking over the responsibility to provide basic public goods and services. Commons do not repudiate state power; they are not anti-sovereign per se. Rather, commons more generally seek to reorient the management of collective resources to local levels of self-governance, but also to work with the state in a collaborative and polycentric fashion. As Ostrom's seventh design principle already clarified, commons often try to obtain public recognition to make self-governance practices more sustainable over the long term. Reformist commons advocates talk more and more of a transformation from a 'Leviathan state' to a 'facilitator', 'enabling', 'facilitating' or 'relational' state ('*l'État partenaire*').[782] What commoners are truly seeking is autonomy 'from the logic of private

[781] Bailey & Mattei, *supra* n 64, 1012.
[782] Samuel Cogolati and Jonathan Piron, 'Vers des Partenariats Publics-Communs' (25 June 2017) Etopia, <https://etopia.be/vers-des-partenariats-publics-communs/> (accessed 26 Decembre 2019); Foster & Iaone, *supra* n 70, 289-290 and 335; R. Quentin Grafton, 'Governance of the commons: A role for the state?' (2000) 76(4) *Land Economics* 504; see also, Geoff Mulgan, 'Government *with* the people: the outlines of a relational state' in Graeme Cooke and Rick Muir (eds), *The Relational State: How Recognising the Importance of Human Relationships Could Revolutionise the Role of the State* (Institute for Public Policy Research 2012) 20-34.

property' to develop 'alternative institutions of governance' outside of the public/private dichotomy.[783] In this sense, international law and institutions may provide important arenas to protect the resources upon which communities depend in the Global South. As we will see in Chapter 3, communities of peasants have already resorted to international law as a new political space of contestation against the enclosure of natural commons. With its encounter of new forms of horizontal and polycentric self-governance, international law may potentially transform from the bottom-up, reorient nation-states away from a monocentric position over the vertical management of shared natural resources, and empower affected communities as co-deciders about CPR access and distribution. In its turn, international law would then facilitate or enable the coordination of various autonomous centres of decision-making over shared natural resources.

### 2.2.3. Top-down global public goods in international law[784]

Both the commons and international law have different subjects of attention for the process of development itself. While the commons focus on communities' experiences and own efforts, the narrative of international law calls for more effective international cooperation and collective action on a global scale. This is illustrated in the recent call of some international legal scholars for accelerating the supply of GPGs for development (see *supra*, Introduction, Section 6.4). For instance, Bodansky argues that, '[s]ince GPGs cannot be adequately produced by the market, we need international institutions and international law to provide them'.[785] Likewise, Trachtman contends that international law 'comprises a kind of rudimentary government' to provide GPGs,[786] whereas Shaffer affirms that international law 'is required to produce global goods'.[787]

However, the vast majority of legal scholars writing on the topic argue that international law as it currently stands, with its cardinal principles of state sovereignty and state consent, constitutes a hindrance to the effective provision of GPGs. Shaffer, for example, warns that international law could 'potentially impede [the] dynamic processes that are needed to address GPGs

[783] Bailey & Mattei, *supra* n 64, 878-9.
[784] This subsection draws on Cogolati, Hamid & Vanstappen, *supra* n 108; Cogolati, *supra* n 165.
[785] Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law and Legitimacy' (2012) 23(3) *European Journal of International Law* 651, 652.
[786] Joel P. Trachtman, *The Future of International Law: Global Government* (Cambridge University Press 2013) 7-9 and 68.
[787] Gregory Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23(3) *European Journal of International Law* 669, 670-671.

challenges',[788] while Nico Krisch asserts that 'classical international law' is inadequate in providing proper solutions to the challenges posed by the provision of GPGs.[789] Similarly, Trachtman argues that, '[i]n the international system, based as it is on individual state consent, it may be tougher to make rules that would bind free-riders'.[790] In this sense, Petersmann too concludes that, to limit the participation problem, one would need 'rights-based rules, institutions and governance mechanisms that go beyond those of "Westphalian intergovernmentalism"'.[791] Essentially, most legal scholars argue that international law *de lege lata*, i.e. organized along Westphalian lines, is ill-suited to the provision of GPGs as it lacks coercive mechanisms, but equally contend that international legal rules and institutions are crucial to establish exactly those coercive mechanisms which are currently missing. To adequately provide GPGs, a major overhaul of the international legal system would thus be required.

This fairly radical critique of the current international legal system finds its origin in older publications on GPGs. The International Task Force on GPGs opened its final report by highlighting this exact issue, namely that the principles of state sovereignty and state consent are a major obstacle for the effective provision of GPGs and the 'basic problem [that] underlies all others'.[792] In the same vein, the economist William Nordhaus emphasizes that, 'under international law […], there is no legal mechanism by which disinterested majorities, or supermajorities short of unanimities, can coerce reluctant free-riding countries into mechanisms that provide for GPGs'.[793] In his view, international law should 'come to grips with the fact that national sovereignty cannot deal with critical GPGs'.[794]

It is no surprise that the classical view on international law is increasingly rejected by the GPG literature. The prisoner's dilemma on which the GPGs theory is based[795] outlines a situation

[788] ibid. 671.
[789] Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *American Journal of International law* 1.
[790] Trachtman, *supra* n 786, 154.
[791] Ernst-Ulrich Petersmann, 'Introduction and Overview: Lack of Adequate Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century?' in Ernst-Ulrich Petersmann (ed.), *Multilevel Governance of Interdependent Public Goods Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, EUI Working Paper RSCAS 2012/23, 46, <https://cadmus.eui.eu/bitstream/handle/1814/22275/RSCAS_2012_23final.pdf?sequence=2&isAllowed=y> (accessed 13 April 2020).
[792] International Task Force on Global Public Goods, *supra* n 132, xi.
[793] William D. Nordhaus, 'Paul Samuelson and Global Public Goods' (5 May 2005) <http://www.econ.yale.edu/~nordhaus/homepage/PASandGPG.pdf> (accessed 19 January 2016) 7.
[794] ibid., 8.
[795] See Kaul, Grunberg and Stern, *supra* n 107, 7.

whereby two prisoners are unable to communicate and therefore act solely in function of their rational self-interest. As a result, both prisoners confess, and each serves more years in prison than they would have if they had established a common strategy. Much like the individuals in the prisoners' dilemma, it is expected that sovereign states acting in total independence will defect from cooperation unless coercive mechanisms are introduced.[796] This analogy highlights that, in order to coerce free-rider states, we need to transpose certain domestic coercive strategies at the global level.[797] For instance, the Report of the High-level Panel on Financing for Development has proposed that the supply of GPGs be financed through global taxation.[798] For some legal scholars, the solution to this inextricable dilemma is to impose interstate cooperation by 'design[ing] punishments that are sufficient to induce compliance'.[799] Nico Krisch equally argues that the effective supply of GPGs calls for a 'turn to non-consensual law-making mechanisms, especially through powerful international institutions with majoritarian voting rules'.[800] In the models promoted by these authors, decisions on GPGs appear to be legitimized through the effectiveness of the output.

In sum, the concerns of international legal scholars adopting a GPGs lens to development seem quite remote from those of small-scale traditional commons. Indeed, a GPGs analysis of development seems to bring less attention for political, cultural and social contexts, norms or values at the local level. The focus here lies on the outside support to produce GPGs on a planetary or regional scale; the main actors are development agencies; GPGs are produced from above by coordinated international action, for example by establishing global taxation. Even though the UNDP publications on GPGs allude to the need for more participation of all stakeholders, they assume that international cooperation between states, development actors, civil society and even businesses is best suited to provide and distribute public goods. International cooperation could then 'somehow' infer the citizens' preferences, but the UNDP publications fail to discuss exactly *how* (i.e. through which processes) GPGs can be defined in the absence of world democracy. As Walker explains, '[t]he discourse on [GPGs] presupposes rather than provides grounds for the relevant 'public', and so suffers from a general deficit of

[796] ibid., 8.
[797] François Constantin, 'Les biens publics mondiaux, un imaginaire pour quelle mondialisation?', in François Constantin (ed.), *Les biens publics mondiaux: Un mythe légitimateur pour l'action collective ?* (L'Harmattan 2002) 81.
[798] See UNGA, 'Recommendations of the High-level Panel on Financing for Development' (26 June 2001) UN Doc. A/55/1000, 9.
[799] Trachtman, *supra* n 786, 161.
[800] Krisch, *supra* n 789, 1.

political authority'.[801] Contrary to the commons where the 'public' is clearly defined (and even limited), the GPGs discourse does not call into question the way we do development and is not really concerned with the way development actors convey peoples' preferences. The Task Force on GPGs only mentioned in that regard that GPGs are 'defined through a broad international consensus or a legitimate process of decision-making'.[802] The World Bank observed the same 'international consensus for action' in its reports on GPG,[803] but the question of what goods should be provided publicly in the first place, as well as the procedure underlying such decisions, have been left largely unexplored.[804] The process of defining which goods to produce and how to distribute them equitably among all people around the world does not appear as the core concern of academics and policy-makers writing on GPGs challenges. The risk is that a development process solely based on GPGs results considers people as passive beneficiaries and consumers of GPGs and does not empower communities as self-organizers. Indeed, it is not all clear how the international regimes for peace, security, climate change or international financial stability, which are devised in the three UNDP studies, 'bring the poor into the calculus'.[805] Langford therefore explicitly asks whether such regimes 'risk depriving some people living in poverty and minority and indigenous peoples of their rights in order to obtain global meta goals'.[806]

### 2.3. Generative commons versus extractive international law

We now come to the third and last tension between international law and the practice of commoning: the concrete activity of preserving a CPR in the long term through collective action and according to *ad hoc* rules. To this end, I draw in this Section upon the distinction which commons scholars often make between 'generative' and 'extractive' ownership.[807] In *Owning*

[801] Neil Walker, 'Human Rights and Public Goods: The Sound of One Hand Clapping' (2016) 23(1) *Indiana Journal of Global Legal Studies* 249, 251.
[802] International Task Force on Global Public Goods, *supra* n 132, 27.
[803] Development Committee, *supra* n 149, 4.
[804] International Task Force on Global Public Goods, *supra* n 132, 27.
[805] Malcolm Langford, 'Keeping Up with the Fashion: Human Rights and Global Public Goods' (2009) 16(1) *International Journal on Minority and Group Rights* 165, 177.
[806] ibid.
[807] See, e.g., David Bollier and Silke Helfrich, *Free, Fair and Alive: the Insurgent Power of the Commons* (New Society Publishers 2019) 74; Gutwirth & Stengers, *supra* n 298, note 97: 'Génératif définit de manière transversale une capacité de faire naitre, faire émerger, engendrer, à distinguer d'une reproduction du même par le même ou d'une fabrication dont un agent intentionnel serait responsable. Le terme rejoint le sens ancien de *phusis* – la nature comme ayant le pouvoir de croitre et de s'épanouir. Mais les sciences contemporaines associent plutôt générativité et couplage dynamique entre processus faisant émerger des propriétés nouvelles irréductibles à celles des processus qui y participent.'; Mattei & Quarta, *supra* n 18, 68; Capra & Mattei, *supra* n 22, 145-146.

*Our Future*, business journalist Marjorie Kelly calls the dominant ownership model of capitalism or communism (either based on private or state ownership) *extractive*, 'for its focus is maximum physical and financial extraction'.[808] *Generative* ownership, by contrast, has the purpose of generating the institutional conditions where life and nature can flourish – it is 'socially fair and ecologically responsible'.[809] The real economy is in the hands of, *inter alia*, communities who help generate, preserve and share CPRs. Kelly herself identifies Ostrom's 'commons ownership and governance' where 'assets are held or governed in common' by a community as one of the broad categories of generative ownership design ('a *social ecosystem* of generative design').[810]

The table below (figure 4) summarizes the key differences between the two ownership models along five 'design patterns' ('The Architecture of Ownership').[811]

| Extractive ownership | Generative ownership |
|---|---|
| *Financial Purpose:* maximizing profits in the short term | *Living Purpose:* creating the conditions for life over the long term |
| *Absentee Membership:* owners are disconnected from the life of enterprise | *Rooted Membership:* ownership is held in human hands |
| *Governance by Markets:* control is in the hands of capital markets on autopilot | *Mission-Controlled Governance*: control by those focused on social mission |
| *Casino Finance:* extractive investments and capital as master | *Stakeholder Finance:* capital becomes a friend rather than a master |
| *Commodity Networks*: goods are traded based solely on price and profits | *Ethical Networks:* collective support for social and ecological norms |

**Figure 4 – Extractive vs. generative ownership**

According to Kelly, the *law* plays a role 'in the background to help bring this economy into existence and hold in place'.[812] Legal scholars embracing the commons as a new paradigm similarly tend to view classic legal institutions such as property, contracts, torts and legal personhood 'from their development as basic institutions of capitalist *extraction*' and have sought to reinterpret them 'as *generative* institutions of ecological private law.'[813] To put it in the words of Fritjof Capra and Ugo Mattei in *The Ecology of Law*, whereas '[a] generative ecological law will support this economy, a network from the local to the global', 'the official extractive legal system will fight it through the use of mechanistic law as organized violence'.[814] Building upon this division, Serge Gutwirth and Isabelle Stengers have argued that an extractive

[808] Marjorie Kelly, *Owning Our Future. The Emerging Ownership Revolution* (Berrett-Koehler 2012) 11.
[809] ibid.
[810] ibid., 134 (original emphasis) and 141.
[811] ibid., 14 and 18.
[812] ibid., 134.
[813] Mattei & Quarta, *supra* n 72, 4 (emphasis added).
[814] Capra & Mattei, *supra* n 22, 145.

system of law is indeed tantamount to the destruction of the commons, for the definition of what is legal or not in a commons cannot be processed according to 'formal' or 'generalized' legal constraints, but depends upon the practical demands of the specific context and the interdependent stakeholders involved: 'the commons require an "earthly" law, that is able to address the way in which they entangle practices, sensitivities, modes of cooperation, customs in close interdependency. A law to come, that is inductive, topical, instead of a given and abstract, axiomatic and deductive law: a law which would favour case-law and practices as sources, more than legislation or/and "scholarship"'.[815]

What kind of 'supportive institutions and rules',[816] then, could we find in *international law* to help the commons flourish and generate? Drawing upon Kelly's distinction, I would like to argue that the foundational principles of international law historically focus on extraction and exploitation of natural resources for economic development purposes, rather than their conservation and flourishing. International law basically encourages the process of extraction of the socio-ecological resources from the commons to the capital. The extractive model of international law and its exploitation of natural resources is synonymous of eradication of the commons. At the very least, conservation only features as a secondary concern, when overexploitation of natural resources could jeopardize the end goal of economic development. But beyond this secondary need for sustainable development, it is hard to discern in international law a fundamental interest to generate ecological commons according to other criteria than supply and demand.[817] To paraphrase Kelly again, whereas the 'generative' practice of the commons aims at creating the conditions for the sustainable preservation of natural resources over the long term, the 'extractive' approach of international law aims at maximizing profits in the short term and is disconnected from communities and nature.

[815] Gutwirth & Stengers, *supra* n 298, 335-336: 'les *commons* réclament un droit « terrestre », capable de s'adresser à la manière dont ils intriquent des pratiques, des sensibilités, des modes de coopération, des coutumes en interdépendance étroite. Un droit en devenir, inductif, topique, plutôt qu'un droit posé et abstrait, axiomatique et déductif : un droit qui favoriserait jurisprudence et pratiques comme sources, que plus que la loi ou/et la "doctrine"' (free translation).
[816] Kelly, *supra* n 808, 134.
[817] Bollier, *supra* n 279, 33.

### 2.3.1. Extractive international law

#### 2.3.1.1. Origins

Since its origins in the 16th century, echoing the early process of economic development described in Chapter 2, the discipline of international law seems to have been structurally biased towards the appropriation and enclosure of natural 'assets' to foster wealth accumulation. Critical legal scholars have already shown how international law served as the 'bulwark' for this extractive model of economy.[818] At the root of the depletion of the commons would be a mechanistic and anthropocentric (see, *supra*, Chapter 1, Section 1.5.) international legal system inherited from the Age of Exploration.[819] So, not only would international law not help in protecting the commons, but their enclosure would be at the very core of the genealogy of international law. Usha Natarajan and Kishan Khoday have shown that '[t]hrough particular disciplinary conceptualizations of sovereignty, development, property, economy, human rights, and other central disciplinary tenets, international lawyers have helped normalize a worldview where nature is understood predominantly as a natural resource, where humanity is at the centre of the environment and privileged above all else, where progress is defined by our degree of control over nature, and where this capacity to control is believed to be limitless'.[820] As we shall see below, it is the quest for the economic benefits arising out of the extraction of natural resources that has forged the principles of property and sovereignty under international law.

Indeed, the legacy of the providentialist doctrine of commerce, adopted by the early authors of international law, Francisco de Vitoria and Hugo Grotius 'was the installation of a view of nature as commodity'.[821] For Vitoria, God made man responsible for the natural environment. Nature had been created for man's use. Nature ought to be exploited. The right of the Spanish *conquistadores* to appropriate *terra nullius* was also a duty to make the ground productive: 'Vitoria's theory of property was one which abhorred a vacuum and so encouraged the exploitation of unrealized potential, the occupation of vacant territory or resources, wherever they could be found.'[822] Andrew Fitzmaurice stresses that the principles developed by Vitoria are not idiosyncratic, but foundational to Western thinking on the nature of humans to exploit

[818] Porras, *supra* n 570, 642.
[819] Capra & Mattei, *supra* n 22, 159.
[820] Natarajan & Khoday, *supra* n 651, 574-575.
[821] Porras, *supra* n 570, 641.
[822] Andrew Fitzmaurice, 'The Problem of Eurocentrism in the Thought of Francisco de Vitoria' in José María Beneyto and Justo Corti Varela (eds) *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law* (Springer 2017) 84.

their environment: '[t]he ideas that ownership of property is based upon use […] and more broadly that we demonstrate that we are human through the exploitation of nature (or that we are not human if we fail to do so) are fundamental to European history.'[823] Writing on the appropriation of nature in the early modern European tradition of the law of nations, Ileana Porras similarly considered that the international legal system promoted a right to property in response to the needs of private economic interests which transformed nature as an ecosystem into a material thing subject to extraction and trade:

> The fauna and flora in situ remained invisible to international law. The natural world remained opaque. Only when it could be imagined as serving to fulfil the needs of Europeans did the natural world become visible, and then only as property. Thus, while nature-as-such was absent in the law of nations, reduced to property, the material world became visible in the form of nature-as-commodity, ready to enter the stream of commerce. In this way, the early authors of the law of nations participated in the production of a world-view, which subsequently became dominant, of a material world whose value depended on the potentiality of ownership. It is, moreover, the view of nature that continues to prevail in international law.[824]

Grotius' freedom of the sea[825] (see, *supra*, 2.1.1.2.) can also be seen in this light as a legal argument responsive to the economic and commercial needs of the Dutch East India Company (VOC) at the time. The exclusive right of the Portuguese (or the Spanish) to navigate over the Atlantic and the Indian oceans would indeed have frustrated the VOC's interest to trade in the same region without barriers.[826] In Grotius' perspective, if the ocean as *res communis* was treated as a vast, inexhaustible, domain which was impossible to enclose, its resources could perfectly become 'the private property of him who catches them'.[827] As we saw above (see, *supra*, Section 2.1.2.2.), John Locke was the most explicit about the requirement of exploitation of nature to reach the status of private property: '[l]and that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing'.[828] In that regard, the international law principle of *terra nullius* (see, *supra*, Section 2.1.2) illustrates very well how a natural site

[823] Fitzmaurice, *supra* n 621, 7.
[824] Porras, *supra* n 570, 647.
[825] See, Grotius, *supra* n 579.
[826] See also, Martine van Ittersum, *Profit and Principle: Hugo Grotius Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)* (Brill 2006).
[827] See, Grotius, *supra* n 579, 29. See also, Schermaier, *supra* n 553, 28: 'Grotius's concept of ownership conforms with modern property law doctrine. […] the owner can do with his things whatever he likes and can exclude others from use and benefit.'
[828] Locke, *supra* n 615, 118, para. 33 (emphasis added), quoted in Mickelson, *supra* n 601, 627.

deemed to be left 'vacant' or 'belonging to no one' could be appropriated by the first taker to exploit it as an economic resource.[829] As Karin Mickelson today concludes, 'peoples who do not treat the natural world as a set of resources to be intensively exploited were seen to lack an enforceable claim to ownership.'[830]

The extractive bias of international law is not limited to the right to private property, but extends to the very concept of sovereignty itself (first codified with the 1648 Treaty of Westphalia) that is also based on 'notions of control and productive use of nature':[831]

> The capacity of societies to shape and control their environment was understood to indicate their level of progress, distinguishing between the civilized and those close to a "state of nature". As modern international law is of European origin, its foundational concept of sovereignty has evolved in ways that mirror these Enlightenment understandings of nature.[832]

The doctrine of sovereignty, as a development mechanism located at the heart of international law, sought to demarcate clear jurisdictional boundaries between political units to facilitate the commodification and extraction from the natural environment of increased resources.[833] In its static dimension, sovereignty should be understood as 'the locus of ultimate authority, control, or decision-making power over the territory and its inhabitants.'[834] The principle of state sovereignty as an attribute of governments acting on behalf of their states had a major effect in facilitating land grabs. In *Imperialism, Sovereignty and the Making of International Law,* Antony Anghie provides a powerful account of how 19h-century international law justified industrialised states to colonize 'Third World' peoples, in their quest for the extraction of valuable 'raw materials', needed for their economic prosperity: 'imperial expansion was powerfully motivated by the desire of colonial states to exploit the resources of non-European territories'.[835] That is why international law denied sovereignty to the 'uncivilized' polities unable to possess territory and to make extractive use of nature like industrialised states.

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[829] Natarajan & Khoday, *supra* n 651, 587.
[830] Mickelson, *supra* n 601, 637.
[831] Natarajan & Khoday, *supra* n 651, 586, citing Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (Berghahn Books 2005) 7-16.
[832] ibid., 576.
[833] ibid., 588.
[834] Jochen von Bernstorff, '"Community Interests" and the Role of International Law in the Creation of a Global Market for Agricultural Land' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 282.
[835] Anghie, *supra* n 625, 211.

2.3.1.2. Modern developments

Paradoxically, the colonial discourse of natural resource extraction was also taken over into the post-colonial world. The quest of states for strengthened sovereignty through economic control, exploitation and marketing of natural resources can indeed be seen in modern developments of international law linked to decolonization efforts.[836] By accepting the *uti possidetis* doctrine, newly independent states accepted territorial boundaries that did not correspond to the traditional rules of exclusion of local communities or ethnic groups on the ground, but which had been negotiated artificially between colonial powers at the end of the 19th century.[837] As Natarajan and Khoday observe, '[i]n their quest to gain equal footing under international law, non-European states had to considerably transform their domestic spheres to enable the increasingly efficient exploitation of nature through instituting appropriate European systems of land tenure, private property, contract, torts, and so on.'[838] In the aftermath of World War II, the principle of permanent sovereignty over natural resources (PSNR) thus emerged as a 'new principle of public international law'.[839] The 1962 Declaration on PSNR, a non-binding resolution of the UNGA,[840] proclaimed '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources' and dictated to both of them the duty to exercise their sovereignty 'in the interest of their national development and of the well-being of the people of the State concerned.'[841] What is interesting to note for our purposes in this legal instrument is that the right to extract natural resources is reified as a prerequisite of development. As Olivier De Schutter has already noted with regard to the erosion of the

[836] Article 2(1) of the UN Charter, *supra* n 741: 'The Organization is based on the principle of the sovereign equality of all its Members.'
[837] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 103.
[838] Natarajan & Khoday, *supra* n 651, 587.
[839] Nico J. Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 UN Declaration as the Opinio Iuris Communis' in Marc Bungenberg and Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 16; On this principle, see also, Sangwani Patrick Ng'ambi, 'Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans' (2015) 12(2) *Loyola University Chicago International Law Review* 153; Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law' (2013) 14 *Melbourne Journal of International Law* 451; Pahuja, *supra* n 837, 285; Nico J. Schrijver, *Sovereignty over natural resources: balancing rights and duties* (Cambridge University Press 1997).
[840] Note that the newly independent states chose for a forum where they had a significant majority over developed nations.
[841] UNGA, 'Permanent sovereignty over natural resources' (14 December 1962) GA Res 1803 (XVII), UN Doc. A/RES/1803(XVII), para. 1. Note that not only states, but also 'peoples' are beneficiaries of the right to permanent sovereignty in the 1962 formulation. The reference to 'peoples' fades away in subsequent resolutions. The progressive claim that communities within a state would also have a right to self-government over natural resources is assessed below, in Chapter 3. In practice, such claims often conflict with a state's sovereign claims.

commons under international law, '[t]he disruption of communal social relationships and the shift to an exploitative relationship to nature […] was not the price to pay for economic development to proceed: they were the definition of progress itself, and were to be treated as benefits, not harms.'[842] Thus, developing states also had to adapt to international law's extractive standards.

The doctrine of PSNR was subsequently reaffirmed in several other resolutions of the UNGA,[843] among which, most notably, the 1974 Charter of Economic Rights and Duties of States,[844] and international arbitral and judiciary decisions.[845] According to the ICJ, the principle is now part of 'customary international law'.[846] In 1974, a few years after the CHM principle was formally accepted, the G-77 – the UN group composed of newly decolonized and independent states – also drafted the UN Declaration on the Establishment of a NIEO (see *supra*, subsection 2.3.3.1).[847] The UN Declaration sought 'to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development'.[848] In this other post-independence move, one of the core principles which the NIEO Declaration formulated was again the affirmation of the doctrine of PSNR:

> The [NIEO] should be founded on full respect for […] [f]ull permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard those resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right […].[849]

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[842] De Schutter, *supra* n 21, 235.
[843] See, e.g., UNGA, 'Permanent sovereignty over natural resources' (25 November 1966) GA Res 2158 (XXI), UN Doc. A/RES/2158(XXI); UNGA, 'Permanent sovereignty over natural resources' (19 December 1968) GA Res 2386 (XXIII), UN Doc. A/7324, 24; UNGA, 'Permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development' (11 December 1970) GA Res 2692 (XXV), UN Doc. A/9221, 63.
[844] UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) GA Res 3281, UN Doc. A/RES/3281(XXIV), Article 2(1).
[845] See, e.g., *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Government of Libyan Arab Republic* (1978) 17 ILM 29-30, paras 84-88; *Libyan American Oil Company (LIAMCO) v. Government of Libyan Arab Republic* (1981) 20 ILM 1, 53, para. 100.
[846] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005, ICJ Reports 2005, p. 168, para. 244.
[847] UNGA, 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) GA Res. 3201 (S-VI), UN Doc. A/RES/3201(S-VI).
[848] ibid., preambular para. 3.
[849] ibid., para. 4, (e).

Decolonizing states articulated other principles pertaining to the PSNR in the interest of development, such as '[t]he right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities'[850] and '[t]he need for developing countries to concentrate all their resources for the cause of development'.[851] PSNR thus became a legal basis for developing states to legitimize nationalization policies, even if it did not exempt them from general obligations under international law, such as the duty to prompt, fair and adequate compensation for foreign investors.[852] Developed states, in reaction, used this duty of fair compensation and other 'legal doctrines such as state succession, acquired rights, contracts and consent to protect the interests of their corporate nationals in [developing] states and to resist the attempts by these new sovereign actors to establish a [NIEO] which included their own sovereignty over their natural resources.'[853]

Even if '[f]ew of the NIEO initiatives had an enduring impact on international law',[854] it is worth noting how the decolonization movement borrowed an aspect of the extractive language of Western powers for the sake of being included in the international legal order and securing the benefits of natural resource exploitation. The strict territorial circumscription within state boundaries of natural resource sovereignty under the doctrine of PSNR may also seem disturbing in the light of the growing environmental causes of global significance, such as climate change or biodiversity. In contrast to other inspiring UN initiatives such as the 1972 Stockholm Declaration[855] or the 1982 World Charter for Nature, which focused on 'the preservation and enhancement of the human environment',[856] nature still appears, under the developmental concept of PSNR, as a storehouse of resources to be fully mastered and exploited through 'permanent sovereignty'. This prompted some authors to argue in the other direction, affirming that, in modern international law, PSNR entails rights but also duties to exercise due

[850] ibid., para. 4, (h).
[851] ibid., para. 4, (r).
[852] UNGA Resolution 1803 over PSNR, *supra* n 841, Article 4. See, *contra*, 1974 Charter of Economic Rights and Duties of States, *supra* n 844. See also, e.g., Anita Ronne, 'Public and Private Rights to Natural Resources and Differences in their Protection?' in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press 2010) 68-69.
[853] Penelope Simons, 'International law's invisible hand and the future of corporate accountability for violations of human rights' (2012) 3(1) *Journal of Human Rights and the Environment* 5, 21.
[854] Anghie, *supra* n 625, 245.
[855] UN Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc. A/CONF.48/14/Rev.1 ('Stockholm Declaration').
[856] UNGA, 'World Charter for Nature' (28 October 1982) UN Doc. A/RES/37/7.

care for the environment[857] and for the collective rights of indigenous communities over their land and natural resources.[858] Yet, taken on its own, PSNR was deemed a sacred prerogative (merged with self-determination), which allowed newly independent states to assert full sovereignty over the benefits arising from the extraction of natural resources vis-à-vis colonizing states and foreign private enterprises.[859] By concentrating the 'ultimate decision-making authority regarding the course of development' in developing states within their own jurisdiction,[860] the doctrine of PSNR certainly liberated them from colonial rule and achieved a more equitable allocation of power and wealth in the international arena. However, it did not fundamentally deviate from the extractive nature of international law – quite the contrary, it extended the logic of capitalist accumulation as a prerequisite of development to the post-colonial world and the expense of the commons.[861]

Admittedly, over the last decades, international law saw the emergence of core principles and norms, such as state responsibility,[862] the obligation to prevent transboundary harm,[863] due diligence and the obligation to conduct environmental impact assessments,[864] and the

[857] Lila Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 *Annual Survey of International and Comparative Law* 43, 44; Schrijver, *supra* n 839, 27.
[858] Pereira & Gough, *supra* n 839, 460: 'In order to ensure that states respect public goods, there are recognised limits imposed on the way sovereignty over natural resources is exercised, through, among other things, the allocation of property rights and the establishment of procedures for communities to participate in the adoption of, or to challenge, decisions affecting these resources.'
[859] ibid., 462; Lillian Aponte Miranda, 'The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development' (2012) 45(3) *Vanderbilt Journal of Transnational Law* 785, 790.
[860] Miranda, *supra* n 859, 792.
[861] ibid., 817-818: 'States often utilize this doctrine, implicitly or explicitly, as a sword against the interests of indigenous peoples rather than as a shield to protect their independence from foreign economic control.'
[862] ILC, 'Draft Articles on the Responsibility of States for Intentionally Wrongful Acts' (2001) *Report of the International Law Commission on the Work of Its Fifty-Third Session*, 56 UN GAOR Supp. No. 10, UN Doc. A/56/10.
[863] Stockholm Declaration, *supra* n 855; UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (12 August 1992) UN Doc. A/CONF.151/26/Rev. 1, Principle 2 ('Rio Declaration'); International Law Commission, 'Draft Articles on Transboundary Harm from Hazardous Activities' (2001) *Report of the International Law Commission on the Work of Its Fifty-Third Session*, 56 UN GAOR Supp. No. 10, UN Doc. A/56/10, 370.
[864] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (20 April 2010) Judgment, ICJ Reports 2010, 14, para. 204: 'it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.' See also, ITLOS, *supra* n 681, paras 148: 'The Court's reasoning in a transboundary context [in the *Pulp Mills* case] may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind.'

precautionary principle[865], developed to *constrain* the negative effects of extractive activities of states and private actors on the environment, including in areas beyond the limits of national jurisdiction. However, these new principles have been unable to curb the extractive trend of international law and effectively address the Anthropocene's existential crisis on Earth.[866] For some critical scholars such as Anna Grear, international environmental law even enacted 'the intensifying eco-governmentality (and "neoliberalisation of nature")': 'the legal subject provides the "centre" (the very site of mastery, panoptic in its knowledge) set against "nature" or "environment" as the backdrop or context for the rational subject's agency'.[867] In this sense, even if environmental law responded to the destruction of the planet, its method reproduced the mechanistic and extractive logic of international law – at the exclusion and cost of the commons. To use again Grear's words Grear, '[t]he resource managerialism at the heart of contemporary responses to environmental challenges is operationalized by dense networks of corporate-managerial-administrative regulatory regimes facilitating a spectacular (if historically familiar) range of "land grabs" and dispossessions in the name of "environmental protection"'.[868] This extractive dynamics of international law seems for example at play in the expropriation of land or natural resources for environmental purposes (so-called 'green grabs' or 'conservation enclosures') enabled under the 1992 United Nations Convention on Biological Diversity (CBD):[869] '[t]hrough their roles in securing land for ecotourism; protecting rights to genetic material, minerals or ecosystem services; transforming residents into wage labourers; selling images of pristine nature; and drawing in conservation funding, protected areas in fact launch private capital accumulation'.[870] Under international law's extractive imaginary of nature, the commons do not seem to be considered as social institutions and ecosystems of their own; only the natural resources at the heart of the commons are viewed as forms of capital to be exploited.

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[865] Rio Declaration, *supra* n 863, Principle 15: 'In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

[866] Tim Stephens, 'Reimagining International Environmental Law in the Anthropocene' in Louis J. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017) 32.

[867] Grear, *supra* n 265, 82 and 86.

[868] ibid., 89.

[869] CBD, *supra* n 538, Article 8(a) and (c): 'Each Contracting Party shall, as far as possible and as appropriate […] [e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity […] [and] [r]egulate or manage biological resources important for the conservation of biological diversity'.

[870] Catherine Corson and Kenneth Iain MacDonald, 'Enclosing the Global Commons: the Convention on Biological Diversity and Green Grabbing' (2012) 39(2) *The Journal of Peasant Studies* 273.

Even beyond the reserved sphere of national jurisdiction, it cannot be said that any of the metaphorical approaches to the global commons described above in contemporary international law is *per se* 'generative'. The commodification of nature now takes place beyond state boundaries. We already observed how the deep seabed became in the last years increasingly subject to commercial pressure for mining exploration and exploitation. Surabhi Ranganathan showed how international law 'reified an *extractive* imaginary of the ocean floor that now shapes the fate of the ocean, and constrains any search for "solutions" to problems of inequality and environmental harm'.[871] Rather than a source of solutions, international law, in her view, contributed to the current crisis by configuring the oceans 'into a series of extraction sites principally for the benefit of a few states and corporations': 'this configuration has relied on – and continues to draw legitimacy from – a construction of the seabed as socio-culturally, economically and ecologically disembedded – that is, as remote, insulated and lacking local constituencies or pre-existing "systems of meaning and practice" that would be ousted by the "narrow predication of 'universal interest'" on its mining potential'.[872]

To sum up, generative commons, understood in Ostrom's sense as a socio-ecological institution of self-governance, are not only made invisible in the managerial and administrative regimes of environmental domains under international law; international law also turned the commons over to the extractive interests of states and private corporations.

### 2.3.2. Generative commons

Recognizing the commons under international law would entail going beyond the current extractive understanding of nature. A commons is just not an economic asset, and the CPR that is at its core is of more than utilitarian value for the people who depend on it. As Weston and Bollier phrase it, the commons assert a 'different set of cultural and productive relationships with natural resources'.[873] In a commons, the market value of natural resources is less important – not to say irrelevant – compared to their holistic spiritual, cultural, traditional, relational value for the community. As Ugo Mattei and Alessandra Quarta formulate it, '[i]nstitutions of commons function through a direct legal empowerment of their members in common pursuit of a *generative* meaning or task, and they respond to real human needs for participation, security

[871] Ranganathan, *supra* n 697, 580 (emphasis added).
[872] ibid., 577, citing Onur Ulas Ince, 'Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention' (2014) 79(1) *Rural Sociology* 104, 127.
[873] Weston & Bollier, *supra* n 21, 127.

and sociability'.[874] A commons is like an ecosystem where individual users and nature are interdependent. Together, commoners establish, adapt, *generate* rules for sustainable management over the long term of the natural resources upon which they depend. For Gutwirth and Stegners, this generativity constitutes what they define as a 'right to commoning' (see, *infra*, Chapter 3).[875] So, just like Capra and Mattei proposed an 'ecology of law' to make 'community sovereign' and 'ownership generative',[876] would it be possible to transform international law from an extractive to a generative model of law?

In environmental legal terms, in contrast to the binary split between the human 'subject' and environmental 'object' (that is merely 'managed'), a 'New Materialist'[877] approach would view the legal subject

> as just one partner in a 'spatial and temporal web of interspecies dependencies'. Environmental epistemology thus becomes fully and radically *ecological* in the richest sense. And environmental subjects are themselves *ecologies* – and seen as such, in place of the panoptic subject radically separated from 'the environment' it 'acts upon'.[878]

So would also a generative approach to international law conceive the commons as a complex and interdependent ecosystem of its own, and not merely as a natural resource to be extracted in the traditional top-down direction. So would international law 'cast aside the eco-destructive assumptions and ideological closures of the Anthropocene-Capitolocene'[879] and help the commons flourish and generate through supportive social and ecological rules.[880] The very purpose of international law would not be to transform natural resources into capital, rather create the conditions for the sustainable preservation and defense of the commons as socio-ecological institutions of their own. Admittedly, this move from an extractive international legal order into a generative one that serves communities of commoners would be deeply challenging

[874] Mattei & Quarta, *supra* n 18, 70 (emphasis added).
[875] Gutwirth & Stengers, *supra* n 298, 337.
[876] Capra & Mattei, *supra* n 22, 131.
[877] New materialism is an interdisciplinary school of thought in human and social sciences, and most notably in feminist studies, reconceptualizing materiality beyond both postcontructivism and positivism. See, 'Introducing the New Materialisms' in Diana Coole and Samantha Frost, *New Materialisms: Ontology, Agency, and Politics* (Duke University Press 2010) 1-43.
[878] Grear, *supra* n 265, 93 quoting Donna J. Haraway, *When Species Meet* (University of Minnesota Press 2008) 11 and 3-4. Note that Grear's critical, New Materialist, view of the subject/object dualism in environmental law, could also apply to our three-layered (subject/object/practice) definition of the commons suggested in Chapter 1 for theoretical purposes. It could indeed be argued that the commons represents a transversal institution which cannot so easily be dissolved into strict, individual, material categories of subjects vs. objects. That would be a valid argument. That is also why I also emphasize the dynamic, highly context- and purpose-specific, aspect of the generative practice of *commoning*.
[879] ibid., 95.
[880] Kelly, *supra* n 808, 134.

for international law that continues to consider commons as 'global commons' – i.e. vast resource domains to be explored and exploited. Yet, international law has not been entirely unresponsive to calls for greater social justice for marginalized, indigenous and peasant communities in the allocation of land and natural resources, especially in the language of human rights. International human rights law might become the most important legal discourse of resistance for marginalized communities to call for the recognition and protection of the commons – that is what we shall see in the next and last Chapter.

## 3. Summary

This Chapter 2 started by reviewing the growing scholarship on the commons in the disciplines of property and IP law. Section 1 showed that both legal disciplines revisited the basic assumptions of their field to recognize new forms of common ownership, such as property as a bundle of rights or the intellectual public domain to protect knowledge commons. Section 2 then sought to approach the field of international law to look for similar forms of recognition of the commons as an alternative model of governance. Surprisingly, however, this Chapter quickly concluded that very little has been said about the role that international law could play in the empowerment of local communities of commoners. Of course, international lawyers are all familiar with the notion of '*global* commons' like the deep seabed or the Moon and with Hardin's 'tragedy of the commons'. What struck me, however, is that the social institution of the commons, in Ostrom's sense, as researched in all fields of natural and social sciences, was absent in the classic principles of public international law. Clearly, the notion of the commons is inadequately theorized under international law in comparison with other fields of the law. Not only that, but most of the time, the term of 'commons' was confused with Hardin's worldview of unrestricted and unregulated open-access resources. This is what I called the 'commons gap' in international law – the gap of adequate international legal recognition or protection for the commons as a bottom-up system of governance and natural resource management.

The most important lesson to take from this Chapter, is that international law is itself part of the phenomenon of enclosure. The fact that international law has so far been unable to recognize or protect the commons as a social institution of its own is not a coincidence. Since the Industrial Revolution, international law was instrumental in the process of commodification of the commons. As Serge Gutwirth and Isabelle Stengers wrote, '[t]he difficulty to imagine today

how to extract from the law the possibilities of satisfactory 'qualifications' of *commoning*, is not at all surprising since the law in force since the Enlightenment has always translated its process of eradication.'[881] There is indeed a structural link between international law's disregard of the commons and the discipline's origins, assumptions and foundational principles. The question is how this process of eradication of the commons did materialize in international law? That is the main interrogation that guided the writing of this chapter. It brought me to confront the three aspects of the commons (the object, the subject and the practice of communing) with some classic doctrines of international law.

This exercise of deconstruction proceeded in three steps, exactly like in the definition of the commons (see, *supra*, Chapter 1, Section 3). I was indeed able to identify three kinds of tensions (see, *supra*, Figure 3) between each element of the commons, on the one hand, and the discipline of international law, on the other. First, from the perspective of the '*object*' of the commons, I observed a tension between the exhaustibility of the CPRs (at the heart of the management system of the commons) and the vast and inexhaustible resource-domains depicted in the notions of *res communis*, *res nullius* or CHM in international law. That is a first important distinction to notice since the need for preservation and the necessity of exclusive rules of access to the fragile ecosystems of lands, seeds, forests or water reserves have basically nothing to do with the open-access regime governing global commons in international law. Second, from the perspective of the *subject* of the commons, in contrast to sovereign states, self-organized communities of commoners are not yet recognized as subjects of international law. It was said that the bottom-up space of self-governance of the commons challenges top-down international law on at least three counts: polycentricity, horizontal subsidiarity and informality. Third, based on the distinction Kelly draws between extractive vs. generative ownership, I argue that the foundational principles of international law – through concepts such as sovereignty (including the postcolonial doctrine of PSNR) and private property – historically focus on extraction and exploitation of natural resources for economic development purposes, rather than their conservation and flourishing. In other words, whereas the 'generative' practice of the commons aims at creating the conditions for the sustainable preservation of CPRs over the long term, the 'extractive' approach that is dominant in international law aims at maximizing the capacity of extraction and exploitation of natural resources.

[881] Gutwirth & Stengers, *supra* n 298, 330: 'La difficulté à imaginer aujourd'hui comment extraire du droit des possibilités de "qualification" satisfaisante du *commoning*, n'est, rappelons-le, pas du tout surprenante, car la législation en vigueur depuis les Lumières a toujours traduit le processus de son éradication' (free translation).

To sum up, this Chapter focused on a deconstruction of international law in its 'negative' dimension – that is, as an instrument of commodification and colonization. The conclusion was that the international law basically encourages the process of extraction of ecological resources and transformation from commons to capital. The question that remains for Chapter 3 is to evaluate to what extent international human rights norms could correct this and bridge the gap of legal protection by recognizing the commons as a system of collective use and management and legal institution of its own. Why? Because as Ostrom stated in her seminal book *Governing the Commons*, the 'minimal recognition of rights to organize' is one of the eight design principles that characterizes a robust and sustainable commons-based institution.[882] Commons cannot survive in a legal vacuum.

[882] Ostrom, *supra* n 8, 90.

# Chapter 3
# The Commons and Human Rights

## 1. Reconstructing the commons in international human rights law

### 1.1. Human rights and the reconstruction of international law

The principle of open access to global commons, the top-down doctrine of state sovereignty and international law's extractive approach of nature remain deeply embedded in the discipline of international law and cannot simply be discarded. These dominant doctrines of international law make it difficult to foreground other governance systems than the state or the market to govern shared resources at the local, but also global level. However, the international legal system is not set in stone. It was profoundly transformed since World War II and the decolonization process. In a structural shift of powers, statehood was accorded to former colonial territories which had long been viewed as the property of 'civilized' Western states – 'the transformation from a world of empires to the world of quasi-functional sovereign states'.[883] As we already saw above with the PSNR doctrine, the top-down and extractive logic of state sovereignty was actually expanded with the creation of new subjects of international law in the post-colonial world, but the transformation of the international system of states also led newly independent states to reform international legal norms and global values in a way that was more responsive to the needs of the Global South.

This shift was associated with the breakthrough of universal human rights as a new social imaginary in the international law-making agenda. One of the most profound changes was the emergence of human rights[884] in a more 'horizontal' global society – at least formally speaking.[885] The emergence of human rights probably represents the most cosmopolitan achievement of the 20th century in international law: international law is no longer the reserved domain of states. Or, to put it in Barbara Stark's words (as in Chapter 2, Section 2.2), '[t]he recognition of individual human beings as subjects of international law was the first major sea

[883] Steven L. N. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press 2016) 3.
[884] Article 1(3) of the UN Charter, *supra* n 741: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.
[885] Article 2(1) of the UN Charter, ibid.: 'The Organization is based on the principle of the sovereign equality of all its Members.'

change in international law *from the bottom up*.'[886] As another commentator observes, '[d]ue to the rise of economic, social, and cultural rights since the 1990s, rights claims in particular have become the new lingua franca in addressing experiences of injustice in the globalized economy.'[887] To date, international human rights law indeed remains 'international law's sole, approved discourse of resistance'.[888] Thus, in the face of the current wave of enclosure, predominantly in the Global South, the international legal scholarship could now reflect on tools and strategies under international human rights law to recognize and protect the commons essential for the subsistence of so many communities. Instead of rejecting any kind of international law solution, this work suggests bridging the commons gap and empowering communities as key actors of their development by resorting to human rights.

The emergence of human rights reveals that nothing should preclude us from rethinking the traditional foundations and assumptions of international law and from dismantling barriers to alternative movements towards the protection of the commons in a post-colonial era. The work of international legal scholars on the commons cannot be unrelievedly pessimistic. The critique about the top-down and extractive nature of international law does not need to end in 'nihilist abandonment of the discipline as irredeemable'.[889] It can tell another story, not to 'rewrite history', but rather to resist the mainstream approach of rational development of international law as an instrument of empire and colonization.[890] In this sense, it is possible to conceive a counter-narrative – a shift from an extractive model of international law to a more ecological international legal order that promotes and protects stewardship of shared resources by local communities themselves. If international law played a role in the vast enclosure of the commons from the colonial era onwards, today it may very well serve as a tool to combat the dispossession of communities around the world. Think, for instance, of indigenous peoples resorting to international law to combat extractive industries. As Jedediah Purdy paradoxically recalls, '[c]ompared to the era of colonial expansion, when international law was either affirmatively involved in or conveniently blind to the oppression of indigenous peoples occurring on almost every continent subject to colonial imperialism, international law today represents one of the indigenous peoples' principal weapons against mistreatment flowing from colonial legacies.'[891]

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[886] Barbara Stark, 'International Law from the Bottom Up: Fragmentation and Transformation' (2013) 34 *University of Pennsylvania Journal of International Law* 687, 690 (emphasis added).
[887] von Bernstorff, *supra* n 834, 285.
[888] Rajagopal, *supra* n 761, 405.
[889] Natarajan and Khoday, *supra* n 651, 575.
[890] Gutwirth & Stengers, *supra* n 298, 310.
[891] Jedediah Purdy, 'Chapter Five. The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129(6) *Harvard Law Review* 1755.

What if we also used international law to save the commons from enclosure? International human rights norms may indeed have the potential to translate moral and social demands for recognition of the commons as an institution of its own into concrete legal entitlements.

### 1.2. Criticisms of the international human rights discourse

Before digging deeper into the discipline of international human rights law, let us consider some of the criticisms often levelled against human rights in general, and those that are especially relevant to the legal protection of the commons in the Global South. We should not, indeed, succumb too quickly to the illusion that rights may redress any kind of dispossession or enclosure. The pertinence of claiming rights through litigation has already caused much ink to flow among legal theorists.[892] The human rights discourse presents at least[893] three limits for those suffering disadvantage through dispossession and enclosure of the commons in the development context.

The first obvious limitation is that the 1948 Universal Declaration of Human Rights (UDHR)[894] was mostly driven by Western countries, thereby excluding voices of colonized countries from the Global South – like those of disadvantaged peoples depending on the commons for their survival. Many of the contestations surrounding human rights revolved around the claim to universality. Some international legal scholars, notably those associated with the TWAIL,[895] have claimed that the idea of human rights is in that sense *not truly universal*, but culturally imperialist. Western ideas of economic and social freedoms would even further oppress Third World peoples, in the view of some critical pundits. Thus, according to Balakrishnan Rajagopal, '[g]iven that most Third World social movements consist of the urban poor, peasants, workers in the informal sector, illiterate women, and indigenous peoples whose resources are being destroyed, the legal categories – such as human rights – that are being used to represent "voices" of suffering tend to have elitist blind spots.'[896] Ratna Kapur, who has explored the 'dark side' of the human rights project, points out that '[a]ssertions about the universality of human rights simply deny the reality of those whom it claims to represent and speak for, disclaiming their

[892] See, e.g., *pro*, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). See, e.g., *contra*, Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363.
[893] Think, among many others, of human rights' masculinist ontology, ineffectiveness in some regions of the world, lack of enforcement mechanisms, religious origins, legalist bias, apolitical claim.
[894] UNGA, 'The Universal Declaration of Human Rights' (1948) Resolution 217 A (III).
[895] See, Anthony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77.
[896] Rajagopal, *supra* n 761, 406.

histories and imposing another's through a hegemonising move.'[897] In the case of the commons, the predominant Western characteristics of the human rights discourse may be ill-suited to recognize traditional, non-Western institutions of natural resource governance deviating from private or public property, especially in the Global South. The commons would require a more contingent understanding of the highly context-specific governance mechanisms at play in local communities. However, while developments were heavily dominated by Western countries until the 1970s, regional human rights courts have interpreted their constitutive charters more extensively over time to include the experience of indigenous and tribal peoples. More recent human rights instruments such as UNDRIP[898] and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)[899] have known significantly more inclusive processes, driven not only by countries from South America, Africa or Asia but also by indigenous and peasants communities themselves. These initiatives, derived from the experience of local communities in the Global South, have enriched the international human rights framework from the bottom up, creating specific obligations for states to respect various aspects of the commons.

Second, human rights are first designed as *individualistic* entitlements, thus countering efforts to recognize the social institution of the commons and its values of interdependence, (intra- and intergenerational) equity and sustainability. As Conor Gearty critically writes, '[t]he idea of the world outside the human as being inherently capable of belonging to the individual, and therefore as being something over which complete human mastery can be exercised, is one that is very deeply entrenched in the law in capitalist society'.[900] Similarly, Ugo Mattei, one of the most vocal legal scholars embracing the commons, forcefully rejects the liberal individualism in which human rights are grounded:

> An analysis limiting itself to rights is helplessly loaded by bourgeois rhetoric: it maintains an individualistic vision where there can be no solid "belonging" to a generation […], it de-emphasises duties and obligations which are crucial for a relational vision of reality such as that offered by the commons. […] Should we not avoid, in a legal definition of the commons, deploying the rhetoric of rights while

[897] Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28(4) *Sydney Law Review* 665, 674.
[898] UNDRIP, *supra* n 181.
[899] UNGA, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (17 December 2018) UN Doc. A/RES/73/165 ('UNDROP').
[900] Conor Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1(1) *Journal of Human Rights and the Environment* 7, 8.

> focusing instead on how to institutionalise genuine collective relationships based on duties of care of one another and of the environment?[901]

Other commons scholars highlight the naivety of the liberal myth of achieving individual rights solely through litigation, without strong social protection and regulatory policies at the collective level: 'the theoretical and practical exchanges around the *commons* have the merit of perceiving the uselessness of a legal response based on listing rights when it is not coupled with political actions aimed at achieving effective wealth redistribution, housing, education, access to essential services.'[902] The collective dimension of human rights is indeed crucial for small-scale farmers, fisherfolks, pastoralists, hunters and gatherers who depend on commons for their survival, especially in the non-Western world. Autonomy and collective self-regulation constitute the defining elements of the commons. However, going beyond the atomistic bias of most human rights treaties, local and international rights claims of indigenous communities and other minorities exhibiting collective characteristics have asserted peoples' or collective rights which could similarly encapsulate the communal life experience of the commons.[903] In recent years, the Inter-American Court has developed a jurisprudence on collective rights (see, *supra*, Section 3.3). Collective rights have also been recognized in the 1989 International Labour Organization's Convention No 169 on Indigenous and Tribal Peoples,[904] as well as both UNDRIP[905] and UNDROP.[906]

Third, closely related to the former individualistic bias, the human rights framework considers non-human life and *ecosystems* as objects of human mastery, but not as subjects of legal rights. The human rights discourse seems to promote a concept of material and economic development which secures the right to extract natural resources as an integral component of human dignity without clear planetary boundaries – at the cost of ecological concerns for the commons.[907] As Louis J. Kotzé notes, '[a]nthropocentric-oriented rights are utilitarian and they focus on the

[901] Mattei, *supra* n 207, 16.
[902] See, e.g., Quarta & Ferrando, *supra* n 283, 279.
[903] See, Cindy L. Holder and Jeff J. Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24(1) *Human Rights Quarterly* 126. Dwight Gordon Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing 2011).
[904] ILO Convention No 169, *supra* n 180.
[905] UNDRIP, *supra* n 181, preambular para. 22: 'indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'.
[906] UNDROP, *supra* n 899, Article 26(2): 'Peasants and other people working in rural areas have the right, individually and/or collectively, in association with others or as a community, to express their local customs, languages, culture, religions, literature and art, in conformity with international human rights standards.'
[907] See, e.g., Rio Declaration, *supra* n 863, Principle 1: 'human beings are the centre of concerns for sustainable development'.

socio-economic context thus seeking to ground, improve access to and expand human claims to resources with a view to ensuring economic development in its widest sense'.[908] It should be acknowledged that neither the language of the 1948 UDHR nor that of the two 1966 Covenants recognize the most basic environmental right to healthy air, water or food – not even as subsistence rights in the sense that a healthy and clean environment constitutes a condition to life.[909] In that regard, human rights have not been adequate in confronting the top-down, extractive, and anthropocentric patterns of international law highlighted above (see, *supra*, Chapter 2).[910] However, while still not proclaiming a universally binding and substantive right to the environment, the nexus between human rights and the environment was recognized in the Stockholm Declaration of 1972,[911] and later reinforced in the Río Declaration[912] and the work of the UN Special Rapporteur on Human Rights and the Environment.[913] What is more, the Río+20 Declaration did affirm the existence of environmental rights in 2002.[914] As of now, it should be acknowledged that there is not yet a universal hard law instrument in the form of a global treaty (safe regional treaties) recognizing environment rights – let alone an explicit right to the commons.

### 1.3. Resorting to international human rights law to resist enclosure

Why would we then resort to international human rights law to resist enclosure and combat the commodification of the commons? To start with, the interface between human rights and commons is not new; it predates the emergence of international human rights law in the middle of the 20th century. The commons and human rights have, arguably, an intertwined history

[908] Louis J. Kotzé, 'Human rights and environment in the Anthropocene' (2014) 1(3) *The Anthropocene Review* 252, 258.
[909] Laura Westra, 'Environmental Rights and Human Rights: The Final Enclosure Movement' in Roger Brownsword (ed.), *Global Governance and the Quest for Justice. Volume IV: Human Rights* (Hart Publishing 2004) 110.
[910] Natarajan & Khoday, *supra* n 651, 593.
[911] Stockholm Declaration, *supra* n 855, Principle 1: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'
[912] Rio Declaration, *supra* n 863, Principle 3: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.
[913] UN Special Rapporteur on Human Rights and the Environment, 'Draft Principles on Human Rights and the Environment' (16 May 1994) UN Doc. E/CN.4/Sub.2/1994/9, Annex I; HRC, 'Resolution on Human Rights and the Environment' (24 March 2014) UN Doc. A/HRC/25/L.31.
[914] UN Conference on Sustainable Development (Rio+20), 'The Future We Want' (27 July 2012) UN Doc. A/RES/66/288, para. 39: 'We recognize that planet Earth and its ecosystems are our home and that "Mother Earth" is a common expression in a number of countries and regions, and we note that some countries recognize the *rights of nature* in the context of the promotion of sustainable development' (emphasis added).

since at least the 13th century. The Magna Carta of 1215[915] – which is often identified as the origin of modern human rights[916] – and the less known accompanying Charter of the Forest of 1217[917] – addressing economic survival in afforested areas – both restricted autocratic behaviour if the monarchy and recognized 'common rights in restoring subsistence usufructs (goods or usages required for well-being)'.[918] Whereas the former focused on what we would today call civil and political freedoms against arbitrary and cruel punishment, the latter gave to commoners legal protection from 'intrusions by privatizers' in the form of rights of grazing, fishing in streams and extracting timber from forests.[919] Both instruments were regarded at the time as two facets of the same coin. Yet, while the Magna Carta is still being celebrated as the 'Holy Grail' in the literature,[920] the socio-economic rights enshrined in the Charter of the Forest have largely been overlooked by constitutional and human rights lawyers. However, in contrast to today's criticism about the individualistic nature of human rights, the Charter did provide from the Middle Ages the basis of rights held in common by communities to resist enclosure of the 'forest', on which so many relied for hunting, fishing and grazing and which covered approximately one-third of the land of southern England.[921] International human rights law professor Geraldine Van Bueren showed how the 800-years old document already protected commoners, including women, against the seizure of traditional common land, in the same way as contemporary human rights norms protect the rights to an adequate standard of living and

[915] A full transcript translated in English is available here: The National Archives, 'Magna Carta, 1215' <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/> (accessed 13 January 2020).
[916] Eleanor Roosevelt described the Universal Declaration of Human Rights in her speech at the UNGA on December 10, 1948, as 'the international Magna Carta for all men everywhere': see, M. J. Altman, 'How One Woman Changed Human Rights History' (10 December 2018) <https://unfoundation.org/blog/post/how-one-woman-changed-human-rights-history/> (accessed 13 January 2020). See also, e.g., Sir Rabinder Singh, 'The development of human rights thought from Magna Carta to the Universal Declaration of Human Rights' in Robert Hazell and James Melton (eds), *Magna Carta and Its Modern Legacy* (Cambridge University Press 2015) 267-280; Nicolae Pavel, 'Defining the Concept of Human Rights in the Light of Juridical Values Theory' (2012) 4(1) *Contemporary Readings in Law and Social Justice* 502, 511.
[917] A full transcript translated in English is available here: The National Archives, 'Charter of the Forest, 1225' <https://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/> (accessed 13 January 2020).
[918] Linebaugh, *supra* n 210, 8.
[919] ibid., 7.
[920] James Melton and Robert Hazell, 'Magna Carta… Holy Grail?' in Robert Hazell and James Melton (eds), *Magna Carta and Its Modern Legacy* (Cambridge University Press 2015) 3.
[921] Geraldine Van Bueren QC, 'More Magna Than Magna Carta: Magna Carta's Sister – the Charter of the Forest' in Robert Hazell and James Melton (eds), *Magna Carta and Its Modern Legacy* (Cambridge University Press 2015) 197.

food.[922] For this reason, Professor Anthony King even suggested using the more explicit term of 'Charter of the Commons'.[923]

Over the last decade, commons scholars and activists have more intensively explored the potential of modern human rights to catalyse today's fights of bottom-up communities of commoners against enclosure. Human rights are currently going through a resurgence in this field. In their book '*Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (2013), Burns Weston and David Bollier have suggested that 'commoners have the fundamental human right, sanctioned by national and international law, to establish and maintain commons to protect their vital ecosystem resources'.[924] They claim that '[b]y framing perceived environmental entitlements as human rights, rights-holders (e.g., commoners) can assert maximum claims on society, juridically more elevated than commonplace standards, laws, or other policy choices'.[925] They thus drafted a so-called 'Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources' ('Green Governance Covenant'), whose Article I declares:

1. Commons- and rights-based ecological governance is a system for using and protecting all the creations of nature and related societal institutions that we inherit jointly and freely, hold in trust for future generations, and manage democratically in keeping with human rights principles grounded in respect for nature as well as human beings, including the right of all people to participate in the governance of wealth and resources important to their basic needs and culture.
2. Typically, commons- and rights-based ecological governance consists of non-State management and control of natural wealth and resources by a defined community of natural persons (commoners), directly or by delegation, as a means of inclusively and equitably meeting basic human needs. It generally operates independently of State control, and it need not be State-sanctioned to be effective or functional.
3. Where appropriate or needed, the State may act as a guardian or trustee for commons- and rights-based ecological governance or formally facilitate its principles and practices by establishing commons-like State institutions to manage publicly owned natural wealth and resources.[926]

[922] ibid., 201.
[923] ibid., 203, footnote 40.
[924] Weston & Bollier, *supra* n 21.
[925] Burns H. Weston and David Bollier, 'Toward a recalibrated human right to clean and healthy environment: making the conceptual transition' (2013) 4(2) *Journal of Human Rights and the Environment* 116, 122.
[926] ibid., 274-275; Burns H. Weston and David Bollier, 'Universal Covenant Affirming a Human Rights to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources' (2013) <http://commonslawproject.org/sites/default/files/clp_universal_covenant.pdf> (accessed 12 January 2020); 'Universal Covenant Affirming a Human Right to Commons- and Rights-Based Governance of Earth's Natural Wealth and Resources' (2013) 4(2) *Journal of Human Rights and the Environment* 215.

Femke Wijdekop drew upon this idea to make the case for 'introducing procedural environmental rights to establish, maintain, participate in-, be informed about and seek redress for ecological commons'.[927] Similarly, Saki Bailey presented human rights as a legal and institutional tool capable of protecting the interests and values of the commons:

> [E]ven if rights may not be the most promising legal institution for the protection of the commons […] rights as a legal institution may still serve the commons and intergenerational justice as a very promising and powerful *moral claim* capable of gaining strong public support for the redistribution of resources and even catalysing the creation of moral communities that emphasise duties over entitlements. Also, as the experience of recent events in Europe shows more clearly, rights may also serve as a powerful *political strategy* for reclaiming and/or preventing the privatisation of such resources where legislative politics has failed.[928]

Still in the same vein, Serge Gutwirth and Isabelle Stengers introduced the 'right to commoning' by reference to Weston and Bollier as a utopian, but necessary legal innovation to resist the 'double sovereignty' of the state and private owner and prevent an ecological and social disaster of the 'every man for himself' approach:

> *Commoning* should […] be recognized as a human right, which in addition is a right constituting a great asset for the realization of other human rights such as the right to work, health, food or a healthy environment. […] Claiming the right to *commoning* should not, of course, imply that the state shifts the responsibilities incumbent upon it on the commons, but that it 'helps, supports, fosters' the institutionalization of *commoning* initiatives, which, in a subsidiary and polycentric manner, have the ability to satisfy other human rights […].[929]

Recourse to human rights to defend the institutionalization of commons-based initiatives finds several concrete applications. In Italy, communities have resorted to fundamental rights to resist the enclosure of commons for private profit and to subject essential goods like water, culture and education to constitutional oversight.[930] At a city level, Sheila Foster and Christian Iaione have aligned 'the commons claim […] with the idea behind the "right of the city" – the right to

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[927] Femke Wijdekop, 'A Human Right to Commons- and Rights-based Ecological Governance: the key to a healthy and clean environment' (2014) <http://earthlawyers.org/academic-papers/> (accessed 22 May 2018).
[928] Bailey, *supra* n 501, 125-126 (emphasis added).
[929] Gutwirth & Stengers, *supra* n 298, 331-332: 'Le *commoning* devrait […] être reconnu comme un droit humain et, qui plus est, un droit constituant un atout précieux quant à la réalisation d'autres droits humains tels que le droit au travail, la santé, l'alimentation et un environnement sain. […] La revendication du droit au *commoning* n'implique évidemment pas que l'Etat se décharge sur les *commons* des responsabilités qui lui incombent, mais qu'il "assiste, soutienne, favorise" l'institutionnalisation de démarches de *commoning*, qui, de manière subsidiaire et polycentrique, se donnent la capacité de rendre la satisfaction de droits humains […].'
[930] Bailey & Mattei, *supra* n 64, 966.

be part of the creation of the city, the right to be part of the decision-making processes shaping the lives of city inhabitants, and the power of inhabitants to shape decisions about the collective resource in which we all have a stake.'[931] Other scholars have been less explicit about the legal entitlement to the institution of the commons, using the notion in vaguer terms as global resource domains. Referring to 'the final enclosure movement' dispossessing the poor of the world, Laura Westra pressed us to turn 'to a Kantian approach to a universal cosmopolitan rule' to tackle 'the effect of globalized policies on the *basic rights* of present and future generations *to the universal commons*': '[t]he greatest tragedy', she writes, 'is that, unless some radical and immediate action is taken to reverse present trends, the very existence of the "commons" will remain only a historic fact, not even a memory for future generations'.[932]

However, the status and jurisdictional reach of an alleged right to the commons – proclaimed in all these academic writings and places of activism – remains markedly unclear and speculative. The creative imagination of jurists is of great importance here. As we have seen, the law is part of the problem since modernity and international law, in particular, has most often been crafted to serve the interests of expansionist states and private corporations. However, the right of access, use and management of the commons cannot merely remain an abstract 'moral claim' or 'political strategy' *de lege feranda*. For if we want to make any sense of the right to establish and maintain commons, it is necessary to be able to enforce such entitlement *de lege lata*. Even if the commons may imply moral values of cooperation, mutual trust, reciprocity, participation which stand in stark contrast to the competition and individualism of the market, the law cannot be called upon to protect only the most 'virtuous' ones.[933] It would even be a mistake to consider commons as inherently 'good', as we will see that communities may very well, for instance, discriminate against women or strangers (see *infra*, Chapter 3). A commons simply represents an alternative model of self-governance upon which communities rely for their livelihood. As Ostrom showed in her seventh design principle, it is a matter of sustainability for the commons to be legally recognized and protected externally against their destruction by the state or the market. So, commoners should enjoy the right to the commons solely by virtue of their humanity – because they depend upon the commons for their survival.

[931] Foster & Iaione, *supra* n 70, 288.
[932] Westra, *supra* n 909, 119 (emphasis added).
[933] Gutwirth & Stengers, *supra* n 298, 333.

Moreover, even if the commons may represent a transformative political principle,[934] the commons respond to empirical realities and are first and foremost a source of food, culture, spirituality, for communities across the world. In these conditions, it would be a mistake to reduce the right to the commons to a utopian political strategy. Samuel Moyn already warned against the tragic fate of human rights when they are conceived as utopia.[935] Without denying the immense value of the alternative political horizon which the commons today open up in international law, it would be counterproductive to downgrade the right to the commons as an abstract political ideology. Communities of commoners around the world are looking for a tangible international legal framework to which they can resort to claiming their rights in a bottom-up fashion, not a universal political project that would be imposed upon them from the top. In other words, the purpose is not to capture the commons as a totality. It is not to deny the concrete local and social distinctiveness of every commons by conceiving them in terms of universal human rights language and values, nor to put forth a vision of a single system of governance for all communities at the global level. As Burns Weston and David Bollier have emphasized, '[t]here is no universal template of a commons for the simple reason that each is grounded in particular, historically rooted, local circumstances'.[936] Rather, my objective is to demonstrate that, pursuant to current human rights law, communities are entitled to satisfy collective needs through a different model of governance than the traditional public-private one, that is the self-management of commons.[937] If we want to protect the commons against the predatory attitudes of states and markets, it is urgent to identify the human rights which commoners can claim under international law. So, a new and more concrete question arises in this last chapter: can international and regional human rights instruments play any role in closing the commons gap in international law? And if so, what kind of rights, sanctioned by positive international law, are likely to protect commons-based institutions which are under threat in the process of development? Following a brief background on human rights-based approaches to development (HRBA) (Section 2), Section 3 focuses on international human rights guarantees that can potentially protect the commons as a social institution.

## 2. Human Rights-Based Approaches to Development (HRBA)

[934] Dardot & Laval, *supra* n 91.
[935] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).
[936] Weston & Bollier, *supra* n 21, 126.
[937] Daniella Festa, 'Les communs urbains. L'invention du commun' (2016) 16 *Tracées, Revue de Sciences humaines* 233, para. 51.

Let us start with the process of development. Human rights are not just legal standards. Over the last 20 years, human rights have gained a prominent place in the policy discourse of bilateral and multilateral donors. HRBA aim at encompassing human rights standards into the design, implementation, monitoring, and evaluation of development programs and policies. There are, therefore, in my view, several advantages of considering HRBA for implementing human rights obligations linked to the commons in development. To begin with, HRBA constitute a normative framework that has its basis in international human rights conventions to which States have agreed by consensus. Development and human rights discourses cannot be considered mutually exclusive domains of economists and lawyers respectively. There lies the strong appeal of HRBA because it has, as Darrow and Tomas explain, '1. a solid normative basis for values and policy choices that otherwise are more readily negotiable; 2. a predictable framework for action, with the advantage of objectivity, determinacy, and the definition of appropriate legal limits'.[938] The advantage of invoking human rights in the context of development cooperation is to rely on legal obligations which are binding upon States and State members of international organizations. There lies the more compelling and constraining nature of this rigorous, non-negotiable and objective normative framework: HRBA focus on holding all stakeholders in the development process accountable to rights-holders.

Furthermore, HRBA are based on the strong normative 'premise that development cooperation should lead to the realization of human rights because of their *intrinsic* value'.[939] Poverty is seen as a violation of human rights. Certainly, there are also instrumentalist reasons for adopting HRBA in development strategies, because human rights are also deemed to contribute to aid effectiveness, for example in promoting good governance. Yet, human rights are seen as ends in themselves. This is the distinctive characteristic and normative force of a rights-based approach. The principles of non-discrimination and equality in access to benefits must be taken into account in every phase of the development cycle because they are legally imperative, and this 'in terms of their own substantive merit'.[940]What is more, the objective in HRBA is to capture the experiences of people themselves, to empower people, and to promote ownership

[938] Marc Darrow and Amparo Tomas, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27(2) *Human Rights Quarterly* 485.
[939] David D'Hollander, Ignace Pollet and Laura Beke, 'Promoting a Human Rights-Based Approach (HBRA) within the Development Effectiveness Agenda' (July 2013) *Briefing Paper prepared for the CSO Partnership for Development Effectiveness (CPDE) Working Group on HRBA*, <https://lirias.kuleuven.be/bitstream/123456789/450420/1/cpde_hrba_briefing_paper_final.pdf> (accessed 30 September 2016) 8.
[940] ibid., 11.

of the development process.[941] The final outcome counts less than the process of development, which must be locally owned by the communities themselves. People are empowered as key actors in their own development, rather than passive recipients of GPGs. The development process is reconstructed as a relationship between rights-holders, the commoners, who claim rights to duty-bearers, the development actors. Democratic and community-based methods that allow communities to claim their rights should be preferred over other results-based methods, such as government-to-government aid, even though the latter might be more effective to fulfil certain development needs on the short term.

### 2.1. Origins

While the contemporary discourse on HRBA may find its origins in anti-colonialism struggles and the establishment of the 1986 UN Declaration on the Right to Development[942] in the context of the NIEO, it is a relative newcomer in the development community. HRBA only really emerged in the 1990s, in reaction to the failures of the SAP era and the Washington Consensus.[943] It is probably the 1993 Vienna Declaration and Programme of Action that first promoted a broader understanding of human rights in recognizing that 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.[944] Additional impetus was added in 1997 by the then UN Secretary-General Kofi Annan and his report on 'Renewing the United Nations: A Programme for Reform', which declared human rights to be a cross-cutting issue for the whole UN system, including its development programs.[945] Moreover, to dispel any doubts, at the end of the same decade, the landmark book of Amartya Sen entitled *Development as Freedom* corroborated that it was impossible to achieve meaningful development for all without the enjoyment of basic political and economic rights.[946]

[941] Alessandra Lundström Sarelin, 'Human Rights-Based Approaches to Development Cooperation, HIV/AIDS, and Food Security' (2007) 29(2) *Human Rights Quarterly* 460, 476.
[942] UNGA, 'Declaration on the Right to Development' (4 December 1986) UN Doc. A/RES/41/128.
[943] Tahmina Karimova, *Human Rights and Development in International Law* (Routledge 2016) 39-40.
[944] UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc. A/CONF.157/23, para. 8.
[945] UNGA, 'Renewing the United Nations: A Programme for Reform' (14 July 1997) Report of the Secretary-General, UN Doc. A/51/950, paras 78-79.
[946] See Amartya Sen, *Development as Freedom* (Anchor Books 2000).

### 2.2. Development paradigm

Today, the link between human rights and development is no longer in question. The post-2015 development agenda expressly acknowledges that it is grounded in international human rights law.[947] However, there is no clear consensus, let alone a normative and binding instrument, to define what HRBA should precisely mean in development cooperation. HRBA represent more than economic and social rights and the right to development: HRBA advance pragmatic principles and toolkits that specifically apply to development programming.[948] In fact, HRBA have been articulated, interpreted and operationalized in various ways by multilateral donors like the Children's Fund (UNICEF)[949] and the EU,[950] bilateral donors such as SIDA[951] and DIFD,[952] and NGOs like Oxfam[953].[954] This is why it is probably more accurate to refer to HRBA in the plural, to reflect the multidimensional, if not fragmented nature of this development paradigm. This being said, the United Nations Development Group (UNDG) did lay down in 2003 a Statement of Common Understanding of the 'Human Rights-Based Approach to Development Cooperation and Programming' (UN Common Understanding). While not legally binding, this document has been used by many development agencies – most of which are

[947] UN 2030 Agenda, *supra* 26, preamble and para. 10.
[948] Paul Gready, 'Rights-based approaches to development: what is the value-added?' (2008) 18(6) *Development in Practice* 736.
[949] UNICEF, 'Human Rights-based Approach to Programming' (23 January 2016) <http://www.unicef.org/policyanalysis/rights/> (accessed 30 September 2016); UNICEF, 'The UNICEF Strategic Plan, 2014-2017: Realizing the rights of every child, especially the most disadvantaged' (11 July 2013) UN Doc. E/ICEF/2013/21.
[950] Council of the EU, 'Council conclusions on a rights-based approach to development cooperation, encompassing all human rights' (19 May 2014) Foreign Affairs (Development) Council meeting, <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/142682.pdf> (accessed 30 September 2016); European Commission, 'Tool-Box: A Rights-Based Approach, encompassing all human rights for EU Development Cooperation' (30 April 2014) SWD(2014) 152 final, <http://www.eidhr.eu/files/dmfile/SWD_2014_152_F1_STAFF_WORKING_PAPER_EN_V5_P1_768467.pdf> (accessed 30 September 2016).
[951] Sida, 'Human Rights Based Approach at Sida' (29 September 2015) <http://www.sida.se/English/partners/resources-for-all-partners/methodological-materials/human-rights-based-approach-at-sida/> (accessed 30 September 2016).
[952] DFID, *Realising human rights for poor people: Strategies for achieving the international development targets* (October 2000) <http://www2.ohchr.org/english/issues/development/docs/human_rights_tsp.pdf> (accessed 30 September 2016); See also Laure-Hélène Piron and Francis Watkins, 'DFID Human Rights Review: A review of how DFID has integrated human rights into its work' (July 2004) <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2289.pdf> (accessed 30 September 2016).
[953] Oxfam, 'Our commitment to human rights', <https://www.oxfam.org/en/our-commitment-human-rights> (accessed 30 September 2016).
[954] See for contributions unravelling the different HRBA discourses: Celestine Nyamu-Musembi and Andrea Cornwall, 'What is the 'rights-based approach' all about? Perspectives from international development agencies' (November 2004) *IDS Working Paper 234*, <http://www.ids.ac.uk/files/dmfile/Wp234.pdf> (accessed 30 September 2016); D'Hollander et al., *supra* n 939.

subsidiary entities of the UN – as a starting point and blueprint to further operationalize HRBA in their work. The Common Understanding is articulated around these three key elements:

> 1. All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the [UDHR] and other international human rights instruments.
> 2. Human rights standards contained in, and principles derived from, the [UDHR] and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
> 3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.[955]

The UN Common Understanding further puts forward six human rights principles: (i) 'universality and inalienability'; (ii) 'indivisibility'; (iii) 'inter-dependence and inter-relatedness'; (iv) 'non-discrimination and equality'; (v) 'participation and inclusion'; and (vi) 'accountability and the rule of law'. The last three principles merit further explanation as they clearly show the transformative character of this new development paradigm.

First, HRBA promote a development process that underlines the *accountability* of development actors under human rights law. As the Office of the High Commissioner for Human Rights (OHCHR) puts it, '[r]ights imply duties, and duties demand accountability.'[956] The principle is that where human rights are omitted or violated, remedies must be provided; aggrieved rights-holders must be allowed to institute legal proceedings against duty-bearers. Moreover, States are not the only duty-bearers, other multilateral donors should also be answerable for the observance of human rights. This means that development actors adopting HRBA into their policies recognize the 'responsibility to account themselves to those whom they serve'.[957] Accountability does not need to be achieved solely through judicial proceedings, it can be served by better monitoring, reporting and public debate.

Second, development programs based on human rights must be *participatory and inclusive*. Participation is prescribed by a host of international human rights conventions, such as the Convention on the Rights of the Child (CRC) of which Article 12 ensures that a child may

[955] UNDG, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies', <https://undg.org/wp-content/uploads/2015/05/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN1.pdf> (accessed 30 September 2016) 17.
[956] OHCHR, 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' (2006) UN Doc. HR/PUB/06/12, para. 24.
[957] Sarelin, *supra* n 941, 478.

express its views 'freely in all matters affecting [it]'[958] or CEDAW, which guarantees women equal participation rights in political, public and cultural life.[959] As the UNDP emphasises in its Social and Environmental Standards, it must 'ensure the meaningful, effective and informed participation of stakeholders in the formulation, implementation, monitoring and evaluation of Programmes and Projects'.[960] The key principle is empowerment. All people and communities must be engaged and duly informed in finding solutions to realise their rights. People contribute to the design of development projects on the basis of civil and political rights. HRBA imply 'a fundamental rethinking of the development process: a paradigm shift from seeing aid beneficiaries as passive 'need-fulfilling' individuals to active "agents of change"'.[961]

A third transformative principle underlying HRBA is that of *equality and non-discrimination*. HRBA seek to empower human beings in recognizing the dignity and agency of all individuals. Prohibited grounds of discrimination include race, ethnicity, gender, age, language, disability, sexual orientation, religion, political or other opinion, national or social or geographical origin, property, birth or any other status, including as an indigenous person or as a member of a minority. HRBA shift the focus of development to the most fragile, marginalised and deprived by discrimination. In the words of the OHCHR, HRBA strive to analyse 'the inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress'.[962] HRBA thus call for development programmes to share resources more equally and reassert the rights of the most vulnerable people to those resources.[963]

Since the release of the Common Understanding, HRBA have proliferated in the operational policies of almost all major multilateral and bilateral development agencies. Most notably, the UNDP's Social and Environmental Standards, which aim to prevent adverse social and environmental risks and impacts in its operations, state since January 2015 that 'UNDP seeks to support governments to adhere to their human rights obligations and empower individuals

[958] Convention on the Rights of the Child (adopted by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[959] Convention on the Elimination of All Forms of Discrimination against Women (adopted by General Assembly resolution 34/180 of 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 ('CEDAW').
[960] UNDP, 'Social and Environmental Standards' (June 2014) <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDPs-Social-and-Environmental-Standards-ENGLISH.pdf> (accessed 30 September 2016) 9.
[961] D'Hollander et al., *supra* n 939, 9.
[962] OHCHR, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (United Nations 2006) 15.
[963] Nyamu-Musembi & Cornwall, *supra* n 954 at 2.

and groups, particularly the most marginalized, to realize their rights and to ensure that they fully participate throughout UNDP's programming cycle.'[964] Although the UNDP carefully warns that it 'does not have a monitoring role with respect to human rights', the UN agency pledges to 'both refrain from providing support for activities that may contribute to violations of a State's human rights obligations and the core international human rights treaties, and seek to support the protection and fulfilment of human rights.'[965] The UNDP's Strategic Plan 2014-2017 also recognizes the HRBA as a key engagement principle.[966] Even major multilateral development banks like the African Development Bank (AfDB)[967] and the European Bank for Reconstruction and Development (EBRD),[968] while not adopting cross-cutting human rights policies, have at least referred to human rights in aspirational terms in their safeguard policies, and recognized the responsibility of borrowing countries to respect human rights.[969]

### 2.3. World Bank

In contrast to the progress made by these agencies towards integrating human rights in their programming, and despite references to the UDHR and other human rights-related subject-matters in the new Environmental and Social Framework (ESF) which applies to all new investment project financing since end of October 2018,[970] the World Bank remains one of the few development institutions which stills refuses to recognize formally human rights obligations in its operational policies. The World Bank has traditionally rejected the human

[964] UNDP, *supra* n 960, 6.
[965] ibid., 9.
[966] UNDP, *Changing with the World. UNDP Strategic Plan: 2014-17* (UNDP 2013) 16.
[967] AfDB, 'Safeguards and Sustainability Series' (December 2013) Volume 1 – Issue 1, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System__-_Policy_Statement_and_Operational_Safeguards.pdf> (accessed 30 September 2016) preamble, para. 3.
[968] EBRD, 'Environmental and Social Policy' (7 May 2014) <http://www.ebrd.com/downloads/research/policies/esp-final.pdf> (accessed 30 September 2016) 2. See also, Agreement Establishing the European Bank for Reconstruction and Development (adopted 29 May 1990, entered into force 28 March 1991) 1646 UNTS 97, preamble, para. 1.
[969] World Bank, 'Comparative Review of Multilateral Development Bank Safeguard Systems' (May 2015) Main Report and Annexes, Prepared by Harvey Himberg, <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf> (accessed 30 September 2016) ix.
[970] World Bank, *The World Bank Environmental and Social Framework* (World Bank 2017) <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf> (accessed 24 April 2020) (ESF).

rights agenda as *ultra vires* on the basis of the 'political prohibition' laid down under, notably, Article IV, Section 10 of its Articles of Agreement (its constituent instrument):

> The Bank and its officers shall not interfere in the political affairs of any member […]. Only economic considerations shall be relevant to their decisions […].[971]

This political prohibition, which can be found in the constituent instruments of most other multilateral development banks, serves as a shield to avoid arbitrariness and discrimination based on political aims in the Bank's financial decisions. Yet, it should be acknowledged that the line between political intrusion and permissible action based on 'economic considerations' has often been reinterpreted by the World Bank's successive General Counsels. The prevailing view of what amounts to political interference (not only with regard to human rights, but also the environment, corruption, the fight against terrorism or gender equality) has evolved within the institution.[972] As Roberto Dañino, former General Counsel, opined in 2007, 'it is consistent with the Articles that the decision-making processes of the Bank incorporate social, political, and any other relevant input that may have an impact on its economic decisions.'[973] This concretely meant that the Bank could take any type of human rights into account, provided they were relevant for its economic decisions. In October 2006, the next General Counsel, Ana Palacio, adopted a so-called 'permissive' interpretation of the Bank's consideration of human rights, that is one 'allowing, *but not mandating*, action on the part of the Bank in relation to human rights'.[974] So, 'human rights would not be the basis for an increase in Bank conditionalities, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business'.[975] The General Counsel from 2009 to 2016, Anne-Marie Leroy, also accepted in line with previous General Counsels, 'the link between development and human rights'. However, she stressed that '[t]his process […] must be in accordance with the mandate vested in the Bank' and thus repeated that 'only economic considerations – meaning those that have a direct and obvious economic effect relevant to the Bank's work – can be taken into account in decisions by the Bank and its officers'. The official position of the Bank was therefore that it would not go 'beyond the bounds of the Bank's

[971] IBRD Articles of Agreement, *supra* n 43.
[972] See Cissé, *supra* n 58, 59; Shihata, *supra* n 58, 219.
[973] Dañino, *supra* n 47, 23.
[974] Palacio, *supra* n 62 (emphasis added).
[975] ibid.

institutional mandate' to support the human rights obligations of its clients.[976] The current General Counsel, Sandie Okoro, a strong supporter of women's rights,[977] has shown more openness towards the human rights agenda,[978] but has not yet acknowledged that the Bank is as such bound by international human rights law.

This restrictive interpretation of the Articles of Agreement can explain why the new ESF, adopted by the Bank's Board of Executive Directors on 4 August 2016, lacks any clear dedicated and binding human rights safeguard.[979] The ESF replaces the Bank's safeguard policies and must ensure that the Bank's activities do not cause harm to communities and the environment. It requires borrowing countries to comply with a set of rules in investment projects around mitigation of environmental risks, public participation, resettlement for victims of involuntary displacement, indigenous people, labour and working conditions. Yet, despite the repeated calls by civil society groups[980] and UN independent experts[981] throughout the public consultations, the Bank declined to adopt binding requirements to respect human rights and provide appropriate remedy for violations. The aspirational vision statement merely states that the Bank 'seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments'.[982] The ESF limits itself to referring to the UDHR and other human rights in the areas of labour, health, property and housing, and – most significantly – indigenous peoples' rights. The Bank has sought to make the ESF more coherent with the human rights language. Nevertheless, while some requirements symbolically refer to the progressive achievement and core concepts of human rights (e.g., 'consultation' and 'free prior and informed consent'), the ESF does not formalize

[976] Anne-Marie Leroy and Makhtar Diop, 'Joint Allegation Letter AL Food (200-9) Debt (200-9) Oth 7/2012' (9 October 2012) <http://spdb.ohchr.org/hrdb/22nd/OTH_09.10.12_(7.2012).pdf> (accessed 30 September 2016) 5.
[977] Sandie Okoro, 'Seen and Note Heard. Proceedings of the Annual Meeting' (2017) 111 *American Society of International Law* 267.
[978] For example, the two last editions of the Law, Justice and Development Weeks 2018 and 2019 – the flagship annual event of the Bank's Legal Department – examined the interlink between rights and development, and emphasized the role that multilateral banks may play in advancing human rights.
[979] ESF, *supra* n 970.
[980] See, Bank on Human Rights, 'Obstacles to Participation in World Bank Safeguards Consultations', 25 November 2014, <http://bankonhumanrights.org/wp-content/uploads/2014/11/Consultations_letter_11.25.14-Final.pdf> (accessed 30 September 2016).
[981] See, OHCHR, 'Letter from special procedures mandate-holders of the United Nations Human Rights Council to Mr. Jim Yong Kim' (12 December 2014) <http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf> (accessed 30 September 2016).
[982] ESF, *supra* n 970, para. 3.

any international legally binding commitment and leaves the borrower countries' deference to domestic standards unimpaired.[983]

The Bank's position has attracted widespread condemnation, not only in civil society[984] and the academic community,[985] but also in human rights monitoring bodies. The UN Committee on Economic, Social and Cultural Rights (CESCR) thus called upon the Bank in a statement as early as of 1998 'to pay enhanced attention in [its] activities to respect for economic, social and cultural rights, including through […] facilitating the development of appropriate remedies for responding to violations'.[986] In a report of 2013, Raquel Rolnik, UN Special Rapporteur on adequate housing, urged the Bank to 'adopt safeguards policies aligned with the international human rights obligations of its member States and clients'.[987] More recently, in a report of August 2015 on the human rights policy of the World Bank, Philip Alston, UN Special Rapporteur on extreme poverty and human rights depicted the World Bank as a 'human rights-free zone' and concluded that 'the existing approach taken by the Bank to human rights is incoherent, counterproductive and unsustainable' and called on 'a transparent dialogue designed to generate an informed a nuanced policy that will avoid undoubted perils'.[988] However, it would be wrong to suggest that the Bank totally ignores human rights.

As a matter of fact, the Bank argues that its work is focused on poverty reduction, and therefore only incidentally on the realization of economic, social and cultural rights. Even though formal human rights standards are still missing from the Bank's conditionalities for investment project financing, the Bank acknowledged as early as 1998 that 'creating the conditions for the

[983] María Victoria Cabrera Ormaza and Franz Christian Ebert, 'The World Bank, human rights, and organizational legitimacy strategies: The case of the 2016 Environmental and Social Framework' (2019) 32 *Leiden Journal of International Law* 483.
[984] See, e.g., Human Rights Watch, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations* (Human Rights Watch 2013); Human Rights Watch, 'World Bank: Don't Slight Rights at Annual Meetings' (8 October 2015) <https://www.hrw.org/news/2015/10/08/world-bank-dont-slight-rights-annual-meetings> (accessed 30 September 2016); Kirk Herbertson, Kim Thompson and Robert Goodland, *A Roadmap for Integrating Human Rights into the World Bank Group* (World Resources Institute 2013).
[985] See, e.g., Darrow, *supra* n 57, 192. See alos, Samuel Cogolati, 'La Banque mondiale à l'épreuve des droits de l'homme' (27 January 2016) *Le Monde* <https://www.lemonde.fr/idees/article/2016/01/28/la-banque-mondiale-a-l-epreuve-des-droits-de-l-homme_4855422_3232.html> (accessed 24 April 2020).
[986] CESCR, 'Globalization and Economic, Social and Cultural Rights' (May 1998) UN Doc. E/C.12/1998/26 paras. Chap. VI, sect. A, para. 515, para. 7.
[987] UNGA, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Addendum, 'Mission to the World Bank' (15 February 2013) UN Doc. A/HRC/22/46/Add.3, paras 11 and 75.
[988] UNGA, Report of the Special Rapporteur on extreme poverty and human rights (4 August 2015) UN Doc. A/70/274.

attainment of human rights is a central and irreducible goal of development'.[989] The ESF now states that the Bank 'shares the aspirations of the [UDHR] and helps its clients fulfil those aspirations'.[990] The broad idea which the Bank seems to support is that its work on governance and development, in providing access to services such as health care, water and education, actually contributes to creating the conditions necessary for realising human rights. In that sense, the contribution of the Bank to human rights would rather be 'implicit'.[991]

### 3. Human rights guarantees

It should be acknowledged that HRBA serves as a rhetorical instrument in development. Human rights in HRBA cannot entirely be understood as strict legal norms linked to specific legal instruments to apply in a State context only, but rather as more operational principles which underpin the development enterprise of a given development agency. For Langford, '[t]he 'human rights approach to development' has reached development buzzword status'.[992] Hence, there are concerns in the literature that HRBA would be no more than new fashions 'to dress up the same old development', instead of 'powerful forces for change': '[s]ome agencies can proclaim their commitment to human rights, yet the bulk of their practice remains entirely unaffected by nice-sounding policies as it is framed by older or competing development models that remain hegemonic in practice.'[993] The joint World Bank-OECD flagship publication entitled *Integrating Human Rights into Development* mentions the same potential shortcoming of HRBA, that is 'the risk of "rhetorical repackaging", which involves a superficial use of human rights terms in development without full incorporation of human rights obligations or principles'.[994] Consequently, the section explores, as a matter of internationally recognized human rights standards, to what extent states and international development agencies like the World Bank are bound to recognize the institution of the commons. While commenting upon

[989] See, World Bank, *Development and Human Rights: The Role of the World Bank* (1998), <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/08DHR.pdf> (accessed 30 September 2016).
[990] ESF, *supra* n 970, para. 3.
[991] See, World Bank, 'Human Rights', <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20749693~pagePK:98400~piPK:98424~theSitePK:95474,00.html> (accessed 30 September 2016): 'While the World Bank is not an enforcer of human rights, it may play a facilitative role in helping its members realize their human rights obligations.'
[992] Langford, *supra* n 805, 165.
[993] Nyamu-Musembi & Cornwall, *supra* n 954, 1 and 5.
[994] World Bank and OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges* (2nd ed., World Bank and OECD 2013) xxxiii.

the Charter of the Forest of 1217, Van Bueren noted that '[e]ach of the medieval rights […] has its counterparts in treaties focusing on human rights'.[995] It is therefore worth reconstructing the commons in the constellation of existing civil, political, economic, social and cultural rights. That is what we shall do in this third and last section, reviewing, in turn, the right to freely dispose of natural wealth and resources (3.1), the right to clean and healthy environment (3.2), the right to communal property (3.3.), the right to food (3.4), indigenous rights (3.5), peasants' rights (3.6), and women's rights (3.7).

### 3.1. Right to freely dispose of natural wealth and resources

The doctrine of PSNR exposed above in its alleged extractive dimension (see, *supra*, Chapter 2, Section 2.1.6.2) was also originally created as a legal strategy by the group of G-77 states in the midst of the decolonization era to resist enclosure by powerful states from the Global North and their private corporate entities. Unsurprisingly, the proposal of newly independent states to include a right to *permanent sovereignty* over natural resources[996], at the two international human rights covenants implementing the UDHR, met with strong opposition by Western powers in the UN.[997] The less controversial right to *freely dispose* of natural wealth and resources thus made its way into the identically formulated Article 1(2) of both the International Covenant on Civil and Political Rights (ICCPR)[998] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[999] following the peoples' right to self-determination in the first paragraph:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[995] Van Bueren, *supra* n 921, 201.
[996] See, UN Declaration on the Right to Development, *supra* n 942, Article 1(2): '[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable *right to full sovereignty over all their natural wealth and resources*' (emphasis added).
[997] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005) 5-25. There was notably a concern to attribute sovereignty to 'peoples', which Western countries refused to see as 'states'.
[998] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').
[999] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 4 ('ICESCR').

Note the exception to the benefit of industrialised countries in the second part of the first sentence, to protect foreign investment projects against expropriations without compensation. The reference to 'means of subsistence' in the second sentence was nonetheless justified by a country taking part in the negotiations in 1955 'to prevent a weak or penniless government from seriously compromising a country's future by granting concessions in the economic sphere – a frequent occurrence in the 19th century.'[1000] This right means that peoples cannot be denied access to hunting grounds, fisheries or forests if they depend upon those resources for their survival. Article 1(2) is reinforced by the additional rule of interpretation laid down under Article 47 of the ICCPR and Article 25 of the ICESCR, stating that:

> [n]othing […] shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

The collective nature of this right conferred upon 'peoples' cannot be disputed.[1001] Moreover, as we have seen earlier, the commons represent, in most rural areas of developing countries, the primary means of subsistence. Hence, it seems plausible that communities affected by the enclosure of the commons upon which they rely for their survival would invoke the right to 'dispose of their natural wealth' in order not to be deprived of their 'own means of subsistence'. Even though the Human Rights Committee (HRC) seems to have avoided any concrete implementation of Article 1 of the ICCPR in its jurisprudence, in *Apirana Makhuika et al. v. New Zealand*, it read Article 1(2) (which had been claimed by the alleged victim) in conjunction with Article 27 of the ICCPR (on the right of minorities) to state that the Maori people should not be deprived of the traditional use and effective control of the fisheries as an essential part of their culture.[1002] The CESCR was more explicit, for example in its *Concluding Observations on the Democratic Republic of Congo*, in noting that, under Article 1(2) of the ICESCR, mining contracts should not be detrimental to local populations and that forest concessions should not

[1000] UNGA, 10th Session, 672nd meeting of the Third Committee (25 November 1955) UN Doc. A/C.3/SR.672, para. 31, quoted after von Bernstorff, *supra* n 834, 286.
[1001] As such, an individual could not claim to be a victim of a violation of Article 1(2). However, there is no clear definition of the 'peoples' entitled to this right under the ICCPR and ICESCR.
[1002] HRC, *Apirana Makhuika et al. v. New Zealand*, Communication No. 547/1993 (27 October 2000) UN Doc. CCPR/C/70/D/547/1993, paras 9.3 and 9.7. Note that in this case, the issue of traditional management of fisheries is not seen as a sovereign right, but as the cultural entitlement of a minority. See also, HRC, *Bernard Ominayak Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990) UN Doc. A/45/40, Annex IX(A), paras 13.3 and 13.4: the Committee noting 'that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights', but that it could not apply in the individual case at hand, decided that the facts raised issues under Article 27.

deprive indigenous communities of 'the full enjoyment of their rights to their ancestral lands and natural resources' and that such projects should only be carried out 'with the participation of the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned activities.'[1003]

The right to natural resources is also laid down at the regional level as a stand-alone provision in Article 21(1) of the African (Banjul) Charter on Human and Peoples' Rights (AfCHPR):[1004]

> All peoples shall freely dispose of their natural resources and States Parties shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from their natural resources.

Article 21(2) specifies that:

> [i]n case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The African Commission on Human and Peoples' Rights (ACHPR) has noted that '[t]he origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land' and '[t]he aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation'.[1005] The question of who constitutes a 'people' under Article 21 has notably been addressed in ground-breaking *Endorois* case – the first case to recognize an African indigenous community's right over traditionally owned land. The African Commission, 'aware that [vulnerable groups in Africa] are being victimised by mainstream development policies', and '[departing] from the narrow formulations of other regional and universal human rights instruments', retained two key criteria: the sacred relationship which the community entertained with their ancestors' land, and self-identification as indigenous peoples.[1006] The Commission then held that 'a people inhabitant a specific region within a state

[1003] CESCR, *Concluding Observations: Democratic Republic of the Congo* (20 November 2009) Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, UN Doc. E/C.12/COD/CO/4, paras 13-14.
[1004] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ('ACHPR').
[1005] African Commission on Human and People's Rights (ACHPR), *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria* (27 May 2002) Communication No. 155/96, para. 56.
[1006] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) Communication No. 276/2003, paras 148, 149, 156-157.

can claim the protection of Article 21'. Since the Endorois never received adequate compensation nor restitution of their land, Kenya was found to have violated their right to freely dispose of their wealth and natural resources in disrupting the community's pastoral enterprise.[1007] The decision of the Commission was, however, not binding and was never implemented. More significantly, the African Court on Human and People's Rights (AfCtHRP) recognized, in a much-publicized judgment on 26 May 2017, that the Ogiek Peoples, one of the last forest-dwelling communities in Kenya, had a major role to play in protecting the Mau Forest as an area on which they depend for their livelihood.[1008] By evicting the Ogieks from the Mau Forest and depriving them of their traditional food resources therein, the Kenyan government was found to have violated their right to freely dispose of their wealth and natural resources.[1009] The American Convention does not incorporate an equivalent right, but the Inter-American Court of Human Rights (IACtHR) has afforded similar protection.[1010]

The importance of the right to 'economic self-determination'[1011] should not be overstated. According to Olivier De Schutter, the right to freely dispose of natural wealth and resources remains 'one of the most under-rated and under-utilized norms in the international human rights system of protection'.[1012] Yet, it has not been fully incorporated into advocacy strategies of land rights or commons activists. At first sight, though, this positive norm of international human rights law comes close to the 'Universal Covenant Affirming a Human Right to Commons- and Rights-Based Governance of Earth's Natural Wealth and Resources' imagined by Weston and

[1007] ibid., paras 267-268.
[1008] ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Judgment of 26 May 2017), Application No. 006/2012.
[1009] ibid., para. 200.
[1010] The Inter-American Court of Human Rights (IACtHR) has however developed extensive case-law regarding the right to collective property and access to communal lands for indigenous and tribal peoples: see, *infra*, Section 3.3. See, in particular, *Case of the Saramaka People v. Suriname (Judgment of 28 November 2007)*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (Ser. C) No. 172, para. 93: 'by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of both 1966 Covenants], they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants. This Court considers that the same rationale applies to tribal peoples due to their similar social, cultural, and economic characteristics they share with indigenous peoples.'
[1011] See, e.g., Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries' (2006) 39(2) *New York University Journal of International Law and Politics* 417.
[1012] Olivier De Schutter, 'The host state: Improving the monitoring of international investment agreements at the national level' in Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 165.

Bollier.[1013] Moreover, the emergence of this norm in the midst of the decolonization era challenges the absolute and unqualified authority of the state to dispose of the land and natural resources within its territory and 'the orthodox top-down model of development', and this alone signals 'a significant turning point in the evolution of international law'.[1014] Insofar local communities of 'peoples' are recognized as legitimate rights bearers, they may exercise greater control over the resources upon which they depend and participate more directly in a bottom-up process of development.

The crucial question, however, remains who is entitled to freely dispose of natural wealth and resource.[1015] It can seriously be doubted that communities other than populations of non-self-governing territories, minorities or indigenous peoples may enjoy the same subsistence rights – think of small-scale farmers, pastoralists, forest dwellers, artisanal fishers who depend on commons for their subsistence.[1016] Even if the African Commission was willing to interpret the criteria of indigenousness extensively so as to cover various types of cultural attachment to ancestral land and resources, the personal scope of the right applies to narrowly defined categories of peoples and may be limited to other communities of commoners who do not necessarily have a 'distinct identity' but may nonetheless equally suffer from enclosure and dispossession.

Self-rule and peoples' ability to choose their own governance system constitute a basic element of the right to self-determination.[1017] However, this may be limited to a people's ability to have access to a democratic and representative government.[1018] Commoners now *may* come within the rubric of the rights bearers and engage more directly in the process of development, but the

[1013] Weston & Bollier, *supra* n 21.
[1014] Miranda, *supra* 859, 830 and 840.
[1015] See, Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015) 66: 'in the context of a sovereign State, the term "peoples" refers in particular to all persons within a State as the sum of all the peoples living in the State, i.e., the population as a whole, and to distinct groups within a State possessing certain common characteristics – in particular, minorities and indigenous peoples.'
[1016] See, for a detailed analysis of the meanings of 'peoples' under the ACHPR, Richard N. Kiwanuka, 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82(1) *American Journal of International Law* 80.
[1017] Farmer, *supra* n 1011, 432: 'Economic self-determination is, in effect, both driven by and supportive of democratic participation and self-governance.'
[1018] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International & Comparative Law Quarterly* 241, 249: 'The self-determination which identifies the nation as the State could be called the classical, or Hobbesean, conception of self-determination. […] Nations, according to this conception, are artificial communities, collections of individuals who are linked principally by the existence of a statal decision-procedure which makes it possible for them to participate in the conduct of their common affairs within the State.'

national polity remains the ultimate sovereign upon its territory – which includes its natural wealth and resources. As Nico Schrijver writes, 'States are still the prime layer of international administration and have the primary responsibility for realizing the right to development of their citizens'.[1019] Even if the recognition of the control of designated natural resources may allow a community to design its own means of communal development, the norm as such was simply not designed to recognize any specific form of communal management – let alone the social institution of the commons. It may very well be that the state would even object to the institution of the commons, while leaving its 'peoples' free to use and control natural resources through other means. The state could, for instance, increase the transparency or consultation of its peoples in their ability to participate in decisions regarding the use of their natural resources.

Finally, the right to economic self-determination may play a distributive role in the intrastate allocation of land and natural resources,[1020] but it emphasizes the 'free disposition' of natural resource discovery, exploitation and extraction as primary means of development. It does not safeguard the sustainable use or management of natural resource over the long term and it does not prescribe any clear limitation to natural resource development. As common Article 1(2) of both 1966 Covenants explicitly states, it should not jeopardize 'international economic co-operation' and the rights of foreign investors. Or as a commentator puts it, '[e]conomic self-determination was not designed in opposition to international economic growth' and it can even 'support the work of the World Bank'.[1021] That is why it would be a mistake to reduce the commons to mere CPRs in the sense of 'natural wealth and resources' which could be 'freely disposed' of, as in Hardin's model, to serve the dominant model of development. As Kotzé writes, 'an ecological reorientation of rights evinces the potential that human rights could have to refocus attention away from serving human needs exclusively, to an approach that instead seeks to ensure care for human well-being, while simultaneously respecting the limits of Earth's life-supporting systems and the ecological integrity of other species.'[1022] The instrumentalist and extractive view of nature of the economic self-determination norm justifies looking at the more ecological conception of the right to a clean and healthy environment in our search for a more powerful advocacy tool and legal protection of the commons.

[1019] Nicolaas Schrijver, 'Self-determination of peoples and sovereignty over natural wealth and resources' in OHCHR, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013) 101.
[1020] Miranda, *supra* n 859.
[1021] Farmer, *supra* n 1011, 454 and 455.
[1022] Kotzé, *supra* n 908, 265.

### 3.2. Right to a clean and healthy environment

More generative conceptions of nature emerged after the decolonization era. As said above, Burns Weston and David Bollier have already suggested that the right to a clean and healthy environment could be interpreted 'as the human right to commons- and rights-based ecological governance – what [they] call "Green Governance."'[1023] The 1972 Stockholm Declaration laid the groundwork for a right to a clean and healthy environment to flourish in proclaiming that:

> [b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.[1024]

Principle 1 of the Stockholm Declaration thus states that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[1025]

Ten years after the Stockholm Declaration, the World Charter for Nature (1982) emphasized again the ecological interdependency of mankind and natural systems: 'Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.'[1026] However, a 'moral code of action' is not the same as a legally binding right to a healthy and clean environment. Neither the International Bill of Rights nor the European Convention from 1950 or the American Convention from 1969 mention the environment. The right to a clean and healthy environment has nonetheless been derived from other recognized rights to an adequate standard of living (including adequate food, clothing and housing),[1027] life[1028] and family life.[1029] For example, Judge Weeramantry has observed, in his separate opinion in the ICJ case of *Gabcikovo-Nagymaros Project*, that '[t]he protection of the environment is […] a vital part of

[1023] Weston & Bollier, *supra* n 21.
[1024] Stockholm Declaration, *supra* n 855, 3, para. 1.
[1025] ibid., 4, Principle 1.
[1026] World Charter for Nature, *supra* n 856.
[1027] ICESCR, *supra* n 999, Article 11(1).
[1028] See, e.g., Article 2 ECHR, *supra* n 744; European Court of Human Rights (ECtHR), *Öneryildiz v. Turkey* (30 November 2004) No. 48939/99, 41 *EHRR* 20; ECtHR, *Budayeva and others v. Russia* (20 March 2008) Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 59 *EHRR* 2.
[1029] See, e.g., Article 8 ECHR, *supra* n 744. ECtHR, *Lopez Ostra v. Spain* (9 December 1994) No. 16798/90, 20 *EHRR* 277.

contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself' and '[i]t is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments'.[1030]

However, recognizing that a clean and healthy environment has a profound impact on human life and dignity, certainly in the light of the current ecological crisis, is still not the same as identifying the right autonomously and explicitly by name. Such an autonomous and explicit entitlement to a clean and healthy environment can only be found at the regional level. The African regional human rights system was the first to recognize a substantive[1031] environmental right[1032] in Article 24 of the 1981 Banjul Charter:

> [a]ll peoples shall have the right to a general satisfactory environment, favourable to their development.[1033]

The ACHPR has emphasized that the right to a general satisfactory environment 'requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.'[1034]

The San Salvador Protocol of 1988 to the American Convention on Human Rights (ACHR) also proclaims in Article 11 that:

> [e]veryone shall have the right to live in a healthy environment and to have access to basic public services

and that:

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[1030] *Gavcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 7, *Separate Opinion of Vice-President Weeramantry*, 91-92.
[1031] 'Substantive' is here used in opposition to 'procedural' environmental rights, for example incorporated in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (signed on 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.
[1032] A.A. Du Plessis, 'The balance of sustainability interests from the perspective of the African Charter on Human and Peoples' Rights' in Michael Faure and Willemien Du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Law Press 2011) 35.
[1033] ACHPR, *supra* n 1004.
[1034] *SERAC, supra* n 1005, para. 52.

> [t]he States Parties shall promote the protection, preservation, and improvement of the environment.[1035]

In its 2018 Advisory Opinion OC-23/17 (the first very case in which the Court addressed environmental rights directly), the IACtHR progressively held that the right to a healthy environment is also 'included among the economic, social and cultural rights protected by Article 26 of the American Convention'.[1036] It underscored that 'the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities.'[1037] This means in practice that the right to environment falls under the direct jurisdiction of the IACtHR. Interestingly, from an ecological viewpoint, the Court also emphasized that:

> as an *autonomous right*, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, *as legal interests in themselves*, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection *in their own right*.[1038]

Following this interpretation, the IACtHR held for the first time in a contentious case, in its 2020 judgment in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, that the State violated the autonomous right to a healthy environment.[1039] In addition, it also found that the State infringed the rights to cultural identity and adequate food and water.[1040] In this case, above 90 indigenous communities (representing some ten thousand people) claimed recognition of their ancestral lands in the Argentinian province of Salta, on the border with Paraguay and Bolivia. The enclosure of their lands through fencing by private individuals severely impaired their traditional way of life based on hunting, gathering, agriculture, and fishing. Interestingly, like in its 2017 Advisory Opinion, the Court recognized

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[1035] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (signed on 17 November 1988, entered into force on 16 November 1999) OAS Treaty Series No 69, 28 *ILM* 156 ('San Salvador Protocol').
[1036] *State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Article 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights (Advisory Opinion OC-23/17 of 15 November 2017 requested by the Republic of Colombia)*, Inter-Am. Ct. Hr.R., (Ser. A) No. 23, para. 57.
[1037] ibid.
[1038] ibid., para. 62 (emphasis added).
[1039] *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Judgment of 6 February 2020)*, Inter-Am. Ct. H.R., (Ser. C) No. 400.
[1040] ibid., para. 289.

the right to a healthy environment as a 'universal interest' and 'fundamental right for the existence of humanity'. Although the right to a healthy environment is not explicitly referred to in the wording of Article 26 of the Pact of San José,[1041] the Court emphasized that all natural components, such as forests, seas and rivers should be protected for their importance to the ecological system as such; and not simply for the sake of their impact on, or their usefulness for, human beings. Under the right to a healthy environment, States have an obligation of due diligence 'to prevent the activities carried out under its jurisdiction from causing significant damage to the […] environment.'[1042] States should pay special attention to vulnerable groups such as 'the communities that depend, economically or for their survival, fundamentally on environmental resources, [like] the forest areas or river domains.'[1043] This ruling marks a significant milestone in the recovery of indigenous lands, which are governed as commons – all the more so in a country, Argentina, which still lacks a mechanism for protecting indigenous territories without formal property titles.

Turning to another regional system, it should be mentioned that Article 38 of the Arab Charter on Human Rights states that:

> [e]veryone shall have the right to an adequate standard of living […] including […] a right to a safe environment.[1044]

Finally, Article 28(f) of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration similarly provides that:

> [e]very person has the right to an adequate standard of living for himself or herself and his or her family including […] [t]he right to a safe, clean and sustainable environment.[1045]

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[1041] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José), Article 26: 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'

[1042] *Our Land*, *supra* n 1039, para. 208.

[1043] ibid., para. 209.

[1044] Arab Charter on Human Rights (adopted on 22 May 2004, entered into force on 15 March 2008) reprinted in (2005) 12 *International Human Rights Reports* 893. The Arab Charter does not have any enforcement mechanism.

[1045] Association of Southeast Asian Nations (ASEAN), 'ASEAN Human Rights Declaration' (signed on 18 November 2012) available at <https://asean.org/asean-human-rights-declaration/> (accessed 20 January 2020). As such, the Declaration is not legally binding and the ASEAN Intergovernmental Commission for Human Rights has a weak protection mandate: see, Hien Bui, 'The ASEAN Human Rights System: A Critical Analysis' (2016) 11(1) *Asian Journal of Comparative Law* 111.

Beyond these four autonomous regional human rights guarantees, other international soft-law initiatives have sought to recognize legal personality, and grant rights, to nature itself. The *Universal Declaration of Rights of Mother Earth* which Bolivia submitted to the UN in 2011 (following the World People's Conference on Climate Change and the Rights of Mother Earth that was held just outside the city of Cochabamba) recognizes to Mother Earth and all beings of which it is composed (ecosystems, natural communities, species and all other natural entities), among many other rights, the right to life and to exist.[1046] This instrument echoes the right to nature that is incorporated in such as Article 71 of Ecuador's Constitution:

> Nature, or *Pacha Mama* [i.e. Mother Earth], where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. Every person, community, people or nationality may require public authorities to respect the rights of nature. The relevant principles established in the Constitution shall be observed to apply and interpret these rights. The State shall encourage natural and legal persons, and collectivities, to protect nature and shall promote respect for all the elements that form an ecosystem.[1047]

With this declaration open to discussion on the international stage, we approach Stone's original and bold proposal in 1972 to give legal rights to trees.[1048] While those initiatives should be praised for reimagining a more generative and 'ecocentric'[1049] international legal order, it could be contested that the Declaration of Rights of Mother Earth remains merely aspirational and symbolic at the international level. That is true. The human right to a clean and healthy environment is admittedly limited in its application worldwide and it is doubtful that it has reached international customary legal status. As Weston and Bollier conclude, '[d]espite many

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[1046] World People's Conference on Climate Change and the Rights of Mother Earth, 'Proposal Universal Declaration of the Rights of Mother Earth' (24 April 2010) <https://pwccc.wordpress.com/2010/04/24/proposal-universal-declaration-of-the-rights-of-mother-earth/> (accessed 12 January 2020). Note that the UN General Assembly decided to designate 22 April as International Mother Earth Day: UNGA, 'International Mother Earth Day' (22 April 2009) GA Res 63/278, UN Doc. A/RES/63/278.

[1047] Article 71 of the Constitution of the Republic of Ecuador (20 October 2008) <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (accessed 11 January 2020). See also, Article 33 of the Constitution of the Plurinational State of Bolivia (7 February 2009) <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> (accessed 12 January 2020): 'Everyone has the right to a healthy, protected, and balanced environment? The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.' The preamble to the Bolivian Constitution stipulates that: 'In ancient times, mountains arose, rivers were displaced, and lakes were formed. Our Amazon, our Chaco, our highlands and our lowlands and valleys were covered in greenery and flowers. We populated the sacred earth with a variety of faces, and since then we have understood the plurality that exist in all things and our diversity as human beings and cultures.'

[1048] Christopher D. Stone, *Should Trees Have Standing: Law, Morality, and the Environment* (3rd edn, Oxford University Press 2010).

[1049] Kotzé, *supra* n 908, 258.

noble efforts championing the right internationally […] its standing in the current State sovereignty system is essentially limited in official recognition and jurisdictional reach.'[1050]

However, the principle of interdependence and indivisibility of human rights is unanimously recognized in the literature and jurisprudence of human rights bodies. This means that environmental harm can affect (directly or indirectly) many other rights beyond the strict independent entitlement to a clean and healthy environment, and as such, states should protect those other rights too. Moreover, in contrast to the right to freely dispose of natural wealth and resources, it can be claimed that the autonomous right to a clean and healthy environment protects nature for its own sake, and not necessarily for economic development purposes. The right to a clean and healthy environment, certainly as interpreted autonomously by the IACtHR, entails the recognition of ecosystems such as rivers or forests in the human rights vocabulary – beyond the mere extractive needs of human beings.[1051] It challenges and pressures both state sovereignty and private property. Moreover, the human right to a clean and healthy environment can be understood as a right that has a collective dimension, as it 'is owed to both present and future generations'.[1052] The state has a duty to guarantee a clean and healthy environment in which communities can live. Communities who rely on the commons for their survival could represent groups that may be even more vulnerable to environmental damage. Indeed, as the Inter-American Court noted, 'the groups that are especially vulnerable to environmental degradation include communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins, or run a special risk of being affected owing to their geographical location, such as coastal and small island communities.'[1053] It could be argued on this basis that enclosure or dispossession of a commons – which includes 'displacements caused by environmental deterioration'[1054] – would automatically deprive communities of the enjoyment of a healthy and protected environment. Consequently, states should consult and provide meaningful opportunities for communities of commoners to participate in the process of development affecting their environment.[1055]

[1050] Weston & Bollier, *supra* n 21, 117.
[1051] Gutwirth & Stengers, *supra* n 298, 321-322.
[1052] *Advisory Opinion OC-23/17*, *supra* n 1036, para. 59.
[1053] ibid., *supra* n 1036, para. 67.
[1054] ibid., *supra* n 1036, para. 66.
[1055] *SERAC*, *supra* n 1005, para. 53.

### 3.3. Right to communal property

Another possible avenue for the legal protection of the commons under current international law could be the right to property. Indeed, the right to property should not be understood in a restrictive, Western, individualistic sense only; a group or community can also collectively be entitled to this basic right. Article 17 of the UDHR provides that '[e]veryone has the right to own property alone *as well as in association with others*'.[1056] Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) equally includes the right to own property 'in association with others'.[1057] The Committee on the Elimination of Racial Discrimination (CERD) noted that this right should include the recognition and protection of 'the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources, and to safeguard their right to use lands not exclusively occupied by them, to which they have traditionally had access for their subsistence'.[1058] No similar provision can be found in the ICCPR or ICESCR.

At the regional level,[1059] both the Inter-American Court and the African system have given recognition to formerly invisible notions of property which did not necessarily align with the dominant individual dominium in the West, especially for the protection of indigenous peoples' rights. First, even though Article 21 of the ACHR does not explicitly provide for a collective right to property,[1060] the IACtHR has interpreted the right to property in an evolutionary fashion, so as to include communal property of indigenous peoples.[1061] Thus, in *Mayagna*, the IACtHR ruled that for the purpose of recognizing the property of indigenous communities 'lacking real

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[1056] UDHR, *supra* n 894 (emphasis added).
[1057] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 3 September 1981) 660 UNTS 195 ('ICERD').
[1058] Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations of the Committee on the Elimination of Racial Discrimination* (4 April 2006) Consideration of Reports Submitted by States Parties under Article 9 of the Convention, UN Doc. CERD/C/GUY/CO/14, para. 16.
[1059] See also, Article 1 of Protocol No 1 to the ECHR, *supra* n 744: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.'
[1060] Pact of San José, *supra* n 1041, Article 21: '1. *Everyone* has the right to the use and enjoyment of *his* property. […] 2. *No one* shall be deprived of *his* property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law' (emphasis added).
[1061] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Judgment of 31 August 2001)*, Inter-Am. Ct. H.R., (Ser. C) No. 79, para. 148; *Maya Indigenous Community of the Toledo District v. Belize (Judgment of 12 October 2004)*, Inter-Am. Ct. H.R., (Ser. C) No. 40/04, para. 148; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Judgment of 29 March 2006)*, Inter-Am. Ct. H.R., (Ser. C) No. 146, para. 120.

title', possession of the land by reason of customary practices should suffice.[1062] According to the Court, the 'collective understanding of [indigenous communities of] the concepts of property and possession […] deserves equal protection Article 21'.[1063] Aware of the communal uses and customs of indigenous communities in Latin America, the Court argued in *Sawhoyamaxa* that disregarding the collective right to property 'would render protection under Article 21 of the Convention illusory for millions of persons'.[1064] In the case of *Saramaka People v. Surinam,* the Court again found that some natural resources found on the traditional territory of the Saramaka people were essential for their traditional way of life. It therefore established three procedural safeguards under Article 21:

> [I]n accordance with Article 1(1) of the Convention [(obligation to respect rights without any discrimination)], in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a *denial of their survival as a tribal people*, the State must abide by the following safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan […] within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee *the special relationship that the members of the Saramaka community have with their territory*, which in turn ensures their survival as a tribal people.[1065]

In *Xucuru* (2018), the Court reiterated its jurisprudence under Article 21 regarding collective property rights over traditional territory – considered essential for the protection of cultural identity and even the survival of the indigenous community and its members – and emphasized that this right includes the state obligation to guarantee effective control of the indigenous

[1062] *Mayagna*, ibid., para. 151. See also the reference to 'commons' as areas which are only used collectively by the community in the expert opinion of Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist: 'There are two concepts of collective land: the territory, generally, which the community considers common, although internally there are mechanisms to allocate temporary occupation and use by its members and which does not allow alienation to persons who are not members of the community; and the areas which are only used collectively, the "commons" which are not divided into plots. Almost all indigenous communities have a part used collectively as "commons", and then another part which can be divided and allocated to families or domestic units. Nevertheless, the concept of collective property remains, even if it is disputed by others, often the State itself, when there is no title. When there are problems, the need for property titles arises because the community risks losing everything. The history of Latin America has been one of almost constant dispossession of indigenous communities by external interests.'

[1063] *Sawhoyamaxa*, *supra* n 1061, para. 120.

[1064] ibid.

[1065] *Saramaka*, *supra* n 1010, para. 129 (emphasis added).

territory.[1066] However, the IACHR's decisions regarding the communal use and enjoyment of traditionally owned lands and other natural resources exclusively concerned indigenous and other tribal peoples who have an inseparable relationship with their territory.[1067]

Next, in the African system, Article 14 of the AfCHPR provides that

> [t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The African Court has also interpreted this right to property in a broad sense and in the light of indigenous rights. Although the right as such was addressed in a part of the Charter devoted to individuals, the Court held that it could 'apply to groups or communities' and include 'the right to use (*usus*) and the right to enjoy the produce of the land (*fructus*)'.[1068] That is not too surprising: the African Commission already promoted a broad understanding of the right to property as including 'rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership'.[1069] The African Commission not only recognized homes and lands as being protected from forced eviction but also 'common property resources that were occupied or depended upon'.[1070] Where indigenous communities like the Ogiek or other groups lack a formal title to land, the recognition of their informal collective rights of use may prove an effective strategy to counter large-scale land grabbing activities and commons dispossession in developing countries.[1071] However, the right to (communal) property does not encompass the full spectrum of the meaning of the commons in shaping the identity, way of life and culture of local communities, and could be prone to an instrumentalist understanding of land and natural resources as mere 'commodities'. The challenge remains to give full recognition to the commons as a social institution of its own in the use and management of shared resources.

However, it appears unlikely that the right to property is the best option to protect collaborative and non-proprietary forms of commons-based governance. For instance, Quarta and Ferrando

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[1066] ibid.
[1067] *Saramaka*, *supra* n 1010, para. 86: 'the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.'
[1068] *Republic of Kenya*, *supra* n 1008, paras 123 and 201.
[1069] ACHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (12-26 May 2010) <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> (accessed 22 May 2018), para. 54.
[1070] ibid., para. 1.
[1071] Marella, *supra* n 18, 78.

have argued that the right to property enshrined in the European Charter of Human Rights, in Protocol 1, and in the Charter of Fundamental Rights of the EU 'represent a dogmatic moving back and a serious obstacle to the construction and recognition of the commons as "an alternative structure of property".'[1072] Most commoners simply do not view the commons as assets or resources subject to property ownership – but rather as systems of self-governance upon which they depend for their living. Many commoners are not formal owners of the lands or natural resources upon which they depend under domestic statutory laws. Moreover, the UN Special Rapporteur on the right to food has already noted that for herders, fisherfolk or pastoralists, 'the formalization of property rights and the establishment of land registries may be the problem, not the solution: it may cause them to be fenced off from the resources on which they depend, making them victims of the vast enclosure movement that may result from titling'.[1073] It is true that once property ownership is formalized, it is inevitably commodified, the asset acquires market value and can be privatized, sold and marketed without due attention for the social or spiritual function of the land or natural resource. The commons can then be lost in market transactions. Olivier De Schutter therefore pleaded for the recognition of different categories of land use through a broader right to land, including the system of the commons.[1074] That is the collective human rights standard that was eventually upheld in the UN Declaration on the rights of peasants (see, *infra*, Section 3.6).

Besides, as a commentator noted, 'in contrast to what happens in the case of indigenous peoples, peasants' customary land tenure has not been internationally acknowledged as an entitlement.'[1075] This gap of legal protection for commoners undoubtedly facilitates the current wave of enclosure. For them, the UN Special Rapporteur on the right to food has pleaded in favour of the extension of the rights applicable to indigenous communities:

> That would encourage the management of [CPRs] at the local level by the communities directly concerned, rather than through top-down prescriptions or privatization of the commons. When such arrangements are institutionalized, the centralized management of [CPRs], recognizing their function as collective goods, is recognized as highly effective. Those negotiating the modalities of the use of the commons have the best information about its carrying capacity, and thus about uses that are sustainable, and the users have strong incentives to monitor the use of the commons and to report infractions.[1076]

[1072] Quarta & Ferrando, *supra* n 283, 264.
[1073] Report of the Special Rapporteur on the right to food, *supra* n 419, para. 25.
[1074] See also, De Schutter, *supra* n 1091.
[1075] Denise González Núñez, 'Peasants' Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law' (2014) 14(4) *Human Rights Law Review* 589, 600.
[1076] Report of the Special Rapporteur on the right to food, *supra* n 419, para. 26.

Yet, despite the significant advantages of recognizing the commons, existing international human rights instruments for the protection of collective property seem to remain insufficient to protect fully the commons and all the communities who depend upon them for their survival. Moreover, the case-law of regional human rights courts has so far been concerned with indigenous and tribal peoples. This leaves other commoners vulnerable to dispossession.

### 3.4. Right to food

Since commoners like traditional fishers, land users, pastoralists or herders literally depend on the products of their lands and natural resources for their survival, the right to food can be considered a starting point to realize the right to the commons. The right to food is enshrined under Article 25(1) of the UDHR.[1077] It is more extensively defined under Article 11 of the ICESCR than in any other instrument:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

In the American regional system of human rights, Article 12 of the Protocol of San Salvador provides as follows:

> 1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.

[1077] 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

> 2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

According to the CESCR, the right to food imposes on states an obligation to guarantee that every person has access to the necessary productive resources, which necessarily includes land, water, fisheries or forests to produce their own food.[1078] Interestingly, with regard to our focus on development agencies, the CESCR emphasized that IFIs, including the World Bank, 'should pay greater attention to the protection of the right to food in their lending policies and credit agreements' as well as 'in any structural adjustment programme'.[1079]

The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted in 2004 by the FAO, established that states should 'protect the assets that are important for people's livelihoods', 'such as land, water, forests, fisheries and livestock', but did not mention the commons among these productive resources.[1080] The term 'commons' appears in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Tenure Guidelines)[1081] adopted in 2012 by the Committee on World Food Security (CFS) – an intergovernmental and highly inclusive platform which is today authoritative in the field of world food governance. These Tenure Guidelines are the result of several years of negotiations among UN agencies, states, civil society organizations like *La Via Campesina*, the private sector, and the UN Special Rapporteur on the right to food. They were subsequently endorsed by the CEDAW Committee in General Recommendation No. 34[1082] and later included in UNDROP (see, *infra*, Section 3.6). The Tenure Guidelines seek to protect the access to food of the rural poor by recognizing different – formal or informal – models of shared natural resources governance at the local level, including the commons. Importantly in the context of land grabbing, they prescribe states to 'protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations

[1078] CESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) UN Doc. E/C.12/1999/5, para. 12.
[1079] ibid., para. 41.
[1080] ECOSOC, 'Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security' (28 February 2005) UN Doc. E/CN.4/2005/131, Guideline 8.1.
[1081] Committee on World Food Security (CFS), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO 2012).
[1082] General recommendation No. 34 on the rights of rural women, *supra* n 97, para 36 (a).

under national and international law'.[1083] Guideline 8.3 explicitly recognizes the institution of the commons:

> [T]here are publicly-owned land, fisheries and forests that are collectively used and managed (in some national contexts referred to as *commons*), States should, where applicable, recognize and protect such publicly-owned land, fisheries and forests and their *related systems of collective use and management*, including in processes of allocation by the State.[1084]

In order to support the implementation of the Tenure Guidelines, FAO also prepared a series of technical guidelines, among which a publication entitled '*Governing Tenure Rights to Commons*'.[1085] This document defines the 'commons' as natural resources such as lands, fisheries and forests, which are used and managed collectively by 'a group of people (often understood as "community")'.[1086] As a result of intense NGO lobbying, like the Tenure Guidelines, this document refers extensively to international human rights treaties and declarations.[1087] From the start, it states that '[s]ecure tenure rights to commons are crucial for women and men' and that '[t]he Guidelines represent a historic opportunity to guide governments and hold them accountable in assuming their duties and fulfilling their obligations to implement secure tenure for the legitimate holders of rights to commons'.[1088] As an expert of the UNDROP working group observed, the vision of the right to land promoted by the 2012 Tenure Guidelines is, therefore, 'very different' from 'the one that focuses on promoting individual property titles as the solution to secure land tenure'.[1089]

The link of subsistence between the right to food and the commons is clear, in particular for rural people living in developing countries. In his 2010 report on access to land, the UN Special Rapporteur on the right to food, Olivier De Schutter, not only considered the position of indigenous peoples but also that of 'smallholders, who cultivate the land in conditions that are

[1083] Tenure Guidelines, *supra* n 1081, Guideline 3.1.2. See also, OCHA, *Guiding Principles on Internal Displacement* (UN 2004).
[1084] ibid., (emphasis added). Note, however, the erratic definition of the commons referred to as 'publicly-owned' natural resources. The commons, however, should be distinguished from both traditional public-private property.
[1085] FAO, *supra* n 272.
[1086] ibid., 52.
[1087] ibid., 13.
[1088] ibid., v.
[1089] Christophe Golay, 'Legal reflections on the rights of peasants and other people working in rural areas', Background paper, Prepared for the first session of the working group on the rights of peasants and other people working in rural areas (15-19 July 2013) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Golay.pdf> (accessed 22 May 2018), 18.

often insufficiently secure, and that of other land users, such as fisherfolk, pastoralists and herders, who are particularly dependent on *commons*':

> the right to food requires that States refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food for themselves (the obligation to respect), that they protect such access from encroachment by other private parties (the obligation to protect) and that they seek to strengthen people's access to and utilization of resources and means to ensure their livelihoods, including food security (the obligation to fulfil).[1090]

In this case, the right to land may be seen as 'instrumental to the right to food'.[1091] As the Special Rapporteur on adequate housing also noted, '[t]he right to land […] is not just linked to the right to adequate housing but is integrally related to the human rights to food, livelihood, work, self-determination, and security of the person and home and the *sustenance of common property resources*.'[1092] Peasants and civil society organizations like *La Via Campesina* often claim the right to 'food sovereignty' to emphasize their right to devise their own model of development and communal land and natural resource management.[1093] An oft-cited definition of food sovereignty is:

> the Right of peoples, communities, and countries to define their own agricultural, labour, fishing, food and land policies, which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to food-producing resources and the ability to sustain themselves and their societies.[1094]

What is important to note for our focus on development, is that the food sovereignty approach emerged in reaction to 'the privatization and commodification of communal and public land, water, fishing grounds and forests'.[1095] It represents a bottom-up alternative to top-down development policies promoted by the World Bank and other IFIs, which prioritize liberalization of agricultural products and seeds over traditional agricultural practices.[1096] It demands local self-determination for the affected populations, including the capacity to

[1090] Report of the Special Rapporteur on the right to food, *supra* n 419, para. 10.
[1091] Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 *International Community Law Review* 303, 306.
[1092] HRC, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari' (5 February 2007) UN Doc. A/HRC/4/18, para. 29.
[1093] La Via Campesina, 'Food sovereignty', <https://viacampesina.org/en/food-sovereignty/> (accessed 2 February 2020).
[1094] Rome NGO/CSO Forum for Food Sovereignty, 'Food Sovereignty: A Right For All. Political Statement of the NGO/CSO Forum for Food Sovereignty' (13 June 2002); See also, Peter Rosset, 'Food Sovereignty and Alternative Paradigms to Confront Land Grabbing and the Food and Climate Crises' (2011) 54 *Development* 21.
[1095] ibid.
[1096] von Bernstorff, *supra* n 834, 288.

maintain their commons and regulate their own food supply against enclosures by national governments or private investors. The food sovereignty approach culminated in the UN Declaration on the Rights of Peasants (UNDROP), to be discussed below (Section 3.6). However, it is not yet fully integrated into the right to food as defined by the CESCR.[1097] According to legal scholars adopting the commons framework, the right to food 'does not question the commodification of food, the production of which still relies on market mechanisms (and on price signals in particular) and access to which still depends on purchasing power'.[1098] In this sense, the right to food alone would not be able to fully grasp the collective dimension and customary practices of the production of food and to counter the extractive logic of the enclosure movement in the Global South.

### 3.5. Indigenous rights

The commons are key, not only to produce food but also for sustaining knowledge, culture and traditional practices of around 370 million indigenous people around the world. Indigenous commons are defined in the literature as 'resources either claimed or recognized, as well as the set of institutional arrangements that define resource access, use and control'.[1099] The recent recognition of indigenous rights to commons is a significant breakthrough in international law, for indigenous peoples have suffered enclosure and commodification of their natural environments over the last centuries. Part II (Articles 13-19) of the Convention Nr. 169 of 1989 concerning Indigenous and Tribal Peoples of the International Labour Organization (ILO) – the only international binding agreement that exclusively deals with the rights of indigenous peoples – is entirely devoted to the collective right to land.[1100] The right to land enshrined in Article 14 exists irrespective of titles recognized under statutory law:

[1097] CESCR General Comment No. 12, *supra*, n 1078.
[1098] Olivier De Schutter, Ugo Mattei, Jose Luis Vivero-Pol and Tomaso Ferrando, 'Food as commons: Towards a new relationship between the public, the civil and the private' in Jose Luis Vivero-Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei (eds), *Routledge Handbook of Food as a Commons* (Routledge 2019) 381.
[1099] Iliana Monterroso, Peter Conkleton and Anne M. Larson, 'Commons, indigenous rights, and governance' in Blake Hudson, Jonathan Rosenbloom and Dan Cole (eds), *Routledge Handbook of the Study of the Commons* (Routledge 2019) 386.
[1100] ILO Convention No 169, *supra* n 180. Article 1 defines tribal peoples as peoples 'whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations' and indigenous peoples as peoples 'who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'

> The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Article 15 also requires States Parties to recognize the indigenous peoples' rights to participate in the use, management and conservation of natural resources. This instrument has already been cited as a potential tool for enforcing the use and exclusion rights on the commons, as defined by indigenous peoples themselves within their own collective systems of governance of natural resources.[1101] In the Inter-American system, ILO Convention No. 169 indeed served to resist against the enclosure of traditional indigenous lands. The U'Wa Nation, for example, successfully claimed before the Inter-American Commission on Human Rights (IACHR) that Colombia violated its right to land by developing oil drilling and mining projects on their sacred ancestral territory without prior consultation.[1102] 'Territory', in this sense, represents more than a mere CPR; it is 'a socially constructed space' formed by collective practices of use and management of these natural resources.[1103] However, ILO Convention No. 169 has only been ratified by 23 states at the time of writing.[1104]

Some of the traditional and collective rights of indigenous and tribal peoples recognized in the jurisprudence of the Inter-American Court or the African system exposed above have crystallised in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted on 13 September 2007 by the UNGA. UNDRIP is the outcome of a bottom-up process driven by many years of advocacy by indigenous and civil society organizations. While it is true that UNDRIP is, as other UNGA resolutions, not a legally binding instrument, it has been influential in the interpretation of treaty provisions such as the right to land in the African Charter. Moreover, as the UN Special Rapporteur on the rights of indigenous peoples has argued[1105] and as the IACtHR has previously determined,[1106] some provisions of UNDRIP can

[1101] Bailey, *supra* n 501, 122.
[1102] *U'Wa Indigenous Community (Precautionary Measures)*, IACHR, Case No. 11.754.
[1103] Monterroso et al., *supra* n 1099, 380.
[1104] ILO, 'Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)', <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> (accessed 1 February 2020).
[1105] HRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya' (11 August 2008) UN Doc. A/HRC/9/9, para. 41.
[1106] *Mayagna*, *supra* n 1061, para. 71.

now be said to reflect norms of customary international law.[1107] UNDRIP explicitly states in its preamble that it is concerned with the dispossession of indigenous lands, territories and resources preventing communities from exercising their right to development in accordance with their own needs and interests. Indigenous peoples have the right to exercise self-determination (Article 3),[1108] which is directly linked to autonomy and self-government in matters relating to their internal and local affairs (Article 4). Like Article 18 of the ILO Convention No. 169, Article 8(2), b), provides that 'States shall provide effective mechanisms for prevention of, and redress for […] [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources'. Indigenous peoples have the right to maintain and strengthen their own distinct decision-making institutions (Articles 5 and 18) and to be secure in the enjoyment of their own means of subsistence and development (Article 20).[1109] The traditional lands and shared resources of indigenous communities should also be protected against enclosures (Article 26).

While it does not make explicit reference to the 'commons', it arguably includes a form of bottom-up governance of CPRs among the protected forms of tenure. The Inter-American Court has held in the 2001 *Mayagna* case that 'the State must adopt the legislative, administrative and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, *in accordance with their customary laws, values, customs and mores*'.[1110] Thus, as Olivier De Schutter writes, 'States may have to recognize the customary systems of land tenure that protect communal property rights'.[1111] As the African Court held in the Ogiek case, '[w]ithout excluding the right to property in the traditional sense, [Article 26 of UNDRIP] places greater emphasis on the rights of possession, occupation, use/utilisation of land'.[1112] Article 26(3) of UNDRIP indeed requires states to give legal recognition to lands, territories and resources 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'. To prevent land grabbing, the Declaration prohibits removing indigenous peoples by force from their lands and requires states to consult with their own representative institutions (Article 32(2)), thus strictly imposing 'free, prior and informed consent' to give away lands (Article 10).

[1107] See also, De Schutter, *supra* n 1091, 311.
[1108] See also Article 1 of both 1966 Covenants.
[1109] UNDRIP, *supra* n 181.
[1110] *Mayagna*, *supra* n 1061, para. 164.
[1111] De Schutter, *supra* n 1091, 313.
[1112] *Republic of Kenya*, *supra* n 1008, para. 127.

It can be concluded that indigenous peoples and individuals now enjoy the legal entitlement under international law to protect their right to access, use and keep their lands and natural resources against acts of enclosure in the form of development, exploration or extraction projects by states or private interests. According to Serge Gutwirth and Isabelle Stengers, it is through the right to land that indigenous peoples have most emblematically defended *commoning* practices under international law.[1113] On the one hand, indigenous peoples have expressed their legal entitlements collectively, despite the dominant individualistic framing of international human rights law. On the other hand, indigenous peoples have been able over recent years to establish themselves as subjects of international (or domestic) law, beyond the traditional public-private divide, especially in relation to the management of their ancestral territories. Moreover, interestingly the relationship of reciprocity and interdependence which indigenous peoples entertain with their ancestral lands is not purely instrumental or extractive (in the sense that natural resources would be mastered upon by individuals as landowners), but also deeply spiritual, religious and cultural – which gives some impetus to a more generative and ecological reading of international law.[1114] This link of exclusive enjoyment between an indigenous community and its land has even been understood as a space of self-government, autonomy and 'internal self-determination' under international law.[1115]

However, once again, it should be stressed that these instruments only apply to indigenous peoples.[1116] Even though the requirements for formal recognition as indigenous peoples have been interpreted broadly by regional human rights courts to include tribal people who also 'have a special relationship with their ancestral territories',[1117] the personal scope of indigenous rights remains limited. While indigenous land tenure may fit the main features of the commons as studied by Ostrom, the commons are not always necessarily managed by communities which qualify as indigenous peoples.[1118] According to a recent report by Oxfam, ILC and RRI, indigenous people account for 370 million of the 2.5 billion people depending on communal

[1113] Gutwirth & Stengers, *supra* n 298, 319-320.
[1114] ibid.
[1115] Pereira & Gough, *supra* n 839, 471.
[1116] There is no unanimously accepted definition of 'indigenousness' under international law. However, the Special Rapporteur on the rights of indigenous peoples uses four defining characteristics: 'self-identification as an indigenous people; the existence of and desire to maintain a special relationship with ancestral territories; distinct social, economic or political systems from mainstream society, which may be reflected in language, culture, beliefs and customary law; and a historically non-dominant position within society.' See, HRC, 'Report of the Special Rapporteur on the rights of indigenous peoples' (11 August 2016) UN Doc. A/HRC/33/42, para. 15.
[1117] *Saramaka*, *supra* n 1010, para. 86.
[1118] ibid.

land and natural resources around the world.[1119] In other words, in contrast to indigenous peoples, the right to access land and other natural resources remains unprotected for many commoners around the world. That is why the former UN Special Rapporteur on the right to food recommended in a report in 2010 that, in order to 'access to fishing grounds, grazing grounds and water points for fisherfolk, herders and pastoralists, for whom the protection of commons is vital', '[t]he recognition of communal rights should extend beyond indigenous communities, at least to certain communities that entertain a similar relationship with the land, centred on the community rather than on the individual'.[1120] Similarly, the Special Rapporteur on adequate housing requested the HRC to '[r]ecognize the right to land as human right'.[1121]

## 3.6. Peasants' rights

### 3.6.1. Bottom-up process of adoption

After two decades of advocacy by the international peasant movement represented by *La Via Campesina*[1122] and NGOs – among which *Centre Europe – Tiers Monde* (CETIM)[1123] and *FIAN International*,[1124] the UNDROP was finally adopted by the HRC during its 39th session on 28 September 2018.[1125] The UNDROP was subsequently approved by the UNGA in New York on 17 December 2018, by a majority of 121 states in favour, 8 votes against (among which, the US and the UK who were fierce opponents of the initiatives) and 54 abstentions (among which, Belgium). The Declaration now offers a window into the potential of generalizing the model of community land rights for *all* people involved in small-scale food production, including all those who depend on the commons for their livelihood – beyond the distinct identities, cultures and ways of life of indigenous and tribal peoples.

[1119] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13.
[1120] Report of the Special Rapporteur on the right to food, *supra* n 419, para. 40 c).
[1121] Special Rapporteur on adequate housing, *supra* n 1092, para. 33(e).
[1122] La Via Campesina, 'Key Documents (Peasants' Rights)', <https://viacampesina.org/en/what-are-we-fighting-for/human-rights/peasants-right-resources/> (accessed 2 February 2020).
[1123] Coline Hubert, *La Déclaration de l'ONU sur les droits des paysan.ne.s: Outil de lutte pour un avenir commun* (PubliCetim N° 42, CETIM 2019).
[1124] FIAN International, 'The Declaration on the Rights of Peasants: A Long Overdue Debt' (17 December 2018) <https://www.fian.org/en/news/article/the-declaration-on-the-rights-of-peasants-a-long-overdue-debt-2156> (accessed 2 February 2020).
[1125] UNDROP, *supra* n 34.

Peasants and other people working in rural areas produce 80% of the world's food supply, but paradoxically also represent 80% of the world's hungry.[1126] The UNDROP follows a long-standing request of the international peasant movement, among which *La Via Campesina* and its Indonesian affiliated group *Serikat Petani Indonesia*, who have denounced systematic human rights violations against peasants and other rural groups. Remarkably, one of the main factors which triggered the international movement for peasants' rights from Indonesia was the role that the World Bank played in attempting to revise the Indonesian Basic Agrarian Law. From a strategic point of view, international human rights action was deemed necessary by Indonesian farmers to fight against the Bank's intervention in the liberalization of land regulations in the country.[1127] In this trend towards the recognition of rights of peasants and their fight for food sovereignty, peasant and farmer groups started framing their demands in terms of new rights to commons, as this excerpt from the 2011 Declaration of the European Forum for Food Sovereignty shows:

> Reclaiming the right to our Commons. We oppose and struggle against the commodification, financialisation and patenting of our commons, such as: land; farmers', traditional and reproducible seeds; livestock breeds and fish stocks; trees and forests; water; the atmosphere; and knowledge. Access to these should not be determined by markets and money. In using common resources, we must ensure the realisation of human rights and gender equality, and that society as a whole benefits. We also acknowledge our responsibility to use our Commons sustainably, while respecting the rights of mother earth. Our Commons should be managed through collective, democratic and community control.[1128]

Following civil society pressure, in 2012 the HRC established an open-ended intergovernmental working group with the mandate of negotiating a declaration, outlining the rights of peasants and other people working in rural areas.[1129] The bottom-up process of co-

[1126] OHCHR, 'Joint statement by UN human rights experts – 1st anniversary of the adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. The need to take steps to implement the UN Declaration on the rights of peasants and other people working in rural areas' (17 December 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25439&LangID=E#_ftn1> (accessed 2 February 2020).

[1127] Heri Purwanto, 'Local To Global; How Serikat Petani Indonesia Has Accelerated The Movement for Agrarian Reform' in Henry Saragih (ed.), *La Via Campesina's Open Book: Celebrating 20 Years of Struggle and Hope* (La Via Campesina 2013) 3.

[1128] Nyéléni Europe, 'Food Sovereignty in Europe Now! Nyeleni Europe 2011: European Forum for Food Sovereignty' (21 August 2011) <http://www.nyelenieurope.net/sites/default/files/2016-06/NYELENI_Declaration_English.pdf> (accessed 22 May 2018) quoted in Priscilla Claeys, 'The Right to Land and Territory: New Human Right and Collective Action Frame' (2015) 75(2) *Revue interdisciplinaire d'études juridiques* 115, 123-124.

[1129] HRC, 'Promotion of the human rights of peasants and other people working in rural areas' (24 September 2012) Resolution 19/21, UN Doc. A/HRC/21/L.23.

construction of the text should be praised for its inclusion, besides member states of the HRC, of representatives of civil society and peasants' movements especially from the Global South who made visible their struggles against enclosure.[1130] It is an effort to expand the narrow scope of collective rights exposed above. The UNDROP articulates several implicit and explicit guarantees for the protection of the commons, particularly relevant in the context of development, including the right of peasants to control their natural resources, to enjoy the benefits of their development, 'the right to have access to and to use the natural resources present in their communities that are required to enjoy adequate living conditions', 'the right to participate in the management of those resources' (Article 5); 'the right, individually and *collectively*, to the lands, water bodies, coastal seas, fisheries, pastures and forests that they need to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures' (Article 17(1), emphasis added).[1131]

### 3.6.2. Right to the commons

The development of a Declaration on the Rights of Peasants is particularly noteworthy for this thesis since it is arguably the first time that an international human rights instrument expressly puts forward a stand-alone standard (see, *infra*, for the discussion of the legal status) for states to recognize and protect the 'commons' as a governance model of its own. Article 17(3) of UNDROP indeed includes a collective dimension of the 'Right to land and other natural resources':

> States shall take appropriate measures to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law, recognizing the existence of different models and systems. States shall protect legitimate tenure, and ensure that peasants and other people working in rural areas are not arbitrarily or unlawfully evicted and their rights are not otherwise extinguished or infringed. States shall recognize and protect the natural *commons* and their *related systems of collective use and management*.[1132]

[1130] See, Emma Larking, 'Mobilising for food sovereignty: the pitfalls of international human rights strategies and an exploration of alternatives' (2019) 23(5) *The International Journal of Human Rights* 758, 759: 'The campaign for food sovereignty provides an illuminating case study of an attempt to institute "counter-hegemonic" practices, including by developing human rights from the ground up and outside the state, while at the same time appealing to the state to international law to defend these redefined human rights.'
[1131] HRC, 'Revised draft United Nations declaration on the rights of peasants and other people working in rural areas' (12 February 2018) Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas, Fifth session, UN Doc. A/HRC/WG.15/5/2.
[1132] UNDROP, *supra* n 34 (emphasis added).

The explanatory study on the rationale underlying the Draft Declaration prepared by OHCHR defines the 'commons' by reference to the Oxford English dictionary as 'land or resources belonging to or affecting the whole of a community'.[1133] It provides that this formulation 'highlights the importance of providing tenure security, including through the protection of customary tenure rights and the protection of *commons*, over the land, fisheries, forests, water and other natural resources on which peasants and other people working in rural areas depend for their livelihood'.[1134] The crux of the matter is that peasants rarely have a full title of property on lands and other natural resources since land use is often precarious and not always recognized under statutory laws. As stated above, formalization of land titles is not always a solution, but the very problem. The UNDROP recognizes the plurality of 'systems of collective use and management' of peasants and other people working in rural areas. For instance, herders and farmers may share the same piece of common land. As Ostrom showed, these systems may be more effective in the sustaining CPRs over the long term than purely private or public arrangements. Note, however, that the official French translation of the Declaration provides that 'Les États reconnaîtront et protégeront les *ressources naturelles communes* et les systèmes d'utilisation et de gestion collectives de ces ressources', which is not the same as 'natural commons' in English. The English term should indeed be translated in French as 'communs naturels'. I expressed this concern with the experts appointed by the Chair-Rapporteur. The French translation was not amended accordingly, even though Christophe Golay submitted a formal request during the fifth round of negotiations at the HRC in 2018 to translate 'natural commons' in Article 17(3) in the French version as 'les communs naturels', like in Voluntary Guideline 8.3 on the governance of tenure.[1135] Besides, the inclusion of the 'commons' in the text of the Declaration did not provoke much debate during the last round of negotiations. Another expert, Smita Narula, welcomed the articulation of this new substantive right to land as existing international human rights laws, in her view, approached land in an instrumentalist manner (land as an 'asset') and did not sufficiently recognize that 'land sustains life and forms

[1133] HRC, 'Normative sources and rationale underlying the draft declaration on the rights of peasants and other people working in rural areas' (15-19 May 2017) Study by the Office of the United Nations High Commissioner for Human Rights, Open-ended working group on the rights of peasants and other people working in rural areas, Fourth Session, UN Doc. A/HRC/WG.15/4/3, para. 240.
[1134] ibid.
[1135] HRC, 'Report of the open-ended intergovernmental working group on a United Nations declaration on the rights of peasants and other people working in rural areas' (13 July 2018) UN Doc. A/HRC/39/67, 42.

culture and identity'.[1136] In this sense, it can be concluded that the Declaration helps close the 'commons gap' in international law (see, *supra*, Chapter 2, Section 2).

It is important to stress, however, that originally there was no specific reference to the term 'commons' in the very first draft presented by *La Via Campesina* and entitled 'Declaration of Rights of Peasants – Women and Men'.[1137] It is only since 2016 and the proposal submitted by the Bolivian representative as chairperson-rapporteur of the working group that the Declaration includes a reference to the commons. The reason why the draft now includes this term is to use as much as possible so-called 'agreed language' – that is to say, formulations to be found in other relevant international human rights instruments. The right to land in the current text is, indeed, largely inspired by the 2012 FAO Tenure Guidelines (see, *supra*, Section 3.4). Compared to the Tenure Guidelines, however, the UN Declaration on the Rights of Peasants represents a significant breakthrough in the process of recognizing the commons in international law. The UN Declaration does not make the same mistake as the Tenure Guidelines of assimilating commons to 'public' lands and resources. In the UN Declaration, the term 'commons' is preserved but recognized as a social institution of its own – separate from both public and private property. This also means that the proposed right to the commons is 'amongst the most controversial ones [particularly among Western states like the US or Member States of the EU], because of the collective nature of the rights claimed, because their indeterminate content departs from existing standards, and because of the challenges that their implementation would represent'.[1138]

### 3.6.3. Legal status of the UN Declaration on the Rights of Peasants

A last important question remains, however, about the legal status of the UNDROP. This was even a source of concern for some parties during the negotiations: the representative of the EU was against 'creating new rights in a non-binding document'.[1139] At the UNGA, the delegations from Ethiopia and Switzerland again emphasized the 'non-binding' and 'aspirational' nature of

[1136] ibid., 21, para. 5.
[1137] La Via Campesina, 'Declaration of Rights of Peasants - Women and Men' (2008) <https://viacampesina.net/downloads/PDF/EN-3.pdf> (accessed 22 May 2018).
[1138] Claeys, *supra* n 1128, 127.
[1139] HRC, *supra* n 1135, 5, para. 12.

the Declaration.[1140] Originally, the purpose of *La Via Campesina* was to seek the adoption of a binding 'International Convention on the Rights of Peasants' supplemented by optional protocols to ensure its implementation and provide complaints mechanisms.[1141] The legal form that the UN Declaration eventually took is clearly different. Is the Declaration then merely raising 'awareness' about the situation of peasants? Does it have only 'symbolic power'?[1142] Would it represent a false promise of achieving human rights while it only represents a 'political signal'? Strictly speaking, the short answer is that, like any other UNGA resolution or declaration, the UNDROP as such remains a *non-binding* document.

However, that is not to say that States and international organizations can freely disregard the Declaration. First, the legal influence of the UNDROP should not be underestimated. As a general rule of interpretation in international law, by virtue of Article 31(3)(b) of the VCLT, the UNDROP will also be used as mechanism for the authoritative interpretation of the terms of other related human rights guarantees. As Christophe Golay wrote before its adoption, '[i]nternational law is fragmented on the matter [of peasants' rights], and the elaboration of the UN Declaration represents a unique opportunity to recognize the rights of farmers, local communities, indigenous peoples, fisher people, pastoralists, nomads, hunters, gatherers, landless people, rural women and rural workers *in one single instrument*.'[1143] The UN Declaration, as adopted, indeed represents to date the most recent, comprehensive and authoritative international consensus on the rights of peasants. UN human rights mechanisms are already promoting the Declaration as new guideline. Thus, UN human rights experts recently called states and IFIs to implement the UNDROP in good faith and with meaningful grassroots engagement.[1144] They suggested that the implementation of the UNDROP should be integrated into the Universal Periodic Review and that the rights of peasants should 'be mainstreamed into the strategies aimed at achieving the SDGs'.[1145] The UNDROP will have a

[1140] UNGA, 'Official Records' (17 December 2018), Seventy-third session, 55th plenary meeting, UN Doc. A/73/PV.55, 23 and 24.
[1141] La Via Campesina, *supra* n 1137.
[1142] Larking, *supra* n 1130, 771.
[1143] Christophe Golay, 'Legal analysis on the rights of peasants and other people working in rural areas : The Right to Seeds and Intellectual Property Rights', Prepared for the third session of the United Nations Human Rights Council working group mandated to negotiate a Declaration on the rights of peasants and other people working in rural areas (17-20 May) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Session3/StatementsPresentations/Christophe_Golay_GENEVA_ACADEMY.pdf> (accessed 26 July 2020) 26 (emphasis added).
[1144] OHCHR, *supra* n 1126.
[1145] ibid.

lasting influence on the conclusion and formulation of subsequent regional and international human rights instruments, especially within the context of the UN system.

Second, individual and collective rights set forth in the UN Declaration can be transposed in domestic legislation or become enforceable before judicial or quasi-judicial bodies. For example, most provisions of the UDHR are now incorporated in national constitutions. To be precise, in the case of the UNDROP, Article 2(1) calls States to 'promptly take legislative, administrative and other appropriate steps to achieve progressively the full realization of the rights of the present Declaration that cannot be immediately guaranteed'.[1146] In this way, the UNDROP can become 'hard-law' at the national level. Even if that is not the case, Claeys and Edelman note that 'in contested agrarian landscapes, distinct legal regimes – customary, local, national and international law – frequently overlap, creating spaces of contention in which "soft law" may attain increasing legitimacy as an unquestioned standard'.[1147] This statement is relevant in the context of the commons, where it is possible that 'customary land tenure rights [are] not currently protected by law' (Article 17(3)). The recognition and protection of the commons-based system of collective use and management could then prevail by reference to this new standard enshrined in a UN Declaration.

Third, at international level, although not a legally enforceable instrument as such, the UN Declaration on the rights of peasants (or, to be more precise, some provisions of the UN Declaration) can become binding by way of customary law or general principles, or indeed by virtue of interpretation of other international human rights standards (as exposed above) by subsequent practice. For instance, in the case of *Military and Paramilitary Activities in and Against Nicaragua*, the ICJ referred to UNGA resolutions to rule that the principle of non-intervention in the internal affairs of States was a principle of international customary law.[1148] The ICJ has reached the same conclusion in the case of (some provisions of) the UDHR adopted in 1948[1149] and the IACtHR found an equal customary legal status as to the right to land under

[1146] UNDROP, *supra* n 1132.
[1147] Priscilla Claeys and Marc Edelman, 'The United Nations Declaration on the rights of peasants and other people working in rural areas' (2020) 47(1) *The Journal of Peasant Studies* 1, 11.
[1148] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14.
[1149] See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution*, Advisory Opinion of 21 June 1970, ICJ Reports 1971, 16, separate opinion of Judge Ammoun, para. 76: 'Although the affirmations of the [UDHR] are not binding qua international convention […], they can bind States on the basis of custom within the meaning of paragraph 1(b) of [Article 38 of the ICJ Statute] because they constituted a codification of customary law […] or because they have acquired the force of custom through a general practice accepted as law.' The ICJ accepted this approach in

the UNDRIP of 2007.[1150] The controversial question here is whether the UNDROP is sufficiently consensual to contribute, in the same way as the UNDRIP, to the formation of customary international law. It should be acknowledged the majority for the UNDROP was much less robust than for the UNDRIP, which was adopted by the UNGA, on 13 September 2007, by 144 states in favour, 4 votes against (Australia, Canada, New Zealand, the United States) and 11 abstentions. However, the 4 States which voted against the UNDRIP have since then reversed their position and now support it. By comparison, the UNDROP was adopted at the UNGA by a majority of 121 states in favour, 8 votes against and 54 abstentions.

During the negotiations of the UNDROP, both the US and the EU opposed the very idea of singling out peasants as specific rights-holders. They also rejected the creation of new *collective* rights. In the HRC, the Declaration was adopted by a majority of 33 members, with 3 voting against (Australia, Hungary, the UK) and 11 abstaining (Belgium, Brazil, Croatia, Georgia, Germany, Iceland, Japan, Republic of Korea, Slovakia, Slovenia, Spain). The recorded vote clearly shows a divide between the Global South and the Global North. EU Member States were split, with two voting against (UK was still an EU Member State at the time) and 6 abstaining. In the UNGA, only Luxembourg and Portugal voted as EU Member States in favour of the Declaration. Portugal indeed took a very active role in the negotiations in the HRC to defend family farming and support the lives of peasants and rural workers.[1151] It should also be noted that Switzerland was a co-sponsor of the creation of the Working Group in Geneva and voted in favour of the resolution at the UNGA as it was 'committed […] to maintaining small-scale agricultural systems'.[1152] In the process of ascertaining *opinio juris*, the division between Member States in the UNGA makes the hypothetical recognition of the right of the commons, under Article 17(3) of the Declaration, as a principle of international customary law uncertain. Yet, there is no reason why national positions could not evolve gradually in the future – especially given the fact that, as noted above, the Working Group opted in 2016 for recognized and 'agreed UN language' in order to increase states' support for the declaration. In Belgium,

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the *Hostages* case: *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, 3, para. 42.

[1150] See, e.g., *Mayagna, supra* n 1063, para. 71: 'there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands'.

[1151] HRC, *supra* n 1135, para. 31.

[1152] UNGA, *supra* n 1140, 23.

for example, a resolution in favour of the UNDROP will be discussed and voted in the Federal Parliament; it could reverse the abstention expressed in 2018 in the UN.[1153]

Finally, binding force could be conferred on the UNDROP by incorporating some parts of the Declaration afterwards into the terms of a treaty (by implied reference). These various elements – authoritative interpretation, national implementation, contribution to the formation of international customary law or general principles of law, and incorporation in treaty law – bring me to the conclusion that, even if the UNDROP falls under the category of 'soft-law' on the surface, it may have far-reaching legal consequences in the future. As far as the topic of this study is concerned, it clearly represents an important step towards the international legal recognition of the commons, which peasants and people working in rural areas have always used and managed to secure their livelihood.

### 3.7. Women's rights

The UNDROP places great emphasis on the role played by peasant women and other rural women 'in the economic survival of their families and in contributing to the rural […] economy, including through their work in the non-monetized sectors of the economy'.[1154] However, it should be stressed that women account for 70% of the world's hungry.[1155] In this light, it is unfortunate that, besides a few exceptions,[1156] most of the literature analyses the phenomenon of widespread commodification and dispossession of the commons in a gender-neutral way. The notion of the 'commons' is also most often absent from NGOs reports on women's role in collective land tenure systems.[1157] It should be acknowledged that even this work generally made abstraction so far of the profound violence and discriminations women face in their access to land and other natural resource. This section therefore seeks to reconnect both issues of

[1153] See, Proposition de Résolution sur l'adoption de la Déclaration des Nations Unies du 17 décembre 2018 sur les droits des paysans et des autres personnes travaillant dans les zones rurales, déposée par MM. Samuel Cogolati et Wouter De Vriendt et consorts, *supra* n 76.
[1154] UNDROP, *supra* n 1132, preamble, intent 13.
[1155] ibid.
[1156] Aier, *supra* n 96; Cangelosi & Bieri, *supra* n 96; Federici, *supra* n 96.
[1157] See, e.g., Renée Giovarelli, Amanda Richardson and Elisa Scalise, *Gender & Collectively Held Land: Good Practices & Lessons Learned from Six Global Case Studies*, Landesa & Resource Equity (2016) <http://zpmpd2mggwg34rgsm60didr9-wpengine.netdna-ssl.com/wp-content/uploads/2016-Best-Practices-Synthesis-Report.pdf> (accessed 17 June 2018); Rights and Resources Initiative (RRI), *Power and Potential: A Comparative Analysis of National Laws and Regulations Concerning Women's Rights to Community Forests* (2017) <http://rightsandresources.org/wp-content/uploads/2017/07/Power-and-Potential-A-Comparative-Analysis-of-National-Laws-and-Regulations-Concerning-Womens-Rights-to-Community-Forests_May-2017_RRI-1.pdf> (accessed 17 June 2018).

gender and the commons from an international human rights perspective. Women are indeed disproportionately affected by the new wave of enclosure of the commons, especially since they play a crucial role in managing and sustaining the commons in developing countries. They unquestionably represent an important portion of the labour force (carrying water, harvesting, fishing, etc.) in the context of the commons. As Federici has shown, besides the often uneven distribution of productive work in the commons, even the reproductive burden is carried almost exclusively by women in the household.[1158] Yet, despite their critical contribution and the wide diversity of social systems behind the commons, women still suffer from at least three types of systematic and persistent discrimination in their access to and control of the commons around the world.

The first type of barriers includes discriminatory laws at the state level, which dilute or deny women's rights to the commons.[1159] The FAO Gender and Land Rights Database shows that women represent a significant minority in the total number of agricultural holders across the world – in some countries such as Algeria, Bangladesh, Jordan, or Mali, women represent less than 5%.[1160] For instance, women may be legally unable to acquire rights to lands or other natural resources through markets, inheritance, transfer, or gifts.[1161] Similarly, they may become legally unable to do so when they marry or divorce.[1162] Women may also have inferior rights – e.g. the right to cultivate, but not to alienate. Such rights are often 'derived from and subordinated to those of their husbands, fathers, brothers, even sons'.[1163] There is also a risk that in securing land tenure for communities, women's titles to community lands are not properly documented.[1164] Land titling programmes and agrarian reforms may fail to formalize women's rights, for example in registering land only in men's names or in compensating the loss of land only based on men's activities.[1165] Individual land titling as public intervention then becomes completely counterproductive, as it may, such as the World Bank's WDR 2008

[1158] Federici, *supra* n 1156. See also, Deleixhe, *supra* n 248.
[1159] FAO, *The State of Food and Agriculture 2010-11. Women in Agriculture. Closing the gender gap for development* (2011) <http://www.fao.org/docrep/013/i2050e/i2050e.pdf> (accessed 17 June 2018) 23.
[1160] FAO, 'Gender and Land Rights Database' (2010) <http://www.fao.org/gender-landrights-database/background/en/> (accessed 25 October 2017).
[1161] Renée Giovarelli, 'Overcoming Gender Biases in Established and Transitional Property Rights Systems', in John W. Bruce, Renée Giovarelli, Leonard Jr. Rolfes, David Bledsoe and Robert Mitchell, *Land Law Reform: Achieving Development Policy Objectives* (2006) Law, Justice, and Development, World Bank <https://openknowledge.worldbank.org/handle/10986/7198> (accessed 17 June 2018) 67-68.
[1162] ibid., 68.
[1163] Olivier De Schutter and Katharina Pistor, 'Introduction: Toward Voice and Reflexivity' in Katharina Pistor and Olivier De Schutter (eds), *Governing Access to Essential Resources* (Columbia University Press 2016) 9.
[1164] Giovarelli, Richardson & Scalise, *supra* n 1157, 1.
[1165] General recommendation No. 34 on the rights of rural women, *supra* n 97, para 77.

already warned, 'weaken or leave out communal, secondary or women's rights'.[1166] Codification into law of other customary practices and traditions concerning access or management of the commons may be disadvantageous to women, too.

Second, growing market pressures on land and other natural resources further undermine women's role in the commons in developing countries. It is well known that the current global 'land rush' threatens millions of unrecognized, indigenous or customary land rights. The boom in large-scale land acquisitions by foreign investors in developing countries was triggered by the oil, food supply, and the 2008 financial crisis, and has led to a new wave of enclosure of the commons in the Global South.[1167] Regrettably, the specific situation of women has rarely been taken into consideration in studies on land grabs. Yet, as the UN Special Rapporteur on the rights of indigenous peoples noted, 'land appropriation is not gender-neutral' as it leads women to 'lose their traditional livelihoods, such as food gathering, agricultural production, herding'.[1168] For example, as a recent Oxfam report illustrates, when all the village's mangrove forests were occupied by shrimp farms owned by just one investor, 'women were hit hardest, as they were most reliant on common resources'.[1169] The Committee on the Elimination of Discrimination against Women (CEDAW Committee) similarly observed that the increased and large-scale land acquisitions by private investors 'have put rural women at risk of forced eviction and increased poverty and have further diminished their access to and control over land, territories and natural resources, such as water, fuelwood and medicinal plants'.[1170] Moreover, expulsion and forced displacement often bring secondary effects, such as gender-based violence.

Third, external pressures are not the only causes of discrimination against women. Despite being the main contributors to, and the most dependent on, shared resources, women's position is often weakened by their subordinate status and by formal or informal discriminatory gender norms and cultural attitudes within the community itself. While the specific term 'commons' is rarely explicitly mentioned in the literature, there is now evidence that women are generally

[1166] *World Development Report 2008*, *supra* n 388, 139.
[1167] See Liz Alden Wily, *The Tragedy of public lands: The fate of the commons under global commercial pressure*, (International Land Coalition 2011) <http://www.landcoalition.org/sites/default/files/documents/resources/WILY_Commons_web_11.03.11.pdf> (accessed 17 June 2018).
[1168] HRC, 'Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz' (6 August 2015) UN Doc. A/HRC/30/41, para 16.
[1169] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13, 30.
[1170] General recommendation No. 34 on the rights of rural women, *supra* n 97, para 61.

more likely to be excluded from leadership and decision-making positions in 'community-level discussions', 'in rural extension and water, forestry or fishery services, in cooperatives and in community or elders' councils' which often govern commons in rural areas.[1171] An ILC report on 41 case studies on common property regimes shows that women's participation in decisions concerning land and collectively managed natural resources remains a concern.[1172] In the Naga tribes in the North-Eastern part of India, for example, a case study indicates that whereas 'women are the "true managers" of the resources – they are the tillers, gatherers, seeders and harvesters of the land', 'they have no right to own, sell and inherit any portion of the land they tend'.[1173] In forest communities, another report recalls that whereas 'women generate more than half of their income from forests, compared with one-third for men', 'their role and rights are rarely recognized; their voices too often go unheard when a decision is made'.[1174] A case study developed by custodians of the tradition in Cameroon similarly acknowledges that 'the starting point of injustices in management of the commons often lies with the Traditional Rulers' responsibilities as commons managers, including the exclusion of women'.[1175] Gender roles may also be very different in the transmission of traditional knowledge about the management of crops and preservation of seeds, which can be hegemonically patriarchal in certain indigenous and rural communities.[1176] Globally, despite the major contribution of women to agricultural labour and food production, customary land tenure and other commons-based systems – which women rely on as their primary source of livelihood – are still largely controlled by men.[1177]

In light of the above, it becomes clear that gender may represent a challenging parameter in the international human rights protection of the commons. It should be stressed from the outset that this debate has sometimes been framed as a tension between the commoners' right to self-organization, and the legitimate demand that states and development agencies remove barriers to women's participation in decision-making structures of the commons and ensure women's equal access to, and control over, land, water and other natural resources. On the one hand, Ostrom's seventh design principle states that '[t]he rights of appropriators to devise their own institutions [should] not [be] challenged by external governmental authorities'.[1178] Yet, on the

[1171] ibid., para. 53.
[1172] *Securing Common Property Regimes in a Globalizing World*, *supra* n 269, 29.
[1173] Aier, *supra* n 96.
[1174] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13, 33.
[1175] FAO, *supra* n 272, 43.
[1176] Aier, *supra* n 96.
[1177] Bruce et al., *supra* n 274.
[1178] Ostrom, *supra* n 8, 101.

other hand, recognition of the challenges women face in the access to, management of, and control over the commons, should also constitute a priority within communities, and for states and development agencies concerned with rural development, food security and women's economic empowerment. Some women's rights advocates have warned that 'any advocacy for community land tenure could result in a negative impact on women's rights, either not allowing for change or even worsening women's conditions'.[1179] This is clearly what could make gender so sensitive in a debate that has long been dominated by an ideal of autonomy of the commons.

However, this artificial dilemma between protecting and claiming collective and women's rights is of course not limited to the commons. The paradox, as the UN Special Rapporteur on the rights of indigenous peoples puts it, is that 'women's rights have often been considered divisive and external to the indigenous struggle and connected to "external values" or "Western values" that privilege individual over communal rights'.[1180] Yet, women fighting to be treated as equals in the commons, are also seeking at the same time to protect the distinct identity and practices of their community.[1181] This is the crux of the matter: women are vulnerable not only to violations of their collective rights, as members of the commons, but also to violations of their individual rights, as sub-collectives. In other words, there should be no antinomy between these two aspects: both women's rights and the autonomy of the commons should be respected and treated as mutually reinforcing conditions for governing the commons.

Women's rights to access, control and manage the commons can be found, at least implicitly, in various international and regional human rights instruments. Since it entered into force in 1981, the CEDAW has been the most comprehensive universal international human rights instrument for women's rights worldwide. Article 14 of the CEDAW is the only provision in an international human rights treaty which specifically recognizes the unique situation of rural women:

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in non-monetized sectors of the economy […].
2. 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:

[1179] Cangelosi & Bieri, *supra* n 96, 6.
[1180] Report of the Special Rapporteur on the rights of indigenous peoples, *supra* n 1168, para. 13.
[1181] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13, 34.

> […]
> (f) To participate in all community activities;
> (g) To have […] equal treatment in land and agrarian reform as well as in land resettlement schemes;
> […].

Yet it is only in 2011 that the CEDAW Committee cohesively took the rights of rural women under its loop in a General Statement.[1182] The Committee therein observed discrimination against rural women in terms of access to and control of productive resources such as land.[1183] It noted that 'the lease and sale of large tracts of land to other states or large private companies, as well as the patenting of seeds, tend to reduce the chances that women will be able to provide adequate food to themselves and their families.'[1184] It underscored the importance of rural women's right to participate as 'managers of natural resources' in 'decision-making processes which impact on their lives including through (…) bodies of local governance'.[1185]

In 2016, the CEDAW Committee considered more specifically 'rural women's rights to land, natural resources, including water, seeds and forests, and fisheries as fundamental human rights' in General Recommendation No. 34.[1186] The Committee urged States Parties to the CEDAW as well as 'development partners' to 'address the negative and differential impacts of economic policies, including agricultural and general trade liberalization, privatization and the commodification of land, water and natural resources' and enhance rural women's role in the control over land, water, forests, fisheries, seeds and agricultural cooperative.[1187] Interestingly, the Committee explicitly called on states to 'implement agricultural policies that support rural women farmers' and 'recognize and protect the natural *commons*'.[1188] In that regard, it noted that States Parties should '[e]nsure that land acquisitions, including land lease contracts, do not violate the rights of rural women or result in forced eviction, and protect rural women from the negative impacts of the acquisition of land by national and transnational companies, development projects, extractive industries and megaprojects'.[1189]

With regard to indigenous women specifically (see, *infra*, Section 3.5), Article 22, UNDRIP, which was adopted on 13 September 2007 by the UNGA, calls on states to ensure that

[1182] CEDAW Committee, 'General Statement on Rural Women' (19 October 2011) Decision 50/VI, 50th session, UN Doc. A/67/38.
[1183] ibid., 2.
[1184] ibid., 3.
[1185] ibid., 4.
[1186] General recommendation No. 34 on the rights of rural women, *supra* n 97, para. 56.
[1187] ibid., paras 11 and 59.
[1188] ibid., para. 62 (emphasis added).
[1189] ibid., para. 62 (c).

indigenous women enjoy full protection against all forms of violence and discrimination.[1190] In this respect, the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, dedicated a report on the violations committed against indigenous women, as well as the nexus between individual women's rights and community rights.[1191] She recommended to the UN Member States 'to invest in the leadership capacity of women so that they can play more active roles in indigenous decision-making structures to protect women and girls within their communities'.[1192] She emphasized that indigenous women's livelihoods such as rotational agriculture, pastoralism, hunting and gathering are land-based, and therefore highly vulnerable to the phenomenon of land grabbing.[1193]

At the regional level, the IACtHR has recognized the rights of indigenous communities to their ancestral lands, and especially the need to protect women within their commons. For example, in the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, the IACtHR ruled after years of legal battles at the domestic level that the Sawhoyamawa had been illegally forced off their customary land, which had been taken over by a German investor for beef production. It ordered the restitution of the lands in 2006. In this case, the Court emphasized women's major role played within the community, notably to gather fruit and honey.[1194] The Court recalled that 'States must devote special attention and care to protect [the pregnant women of the Community] and must adopt special measures to secure women, especially during pregnancy, delivery and lactation, access to adequate medical care'.[1195] In 2010, another indigenous community, *Xákmok Kásek*, settled in Paraguay, obtained a favourable ruling from the Court to get its ancestral land back. Again, the Court underscored the vulnerable position of women victims of land grabbing and ruled that the state violated the right to life because it failed to take the required positive measures regarding pregnant women living in extreme poverty owing to the lack of their traditional habitat.[1196]

## 4. Summary

[1190] UNDRIP, *supra* n 181.
[1191] Report of the Special Rapporteur on the rights of indigenous peoples, *supra* n 1168, para. 8.
[1192] ibid., para. 78.
[1193] ibid., para. 23.
[1194] *Sawhoyamaxa*, *supra* n 1061, para 73(70).
[1195] ibid., para. 177.
[1196] *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (*Judgment of 24 August 2010*), Inter-Am. Ct. H.R., (Ser. C) No. 214 (24 August 2010), para. 233.

The potential legal influence of the right to the commons under the UNDROP – which was itself created in a bottom-up process involving peasants and rural workers – leaves a positive impression on us. That was the objective of this last Chapter: instead of rejecting any kind of international law solution, bridging the commons gap by resorting to human rights. Indeed, as we have seen in Section 1, the commons and human rights have a long-intertwined history. The 800-years old Charter of the Forest already protected commoners, including women, against the seizure of traditional common land, in the same way as contemporary human rights norms seek to protect the rights to an adequate standard of living and food. Over the last decade, commons scholars and activists, among which Burns Weston, David Bollier, Saki Bailey, and Christian Iaione, have more intensively explored the potential of modern human rights to catalyse today's fights of bottom-up communities of commoners against enclosure. The emergence of human rights represents the most cosmopolitan achievement of the 20$^{th}$ century in international law. It also serves as a powerful counter-narrative and effective legal strategy to shift from an extractive model of international law to a more ecological international legal order that promotes and protects stewardship of shared resources by local communities themselves. In other words, if international law played a role in the vast enclosure of the commons from the colonial era onwards (as we have seen in Chapter 2), today it may very well serve as a positive tool to combat the dispossession of communities around the world.

Yet, international human rights norms represent more than just a new 'social imaginary'. The right to access, use and management of the commons cannot merely remain an abstract 'moral claim' or 'political strategy' *de lege feranda*. For if we want to make any sense of the right to establish and maintain commons, it is necessary to be able to enforce such entitlement *de lege lata*. Communities of commoners around the world are looking for a tangible international legal framework to which they can resort to claiming their rights in a bottom-up fashion, not a universal political project that would be imposed upon them from the top. Think, for instance, of indigenous peoples, landless people or fishermen resorting to international law to combat forced displacement, land-grabs and enclosure of the commons. My objective in this Chapter was to demonstrate that, pursuant to positive international human rights law, communities are entitled to claim international legal standards to obtain legal recognition for customary land tenure rights not currently protected by law and resist the commodification of the commons. I called this exercise the 'reconstruction' of international law.

After observing that most bilateral and multilateral development agencies now integrate human rights guarantees into their programming and policies in Section 2, Section 3 explored, as a

matter of recognized international human rights standards, the civil, political, economic, social and cultural rights protecting the social institution of the commons. We found that, as a matter of economic self-determination, all peoples may freely dispose and benefit of their natural wealth and resources. Article 1(2) of both the ICCPR and the ICESCR state that '[i]n no case may a people be deprived of its own means of subsistence'. According to human rights monitoring mechanisms such as the HRC or CESCR, those means of subsistence necessarily include the commons in rural areas like fisheries controlled by the Maori people in New Zealand or forests inhabited by indigenous communities in the DRC. However, it can seriously be doubted that communities other than populations of non-self-governing territories, minorities or indigenous peoples may enjoy the same subsistence rights – think of small-scale farmers, pastoralists, forest dwellers, artisanal fishers who depend on commons for their subsistence. Moreover, the right to economic self-determination emphasizes the 'free disposition' of natural resource discovery, exploitation and extraction, which is difficult to apply to the ecological concerns of preservation of the commons. This prompted me to look into more generative conceptions of nature, such as in the jurisprudence on the right to a clean and healthy environment. in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, the IACtHR found for the first time that the enclosure of the indigenous lands in the Argentina severly impaired the traditional way of life of the communities which depended upon them for hunting, gathering, and fishing. Another possible avenue for legal protection of the commons could be the right to property, which includes, according to the CERD, the recognition and protection community lands, water and subsoil resources.

Yet, despite the significant advantages of recognizing the commons, existing international human rights instruments for the protection of collective property seem to remain insufficient to protect fully the commons and all the communities who depend upon them for their survival. Even if recent developments recognize a more inclusive and community version of the right to property, the case-law of regional human rights courts has so far been concerned with indigenous and tribal peoples. This leaves other commoners vulnerable to dispossession. That is why it was interesting to see the term 'commons' appearing explicitly among the models of shared natural resources protected under the FAO Tenure Guidelines of 2012 (Guideline 8.3). The Tenure Guidelines were subsequently endorsed by the UNDROP adopted in 2018. And following the agreed language of the Tenure Guidelines, Article 17(3) of the Declaration calls on States to 'take appropriate measures to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law' and to 'recognize and protect the natural *commons* and their *related systems of collective use and management*'

(emphasis added). In 2016, while considering the right to land and other natural resources of rural women under Article 14 of the CEDAW, the CEDAW Committee, explicitly called on states to 'implement agricultural policies that support rural women farmers' and 'recognize and protect the natural *commons*'.[1197]

So, yes, the short answer to the main research question underlying Chapter 3 is that it is possible to translate the need to protect certain aspects of the commons in terms of human rights. The new right to the commons under Article 17(3) of the UNDROP, even if it remains non-binding on the surface, may lead to the recognition of the commons, as legal institution of its own, in the interpretation of the terms of other related human rights guarantees (Article 31(3)(b) of the VCLT), in the formulation of subsequent human rights instruments, or in its transposition in national legislation. That is, in itself, an important and positive development for the status of the commons in international law.

[1197] General recommendation No. 34 on the rights of rural women, *supra* n 97, para. 62 (emphasis added).

*Every freeman may agest his own wood within our forest at his pleasure, and shall take his pawnage. Also we do grant, that every freeman may drive his swine freely without impediment through our demesne woods, for to agest them in their own woods, or else where they will. And if the swine of any freeman lie one night within our forest, there shall be no occasion taken thereof, whereby he may lose anything of his own.* [1198]

Charter of the Forest, 1225.

# Closing thoughts

The great contribution of American political economist Elinor Ostrom's was to show that there are plenty of institutional arrangements which are formed by the communities themselves and which often prove more effective than the typical 'all-public' and 'all-private' solutions in safeguarding commonly shared resources. From the 1990s onwards, and particularly since the award of the Nobel Prize of economics to Elinor Ostrom in 2009, there has been a proliferation of publications on the commons across a wide array of disciplines like political theory, sociology and history. The commons have become a new buzzword. Beyond academic walls, commons activists like David Bollier, Silke Helfrich and Michel Bauwens now talk about the commons as a 'new paradigm'. In France, Pierre Dardot and Christian Laval have proposed to represent 'the common' (in the singular) as a political principle going beyond the natural properties of the resources to be shared. 'New' commons like cohousing initiatives, community gardening, community land trusts and open-source media like Wikipedia are burgeoning across modern cities in the West. Grassroots social movements and new political parties in Italy, the US and Spain now organize themselves around this 'new' synonym of resistance against the dominant neoliberal worldview based on rational choice, individualism, private property and the hegemony of the market. After centuries of destruction of the commons to feed the process of industrial revolution and colonialism, it seems to be a 'new' challenge to recover the commons and their resilient, cooperative and ecological system of governance.

I completed this thesis amid the Covid-19 crisis. The commons have never been as relevant to me as during this crisis.[1199] Chains of solidarity are popping up all around the world in reaction to an unprecedented pandemic. Spontaneously, in only a few hours, cities and villages have started their own self-help initiatives, especially in the areas of health care and assistance for

[1198] Charter of the Forest, *supra* n 917, para. 9. 'Agistement' and 'pannage' meant, respectively, the proceeds of pasture in the King's forest and the right to pasture pigs in a forest.
[1199] Samuel Cogolati, 'Une Solidarité virale : le réveil des communs face au Covid-19' (7 avril 2020) Mr Mondialisation, <https://mrmondialisation.org/une-solidarite-virale-le-reveil-des-communs-face-au-covid-19/> (accessed 19 April 2020).

the elderly. Thousands of medical students[1200] and even veterinarians[1201] have been stepping up to cover shortages in hospitals. Despite the sparse shelves at supermarkets, neighbours have been creating networks of 'shopping angels' to provide free grocery delivery to the sick and elderly.[1202] Volunteers have been sewing reusable protective face masks for health care providers when the world was facing shortage.[1203] Who could have predicted, just a few days before the outbreak of the pandemic in early 2020, that our modern industrialized and technology-driven societies would depend upon volunteer seamstress to compensate for the total collapse of the global supply chains of face masks in hospitals? That is one of the most embarrassing truths of the Covid-19 crisis. Those initiatives did not respond to a call 'from the top' of any government or the WHO. They were not driven by money. They were not offered by 'the market'. This does not imply that any kind of volunteering work necessarily amounts to a commons-based institution; nor that the commons could replace the state or the market altogether. My point is simply that the global lockdown of the current phase of global neoliberal capitalism (see, *supra*, Chapter 2, Section 2.3.2) has been resulting in a spectacular resurgence of local, decentralised, collaborative, selfless, commons. Because of the failures of both 'the state' and 'the market', the self-help movement has been reviving in the middle of the pandemic and forging new bonds of solidarity at the community level. The sanitary catastrophe has showed that it is not only state bureaucracies or capitalist firms, but also social innovations who have saved the elderly and the most vulnerable among us – especially in the first weeks of the crisis.

Yet, the commons are not simply about a passing trend. The revival of commoning practices in the West is fascinating to observe, but it was not the main topic of this thesis. Chapter 1 (see, *supra*, Section 1.3) described the system of commons-based governance that was widespread in medieval Europe. The quote from the 1225 Charter of the Forest was precisely chosen to

[1200] See, e.g., Selena Simmons-Duffin, 'States Get Creative To Find And Deploy More Health Workers In COVID-19 Fight' (25 March 2020) NPR, <https://www.npr.org/sections/health-shots/2020/03/25/820706226/states-get-creative-to-find-and-deploy-more-health-workers-in-covid-19-fight?t=1587299208205> (accessed 19 April 2020).
[1201] See, e.g., Haroon Siddique and Sarah Marsh, 'Vets recruited to work in UK hospitals during coronavirus outbreak' (9 April 2020) The Guardian, <https://www.theguardian.com/science/2020/apr/09/vets-recruited-to-work-in-hospitals-during-coronavirus-outbreak> (19 April 2020).
[1202] See, e.g., Lauren Lee, 'This student created a network of "shopping angels" to help the elderly get groceries during the coronavirus pandemic' (30 March 2020) CNN, <https://edition.cnn.com/2020/03/17/us/coronavirus-student-volunteers-grocery-shop-elderly-iyw-trnd/index.html> (accessed 19 April 2020).
[1203] Jessica Murray, 'Volunteers stitch together to make scrubs for NHS' (19 April 2020) The Guardian, <https://www.theguardian.com/world/2020/apr/13/volunteers-stitch-together-make-scrubs-for-nhs> (19 April 2020).

show that commons-based institutional arrangements are not swift. The Charter of the Forest is not of merely historical interest. It situates the current private property paradigm in a broader perspective and shows that alternatives to the market-state dichotomy do exist. Despite the expansion of predatory activities of private investors and states, some traditional communities, mostly living in the Global South, have hitherto resisted the enclosure movement. They still depend upon subsistence commons to meet their basic needs. According to a recent report by Oxfam, ILC and RRI, 2.5 billion people, including 370 million indigenous people, rely on communal land and natural resources around the world, which represent approximately 50% of the global landmass.[1204] According to another assessment by ILC and Cirad,[1205] over 8.54 billion hectares of 'commons' around the world can be categorized as 'property of rural communities under customary norms, this is not endorsed in national statutory laws'.[1206] The use, access and management of forests, pastures, grazing lands and fisheries is socially defined and organized, collectively and autonomously, aside from the state and the market. This means that communities of herders, fishermen, pastoralists, indigenous peoples are perfectly able to limit the depletion of CPRs by self-regulating to prevent overconsumption and free-riding. Through self-organized action, commoners sustain shared resources over long periods of time without having recourse to the coercive mechanisms of private property or state regulation. It is the customary practice that defines them as such: 'no commons without commoning'. Those natural resources are effectively governed as commons.

Ostrom's work made that abundantly clear. However, although Ostrom's work was primarily addressed to the development community (she mostly documented case-studies in developing countries like Kenya, Guatemala, and Nepal),[1207] this collective model of bottom-up governance is still far from being generally accepted in the field. Private property, in opposition to 'what is left in common', has been presented as a hallmark of productive efficiency for centuries. Commodification was for long thought to be inevitable. As Blackstone wrote already in the 18th century, the 'communion of goods' was considered retrograde and in need of modernization through privatization.[1208] The false but influential tragedy of the commons was

[1204] *Securing Land Rights and Safeguarding the Earth*, *supra* n 13.
[1205] Cirad is the French agency for agronomical and development research in tropical and Mediterranean areas: see <https://www.cirad.fr/> (accessed 1 February 2020).
[1206] Alden Wily, *supra* n 1167.
[1207] Recall that Pierre Sauvêtre, *supra* n 93, spoke of 'the Ostromian *developmentalist* policy of the commons' (p. 79, emphasis added). According to him, '[t]he historical roots of the commons paradigm and common-pool resources (CPR) analysis are inseparable from a change in the United States (US) development policies and doctrine, with the replacement, during the 1970s and 1980s, of a state-centred development model with a model combining markets with forms of community governance' (p. 81).
[1208] Blackstone, *supra* n 341, 1.

also constructed to convince us of the compelling need to enclose the commons – either through private property or through public regulation. The first movement of enclosure dates back from the late Middle Ages and comprises the seizure of natural resources such as forests, water and lands during the period between the 15th and 19th centuries in England, continental Europe, in the New World and other colonies. The enclosure of biodiversity, creation and knowledge through IP law is just another enclosure movement repeating the same process of great appropriation of the commons throughout the world.[1209] Today, echoing Garrett Hardin's 'Tragedy of the Commons', development agencies like the World Bank still seem to assume that commons should be commodified and privatized to secure land tenure and ensure their transferability in markets. Because so many commons are based on traditional usage and customary practice and are still considered 'backward' by development institutions, these communal systems tend to be highly vulnerable to state and corporate enclosure in the Global South. To date, only one-fifth of the communal lands around the world would be legally recognized.[1210] This explains why local communities face the threat of being deprived of their most basic access to food, land, and other essential resources.

If the World Bank continues to adhere to Hardin's tragedy, my central claim throughout this thesis has been that the alternative model of commons-based governance studied by Elinor Ostrom cannot remain ignored by international law. And yet, international lawyers have certainly already heard of '*global* commons' like the deep seabed or the Moon or of 'the tragedy of the commons', but rarely have they used the commons as a legally relevant institution in Ostrom's sense. Whereas *global* commons like outer space or the high seas are subject to special treaty regimes between states and international legal principles such as the CHM, it remains particularly unclear to what extent international law can require states to recognize the local commons as a social institution and protect marginalized populations from enclosure and dispossession. This is what I called the 'commons gap' in international law – the gap of adequate international legal recognition or protection for the social institution of the commons. Legal contributions so far have focused on revisiting property or IP law, but much less so international law.

Chapter 2 focused on a deconstruction of international law in its negative dimension regarding the commons, as an instrument of commodification and colonization. The fact that international law has so far been unable to recognize or protect the commons as a social institution of its own

[1209] Boyle, *supra* n 260.
[1210] ibid.

is not a coincidence. International law is indeed itself part of the problem. As Jochen von Bernstorff observed in the context of the global land-grab, 'the creation of global markets for agricultural land and the associated processes of commodification and property rights are protected by a transnational economic constitution created by international legal rules and enforced by international institutions, such as the World Bank'.[1211] I have argued that the process of enclosure of the commons is similarly protected by a development agenda focused on secure property rights created by international legal rules and enforced by IFIs, such as the World Bank. There is indeed a structural link between international law's disregard of the commons and the discipline's origins, assumptions and foundational principles. First, from the perspective of the object of the commons, 'global commons' have always been portrayed – be it as *res communis*, *res nullius* or CHM – as vast and inexhaustible resource-domains under international law. Although 'global commons' have nothing to do with the fragile ecosystems of lands, seeds, forests or water reserves which communities of commoners seek to preserve over the long term, this notion is often confused by international legal scholars as a synonym for 'commons'. Second, from the perspective of the subject of the commons, in contrast to sovereign states, self-organized communities of commoners are not yet recognized as subjects of international law. Said differently, the bottom-up space of self-governance of the commons challenges top-down international law on at least three counts: polycentricity, horizontal subsidiarity and informality. Third, from the perspective of generative commoning practices, international law seems to focus through concepts such as sovereignty (including the postcolonial doctrine of PSNR) and private property on extraction and exploitation of natural resources for economic development purposes, rather than their conservation and flourishing. Or to put it in the words of Weston and Bollier, 'our official national and international legal orders are structurally organized to contribute to the deterioration of the natural world, not to prevent it'.[1212]

Admittedly, the international legal order, as it stands, remains state-centric in nature. The idea of open access to the global commons, that is so entrenched in international legal scholarship, has very little to do with Ostrom's work on self-governing and well-limited commons. International law's extractive approach of nature cannot simply be discarded. However, faced with the risk of enclosure in developing countries, international law should provide tools and strategies to protect the commons. Indeed, as we have shown throughout this thesis, commons

[1211] von Bernstorff, *supra* n 834, 294.
[1212] Weston & Bollier, *supra* n 21, 118.

cannot survive in a legal vacuum. If we go back to Ostrom's seminal book *Governing the Commons*, the 'minimal recognition of rights to organize' is one of the eight design principles proposed to characterize a robust and sustainable commons-based institution.[1213] Commons scholars regularly emphasize that this right to self-government needs to be respected by the state and public authorities '*as a matter of law*'.[1214] My contribution, through this work, was to indicate that the same right could be protected *as a matter of international law*. Burns H. Weston and David Bollier believe in 'a "Grotian Moment" that presents an unusual opening in our legal and political culture for advancing new ideas for effective and just environmental protection'.[1215] Chapter 3 looked for this Grotian Moment in the breakthrough of international human rights law as a strategic opportunity to combat the commodification of the commons in the Global South. This is how we suggested bridging the commons gap.

The interface between human rights and the commons is at least as old as the Charter of the Forest of 1225. Since then, social activists and intellectuals have presented human rights as a legal tool capable of protecting the commons. Human rights, indeed, do offer a pragmatic means for commoners to combat commodification and resist enclosure, especially in the context of development. A generative view of international human rights law would encourage us to view ourselves not as separate from nature – as mastering it in the exploration and exploitation of natural wealth and resources – but as its trustees. As Vandana Shiva, a feminist and ecological activist who received the alternative Nobel Prize in 1993, wrote:

> Today we have to look beyond the state and the market place to protect people's rights and deepen democracy. Empowering the community with rights would enable the recovery of commons again.[1216]

We took Shiva's words seriously and sought in Chapter 3 for an ecological reorientation of international human rights law which would depart from top-down and extractive aspirations of both sovereign states and private interests.

We found that, as a matter of economic self-determination, all peoples may freely dispose and benefit of their natural wealth and resources. Next, all peoples shall have the right to a clean and healthy environment, which includes the obligation for states to secure ecologically sustainable development and the right of communities to maintain commons. Even the right to property does not need to be understood in a restrictive, Western, sense only; it can be vested

[1213] Ostrom, *supra* n 8, 90.
[1214] Weston & Bollier, *supra* n 21, xx (emphasis added).
[1215] ibid., 118.
[1216] Shiva, *supra* n 638, x.

collectively in a community of herders, fishermen or land-users who depend on a commons for its survival. Since commoners like traditional fishers, land-users, pastoralists or herders literally rely on the products of their lands and natural resources for their livelihood, the right to food imposed on states an obligation to guarantee their access to the necessary productive resources, which includes land, natural resources and other CPRs at the heart of the commons in the Global South. The commons are also key for sustaining ancestral practices of around 370 million indigenous peoples around the world. Not only traditional individual rights have been interpreted by international human rights monitoring bodies and regional human rights courts in an evolutionary fashion to apply to indigenous and tribal peoples, but the UNDRIP of 2007 now also embraces a broader conception of the community rights of possession, occupation, use of land and other natural resources. The traditional lands and shared resources upon which indigenous communities depend are now protected against enclosure under international law. Women should not be overlooked, for they still account for 70% of the world's hungry. In 2016, the CEDAW Committee considered more specifically 'rural women's rights to land, natural resources, including water, seeds and forests, and fisheries as fundamental human rights' in General Recommendation No. 34.[1217] The Committee urged States parties to 'implement agricultural policies that support rural women farmers' and 'recognize and protect the natural *commons*'.[1218]

So, yes, it is possible to translate the need to protect certain aspects of the commons in terms of human rights. International lawyers are familiar with the language of human rights. And such a human rights-based approach to the commons is not radically new in comparison with HRBA in development (see, *supra*, Chapter 3, Section 2). Accountability is a cornerstone of the human rights framework: states and international development agencies can be held accountable for violating the right to collective property or indigenous rights of occupation of land and other natural resources. Existing human rights guarantees thus may serve to control states as well as to ensure that international development agencies, like the World Bank, are not allowed to deprive communities of their access to resources which are essential for their livelihood. However, international and regional human rights are not a panacea and do not resolve all the problems linked to the extractive logic of the Anthropocene/Capitalocene. As such, it does not question the commodification of the commons. The dominant paradigm of private property and appropriation remains unchallenged. International human rights scholars are well aware of the

[1217] General recommendation No. 34 on the rights of rural women, *supra* n 97, para. 56.
[1218] ibid., para. 62 (emphasis added).

limits of their discipline to protect the commons: '[e]ven the most robust legal and policy frameworks designed to support the right to food may lack any self-instituting dimension; they tend to prioritize individuals above collective rights, they impose obligations mostly on states to become operation (it is in that sense that they remain state-centric)'.[1219] An approach based on human rights not only may not save the commons, but it can also co-exist with the logic of propertization, and even reinforce the enclosure movement as a matter of property rights. As Samuel Moyn critically points out, '[n]ot surprisingly, it is probably the right of possession that has been the most frequently asserted and doggedly fortified right in world history, albeit typically within legal systems that made no real claim to base entitlement on humanity.'[1220]

That is why the real challenge for me is not so much to frame access to natural resources as a human right to 'food' or 'property'; it is to frame the *governance* of the commons as a mandatory entitlement of every human being in community with others. In fact, we are here faced in the international legal domain with the same question of the basic definition of the commons as a *social institution* – and not simply, as a 'thing', 'resource' or 'commodity' (see, *supra*, Chapter 1, Section 3). We should stop defining the commons as collective *goods* ('*biens* communs'). The commons can no longer be abstracted from the social networks that participate in their production and protection: without communities, no commons. Similarly, in international law, we should avoid the 'reification' of the commons and stop assimilating the commons with 'global commons'. Indeed, the commons should be considered outside of the realm of physical commodities all-together. For what is at stake is not the economic goods they refer to (be it water, forests, lands or traditional knowledge), but the participatory/collaborative/cooperative mechanisms they imply at the community level. What the language of human rights should recognize is the self-instituting and generative practice of commoning – that is the space of self-governance that is created by human communities themselves beyond the classic public-private divide. It is the social construct and innovation of the commons that now calls for recognition under international law; the physical entity (for example, a forest or a land) should not be disembedded from the social network governing it.

Recent developments show that international law is indeed reinventing itself in a form of 'counter-movement'[1221] or '"recommonification"'[1222] towards the recognition of the commons

[1219] De Schutter et al., *supra* n 1098, 382.
[1220] Moyn, *supra* n 935, 17.
[1221] De Schutter, *supra* n 21, 240.
[1222] De Schutter et al., *supra* n 1098, 382.

as a social institution of its own. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security[1223] adopted in 2012 by the CFS seek to protect the access to food of the rural poor by recognizing customary models of shared natural resources governance like the commons:

> [T]here are publicly-owned land, fisheries and forests that are collectively used and managed (in some national contexts referred to as *commons*), States should, where applicable, recognize and protect such publicly-owned land, fisheries and forests and their *related systems of collective use and management*, including in processes of allocation by the State.[1224]

FAO supported the implementation of the Tenure Guidelines, and the recognition of tenure rights to commons in particular.[1225] Even if the definition provided by the CFS creates legal uncertainty by assimilating the commons to 'publicly-owned' natural resources (which is wrong),[1226] it is a positive development to witness in world food governance that the commons that so many indigenous peoples and peasant communities rely on for their survival are increasingly recognized in human rights instruments. When interpreting the women's right to land and other natural resources under Article 14 of the CEDAW, the CEDAW Committee also urges us 'to recognize and protect the natural commons.'[1227]

The inclusion of the commons in the Tenure Guidelines particularly inspired the wording of the UNDROP adopted by a majority of the UNGA end of 2018. Article 5(1) guarantees the right of peasants and other people working in rural areas to participate in the management of natural resources upon which they depend to enjoy adequate living conditions. Most importantly, Article 17(3) on the right to land and other natural resources calls on states

> to recognise and protect the natural *commons* and their related systems of collective use and management.[1228]

It is not only the access to the lands, water bodies, coastal seas, fisheries, pastures and forests that should be protected to ensure an adequate standard of living for peasants, but also their institutions of self-governance – even if they are not formally recognized under domestic law. This emphasis on the commons as a social institution is new and should be applauded as a major development under international law against the private property dogma and in favour of the

[1223] *Tenure Guidelines*, *supra* n 1081, Guideline 8.3 (emphasis added).
[1224] Note, however, the erratic definition of the commons referred to as 'publicly-owned' natural resources. The commons, however, should be distinguished from both traditional public-private property.
[1225] FAO, *supra* n 272.
[1226] It should be emphasized that the commons go beyond the public-private divide.
[1227] General recommendation No. 34 on the rights of rural women, *supra* n 97, para. 62.
[1228] UNDROP, *supra* n 34.

local interests of communities living in rural areas. Not only the explicit wording of the UNDROP is noteworthy, but also its process of adoption. Interestingly, this initiative for an official international instrument recognizing the rights of peasants specifically did not come from above but was driven by civil society groups representing the peasant movement around the globe. Agrarian activist groups, such as *Serikat Petani* in Indonesia, decided to engage in the creation of a *new* collective right to the commons at the *international* level to push for social change and resist to their dispossession at the local level. The reference to local and customary forms of self-governance also contradicts the dominant development paradigm, as promoted, for example, by the World Bank. Considering that peasants and rural workers represent 80% of those suffering from hunger in the world today, the new attention given to the threats to this collective institution, through the UN Draft Declaration, is a welcome development. It suggests, for the first time, the existence of a window of opportunity for a new international human right to the commons. In this way, international law is likely to offer a wider spectrum of legal strategies to assert the rights of communities to establish and protect commons against enclosure. It now remains to be seen if the final Declaration will effectively respond to the legitimate demands of the world's poorest and most marginalized commoners—small-scale farmers, pastoralists, forest-dwellers, artisanal fishers and indigenous peoples who depend on commons for their survival. The human right to the commons cannot remain an empty promise; further implementation and additional protection are urgently needed for the commons under international law.

To conclude, the way forward is hard to predict under international law. As we have seen, the dominant conception of international law remains statist, top-down and extractive in nature. The same is true of the classic model of development as wealth accumulation. The World Bank has been reluctant so far to embrace the commons as a model of natural resource governance, beyond market and state. Yet, international law has not been entirely unresponsive to calls for greater protection of marginalized, indigenous and peasant communities depending on the commons for their survival in the Global South. It is possible to reinterpret human rights guarantees and to observe progressive developments in UN fora – especially over the two last decades – which recognize the commons as a social institution of its own. Surprisingly, however, most of these developments have not been incorporated yet into advocacy strategies. The UNDROP of 2018, for instance, has not yet been largely grasped by civil society advocates as a strategic tool for the recognition and protection of the commons in development projects and policies. Even commons scholars and activists tend to avoid engaging with international

law as a solution.[1229] Part of this mistrust is entirely justified by centuries of plunder and commodification through the doctrines of *res nullius* and PSNR. But if we want to elevate the commons *as a legal institution of its own* – and not just a mere utopia or political principle, we will need to make positive use of the UNDROP as a stepping-stone toward the reconstruction of the commons under international law.

For sure, it would be overly optimistic to claim that a small part (that is Article 17(3)) of a legally non-binding resolution of the UNGA (that is UNDROP) would suffice to institutionalize self-regulation on an equal footing with market rules and public regulation in international law. The process of re-empowerment of local communities will take time and efforts. We are just witnessing the beginning of a movement towards the reconstruction of the commons under international law. While recent soft law human rights instruments have explicitly recognized the commons as a form of tenure, we still miss a strong normative ground to hold states, international development agencies and private actors accountable for commodifying and enclosing the commons (in a defensive mode) and to empower commoners around the globe in the co-management of the resources they share (in an enabling mode). We need more to elevate the commons – beyond the market (the private) and the state (the public) – as a sphere of governance of its own under international law. This reconfiguration of the international legal order does not need to operate in a conflicting way only (the commons '*against*' the market and the state) but can entail mutual benefits in hybrid management systems (for example, in the form of public-commons partnerships[1230]). The challenge is simply to translate into international law what has long been accepted in economics thanks to Elinor Ostrom and others: there are more institutional possibilities than just the state or the market to govern CPRs.

What communities of commoners in Cochabamba (Bolivia), in the Embobut forest (in western Kenya) or in the Wampis' territory (in Peru) (see, *supra*, Introduction, Section 7) are looking for, is now a tangible international legal framework to which they can resort to claiming their rights to the commons beyond the duopoly of the market and state. The co-construction of UNDROP has shown that international law may be embraced from below by civil society organizations as a new guiding frame and weapon to save the commons in rural areas. It is an encouraging sign to see that a majority of states within the UN has supported the emergence of an obligation to recognize the commons, but work remains to be done in civil society and

[1229] Capra & Mattei, *supra* n 22, 159: 'seeking the use of 'top-down' international law to protect the commons is like trying to employ a fox to protect a chicken house.'
[1230] Cogolati & Piron, *supra* n 782.

national parliaments[1231] to convince governments from the Global North to join the movement. The outbreak of the coronavirus crisis and with it the collapse of the global supply chains could accelerate this regenerative process. It could make the struggle against the privatization of essential resources and services like health care more urgent. It is my deep hope that the institutionalization of the commons under international law will be seized as an opportunity to advance more generative and ecological practices to share natural resources worldwide. After all, the commons were already present in the 1225 Charter of the Forest. International law may just represent yet another forum for contestation and recognition, but it is a new and significant one in the struggle to save the commons in the 21st century.

[1231] See, e.g., Proposition de Résolution sur l'adoption de la Déclaration des Nations Unies du 17 décembre 2018 sur les droits des paysans et des autres personnes travaillant dans les zones rurales, déposée par MM. Samuel Cogolati et Wouter De Vriendt et consorts, *supra* n 76.

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## 2. International documents

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