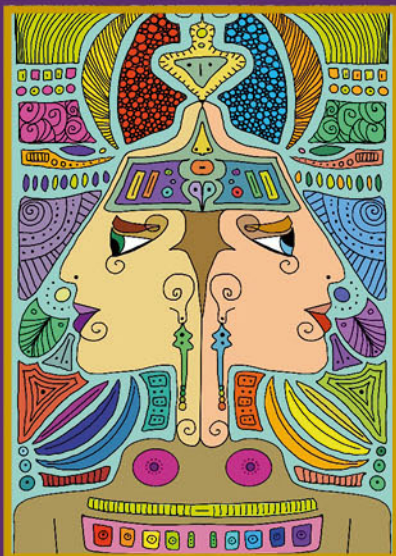


edited by  
**ANTONIETTA DI BLASE**  
**VALENTINA VADI**



**THE INHERENT  
RIGHTS  
OF INDIGENOUS  
PEOPLES  
IN INTERNATIONAL  
LAW**

*Collana*

Diritto internazionale,  
Diritto internazionale privato  
e dell'Unione Europea

**3**



*Roma TrE-Press*

2020

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“This excellent collection is a welcome addition to the growing literature on Indigenous Peoples’ rights in international law. In an accessible and insightful way, its authors examine a diverse range of issues related to the fundamental right of Indigenous Peoples’ self-determination, their lands and their culture.

At a time when, despite positive legal developments, the very survival of these peoples as distinct societies remains under constant threat, this book reminds us that the rights of Indigenous Peoples are first and foremost inherent rights that are deeply connected with their lands, cultures, and legal systems. We should never lose sight of this essential fact.”

MAURO BARELLI,  
*The City Law School, University of London.*

“Framing the rights of Indigenous Peoples as ‘inherent rights’, this fascinating volume navigates and places Indigenous rights within the origins of human rights law and the concept of human dignity. This much needed reframing, itself a response to skeptics of the collective aspects of human rights, at the same time, opens new conceptual spaces for a deeper understanding of Indigenous rights as contributing to an intercultural understanding of all human rights.

This succinct volume adopts an International Law perspective, and at the same time, stresses the importance of history in any discussion of Indigenous rights, as well as the impact of such time frames in interpreting these rights today, including the concepts of sovereignty and self-determination.

In addition to an enticing discussion on sovereignty and self-determination, as well as land rights (mainly through analysis of decisions of the Inter-American Court of Human Rights and the African Court on Human and Peoples Rights), the book points out the inadequacies of international protection of cultural rights, including Indigenous Peoples’ cultures. Finally, the emphasis on economic law and Indigenous Peoples’ rights is another special contribution of this volume.

The *Inherent Rights of Indigenous Peoples* is an innovative volume, and should be read by all those interested in the rights of Indigenous Peoples, students and practitioners alike.”

ELSA STAMATOPOULOU,  
*Columbia University, Director Indigenous Peoples’ Rights Program*



Università degli Studi Roma Tre  
Dipartimento di Giurisprudenza

*Diritto internazionale*  
*Diritto internazionale privato e dell'Unione Europea*

3

The Inherent Rights of  
Indigenous Peoples in  
International Law

edited by  
ANTONIETTA DI BLASE and VALENTINA VADI



*Roma TrE-Press*

2020

Il presente volume è il n. 3 della Collana Diritto internazionale, Diritto internazionale privato e dell'Unione Europea, varata su iniziativa di docenti del Dipartimento di Giurisprudenza. Con questa Collana si intende condividere e sostenere scientificamente il progetto editoriale di Roma TrE-Press, che si propone di promuovere la cultura giuridica incentivando la ricerca e diffondendo la conoscenza mediante l'uso del formato digitale ad accesso aperto.

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*Immagine in copertina:* @valevale\_design

*Elaborazione grafica della copertina:* **MOSQUITO**. [mosquitoroma.it](http://mosquitoroma.it)

*Impaginazione e cura editoriale:* Colitti-Roma      colitti.it

*Edizioni:* Roma *TrE-Press* ©

Roma, febbraio 2020

ISBN: 978-88-32136-92-0

<http://romatypress.uniroma3.it>

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Fondazione Roma Tre-Education, piazza della Repubblica 10, 00185 Roma

*To my family*  
V.V.

*To the memory of my mother*  
A.D.B.





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## *Abbreviations*

ABS	Access and Benefit Sharing
ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ADPIC	Accord de l'OMC sur les aspects des droits de propriété intellectuelle qui touchent au commerce
AJIL	American Journal of International Law
BCPs	Biocultural Community Protocols
BIT	Bilateral Investment Treaty
CARIFORUM	Caribbean Forum of the African, Caribbean and Pacific Group of States
CBD	Convention on Biological Diversity
CEMIRIDE	Centre for Minority Rights Development
CETA	Comprehensive Economic and Trade Agreement among the European Union, its Member States and Canada
COMESA	Common Market for Eastern and South Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUP	Cambridge University Press
DSB	Dispute Settlement Body (WTO)
ETS	European Treaty Series
FAO	Food and Agriculture Organization

FDI	Foreign Direct Investment
FPIC	Free, Prior and Informed Consent
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ILR	International Law Reports
ISDS	Investor-State Dispute Settlement
MATs	Mutually Agreed Terms
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
OUP	Oxford University Press



PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
TK	Traditional Knowledge
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHR Committee	United Nations Human Rights Committee
UNPFII	United Nations Permanent Forum for Indigenous Issues
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WIPO/GRTKF/IC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
WTO	World Trade Organization
WWII	Second World War



## INTRODUCTION



Antonietta Di Blase and Valentina Vadi\*

*Introducing the Inherent Rights of Indigenous Peoples*

1. *The International Law Dimensions of the Rights of Indigenous Peoples*

In the age of exploration, and for some time afterwards, indigenous peoples were recognised as important players in international relations. They signed treaties and had autonomous forms of governance and independence. The colonization process dramatically altered this state of affairs, and international law almost forgot them. For centuries, indigenous peoples have not been considered to be actors of international law. Nonetheless, their contemporary efforts to protect their rights and regain control of their own destinies has highlighted ‘the transformative potential of international law’ as a tool of re-empowerment.<sup>1</sup> In the past decades, a new awareness of the importance of indigenous rights has emerged at both domestic and international levels. Such an awareness of the state duty to protect the social and cultural identity of indigenous peoples has developed particularly in the last fifty years. UN organs have systematically codified human rights law and adopted specific international law instruments that protect indigenous peoples’ rights. Indigenous transnational networks have not only enabled the transcontinental exchange of information and catalysed attention to the rights and needs of indigenous peoples, but they have also canvassed an important role for indigenous peoples in contemporary international relations. Although the estimated 370 million indigenous peoples live across 90 countries and are characterized by a variety of different geographical, political, and social situations, they have tried to convey common pressing needs.

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\* Antonietta Di Blase authored sections 2 and 3 while Valentina Vadi authored sections 1, 4, and 5. The respective comments and inputs are gratefully acknowledged. The authors wish to thank Professor Yoshimura Sachiko for providing them with helpful suggestions. The usual disclaimer applies. Access to websites has been checked on 21 October 2019.

<sup>1</sup> M. Barelli, *Seeking Justice in International Law—The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge 2016) 4.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has created further momentum for raising public awareness of indigenous peoples' rights.<sup>2</sup> It has led UN institutions to investigate how given international legal frameworks can better serve the needs of indigenous peoples,<sup>3</sup> or to study how global challenges can particularly affect them.<sup>4</sup> For instance, within international cultural law, the UNDRIP has shown the inadequacy of international cultural instruments to address the fundamental interests and values of indigenous peoples. In order to address this traditional imbalance, UNESCO has activated a number of mechanisms to change its course of action. For instance, the 2019 Operational Guidelines for the Implementation of the World Heritage Convention now encourage the parties to 'adopt a human-rights based approach, and ensure gender-balanced participation of a wide variety of stakeholders and rights-holders, including ... indigenous peoples ... in the identification, nomination, management, and protection processes of World Heritage properties.'<sup>5</sup> One could argue that these changes are minimal; and that there is no specific legal instrument protecting indigenous cultural heritage at the international law level. While the adoption of a specific convention safeguarding indigenous cultural heritage would seem appropriate, nonetheless, UNESCO can endorse only the changes that its Member States are willing to support. In conclusion, the UNDRIP has certainly raised awareness of the rights of indigenous peoples and fostered change, even though it will probably take decades to realize its full potential.

However, concerns persist because of the continued widespread breaches of the rights of indigenous peoples. In many regions of the world, discrimination against indigenous peoples and violation of their human

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

<sup>3</sup> See e.g. United Nations Educational, Scientific and Cultural Organization (UNESCO), *UNESCO Policy on Engaging with Indigenous Peoples* (Paris: UNESCO 2018).

<sup>4</sup> See e.g. International Labour Organization (ILO), *Indigenous Peoples and Climate Change—Emerging Research on Traditional Knowledge and Livelihoods*, A. Ahearn, M. Oelz, and R. Kumar Dhir (eds) (Geneva: ILO 2019).

<sup>5</sup> UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, WHC.19/01, 10 July 2019, at <<https://whc.unesco.org/en/guidelines>>.

rights and fundamental freedoms continue today. Many indigenous peoples face the indifference, if not hostility, of local authorities – often disregarding their rights in order to favour the exploration and exploitation of indigenous territories through large-scale projects. Indigenous leaders denouncing the negative impact of those projects have been threatened, harassed or sometimes even killed, in order to prevent these peoples from exercising their rights.<sup>6</sup> The dispossession of indigenous lands has forced a vast number of families to flee from their homelands with the effect of definitely disrupting their communal ties and traditions. These situations have provoked public widespread outcry and the rise of social protests by a vast number of non-governmental organisations active in the field of human rights.

Some advocates of indigenous rights are increasingly conceptualizing the violations of such rights as ‘cultural genocide.’<sup>7</sup> However, although cultural genocide has been ‘a persistent international legal issue’, international law remains impervious to the same.<sup>8</sup> International law does not formally recognize the concept of cultural genocide, even though international lawyers have coined the term and investigated it for decades. Defined as ‘the purposeful weakening and ultimate destruction of cultural values and practices of feared out-groups’,<sup>9</sup> the idea of ‘cultural genocide’ was famously elaborated by the Polish lawyer, Raphael Lemkin (1900–1959), in the aftermath of WWII. Because ‘what makes up a group’s identity is its culture’, Lemkin believed that ‘the essence of genocide was cultural.’<sup>10</sup> His unpublished works examined the linkage between colonialism and genocide.<sup>11</sup> Nonetheless, the concept of cultural genocide was not included in the Genocide Convention that limits its definition of genocide to violence committed ‘with intent to destroy, in whole or in part, a national,

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<sup>6</sup> See Special Rapporteur on the rights of indigenous peoples, Report to the Human Rights Council of 10 August 2018, Doc. UN A/HRC/39/17, Human Rights Council, 39th session, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/246/34/PDF/G1824634.pdf?OpenElement>>.

<sup>7</sup> For discussion, see L. Kingston, ‘The Destruction of Identity: Cultural Genocide and Indigenous Peoples’ (2015) 14 *Journal of Human Rights* 63–83.

<sup>8</sup> E. Novic, *The Concept of Cultural Genocide—An International Law Perspective* (Oxford: OUP 2016) 9–10.

<sup>9</sup> L. Davidson, *Cultural Genocide* (New Brunswick, NJ: Rutgers University Press 2012) 18–9.

<sup>10</sup> L. Bilsky and R. Klagsbrun, ‘The Return of Cultural Genocide?’ (2018) 29 *European Journal of International Law* 373–396.

<sup>11</sup> J. Docker, ‘Are Settler-Colonies Inherently Genocidal?’ in D.A. Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York: Berghahn Books 2008) 81, 90–91, and 94.

ethnic, racial or religious group.<sup>12</sup> Reportedly, the inclusion of cultural genocide as part of the Genocide Convention was contested by States fearing prosecution for their treatment of minorities and indigenous peoples.<sup>13</sup> Although indigenous peoples can be comprehended under the definition of ‘national, ethnical, racial or religious groups’ that must be protected against genocide, the 1948 Convention on the Prevention and Repression of Genocide is inapplicable whenever the intention to physically destroy the group is lacking.<sup>14</sup> Analogously, a draft provision on cultural genocide was debated during the *travaux préparatoires* of the UNDRIP, but ultimately not included in its text.<sup>15</sup> Nonetheless, the UNDRIP expressly provides that indigenous peoples shall not be subject to any act of genocide and that they have the right not to be subjected to forced assimilation or the destruction of their culture.<sup>16</sup> Their ‘integrity as distinct peoples’, cultural values, and cultural rights plays a central role in the UNDRIP.<sup>17</sup>

This introduction unfolds as follows. After having introduced some key challenges in the protection of indigenous peoples’ rights under international law in this first section, section 2 defines the notion of indigenous peoples, canvasses the distinction between indigenous peoples and minorities, and the cogency and urgency of their protection. Section 3 briefly explores the protection of indigenous rights in human rights law. Section 4 introduces the concept of ‘inherent rights.’ Finally, section 5 concludes briefly summarising the contributions of this book.

## 2. *Indigenous Peoples and Minorities in International Law*

There is no single definition of indigenous peoples in international law. While the UNDRIP does not define indigeneity, two notions of indigeneity are found in the International Labour Organization (ILO) Convention

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<sup>12</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, in force 12 January 1951, 78 *UNTS* 277, Article 2.

<sup>13</sup> S. Mako, ‘Cultural Genocide and Key International Instruments: Framing the Indigenous Experience’ (2012) 19 *International Journal on Minority and Group Rights* 175–194, 180.

<sup>14</sup> See the Report of the independent international fact-finding mission on Myanmar of 12 September 2018 (Doc. A/HCR/39/64, following to Res. 34/22 of the UN Human Rights Council).

<sup>15</sup> Novic, *The Concept of Cultural Genocide*, 9–10.

<sup>16</sup> UNDRIP Articles 7 and 8.

<sup>17</sup> See e.g. UNDRIP Articles 14, 15, and 16.



169 and in the Martinez-Cobo Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities, respectively. The ILO Convention 169 applies to peoples regarded as indigenous on account of their descent from the populations that inhabited a country at the time of conquest or colonization, who retain some or all of their social, economic, cultural, and political institutions.<sup>18</sup> Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, gave one of the most cited definitions of the concept of indigenous peoples in his renowned Study on the Problem of Discrimination against Indigenous Populations. The study defined 'Indigenous communities, peoples and nations' as

those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.<sup>19</sup>

This working definition stressed various features of indigenous peoples, including historical continuity, cultural diversity, and the linkage with their ancestral lands.

Indigenous peoples differ from minorities. Here again, there is no single definition of minorities in international law. Francesco Capotorti, a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined 'minority' as

a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>20</sup>

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<sup>18</sup> International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382, Article 1.2.

<sup>19</sup> Special Rapporteur on the Rights of Indigenous People, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Economic and Social Council, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (by José R. Martinez-Cobo).

<sup>20</sup> F. Capotorti, 'Study on the Rights of Persons belonging to Ethnic, Religious and

At first glance, the ‘voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions’ is a feature that characterizes both indigenous peoples and minorities in the practice of the United Nations.<sup>21</sup> Both kinds of communities can be encompassed within the definition of ‘national, ethnical, racial or religious groups’ under the already mentioned 1948 Convention on the Prevention and Repression of Genocide that proscribes crimes against the life or survival of those groups ‘committed with intent to destroy, in whole or in part’, such groups.<sup>22</sup> In addition, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires States to eradicate discrimination related to ethnical or native elements, which are distinctive both for minorities and indigenous groups.<sup>23</sup> Indigenous peoples are often numerically inferior to the population of the countries in which they live—even though an indigenous group does not need any numerical evidence to be characterized as such—and often share a non-dominant status with minorities. Debates leading to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples started in the 1980s within the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a subsidiary organ of the then Human Rights Commission.

However, the regime safeguarding the rights of minorities and that safeguarding the rights of indigenous peoples have different histories, goals, and objectives. Therefore, indigenous peoples see any analogy between their case and that of minorities as ‘highly problematic.’<sup>24</sup> This section now

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Linguistic Minorities’, UN Publications, Sales no. E.91.XIV, Geneva 1991, para. 568.

<sup>21</sup> A situation of a special kind relates to the Inuit of Greenland, representing more than 80% of the population of that territory. On the basis of the *Home Rule Act* No. 577 of 29 November 1978, Greenland obtained self-government in some fields as education, health, fisheries, and environmental protection. The Act is available at <[http://www.stm.dk/\\_p\\_12712.html](http://www.stm.dk/_p_12712.html)>.

<sup>22</sup> Article 2 of the Convention on the Prevention and Repression of Genocide seems to provide an instrument of claim for genocide whenever the destruction or forced removal of indigenous peoples from their traditional land is made with the intent of destroying the group, which is easily foreseeable because of their physical and spiritual attachment to their land.

<sup>23</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted General Assembly Res. 2106 (XX) of 21 December 1965, in force on 4 January 1969, 660 *UNTS* 195.

<sup>24</sup> J. Castellino and C. Doyle, ‘Who Are Indigenous Peoples?’ in J. Hohmann and M. Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples* (Oxford: OUP 2018) 7–37, 14.

highlights these differences by briefly juxtaposing the different histories, goals, and objectives of the two international law regimes. From a historical perspective, treaties safeguarding minorities date back to the seventeenth century. Treaty provisions protecting religious minorities were part of the Peace of Westphalia, which recognized state sovereignty to the extent that states did not violate the rights of religious minorities.<sup>25</sup> If states violated such rights and behaved tyrannically towards their peoples, the international community had the right to intervene.<sup>26</sup> Minorities Treaties accompanied the post-World War I Peace Settlement.<sup>27</sup> Such treaties commonly included the rights to equality and non-discrimination; the right to citizenship; the right to use one's own language in public and private; the right of minorities to establish their own religious and cultural institutions; an obligation on the state to provide financial support to minority schools.<sup>28</sup> The League of Nations nonetheless failed to adequately protect the rights of minorities. During World War II, the displacement, massive persecution, and genocide of minorities took place. In the aftermath of WWII, the question of minority protection acquired more salience and urgency due to the outrage caused by such crimes. This led to the adoption of a number of UN Resolutions and international conventions both at the universal and regional level.<sup>29</sup> Whereas the League of Nations' system built on earlier

<sup>25</sup> See the Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Münster, *Instrumentum Pacis Monasteriensis*), signed 24 October 1648, <[https://avalon.law.yale.edu/17th\\_century/westphal.asp](https://avalon.law.yale.edu/17th_century/westphal.asp)>, Article XXVIII; and the Peace Treaty between the Holy Roman Emperor and Sweden (Treaty of Osnabrück, *Instrumentum Pacis Osnabrugensis*), signed 24 October 1648, <<http://www.pax-westphalica.de/ipmipo/indexen.html>> Article IV para 55; Article V, para 3; Article V paras 7, 8 and 29.

<sup>26</sup> See generally B. Simms and D.J.B. Trim (eds), *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press 2011).

<sup>27</sup> See e.g. the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye) signed on 10 September 1919, in force 16 July 1920, <<http://www.austlii.edu.au/au/other/dfat/treaties/1920/3.html>> (visited 22 November 2019) Articles 51, 57, 60, 63, 66, 67.

<sup>28</sup> See e.g. *Minority Schools in Albania*, 1935 PCIJ (ser. A/B) No. 64, Advisory Opinion 6 April 1935; *Minorities in Upper Silesia (Minority Schools, Germany v. Poland)*, 1928 PCIJ (ser. A) No. 15, Judgment 26 April 1928; *Questions Relating to Settlers of German Origin in Poland*, 1923 PCIJ (ser. B) No 6, Advisory Opinion 10 September 1923; *The Greco-Bulgarian "Communities"*, 1930 PCIJ (ser. B) No. 17, Advisory Opinion 31 July 1930; *Access to German Minority Schools in Upper Silesia*, 1931 PCIJ (ser. A/B) No. 40, Advisory Opinion 15 May 1931.

<sup>29</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious Minorities adopted by General Assembly Res. 47/135 of 18 December 1992 (UN Doc. A/RES/47/135); Framework Convention for the Protection of National Minorities 1

treaties protecting religious minorities, the post-World War II architecture expanded the range of protected rights, recognising universal human rights. Contemporary debates over humanitarian intervention in armed conflicts that can affect the very existence of ethno-cultural communities ‘echo the international system’s deeper oscillations between commitment and disengagement, advances and retreats in relation to the international legal protection of those communities.’<sup>30</sup>

The history of indigenous peoples’ rights dates back centuries and necessarily predates the Age of Encounter.<sup>31</sup> Indigenous peoples are historically and culturally rooted in the land on which they exercised an undisputed sovereignty in the past. Their rights to land do not stem from a title awarded by the state; rather they derive from their linkage to a territory where they have lived since time immemorial. In other words, had indigenous peoples continuously been treated as subjects of international law rather than objects of colonization by given states, they would be sovereign nations. Not only do they have special ties to their territory, but in many indigenous worldviews land has a spiritual value, as well as a cultural, social, and economic function within the community.

The international legal instruments governing indigenous peoples’ rights and those protecting minorities also differ because they have different aims and objectives. While minorities often aim to be granted the same opportunities of the majority and non-discrimination in the countries where they live, while preserving their cultural uniqueness, indigenous peoples are often determined to keep a distinct and separate way of living and to exercise the right to a form of self-government in keeping with their tradition and culture.<sup>32</sup> The right to self-determination, which is so fundamental to indigenous peoples—even if exercised within the contemporary boundaries of the state—and is specifically recognized by the UNDRIP, is not mentioned in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

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February 1995, in force 1 February 1998, *ETS* 157.

<sup>30</sup> G. Pentassuglia, ‘Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence’ (2009) 11 *International Community Law Review* 185.

<sup>31</sup> See Report of the African Commission’s Working Group of Experts on Indigenous populations/Communities, adopted by the African Commission on Human and Peoples’ Rights by Res. 65 (XXXIV) 03, 20 November 2003, 92.

<sup>32</sup> See A. Eide, ‘Working Paper on the Relationship and Distinction between the Rights of persons belonging to Minorities and Those of Indigenous Peoples’, UN Doc. E/CN.4/Sub.2/2000/10, 19 July 2000; PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, quoted above.

Minorities.<sup>33</sup> Rather, international law instruments on the protection of minorities prevalently focus the rights of the members of minorities—individually as well as in common with other members of their group—to equality and social cohesion under conditions of equal dignity and non-discrimination.<sup>34</sup> The declaration on minorities does not protect land rights that are a central element in the protection of indigenous peoples' rights. While both sets of instruments recognize the cultural rights of indigenous peoples and minorities respectively, the UNDRIP is more detailed about such rights than other instruments.<sup>35</sup> While the subfields of international law are not self-contained and can influence each other, the international law protection of indigenous peoples seems more dynamic and better crafted than that traditionally reserved to minorities. However, much remains to be done in both fields at the implementation level.

### 3. *Indigenous Rights as Human Rights*

The rights of indigenous peoples are recognized by a range of international law instruments, including human rights law. Traditionally, however, human rights instruments have mainly centred on individuals rather than communities. The protection of indigenous peoples' rights can benefit from the traditional protection of human rights enabling individual members of indigenous tribes to use natural resources of their traditional land and practice their culture and religion together with the other members of the group. Nonetheless, human rights bodies have clarified that individuals could not enjoy those rights if they were deprived of the capacity to live and participate in the life of the native group. Therefore, the protection of indigenous rights cannot be fully effective without recognizing their collective dimension.<sup>36</sup>

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<sup>33</sup> *Supra*, note 29.

<sup>34</sup> For a critical assessment, see Alexandra Xanthaki, 'Against Integration, for Human Rights' (2016) 20 *International Journal of Human Rights* 815–38.

<sup>35</sup> Article 27 of the International Covenant of Civil and Political Rights simply states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

<sup>36</sup> For instance, a complaint by indigenous persons aimed at stopping a project to build a road on public soil because of the impact on the indigenous religious ceremonies has been rejected on the basis that the Government could not grant more extended rights

Thus, if the protection of the individual rights of indigenous peoples is of fundamental importance in addressing indigenous issues, the category of human rights has also been adapted to better suit the specific collective needs and demands of indigenous peoples<sup>37</sup> In fact, indigenous peoples' rights cannot be placed *sic-et-simpliciter* within the category of individual human rights. The right to land of indigenous peoples is not equivalent to the individual title of ownership of a parcel of land. Rather, the former has a collective dimension, being indigenous land strictly connected to the cultural identity, life, and survival of indigenous peoples as a group. Therefore, it should be enjoyed in the form of a collective right. Analogously, the right to take part in spiritual, religious, and cultural traditions cannot be satisfied if it is not granted to the whole group.

With regard to the remedies available to indigenous peoples to obtain redress for the infringements of their rights, indigenous peoples seem affected by the traditional emphasis of human rights law on individual entitlements. Communications before the UN Human Rights Committee set up by the Covenant on the International Civil and Political Rights<sup>38</sup> and the Covenant on the International Social, Economic and Cultural Rights<sup>39</sup> are in fact restricted to individuals. There is a vast number of cases where lack of *locus standi* has barred indigenous peoples from filing a suit before an international court.<sup>40</sup>

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than those awarded to non-indigenous persons, unless incurring in the violation of the non-discrimination principle. The complaint was promoted by a group of indigenous persons and concerned the sacred area of Chimney Rock. See *Lyng v. Northwest Indian Cemetery Protective Association*, US Supreme Court, 19 April 1988, US 439 (1988) no. 86 1013, <<https://supreme.justia.com/cases/federal/us/485/439/#tab-opinion-1957423>>.

<sup>37</sup> See B. Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International And Comparative Law' (2001–2) 34 *New York University Journal of International Law & Policy* 15, arguing that 'The adaptation of the category of "human rights" is of fundamental importance in addressing indigenous issues...but practice and experience suggest that additional concepts are needed and often are deployed.'

<sup>38</sup> International Covenant on Civil and Political Rights (ICCPR) and annexed Protocol, General Assembly Res. 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 *UNTS* 171.

<sup>39</sup> International Covenant on Economic Social and Cultural Rights (ICESCR), General Assembly Res. 2200A (XXI), 16 December 1966, 993 *UNTS* 3. The Optional Protocol to the ICESCR was adopted by General Assembly Res. 63/117, 10 December 2008.

<sup>40</sup> For instance, an action by the Inuit for the annulment of an EU regulation that prohibited the importation of seals before the European Union Court was declared inadmissible: see V. Vadi, 'Cultural Heritage in International Economic Law', in V. Vadi and B. de Witte (eds), *Culture and Economic Law* (London: Routledge 2015) 60–1. In the case *Tsumib v. Government of the Republic of Namibia*, High Court of Namibia [2019] NAHCMD, No. A 206/2015, 28 August 2019, 312, members of the Hai|lom

However, the recent practice of the UN Human Rights Committee in cases related to the infringements of indigenous rights seems to have mitigated the consequences of such a drawback. From the 1990s onward, the Committee has started giving relevance to the collective rights of indigenous people as an element to be considered in the outcome of an individual claim.<sup>41</sup> While arguing that a violation of Article 1 of the Covenant proclaiming the self-determination of peoples cannot as such be the object of a claim by individuals, it considered that violations against the group may affect the effectiveness of the Covenant.<sup>42</sup> This practice has cleared the path towards an assessment of the situation of indigenous peoples by the Committee.<sup>43</sup>

In addition to the UN instruments enabling direct complaints before a universal forum, a number of different regional instruments empower indigenous peoples to monitor the state implementation of their obligations toward indigenous peoples, granting them remedies in case of non-compliance. Regional human rights bodies (in Africa, the Americas and Europe) have interpreted and applied human rights standards to the special circumstances and experiences of indigenous peoples. Indigenous peoples have also voiced their concerns through mass media, effectively shaping international public opinion.

The specific needs and aspirations of indigenous peoples originate from the past wrongs connected with the settlement of colonizers or forced occupation of the lands where they lived as sovereigns. Their rights are based on the need to safeguard their distinctive culture intrinsically tied to

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community sought the court's permission to represent their community in filing a claim on their land rights over Etosha National Park. The Court held that the representatives did not have the necessary *locus standi* to represent the Hai||om people.

<sup>41</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), UN Doc. A/45/40, para. 2, alleging 'violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and, by virtue of that right, to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence.' The Committee found that '[h]istorical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.'

<sup>42</sup> In this sense, see *Apirana Mahuika et al. v. New Zealand*, 27 October 2000 (Communication no. 547/1993), Report of the Human Rights Committee, UN Doc. A/56/40, II, paras. 9.4–9.9.

<sup>43</sup> See M. Scheinin, 'Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights', in J. Castellino and N. Walsh (eds), *International Law and Indigenous Peoples* (Leiden: Brill 2004) 9–15.

the traditional use of their territories. The use of the land according to ways and methods passed from one generation to the next enables their survival as a people: the latter would be seriously jeopardized if they were forcibly assimilated to the dominant culture of the rest of the society living in the State.<sup>44</sup> Thus, the autonomy of indigenous peoples in the administration of their territories and in the exercise of their activities is instrumental to their survival as a group. Expressions of their autonomy (in the sense of self-governance and self-identification) constitute a form of self-determination.

Like other peoples, indigenous peoples have the right to self-determination.<sup>45</sup> Respect for the equality and 'self-determination of peoples' is one of the purposes of the United Nations.<sup>46</sup> Self-determination has played a central role within the decolonization process launched by the UN when proclaiming the right of former colonies to become independent states.<sup>47</sup> Beyond decolonization, cases where the UN supports independence are exceptional. Any extension of the meaning of self-determination beyond the framework established by the UN would entail a high risk of instability and conflicts. This is the reason why it has been generally meant to be a right to internal self-determination, to be exercised within a given state.

The right to self-determination includes the right for indigenous peoples to determine their own economic, social, and cultural development according to their own aspirations. Of particular relevance are indigenous peoples' rights to express a choice, to be informed and to take part in decisions relating to the use of natural resources, in order to avoid inappropriate forms of exploitation. The legal systems and worldviews of indigenous peoples could – in the long-run – provide an alternative model

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<sup>44</sup> *Kayano et al. v. Hokkaido Expropriation Committee* (Nibutani Dam Decision) Sapporo District Court, Civil Division No. 3, Judgment 27 March 1997, (1999) 38 *International Legal Materials* p. 394 (noting that the Ainu's 'distinct ethnic culture is an essential commodity to sustain [their] ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person.')

<sup>45</sup> UNDRIP Article 3.

<sup>46</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, Article 1, paragraph 2.

<sup>47</sup> UN General Assembly Res. 1514 (XV) 14 December 1960, 'Declaration on the Granting of Independence to Colonial Countries and Peoples'. See recently ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion 25 February 2019 No. 169, <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> (highlighting that 'the right to self-determination, as a fundamental human right, has a broad scope of application' but confining itself, in this Advisory Opinion, to 'analysing the right to self-determination in the context of decolonization.')



to the currently prevailing methods and strategies of the global economy.<sup>48</sup> Since the survival of indigenous peoples is intimately connected to the use of resources of the land where they are settled, their model of cultural, economic, and social development is shaped by their inner beliefs and worldviews. Instead of prioritizing profits, the economic, social and cultural model developed by indigenous peoples may emphasize non-economic values, namely the primary needs of indigenous peoples. Therefore, it differs from predominant liberal economic models.<sup>49</sup> International environmental law instruments have further supported sustainable models and alternative pathways to development. Whether these models are too idealistic to be applied more generally or are merely applicable with regard to indigenous peoples remains to be seen.

#### *4. Introducing the Inherent Rights of Indigenous Peoples*

This book aims to discuss crucial aspects of the international legal theory and practice relating to the inherent rights of indigenous peoples. The concept of ‘the inherent rights of indigenous peoples’ appears only once in the UNDRIP, namely in its preamble, where the UN General Assembly recognized ‘the urgent need to respect and promote the inherent rights of indigenous peoples.’<sup>50</sup> The preamble clarifies that the inherent rights of indigenous peoples ‘derive from their political, economic, and

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<sup>48</sup> Arguably, the economic model shaped and fought for by indigenous peoples could become a useful paradigm to re-empower the disempowered sectors of society including the non-indigenous rural communities that obtain the resources for their economic survival from the land and are interested in safeguarding the quality of such resources. Discourse on the rights of indigenous peoples can facilitate the rethinking of the rights of peoples more generally.

<sup>49</sup> See e.g. Permanent Forum on Indigenous Issues, *Study to Examine Conservation and Indigenous Peoples’ Human Rights*, by B. Keane and E. Laltaika, UN doc. E/C.19/2018/9, 8 March 2018, para. 5 (‘recognizing the rights of indigenous peoples to their territories and resources is the most effective way to safeguard biological diversity, to ensure the sustainable use of natural resources and to protect the ecological integrity of critical ecosystems. The role of indigenous peoples in realizing the goals of conservation cannot be overstated: the lands and waters that they continue to manage contain over 80 per cent of Earth’s biodiversity; the forests in demarcated indigenous territories are subject to less deforestation than those in protected areas; and the traditional knowledge systems and resource management strategies of indigenous peoples can play a key role in developing truly sustainable conservation strategies and policies.’)

<sup>50</sup> UNDRIP, preamble.

social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories and resources.’<sup>51</sup> Adopting an inter-civilizational approach to the rights of indigenous peoples means not only that ‘indigenous peoples are equal to other peoples’, but also that ‘they have the right of all peoples to be different, to consider themselves different, and to be respected as such.’<sup>52</sup> Such an approach recognises that ‘all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.’<sup>53</sup> The inherent rights of indigenous peoples are not granted by states; rather, they pertain to indigenous peoples. They are historically and currently inherent rather than acquired rights. They are based on the deep connection of indigenous peoples to their lands, cultures, and legal systems. This is the first monograph focusing on the inherent rights of indigenous peoples in international law. While at least in some countries the term ‘inherent rights’ has been used extensively at the domestic level by indigenous peoples, there has been only limited mentioning of this concept in international legal scholarship. Nonetheless, the concept of inherence is at the heart of human rights law and current international law itself. Human rights are inherent rights, rights that pertain to human beings because of their intrinsic human dignity. The recognition of ‘the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.’<sup>54</sup> Therefore, the recognition of the inherent rights of indigenous peoples is an expression of ‘the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.’<sup>55</sup> It expresses ‘the idea that human rights are inherent in the human person and not simply the result of social, legal or political processes.’<sup>56</sup> Such an approach can contribute to the protection, promotion, and fulfilment of human rights and ‘the foundation of freedom, justice, and peace in the world.’<sup>57</sup>

The volume focuses on three sets of inherent rights of indigenous peoples that are central to the process of their re-empowerment, namely: their right to

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<sup>51</sup> UNDRIP, preamble para. 7. Compare with UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), preamble.

<sup>52</sup> Id. para. 2.

<sup>53</sup> Id. para. 3.

<sup>54</sup> United Nations Declaration of Human Rights preamble.

<sup>55</sup> Id.

<sup>56</sup> J. Morsink, *Inherent Human Rights—Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press 2009).

<sup>57</sup> Universal Declaration of Human Rights, preamble.

self-determination, land rights, and cultural rights.<sup>58</sup> Self-determination entails indigenous peoples being entitled to be ‘in control of their own destinies.’<sup>59</sup> While some countries were reluctant to recognize the right of indigenous peoples to self-determination because they feared that such recognition could affect state sovereignty, indigenous peoples perceived self-determination as essential for the enjoyment of all their rights. In the end, the UNDRIP has recognized that indigenous peoples have the right to self-determination.<sup>60</sup> This provision is generally interpreted as recognizing internal self-determination, that is, the right of indigenous peoples to make meaningful choices in matters of concern to them, and to enjoy some autonomy within the existing state. Self-determination ‘can be exercised in ways that do not fundamentally challenge the sovereignty and integrity of states.’<sup>61</sup>

Such ‘self-determination within the sovereignty of a state’ or ‘internal self-determination’ can also be conceptualized as a form of ‘parallel sovereignty of indigenous peoples’ coexisting with that of, and within, the state. In other words, indigenous sovereignty would run parallel to state sovereignty. This interpretation seems supported by indigenous peoples’ aspirations, international legal instruments, and state practice. The vast majority of indigenous peoples’ ‘self-determination claims are not aimed at dissolving states.’<sup>62</sup> Rather, they are generally in line with the principle of territorial integrity of states. Article 46 of the UNDRIP provides that ‘nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.’ Moreover, several states explicitly recognize the right of self-determination for constituent groups in their constitutions or specific legislation.<sup>63</sup> The possibility of external self-determination or remedial independence might be exercised only if a state committed systematic and

<sup>58</sup> For an excellent study, completed before the adoption of the UNDRIP, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge: CUP 2009).

<sup>59</sup> J. Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-declaration Era’ in C. Charles and R. Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs 2009) 184–199, 187.

<sup>60</sup> UNDRIP, Article 3.

<sup>61</sup> J. Summers, *Peoples and International Law* (Leiden: Brill/Nijhoff 2013) 497.

<sup>62</sup> Barelli, *Seeking Justice in International Law*, 25.

<sup>63</sup> Summers, *Peoples and International Law*, 493.

severe forms of oppression and subjugation.<sup>64</sup> The existence and extent of a right of remedial secession remains contested, and state practice remains too limited to ascertain whether the concept reflects an international law standard.<sup>65</sup> Nonetheless the UNDRIP is not meant to restrict the rights of indigenous peoples, and therefore it can reflect further developments in international law.

Indigenous peoples have a special relationship with land. As the Inter-American Court of Human Rights explained, not only does land constitute their own principal means of subsistence, but it also shapes their cultural identity:<sup>66</sup> the close ties of indigenous peoples to the land 'must be recognised and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.'<sup>67</sup>

Finally, cultural rights have always figured prominently in indigenous advocacy and now permeate the entire UNDRIP. The cultural rights of indigenous peoples are multi-faceted but all express the fundamental need to maintain their own culture. Access to land and natural resources is fundamental for the meaningful exercise of the cultural rights of indigenous peoples. There is mutual supportiveness between the protection of indigenous peoples' cultural and land rights. The customary rule of free, prior, and informed consent is now codified in the UNDRIP and in other international law instruments.<sup>68</sup>

The book adopts an international law perspective, thus mainly focusing on international legal instruments, the jurisprudence of UN mechanisms, regional human rights courts and tribunals, as well as investor-state arbitrations. It complements studies focusing on domestic practice, and refers to domestic cases where needed to discuss state practice. This practice shows an increasing awareness of the inherent rights of indigenous peoples. States have gradually but firmly recognized the inherent rights of indigenous peoples and acknowledged the need to give full implementation to their rights to overcome their historical marginalization and discrimination by the dominant sectors of society.<sup>69</sup> In this regard, there is a growing

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<sup>64</sup> J. Crawford, 'The Right of Self-determination in International Law: Its Development and Future', in P. Alston (ed) *Peoples' Rights* (Oxford: OUP 2000) 7–68, 56 and 57.

<sup>65</sup> Summers, *Peoples and International Law*, 521.

<sup>66</sup> IACtHR (ser. C) No. 125, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005, para. 135.

<sup>67</sup> IACtHR (ser. C.) No. 79, *Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, 21 August 2001, para. 149.

<sup>68</sup> UNDRIP Articles 10 and 32(2); Convention on Biological Diversity, 5 June 1992, 31 ILM 818, Article 8(j).

<sup>69</sup> *Kayano et al. v. Hokkaido Expropriation Committee* (Nibutani Dam Decision), *supra*

awareness that indigenous peoples should decide about their future and the use of their natural resources on the basis of their own cultural values and self-determination. Therefore, the notion of development should be defined according to different cultural contexts, including the worldviews of indigenous peoples. The indigenous notion of development may at times converge with the Western notion; however, at times it differs considerably, the latter being based primarily on economic considerations.<sup>70</sup>

### 5. *Structure of the Book*

This book stems from a number of seminars, workshops, and conferences organised at the Law Department of the University of Roma 'Roma Tre' since the adoption of the UNDRIP. The authors, all distinguished scholars and practitioners have participated in the seminars.<sup>71</sup> Other specialists, active within international organisations, have provided their oral contribution: Mrs. Antonella Cordone, Senior Technical Specialist Indigenous Peoples and Tribal Issues at the International Fund for Agricultural Development (IFAD), who presented on 'Indigenous peoples' development, culture and identity' and Dr. Elifuraha Laltaika, Member of the UN Permanent Forum on Indigenous Issues and Senior Law Lecturer at Tumaini University Makumira in Tanzania.

The book is divided into three parts. Part I introduces the main themes

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n. 42, 31 (acknowledging that 'Even while enduring tremendous political and economic influence from the Shogunate feudal system, Ainu people lived throughout Hokkaido preserving the enjoyment of their unique culture.' and stressing the need to maintain and preserve 'the real life practices' of the Ainu).

<sup>70</sup> R. Stavenhagen, 'Ethnodevelopment: A Neglected Dimension in Development Thinking' in R. Stavenhagen (ed), *Pioneer on Indigenous Rights* (Berlin: Springer 2013) 65–86.

<sup>71</sup> The views in this edited volume are those of the individual authors and do not necessarily correspond to those of the editors. The editing was relatively non-intrusive, in order to allow authors to maintain their own voices and perspectives. The use of particular designations of countries or territories does not imply any judgment of the publisher or the editors as to the legal status of such countries or territories, their authorities or institutions or the delimitation of their boundaries. The mentioning of names of specific companies or products does not imply any intention of infringing upon proprietary rights, nor should it be construed as an endorsement or recommendation by the editors. The authors are responsible for having obtained the necessary permission to reproduce, translate or use material from sources already protected by copyright. This book constitutes a doctrinal work of legal history and theory, with focus on the relevant jurisprudence. It does not constitute legal advice.

and challenges to be addressed, considering the debate on identification of indigenous peoples, the theoretical origins of 'indigenous sovereignty', and the inherent rights of indigenous peoples. Di Blase's chapter explores the right of self-determination of indigenous peoples, explicitly recognized in the UNDRIP. That principle is considered with reference to the fields where it is especially relevant: defining indigeneity, possession and use of the land, identification of members by indigenous communities. National jurisprudence and international practice show a growing awareness about the distinctive features of self-determination as referred to indigenous peoples. Such right cannot be read as legitimizing actions against the integrity of the state, nor can be encompassed within the concept of 'internal' self-determination. The chapter highlights some meaningful elements that suggest a different appraisal. The practice shows increased awareness about the need to identify and safeguard the rights of indigenous peoples to their lands and traditional culture. In addition, the jurisprudence shows that indigenous rights to land have been considered as relevant not only within the internal legal order of the local state, but also in the framework of the relations between the local state and third states.

Vadi's chapter investigates the spatio-temporal dimensions of indigenous sovereignty in international law. The topic holds both theoretical relevance and contemporary practical significance, as it can inform and transform ongoing debates on the rights of indigenous people. The chapter highlights the importance of history in any discussion of indigenous rights and the need to consider competing stories, histories, and temporalities of sovereignty. This method of analysing sovereignty in international law infuses the concept of sovereignty with inter-civilizational connotations, which are often neglected in current debates. Going beyond the traditional conception of state sovereignty, the paper supports the emergence of novel concepts, such as parallel sovereignty, to complement the internal self-determination of indigenous peoples within existing states.

Parts II and III explore the interplay between indigenous peoples and human rights, and international economic law respectively. In particular, Part II focuses on the main developments of the international practice of the UN and relevant jurisprudence relating to indigenous peoples' rights, with a special reference to the positive role of the American and the African international systems for the promotion and protection of human rights. It explores the jurisprudence of regional human rights and demonstrates that such courts are in accord with the approach followed by the UN organs. Citroni's chapter illuminates the jurisprudence of the Inter-American

Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) on indigenous peoples' rights. The chapter focuses on the special connection existing between indigenous communities and their ancestral lands and natural resources contained therein as the source of their distinct cultural identity. Citroni argues that there is a need for reinterpreting the notion of development, going beyond a purely economic meaning and rather encompassing the human dimension. Focarelli's chapter first scrutinises the status of indigenous peoples under international law, both diachronically and synchronically. Focarelli then discusses a recent judgment of the African Court on Human and Peoples' Rights (ACtHPR).

Part III focuses on the protection of indigenous rights in international economic law. Although the protection of indigenous rights has gained some momentum at the international law level since the adoption of the UNDRIP, many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources. In fact, a large portion of the world's remaining natural resources 'are located on indigenous-occupied lands ... [and] global demand for natural resources has skyrocketed in recent years.'<sup>72</sup>

Vadi and Acconci's respective chapters explore the clash between economic development and indigenous peoples' rights from the perspective of international investment law. The protection of the rights of indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law. In fact, a tension exists when a state adopts policies to protect the rights of indigenous peoples, which interfere with foreign investments, as such policies may be deemed to amount to indirect expropriation or a violation of other investment treaty provisions. While the incidence of cases in which arbitrators have taken non-economic values into account is increasing,<sup>73</sup> investment treaty arbitrations do not offer effective remedies against the unfair use of resources by national or foreign companies. Vadi's chapter highlights that, for the time being, investment treaty arbitrations may not provide adequate safeguards to the inherent rights of indigenous peoples. The chapter outlines three principal legal mechanisms that would achieve a better balance between economic interests and the human rights of indigenous peoples in investment treaty

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<sup>72</sup> [Anonymus] 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755–1778, 1756.

<sup>73</sup> V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014).

law and arbitration: treaty drafting, treaty interpretation, and counterclaims. These techniques can prevent conflicts between different treaty regimes and contribute to the humanization of international investment law, as well as the development of international law. Acconci's chapter also discusses whether, and if so how, international investment law is responding to the concerns of indigenous peoples, also focusing on the legal framework established by the European Union. Finally, Vezzani's chapter deals with the international protection and promotion of indigenous traditional knowledge (TK) associated with agriculture. Interest in this knowledge and in sustainable models of agriculture has intensified over the past two decades. The chapter investigates the international legal framework protecting TK, and discusses ongoing international efforts to develop a *sui generis* protection system for such knowledge.



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PART I  
SOVEREIGNTY  
AND SELF-DETERMINATION





Antonietta Di Blase\*

## *The Self-Determination of Indigenous Peoples*

The present contribution aims at providing an overview of the features of indigenous peoples covered by the principle of self-determination that the 2007 Declaration on the Rights of Indigenous peoples has explicitly recognised. The principle of self-determination has been of great significance in three main fields of legal practice: 1) the active participation of indigenous peoples in the definition of ‘indigenoussness’; 2) their self-government, that is, their capacity for managing the possession and use of the land; and 3) self-identification. In these fields, a widespread awareness has emerged about the distinctiveness of the indigenous peoples and their traditional and cultural background, leading to a general approach in favour of the recognition of their autonomy and support for coordination between states and indigenous systems. The right of self-determination of indigenous peoples is also relevant beyond the borders of the local state, also thanks to the contribution of the UN organs established to deal with compliance with human rights. Some pitfalls are present, such as the lack of direct access of indigenous peoples to international instruments of recourse.

### 1. *Premise*

The Declaration on the Rights of Indigenous Peoples of 2007 proclaims in its Preamble ‘the fundamental importance of [indigenous peoples’] right to self-determination to freely determine their political status and freely pursue their economic, social and cultural development.’<sup>1</sup> In the intentions of the authors of the Declaration, self-determination should be instrumental to granting the survival of indigenous peoples as a group, without impinging in the territorial integrity and sovereignty of the state. Indeed, the 2007 Declaration refers to other key founding acts of

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\* The author wishes to thank Valentina Vadi for her comments on an earlier draft of the present contribution. The usual disclaimer applies. Access to websites has been checked on 21 October 2019.

<sup>1</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), General Assembly Res. 61/295, 13 September 2007, Article 3.

the United Nations (UN), including the Charter of the UN,<sup>2</sup> the 1966 International Covenant on Economic and Social and Cultural Rights,<sup>3</sup> and the 1993 Vienna Declaration and Programme of Action.<sup>4</sup> Therefore, it is quite clear that self-determination has to be read in strict conjunction with the principle of territorial integrity of states, to ensure international peace and stability. Another element worthy of being considered is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the UN Charter: while referring to '[t]he principle of equal rights and self-determination of peoples', the Declaration emphasises the duty not to harm the national unity and territorial integrity of a state.<sup>5</sup>

However, regarding 'indigenous peoples' there is an evident inadequacy in the referred acts. They have distinctive characteristics in respect of the dominant sectors of the society that form the people as a constitutive element of the state. They have possessed and used the land since time immemorial. Their customs and traditions find expression in forms of self-government that resemble those of a state.

This explains why the inclusion of self-determination in the final text of the 2007 Declaration was met with objections by some states on the grounds that it could inspire politics and actions that could threaten their territorial and political integrity.<sup>6</sup> Some states asked that in the Declaration

<sup>2</sup> Charter of the United Nations (UN Charter) 24 October 1945, 1 *UNTS* XVI, Article 1.2 (proclaiming the principle of 'equal rights and self-determination of peoples') and Article 4 (upholding the 'territorial integrity of the state',

<sup>3</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 *UNTS* 3, Article 1.1: ('All peoples have the right of self-determination.')

<sup>4</sup> Vienna Declaration and Programme of Action, 25 June 1993, Preamble ('Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity'.)

<sup>5</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, annexed to General Assembly Res. 25/2625 of 24 October 1970 ('Nothing in the foregoing paragraphs shall 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.')

<sup>6</sup> Statement by Australia before the General Assembly, UN Doc A/61/PV.107, 13 September 2007, 11.

a clear reference be included regarding the illegality of actions undertaken to 'dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent states'.<sup>7</sup> To meet these objections, a sentence was introduced in the final text of the 2007 Declaration stating that 'Nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law'. Although the attitude of some states has since changed,<sup>8</sup> reservations of the same kind were expressed by the US and Canada in 2008 during the adoption of the Organization of American states (OAS) Declaration on the Rights of Indigenous Peoples, which was finally approved on 15 June 2016.<sup>9</sup>

The said concerns are nourished by the idea that cases for independence could emerge, similar to those submitted to the UN within the decolonisation process promoted since the 1960s in the name of self-determination. In the case of Western Sahara, the UN has legitimised the aspirations of the Saharawi people—recognised by the International Court of Justice (ICJ) as having the characteristics of an indigenous people—to gain independence from Morocco. Extending self-determination to indigenous peoples was seen as paving the way for their establishment as independent states.<sup>10</sup>

These arguments do not seem to be well-founded. The acts of dispossession that gave rise to indigeneity began in the sixteenth century. Since the end of colonialism, the present international law system has been widely accepted on the basis of the principle of the intangibility of frontiers.

In addition, the risk that the term 'self-determination' could encroach upon the sovereignty of states is contradicted by the attitude of the indigenous peoples themselves. They have made it clear they have no intention to oppose existing governments or establish new states, nor do they possess assets and funds to compete with the dominant actors on the international scene.<sup>11</sup> Their right to self-determination should be intended

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<sup>7</sup> Statement by Sweden, UN Doc. A/61/PV.107, 24.

<sup>8</sup> The reasons for the change can be attributed to a number of factors: the need to gain a good reputation in the world arena, which was especially important for governments applying as partners in multi- or bi-lateral development projects directed towards countries rich with indigenous peoples; the desire to avoid troubles from peoples present in the territory, for fear that an indigenous movement could promote or ally with secessionist parties within the state.

<sup>9</sup> OAS Declaration on the Rights of Indigenous Peoples, 15 June 2016. See the text of the draft Declaration in Doc. OEA/Ser.K/XVI Gt/Dadin/doc.334/08 rev. 3, 30 December 2008, <[https://www.oas.org/dil/GT-DADIN\\_doc\\_334-08\\_rev3\\_eng.pdf](https://www.oas.org/dil/GT-DADIN_doc_334-08_rev3_eng.pdf)> and the declarations by Canada (25) and US (29).

<sup>10</sup> The case is referred to *infra*, para 3.4 and note 90.

<sup>11</sup> See the comment of the Representative of the National Indian Youth Council on the

as ‘the right of autonomy and self-government in matters relating to internal and local affairs, including their financial aspects.’<sup>12</sup> Also in the wording of the Declaration their rights are conceived as being mainly aimed at achieving forms of autonomy related to the management of the land and to participation in the politics of the country in matters of social and economic development, in conformity with their traditions and culture.<sup>13</sup> Besides, the conceptual basis of their systems is not in keeping with the model of state that prevails in the contemporary international law relations. Therefore, founding a state would entail a change in their political, economic and cultural way of life.

According to some scholars, the condition of indigenous peoples should be better framed within the paradigm of the so-called ‘internal self-determination’, to suggest that they essentially pursue their own political, economic, social, and cultural development through forms of self-government and management of the resources of the land exercised within the limits of the autonomy acknowledged by the state. They consider that the expression ‘internal self-determination’ is more appropriate and in line with the absence of their status of subjects of international law.<sup>14</sup>

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Draft Declaration in UN Doc. E/CN.4/Sub.2/1989/33/Add. 1, quoted, 13 ff., paras. 1-4.

<sup>12</sup> Statement by Liechtenstein (UN Doc. A/61/PV.107, 13 Sept. 2007, 23) and India in analogous terms (UN Doc. A/61/PV.108, 13 Sept. 2007, 2).

<sup>13</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, I.2: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among states in accordance with the Charter of the United Nations, this 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 of any kind.’

<sup>14</sup> The expression ‘internal self-determination has been used by the Supreme Court of Canada in the *Quebec Secession* case, Decision of 20 August 1998, para.126 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>>. See G. Arangio-Ruiz, ‘The normative Role of the General Assembly of the United Nations and the Declaration of

However, the expression ‘internal self-determination’ does not seem to fit with the entity ‘indigenous people’. It does not give enough weight to the right to land and self-government that essentially characterise indigenous peoples. The fact that the indigenous rights are implemented through the instruments provided by the internal legal order of the states does not mean that these are the only ways those entities can express their autonomy.

For this reason, it seems that a different point of view should be adopted, in line with the suggestions offered by the 2002 Stavenhagen Report for the UN Commission on Human Rights<sup>15</sup>. In order for self-determination to be exercised, constructive arrangements should be concluded between states and indigenous peoples to reconcile the legitimate concerns of states regarding territorial integrity and national unity, and the equally legitimate concerns of indigenous peoples. Stavenhagen starts from the idea that peaceful coexistence has to be made legally binding and not merely optional from the point of view of international law. This approach appears to be the most suitable instrument not only to recognise but also to respect, protect and fulfil the right to self-determination of indigenous peoples. In this sense, self-determination is extended to the composite entity ‘indigenous people’ organised on the traditional land within the borders of a state.

The 2007 Declaration codifies the rights of indigenous peoples, without

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Principles of Friendly Relations’, (1972) *Recueil des Cours* 137, 566 and 571 (referring to self-determination as a ‘dynamic element in the world community’ but underlining its inclusion within the category of human rights that each state has to abide by within its territory). See also G. Palmisano, *Nazioni Unite e autodeterminazione interna* (Milano: Giuffrè 1997) 262 ff. for a detailed analysis of this approach and extensive references to authors. See also Malcolm N. Shaw, *International Law* (Cambridge: CUP 2017) 225. According to A. Cassese, *Diritto internazionale I. Lineamenti*, (P. Gaeta ed.), (Bologna: Il Mulino 2003) 76-7, self-determination as a category of customary international law includes a number of sub-categories relating to specific situations, all of which see peoples as playing a central role. See also Id., *Self-Determination of Peoples; A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures) (Cambridge: CUP 1995); T. Franck, ‘The Emerging Right to Democratic Governance’, (1992) 86 *AJIL* 46; P. Thornberry, ‘The Democratic or Internal Aspect of Self-Determination’, in C. Tomuschat (ed), *Modern Law of Self-Determination* (Dordrecht: M. Nijhoff 1993) 101. For a political theory approach to the problem see J. M. Valadez, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies*, (New York-London: Routledge 2018).

<sup>15</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples to the UN Commission on Human Rights, UN Doc. E/CN.4/2002/97, 4 February 2002 <<https://www.refworld.org/docid/45377ac70.html>>. The Office of the Special Rapporteur was set up in 2001 by the UN Commission on Human Rights and renewed by the UN Human Rights Council, that replaced the UN Commission on Human Rights in 2006. For an overall view of the UN bodies in the field of Human Rights see <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>>.

giving them a definition. The notion of indigenous peoples has been the object of a long and difficult debate within the UN institutions. Although it is possible to devise the main features of 'indigenous peoples', the variety and 'richness of civilisations and cultures, which constitute the common heritage of mankind',<sup>16</sup> get in the way of a common exhaustive definition. The outcome of the debates has been providing a sufficiently flexible model, suitable for a vast range of situations that differ from the geographical and historical point of view, to be recognised on a case-by-case basis by the local state.

This contribution focuses on analysing the main fields where self-determination has found a practical accomplishment in the acts of the state and in the national and international jurisprudence: self-government in the relationship of indigenous peoples to their traditional lands and self-identification of members of the indigenous community. These two elements are the main distinctive features of the entity 'indigenous peoples' that contribute, being intimately connected, to the definition of indigenous peoples. For this reason, an introductory section will be devoted to the proposals formulated within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1996. Indigenous peoples have played an active role in the development of a widely endorsed definition. Nevertheless, a definitive formulation is not present in the 2007 Declaration. However, the proposals resulting from the works carried out in the UN and the practice developed also in the African continent seem to provide a useful model to identify the substantial characters of indigenous peoples.

The practice of international institutions and of states and the relevant jurisprudence contributes to ongoing debates about the place of indigenous peoples in international legal theory. The point is whether they should be considered as mere beneficiaries of rights, or rather as actors in the international law relations. The latter view seems more in keeping with the developments of the practice, both national and international. A special place will be devoted to the cases before the national courts and the international bodies. The analysis of the jurisprudence is not intended to be exhaustive. Cases have been selected to highlight how the self-determination of the indigenous peoples does receive a general recognition in state practice.

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<sup>16</sup> General Assembly Resolution 61/295 13 September 2007, with annexed 2007 Declaration, Preamble.

## 2. *Defining Indigenous Peoples*

### 2.1. *The Definition of Indigenous Peoples in the Practice of International Intergovernmental Organizations*

As already remarked, in the 2007 Declaration a general definition of indigenous peoples is lacking. The drafters worked out the text using as a reference point the definition given in the final report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, set up by the UN Commission on Human Rights (the so-called Daes Report), published in 1996, with the contribution of representatives of international governmental and non-governmental organizations and legal experts.<sup>17</sup> This achievement was the result of an animated debate that had started in the late 1970s about the implications of post-colonisation and the need to ensure the well-being and development of the inhabitants of the former colonies.

Indigenous peoples contributed through their own representatives or through NGOs taking part in the Working Group set up in 1982 by the said Sub-Commission. The Working Group was the first experiment of direct involvement of indigenous peoples expressing their views and highlighting the situation regarding the implementation of their rights in the world. They contributed, even if only with a consultative role, to the adoption of a text that was forwarded to the UN Commission on Human Rights after being adopted by the Sub-Commission.<sup>18</sup>

The indigenous representatives had maintained a cautious attitude about reaching a definition that would work in all situations that could be considered as 'indigenous'. They preferred to highlight the distinctive characteristics of indigeneity, stressing the importance of the historical ties of those peoples with the original lands and territories, in conjunction with

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<sup>17</sup> See 'Explanatory Note' by Erica-Irene Daes in UN Doc. E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, and the following Reports, devoted to the definition of 'Indigenous peoples': UN E/CN.4/Sub.2/1994/31, 8 July 1994, and UN E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996. These documents are available at the following address: <[https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=6760](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=6760)>.

<sup>18</sup> The Working Group (1982-1995) was a subsidiary organ of the Economic and Social Council, in support of the activities carried out by the Sub Commission on Prevention of Discrimination and Protection of Minorities in the years. It was replaced by the Working Group on the Draft Declaration under the direct supervision of the UN Commission on Human Rights (1995-2006). See the text of the Report by Martinez Cobo 'Study of the Problem of Discrimination against Indigenous Populations', in <<https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html>>.

their right of self-government and the principle of self-identification. For many, a general definition risked introducing elements of rigidity that would fail to cover the multiplicity of global cultures.<sup>19</sup> Only indigenous representatives from Asia stated that a formal definition was urgent to prevent governments from denying the existence of indigenous peoples in their countries.

For these reasons, the analysis of the concept of ‘indigenous people’ carried out by the Rapporteur Daes was rather aimed at providing a guide for the UN organs in view of the codification of the indigenous peoples’ rights or when addressing possible infringements of those rights.

The following elements have been considered relevant for a people to be qualified as ‘indigenous’: (a) priority in time, with respect to the occupation and use of a specific territory; (b) voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by state authorities; and (d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>20</sup> As the Report remarks, these features need not all be present at the same time. It minimises the importance of the lack of a common name in different states to identify the indigenous peoples living within their borders (they could be ‘Natives’, ‘Indians’, or ‘Aborigines’). According to the Rapporteur, the list of the elements proposed for a definition should be applied in a flexible way, enabling a constructive dialogue between governments and indigenous peoples for the recognition of people as ‘indigenous’, where self-definition by the indigenous peoples themselves should be granted.<sup>21</sup> Thus,

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<sup>19</sup> See the declaration by Mr. J. Bengoa, member of the Working Group, in UN Doc/CN/Sub.2/AC.4/1996/2, 10 June 1996, 12, para. 41.

<sup>20</sup> Daes Report of June 10, 1996, referring to the progress of the Working Group on Indigenous Populations established within the UN Sub-Commission on Prevention and Discrimination and Protection of Minorities: UN E/CN.4/Sub.2/AC.4/1996/2, paras. 60-65 and 69. The said Sub-Commission, set up in 1947 as a subsidiary organ of the Economic and Social Council, was renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights. When the UN Human Rights Council replaced the UN Commission on Human Rights in 2006, responsibility for the Sub-Commission passed to the Council.

<sup>21</sup> This point is specially emphasised by F. Marcelli, ‘I popoli indigeni nel diritto internazionale’, in F. Marcelli (ed.), *I diritti dei popoli indigeni* (Roma: Aracne 2009) 35-36. See B. Kingsbury, ‘Indigenous Peoples’ in Wolfrum, R. (ed), (2011) *Max Planck Encyclopedia of Public International Law on line*, <<http://www.iilj.org/wp-content/uploads/2016/08/Kingsbury-Indigenous-Peoples-1.pdf>>, para. 7 (highlighting that ‘[t]hese open-ended approaches to definition help in bridging between two different sensibilities.



an important role was left to subsequent developments of the practice. A series of UN reports, instruments of UN organs, charged with assessing the situation of single indigenous peoples, and international judicial decisions have provided further relevant elements for defining 'indigenouness'.

The 1996 Daes Final Report represents a step forward considering the previous efforts to reach a definition of indigenous peoples. First of all, it shows the awareness of the collective meaning of indigeneity, providing a more advanced construction in comparison to the original approach of the International Labour Organization (ILO) Conventions, prevalently centred on the situation of the individuals suffering because of the discriminatory behaviour of the employers due to their being members of indigenous communities.<sup>22</sup>

In addition, the Daes Final Report adopts the term 'people' instead of 'population'. The latter is present in the Covenant of the League of Nations: article 22 of the Covenant entrusted Member states with the 'duty of promoting the well-being and development of the *indigenous populations*' of the territories that remained under their control. That term conveyed the idea that they were not able to stand by themselves, being at a lower level than the more 'advanced societies'. The work carried out within the League of Nations was aimed at setting up different degrees of supervision as appropriate to those particular territories in the name of the 'sacred trust of civilisation'.<sup>23</sup>

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Ethnicities and identities are dynamic and multiple: ethnic identity may be negotiated and re-fashioned by groups in different relational contexts, and individuals frequently in complete good faith present quite different ethnic identities in different settings. Yet many arguments based on indigenous peoples' rights presume, with good reason, a fixity of the group and a continuity of its identity and sense of place over time, and this may be of great importance to the persons themselves and their understandings of their ancestors, divinities, territories, future generations, and responsibilities'.)

<sup>22</sup> ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382). The ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107, 26 June 1957, 328 *UNTS* 247) has been replaced by ILO Convention No. 169, in force since 5 September 1991, that has been adhered to by 23 states. ILO Convention No. 107 entered in force in 1959 and was adhered to by 27 countries. The latter is still in force in its actual form and content for those Members that have not ratified Convention No.169.

<sup>23</sup> The term 'population' also appeared in the UN acts adopted before the 1960s. See for instance General Assembly Res. 275 (III) 11 May 1949, recommending the Economic and Social Council to study the situation of the 'aboriginal population and other underdeveloped social groups of the American Continent', with a view to promoting their standards of living, integration and development. The resolution can be read online:

The ILO Convention no. 107 of 1957, concluded after WWII and concerning the protection and integration of Indigenous and other Tribal populations in Independent Countries, also referred to 'populations'. In particular, it provided that customs and institutions of indigenous 'populations' should be retained where these were 'not incompatible with the national legal system or the objectives of integration programmes'<sup>24</sup> and 'to the extent consistent with the interests of the national community and with the national legal system.'<sup>25</sup>

The proposal to replace the term 'population' with the term 'peoples' had already been submitted to the said Working Group on Indigenous Populations by a number of indigenous representatives, but had been rejected because critics contended that the use of the term 'peoples' could suggest a new model running counter to the international law concept of the exclusive territorial sovereignty of the states. Several governments raised similar objections regarding the 'self-determination' of indigenous peoples.<sup>26</sup> In the opinion of some states, the self-determination of indigenous peoples would determine a form of 'separate development of statehood or extra-citizenship rights.'<sup>27</sup>

The general use of the term 'peoples' was finally legitimised in the ILO Convention No. 169 of 1989, entitled 'Indigenous and Tribal Peoples Convention' that replaced the former ILO Convention No. 107 of 1957.<sup>28</sup> This represented a step towards the acknowledgment of the autonomy of indigenous peoples. This Convention places special emphasis on the role played by indigenous peoples and the need to respect their culture and spiritual values,<sup>29</sup> giving comparatively less space to the perspective

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<<http://www.worldlii.org/int/other/UNGA/1949/10.pdf>>. In the resolution, the material and cultural development of the aboriginal populations was seen also as resulting in a 'more profitable utilisation of the natural resources of America to the advantage of the world'.

<sup>24</sup> ILO Convention No. 107, Article 7 para. 2.

<sup>25</sup> *Id.* Article 8.

<sup>26</sup> Doc. UN E/CN.4/Sub.2/1989/33/Add.1, 20 June 1989. See the statements of Czechoslovakia (*ibid.* 6, para.2), of Finland (*ibid.* 7, para. 1) and of Sweden (*ibid.* 9, para 1).

<sup>27</sup> See the statement of Australia (*ibid.* 3, para 5): 'if there is a conflict between an indigenous right and a state law or citizenship right, the latter is to be overriding.'

<sup>28</sup> *Supra*, note 22.

<sup>29</sup> See ILO Convention No. 169, Article 1: '1. This Convention applies to: (a) tribal peoples in independent countries 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; (b) peoples in independent countries 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

of integration that had been the dominant outlook in the previous ILO Convention No. 107.<sup>30</sup> Thus, Convention no. 169, giving full expression to all the rights already codified in the ILO Conventions with reference to the whole range of activities involving indigenous peoples, inaugurated a view that was subsequently acknowledged in the Daes Report and in the 2007 Declaration.<sup>31</sup>

## *2.2. The Recognition of the Indigenous Peoples of the African Continent*

As we have seen, the Daes Report includes among the constitutive elements of the definition of indigenous peoples their marginalisation or dispossession by their neighbours regardless of ethnic origin. This approach has significance when it comes to qualifying the peoples of the African continent.

Before the drafting of the Daes Report, questions had been raised about how to identify indigenous peoples in Africa because of the colonisation in that continent being relatively recent in time. This made it difficult to single out indigenous peoples who were ethnically similar to the dominant society of the local state.

Ambiguities in this regard may be traced back to the Final Act of the Berlin Conference for Africa of 26 February 1885 on the principles ruling recognition of the territorial claims of European Powers in Africa: in Art. 6 the expression 'indigenous populations' was used in a way to suggest that it

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state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law' and Article 5 ('(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected'.

<sup>30</sup> Cfr. R. Devasish Roy, 'The ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) and the Laws of Bangladesh: a Comparative Review', Publ. ILO 2009 <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms\\_114957.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_114957.pdf)>.

<sup>31</sup> Perplexities have been expressed also in the debates of the 14<sup>th</sup> session of the Working Group on Indigenous Populations (29 July- 2 August 1996). See Daes Report, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 16, para. 61.

referred to the local inhabitants of the continent, with the exception of the white settlers and their descendants that represented the dominating class of the newly-established states after the decolonisation.<sup>32</sup> These ambiguities are still present in the annex to General Assembly Res. 1541 (XV) of 1 January 1961, on the principles that should guide Members in abiding by their duties under Art. 73 e) of the Charter relating to the administration of non-self-governing territories. It is equivocal in establishing that ‘prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the Country administering it.’<sup>33</sup>

These elements contributed to frustrate the intention of Martínez Cobo, as expressed in his 1982 Report at the UN Working Group on Indigenous Populations, to devote more specific consideration to the African continent as a place where suppression, dispossession and discrimination of indigenous peoples, initiated by the colonial regimes, has continued under the post-colonial regimes.<sup>34</sup> In addition, the Working Group had not received enough data in reply to requests for information about the populations present in that continent. Some African governments have even denied the presence of indigenous peoples within their borders, being concerned that recognition of historical titles in favour of indigenous peoples could endanger the rights of the landowners who could claim the possession of a valid title according to the law of the country.

A step towards a less restrictive view came from the practice of the Inter-American Commission and the Inter-American Court of Human Rights (IACtHR) declared the duty to grant collective rights protection to groups

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<sup>32</sup> *Final Act of the Berlin Conference for Africa*, 26 February 1885 on the principles ruling recognition of the territorial claims of European Powers in Africa, French text available at <<https://mjp.univ-perp.fr/traites/1885berlin.htm>>.

<sup>33</sup> General Assembly Res. 1541 (XV) 1 January 1961, on the principles that should guide Members in abiding by their duties under Article 73 e) of the Charter relating to the administration of non-self-governing territories, Principle no. IV. Text in <<https://documents.un.org/prod/ods.nsf/xpSearchResultsM.xsp>>.

<sup>34</sup> Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations—Final Report (Supplementary Part)*, Doc. UN E/CN.Sub.2/1982/2/Add. 6, 20 June 1982, para. 5 (stating that some groups could be considered within the number of indigenous peoples, referring to ‘groups which occupied or sought refuge in jungle areas, thick forests or mountains, or other areas of difficult access, where they could maintain their own distinct culture and way of life, and who have remained in relative isolation up to the present date.’ The Report quoted a study by Hermán Santa Cruz for the UN. A subsequent Report expressed the need that indigeneity should be restricted to ‘certain population groups in several African Countries or regions’: Doc. UN E/CN.Sub.2/1983/21/Add. 8, 30 September 1983, para. 20.

beyond the 'narrow/aboriginal/pre-Colombian' understanding of indigenous peoples to include peoples deported from Africa and settled in the Americas. They recognised some peoples of African descent living in the Americas because of slavery between the fifteenth and the nineteenth centuries<sup>35</sup> to be entitled to be protected as indigenous peoples.<sup>36</sup> This was in consideration of the fact that their culture and ways of life differ considerably from the dominant society and their survival as peoples depends on the regular access to their traditional land and the natural resources contained therein.

The 2006 Report of the African Commission's Working Group on Indigenous Populations/Communities addresses the specific problem of definition:<sup>37</sup> starting from the definition proposed in the Daes Final Report, it emphasises the marginalisation suffered by communities whose subsistence depends on hunting, gathering or nomadic herding, also following the adoption by the governments of politics to support sedentary farming.

When distinguishing the character of African indigenous peoples, the period of colonisation should not be seen as the only benchmark time-line. Identifying as indigenous all the inhabitants of the African continent before colonisation, with the exception of those who are the direct or indirect descendants of colonisers, would result in an anomalous extension of indigeneity to all the non-descendants of colonisers. In the case *von Pezold and Border Timbers v. Zimbabwe*, decided by an ICSID Arbitral Tribunal in 2015, members of the von Pezold family claimed that the Government of Zimbabwe had unlawfully expropriated their property in violation of the Germany–Zimbabwe Bilateral Investment Treaty.<sup>38</sup> The Government

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<sup>35</sup> An estimated 13 million Africans were illegally transported from the shores of West Africa to the western hemisphere. See N.J. Udombana, 'Reparations and Africa's Indigenous Peoples', in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP 2009) 396.

<sup>36</sup> See *Moiwana Community v. Suriname*, IACtHR (Preliminary Objections, Merits, Reparations and Costs) (ser. C) No. 124, Judgment 15 June 2005; *Case of the Saramaka People v. Suriname*, IACtHR (Preliminary Objections, Merits, Reparations, and Costs) (ser. C) No 172, Judgment 28 November 2007.

<sup>37</sup> 2006 Report of the African Commission's Working Group on Indigenous Populations/Communities, Submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' Adopted by the African Commission on Human and Peoples' Rights (ACommHPR) at its 28th ordinary session <[https://www.iwgia.org/images/publications//African\\_Commission\\_book.pdf](https://www.iwgia.org/images/publications//African_Commission_book.pdf)> The African Commission has been established within the framework of African Charter for Human and Peoples Rights of 1981, in force since 1986. The Commission has vast competences, mainly related to the carrying out of enquiries upon requests from states or individuals or related to the settlement of disputes.

<sup>38</sup> *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID ARB/10/15, Award 28 July 2015.

objected that the policy of redistributing lands was in the public interest, aimed at recovering land from which the black people had been forced from during colonisation. According to the Tribunal, the Claimants were targeted on the basis of their skin colour and, hence, the expropriation was discriminatory and in breach of the BIT.

The Tribunal has also denounced some discriminatory elements, albeit not relevant to decide the case, present in the Land Reform Policy and in the new Zimbabwean Constitution, enacted in 2013, providing for a different regime of compensation for black or white expropriated Zimbabweans. After ‘carefully consider[ing] the Respondent’s arguments relating, in effect, to the righting of historical wrongs’, the Tribunal rejected the argument that expropriation was in the public interest because ‘[o]nce taken, large parts of the properties [were] not actually re-distributed to a historically disadvantaged or otherwise landless population’.<sup>39</sup> Moreover, the redistribution of lands in favour of new Settlers/War Veterans landowners did not in fact contribute to the economic development of the Country. The Tribunal also rejected a request to submit an *amicus curiae* brief by an NGO allegedly representing indigenous tribes, stressing that ‘neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings’.<sup>40</sup>

A substantial contribution towards the definition of indigenous peoples has been given by the African Commission on Human and Peoples’ Rights, since the so-called *SERAC* case involving the state of Nigeria (2000),<sup>41</sup> while a number of other procedures have taken place before the Constitutional Courts of South-Africa, Botswana, and Nigeria.<sup>42</sup>

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<sup>39</sup> Id. para. 502.

<sup>40</sup> *Border Timbers Ltd, Border Timbers International (Private) Ltd, and Hangani Development co. v. Republic of Zimbabwe*, ICSID ARB/10/25, Procedural Order 2, 26 June 2012, para. 57. For commentary, see V. Vadi, ‘Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage’, (2015) 18 *Journal of International Economic Law* 51–77.

<sup>41</sup> *Soc. & Econ. Rights Action v. Nigeria*, Comm. No 155/96, 27 October 2001, <<http://caselaw.ihra.org/doc/155.96/view/en/#merits>>.

<sup>42</sup> See *Aleksor Ltd. v. The Richtersveld Community*, South African Constitutional Court, Case CCT 19/03, Judgment 14 October 2003, <<https://cer.org.za/wp-content/uploads/2011/12/Richtersveld-Community-v-Alexcore-Ltd.pdf>>; *Roy Sesana and Others v. Attorney General*, Botswana, High Court in Lobatse, Case No. 52/2002, Judgment 13 December 2006 < <http://www.saflii.org/bw/cases/BWHC/2006/1.html>>; *The Bodo Community and Others v. Shell Petroleum Development Company Nigeria*, Supreme Court of Nigeria, Case No. 52/2005, Judgment 5 June 2015, (a summary in < <http://lawpavilionplus.com/summary/judgments/?suitno=SC.52%2F2005>>).

In the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya* before the African Commission, the Respondent state objected that the Endorois did not deserve special treatment since they were no different from the other Tugen sub-group. For the respondent, the inclusion of some of the members of the Endorois in 'modern society' had affected their cultural distinctiveness. Accordingly, it would have been difficult to define them as having a distinct legal personality. Consequently, the representation of the Endorois by the Endorois Welfare Council was not legitimate.<sup>43</sup>

The African Commission rejected these arguments on the basis of the evidence submitted to it. The Commission declared that the Endorois 'can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the Tugen sub-tribe or indeed the larger Kalenjii tribe.' The Commission reached this conclusion on the basis of the same elements considered in the jurisprudence of the Inter-American Court. Namely, the Court considered the distinctiveness of indigenous peoples' social, cultural, and economic features, consisting in their special relationship with their ancestral territories, and the possession of their own norms, customs, and/or traditions that regulate, at least partially, the coexistence of the members of the group.<sup>44</sup>

Analogously, in the *Ogiek* case decided on 27 July 2017, the African Court on Human Rights and Peoples' Rights adopted the same view, also referring to the definition developed within the African Commission's Working Group<sup>45</sup> and to the works of the UN. The Court stated that the Ogiek, who had lived in the Mau Forest long before the occupation of the Country by colonisers, possessed the prerequisites to be considered an indigenous people, and should be distinguished from the other neighbouring indigenous groups (the Maasai, Kipsigis, and Nandi).<sup>46</sup>

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<sup>43</sup> Communication No. 276/2003, 11-25 November 2009 <[http://www.worldcourts.com/achpr/eng/decisions/2009.11\\_CMRD\\_v\\_Kenya.htm](http://www.worldcourts.com/achpr/eng/decisions/2009.11_CMRD_v_Kenya.htm)>

<sup>44</sup> *Ibid.* para.161. The African Commission found that the Respondent state had infringed Articles 1, 8, 14, 17, 21 and 22 of the African Charter, in the Recommendations of Banjul (Gambia), 46th Ordinary Session, 11 – 25 November 2009.

<sup>45</sup> Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples adopted by the ACommHPR at its 41st Ordinary Session held in May 2007 in Accra, Ghana, <[https://www.iwgia.org/images/publications/0460\\_ACHPR\\_Advisory\\_Op-UNDRIP\\_UK\\_2010.pdf](https://www.iwgia.org/images/publications/0460_ACHPR_Advisory_Op-UNDRIP_UK_2010.pdf)>

<sup>46</sup> *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Appl. No. 006/2012, Judgment 26 May 2017. The decision can be read at <<https://africanlii.org/fr/afu/judgment/african-court/2017/9>>, paras. 102-113. For an analysis of the case, see

### 3. *The Indigenous Rights to the Land*

#### 3.1. *The Inherent Character of the Rights to the Land and the Rejection of the Doctrine of Terra Nullius*

Among the rights codified in the 2007 Declaration, the right to the land has a prominent place. Possession and use of the land and its resources represent prerogatives that are intrinsic to the characteristics of indigeneity, being connected to the survival of indigenous peoples' autonomous political, economic, and social structure and their unique cultural and religious traditions. The ties with the land feature a kind of distinctive spiritual relationship.<sup>47</sup> states must respect the customs, tradition and land tenure systems of the indigenous peoples when recognising 'the right of the indigenous peoples to own, use, develop and control the lands, territories and resources that they possess'.<sup>48</sup>

The adoption of the Declaration indicates the definitive rejection of the doctrine of *terra nullius*, as it referred to the lands that were the object of conquest or occupation by the European colonisers. That doctrine found support in decisions by national Courts and in public statements of the nineteenth century, in the wake of the theory of the supremacy of the sovereignty of the state. It considered indigenous peoples as deprived of any right to settle or use the resources of the lands inhabited by them unless they received a title from the state. In Australia, that approach prevailed until the middle of the twentieth century.<sup>49</sup> Still in the 1971 case *Milirrpum* (known as the *Gove land rights* case), Judge Blackburn of the Australian Supreme Court of the Northern Territory denied that a 'communal native act' could be validly recognised lacking a title from the Crown. The Court argued that the legal titles provided by the law of the country were unknown in the law system of the indigenous people.<sup>50</sup> The arguments of the Court seem to deny the existence of original titles, where recognition is given to the existing indigenous system based on customary rules. Given the denial of original titles, indigenous peoples were forcibly removed from the land

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Focarelli's chapter in this book.

<sup>47</sup> UNDRIP, Article 25.

<sup>48</sup> UNDRIP, Article 26.

<sup>49</sup> *Milirrpum v. Nabalco Pty Ltd* (1971) Australian Supreme Court (NT), 17 *FLR* 141, Judgment 27 April 1971, 242 <<https://www.atns.net.au/agreement.asp?EntityID=1611>> para. 214.

<sup>50</sup> *Coe v. Commonwealth* (1979), High Court of Australia No. 68, Judgment 5 April 1979 <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/68.html>>.



during the 1950s and 1960s, which was around the time of the housing boom. In other contexts, non-recognition of indigenous titles was rather the result of the indifference of the European countries, leading to a *de facto* presence—in the absence of a legal title awarded by the state—of indigenous peoples, the unique non-disturbed settlers of distant, sometimes inhospitable, lands.<sup>51</sup>

The same approach has been used to deny the validity of treaties concluded between the colonisers and the original inhabitants of the land. Their character of binding treaties under international law has often been denied and the territories have been considered the domain of absolute power of the new occupants. In support of that approach, the argument was put forward that those treaties had contradictory traits: though possessing elements similar to treaties concluded between sovereign entities, they awarded new settlers with the power to unilaterally modify or annul the said treaties, also taking advantage of the lack of adequate instruments of knowledge on the side of the indigenous leaders. For instance, the Treaty of Waitangi between the British Crown and Māori Chiefs from the North Island of New Zealand, signed on 6 February 1840, has been interpreted as enabling complete sovereignty over Māori lands and resources, whereas the Māori believed that they had only given the British Crown the consent to use their land.<sup>52</sup> Although contradicted by the circumstances of the conclusion of those treaties, this interpretation prevailed in the jurisprudence,<sup>53</sup> until the Treaty of Waitangi Act of 10 October 1975 proclaimed the duty to comply with the principles of the Treaty of Waitangi, providing that a Tribunal should be established to receive complaints relating to the interpretation and implementation of the Treaty.<sup>54</sup>

In the United States, the very practice of treaty-making with Indian peoples was abolished through the Indian Appropriations Act of 3 March 1871: ‘No Indian nation or tribe within the territory of the United states shall be acknowledged or recognized as an independent nation, tribe, or

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<sup>51</sup> This can be said for Greenland, Alaska, North Canada, also owing to the difficult conditions for inhabitants of those lands.

<sup>52</sup> Treaty of Waitangi between the British Crown and Māori Chiefs from the North Island of New Zealand. The text is available at <<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/english-version/>>.

<sup>53</sup> *Wi Parata v. The Bishop of Wellington*, New Zealand Supreme Court, Judgment 18 July-17 October 1877 <<http://www.nzlii.org/nz/cases/NZJurRp/1877/183.pdf?query=Wi%20Parata>>78: ‘The title of the Crown to the territory of New Zealand was acquired, *jure gentium*, by discovery and priority of occupation, the territory being inhabited only by savages.’

<sup>54</sup> The Treaty of Waitangi Act is available at <<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/>>

power with whom the United States may contract by treaty'.<sup>55</sup> Though providing that the obligations of any former treaty lawfully made and ratified with any such Indian nation or tribe would not be invalidated, that act fuelled a growing consensus about the illegitimacy of the demands for autonomy by tribal nations in modern America. Treaty-making was progressively abolished as an instrument to rule the settlement on the lands, while tribal land ownership broke up through allotment and federal government forced cultural assimilation policies. This trend found its full expression in the U.S. Supreme Court's ruling in *Lone Wolf v. Hitchcock* (1903), which finally recognised the power of Congress to abrogate the existing treaties with Indian tribes.<sup>56</sup>

### 3.2. *The Shift towards the Qualification of the Indigenous Peoples as entitled with Original Rights within the National Legal Order of the state*

The doctrine of *terra nullius*, which denied the existence of any inherent rights of indigenous peoples to the possession or use of the land, ceased to be followed during the 1960s. Besides the role played by the international organizations, other elements contributed to the demise of the doctrine: the movement for the protection of human rights, which found its main expression in the UN's 1948 Universal Declaration of Human Rights<sup>57</sup> and in the debates leading to the UN Covenants of 1966;<sup>58</sup> access of the new generations of indigenous peoples to education leading to an increased awareness of the existing mechanisms to obtain recognition; the growing contacts between indigenous peoples overseas and the creation of an international indigenous movement; and pressure on the Governments who

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<sup>55</sup> U.S. Congress, Final Draft of the Indian Appropriations act of 1871, Digital Exhibits, <<http://digitalexhibits.libraries.wsu.edu/items/show/5701>> para. 71: 'Future treaties with Indian tribes.'

<sup>56</sup> *Lone Wolf v. Hitchcock*, U.S. Supreme Court, Case No. 553, Judgment 5 January 1903 <<https://supreme.justia.com/cases/federal/us/187/553/>> 187: '[t]he power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.'

<sup>57</sup> UN General Assembly, Universal Declaration of Human Rights, 217 (III) A, Paris, 10 December 1948, <<http://www.un.org/en/universal-declaration-human-rights/>>

<sup>58</sup> International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 *UNTS* 171. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is quoted *supra*, note 3.

received military support by indigenous members during the Second World War to obtain a reward for the sacrifice of blood and lives.

These elements encouraged a general trend towards reversing the theory that indigenous peoples' rights over their original lands had been extinguished through dispossession at the time of colonisation. Eviction and occupation of the lands they had inhabited since time immemorial started to be considered to threaten their very survival and to violate fundamental human rights. Even if the case of dispossession dates back to a time when conquest and colonisation were not illegal, this does not exclude that the contemporaneous effects of continuing past wrongs can be the object of adjudication. In this respect, the UN Human Rights Committee played a crucial role. It examined situations that were the consequences of historical failures to protect indigenous rights in the light of the UN Covenant of 1966 on the Civil and Political Human Rights, even if the facts originating those situations happened long before the Covenant entered into force.<sup>59</sup> In addition, the ILO Committee decided cases relating to the effects of relocation of indigenous communities out of their original lands that happened before the entry into force of Convention No. 169 (1989).<sup>60</sup>

The qualification of indigenous rights to the land as having an 'inherent' character can be found in the national case law of the American and Australian continents since the 1970s. Different governments started to consider the relationship with indigenous peoples under a new approach that favoured the original character of the rights. According to commentators, the milestone of this new trend was a well-known decision by the Supreme Court of Canada, *Calder v. Attorney General of British Columbia*, considered as the catalyst for the recognition of original rights.<sup>61</sup> In the aftermath, the

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<sup>59</sup> Among the most relevant cases see *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (14 February 1984), Final View 26 March 1990, U.N. Doc. Supp. No. 40 (A/45/40) 1 (1990); *Lovelace v. Canada*, Communication No. R.6/24/1977 (29 December 1977), Final View 30 July 1981, U.N. Doc. Supp. No. 40 (A/36/40) 166-181. See *infra*, note 103.

<sup>60</sup> See for instance Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), on the basis of article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiatqartut Kattuffiat (SIK) (ILO Doc. GB.277/18/3 and GB.280/18/5).

<sup>61</sup> Supreme Court of Canada, *Calder v. Attorney General of British Columbia*, 31 January 1973 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>>, rejecting by majority the judgment of the Court of Appeal that '[after] conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer'. Although the decision had no practical effect on the judiciary plane, it was the catalyst for following decisions that accepted the same approach and for the start of negotiations between Canada and the Nisga's Tribal Council in 1976, to reach

title to the land of indigenous peoples was recognised on the basis of two elements: prior occupation of land before the arrival of colonisers, i.e. before the assertion of sovereignty by the colonisers, and pre-existence of central and distinctive attributes of the original societies. In New Zealand, the qualification of the indigenous rights to the land as having an ‘inherent’ character was expressed in the case *Te Weeki v. Reg. Fisheries Officer* 1986<sup>62</sup>, which rejected the *terra nullius* doctrine. Other cases subsequently followed. In Australia, a similar approach was inaugurated by the 1992 *Mabo* case.<sup>63</sup> The new trend also prevailed in the decisions of the courts of some Asian and African states from the 1990s onwards.<sup>64</sup>

The perception of the self-standing, non-derivative rights of the indigenous peoples is founded in two main elements: the factual and continuous use of the land and its resources since the remote past, and the laws in force within the system of the indigenous society that governs the use of the land.<sup>65</sup> Therefore, the exercise of the rights to the land possessed

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an agreement ratified in 2000 that recognised that people’s self-government. The model of that treaty was used in negotiations with other First Nations.

<sup>62</sup> *Te Weeki v. Reg. Fisheries Officer* (1), High Court of New Zealand Case M662/85, Judgment 19 August 1986, NZ.L.R. 682-687.

<sup>63</sup> *Mabo v. Queensland* (2), High Court of Australia, Fed. Case 92/014, Judgment 3 June 1992, 175 C.L.R. 1, para. 42: ‘A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.’ <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html>>.

<sup>64</sup> See J. Gilbert, ‘Historical Indigenous Peoples’ Land Claims: a Comparative and International Approach to the Common Law Doctrine on Indigenous Title’, (2007) 56 *ICLQ* 585–8. According to Gilbert, that doctrine of the original, inherent character of the rights of indigenous peoples stems from the common doctrine of ‘acquired rights’ of the nineteenth century: a change in sovereignty (by conquest or acquisition) does not affect the acquired rights of the inhabitants of the country (*ibid.* 590-592). An ambiguous approach has been followed by the Sapporo (Japan) District Court, Civil Division No. 3, Judgment 27 March 1997 in the case *Kayano et al. v. Hokkaido Expropriation Committee (the Nibutani Dam Decision)*, in (1999) 38 *International Legal Materials* 394. Here the Court, while declaring the illegality of the Confiscatory Administrative Rulings to build a dam because of the enormous damages caused to the Ainu people, that is referred to as an indigenous people, seems not to go beyond the recognition of their cultural rights in the same way as they are recognised to minorities. No referral is present as to original titles on the land or to self-determination as intended in the 2007 Declaration on indigenous peoples. The same ambiguity is present in the Ainu Promotion Act of 26 April 2019 (references in <<https://www.loc.gov/law/foreign-news/article/japan-new-ainu-law-becomes-effective>>).

<sup>65</sup> See for instance the Swedish Land Code of 1734, amended on 1 January 1972, that

by the indigenous peoples cannot be subject to the same rules as those governing the legal titles based on the law of the country as concerns the nullification or transfer of the original titles.

The regime of indigenous rights to the land is fully compatible with state sovereignty. This approach is in line with the evolution of theories on territorial sovereignty. According to the concept prevailing at the beginning of the twentieth century, the relationship between the state and the territory was to be qualified in terms of ownership or possession by the state. This approach has gradually changed, giving primary weight to sovereign functions and considering the territory as the domain wherein states exercise those functions. In this perspective, the presence of different titles within the borders of the state should be considered as fully consistent with sovereignty. Indeed, sovereignty does not necessarily entail that the territory in its entirety is covered by land titles: it can co-exist with the absence of activities controlled by the state or with titles of external origin.<sup>66</sup>

The existence of indigenous peoples' rights does not restrict the sovereignty of the state; rather, it shapes how the sovereign functions of the state are carried out, and how the land and its resources are managed.<sup>67</sup> Without necessarily speaking of a shared sovereignty with indigenous peoples, the indigenous peoples are definitively granted a special place among the other components of the society in respect of possession of the

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grants ownership or usufruct when the use of the land lasted such a long time that nobody knew or heard that the situation had ever been different. Lacking a demarcation of the lands subject to winter grazing in the Reindeer Husbandry Act of 1993, the issue of the existence of those titles is the object of evidence given to the courts should a dispute arise with landowners. These elements have been considered in the proceedings before the European Court of Human Rights (ECHR), case *Handölsdalen Saami Village and others v. Sweden* (Appl. no. 39013/04), Judgment 4 October 2010 (Final), originated from a claim by non-indigenous inhabitants that opposed to winter grazing by the Saami people. The Court has not envisaged in the case a violation of Article 6 of the European Convention on Human Rights. See however the partly dissenting opinion of Judge Ziemele (*ibid.* 20).

<sup>66</sup> See *Island of Palmas case* (or Miangas), *United States of America v. The Netherlands* (Arbiter Huber), Award, 4 April 1928, *II Reports of International Arbitral Awards*, 829-871, <[http://legal.un.org/riaa/cases/vol\\_II/829-871.pdf](http://legal.un.org/riaa/cases/vol_II/829-871.pdf)>, 8 (holding that 'the continuous and peaceful display of territorial sovereignty by peaceful relation to other states is as good as a title') and 9 (holding that 'Sovereignty cannot be exercised in fact at every moment on every point of a territory.')

<sup>67</sup> For a detailed overview of the main theories of sovereignty expressed since the beginning of the twentieth century, see M. Nino, *Land grabbing e sovranità territoriale in diritto internazionale* (Napoli: Editoriale scientifica 2018) 128-187.

land and the traditional use of natural resources.<sup>68</sup>

Besides, the indigenous vision—as also found in the recent debates through their representatives or NGOs—is far from regarding appropriation of a territory as an instrument for conquest and occupation, or as providing a title analogous to the full sovereignty of a state.

The recognition of the existence of a separate set of rules having a distinct origin in respect of the state's legal system does not imply that indigenous peoples possess a form of independent power on the land or even the power of addressing problems connected with possible territorial vindications from inside or outside the borders of the state. They rely on the exclusive capacity of the state to protect its borders and, if needed, to engage in international frontier disputes.<sup>69</sup>

### *3.3. The Legal Effects of Recognition of the Sovereign Rights of the Indigenous Peoples to the Land*

Recognition of the sovereign rights of indigenous peoples to the land may find support in domestic statutes recognising indigenous rights in the form of property rights or titles to use, manage, and possess land.<sup>70</sup> However, such statutes do not replace the original titles, which maintain their inherent character and are not subject to the rules of the state. Even constitutional rules that codify aboriginal rights do not exhaust the content of the indigenous rights.<sup>71</sup>

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<sup>68</sup> With specific reference to the interplay between states and indigenous peoples, M. Nino qualifies the rights of the indigenous peoples to use the land and natural resources as a form of 'shared sovereignty' (*ibid.* 27).

<sup>69</sup> A vast literature exists on the requisite of independence, strictly connected to sovereignty of the state, in the sense that the latter has the capacity of excluding other governing powers from the territory. See, among others, B. Conforti, 'Cours général de droit international public', (1988) 212 *Recueil des Cours* V, 144-163; L. Henkin, 'General Course on Public International Law', (1989) 216 *Recueil des Cours* IV, 26 and 130; P.M. Dupuy, 'L'unité de l'ordre international', in (2002) 297 *Recueil des Cours* 95 (calling 'independence' as a factual situation that guarantees sovereignty and, at the same time, receive from sovereignty a legal qualification or '*formalisation juridique*'). See also J.E.S. Fawcett, 'General Course on Public International Law', (1971) 132 *Recueil des Cours* I, 381-85.

<sup>70</sup> See *Tsilhqot'in Nation v. British Columbia*, Canadian Supreme Court, Judgment 26 June 2014, 2 *S.C.R.*, 279, para. 34. The Canadian Supreme Court has also referred to the requisite of exclusivity of the possession of the land, in the sense that the presence of titles for other peoples had to be excluded, both under the common law of the Country and according to the aboriginal rules (*ibid.* 285-6 paras. 48-9).

<sup>71</sup> See *Delgamuukw v. British Columbia*, Canadian Supreme Court, Judgment 16 June

The recognition of indigenous rights in domestic legal instruments can facilitate the coexistence between different titles within the territory of the state, at the same time giving more certainty to the titles of the indigenous group living in the country. In case of disputes between indigenous peoples and other sectors of society, domestic courts become available.<sup>72</sup> For this reason, indigenous rights are generally the object of special rules, establishing priority in respect of property titles or other titles conferred on the land.<sup>73</sup>

However, such recognition implies a legal fiction, since it consists in adapting a legal category of the law of the country to the indigenous rights that are based on an external source—i.e. the indigenous legal system based in the practices and uses of the indigenous people. This can sometimes prove a difficult task. For instance, in the British legal system, the ‘Aboriginal titles’ of indigenous peoples of the former colonies of the Crown cannot be assimilated to the right of property, nor to sovereign rights. Therefore, they have been included, through a legal fiction, among those titles on the land that the sovereign granted to private persons in exchange for the duty to provide goods or services to the Sovereign. However, they have to be distinguished from the latter, being free from any duty towards the Crown (‘freehold title’), besides being permanent in principle.<sup>74</sup>

Domestic statutes recognising indigenous rights do not have a constitutive effect of such entitlements; rather, they merely recognise such rights. Given the declaratory effect of domestic acts of recognition of indigenous rights, the indigenous titles are granted against the consequences of possible new acts repealing them<sup>75</sup> or reforming the same, for instance in the sense of changing

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1997, 3 S.C.R. <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1569/1/document.do>>1015. Section 35 of the Canada Constitution Act of 1982, provides recognition of the existing aboriginal and treaty rights.

<sup>72</sup> For a comparison between the status of indigenous peoples in North America, Australia, New Zealand and Northern Europe, see K. Göcke, *Indigene Landrechte im Internationalen Vergleich* (Max Planck Institut: Springer 2015) 229 ff.

<sup>73</sup> In Sweden, the use of the land by the Saami people has been codified taking into account the use for time immemorial according to the land Code in force since 2 January 1972. The *Reindeer Husbandry Act*, as amended in 1993, codifies the Saami right of winter grazing on the lands possessed from time immemorial.

<sup>74</sup> Göcke, *Indigene Landrechte*, 232.

<sup>75</sup> See *Calder v. British Columbia*, para. 328 (‘when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished’.)

the original title into a right of property.<sup>76</sup> In addition, domestic measures conferring on other subjects rights on the native lands cannot in principle have the effect of extinguishing indigenous rights. According to the Preliminary working paper by Erica-Irene Daes to the UN Commission on Human Rights of 20 June 1997 ‘extinguishment would mean to give vulnerable and inferior legal status for indigenous land and resource ownership’.<sup>77</sup>

The original character of the ‘aboriginal’ titles is not just the consequence of their priority in time in respect of the moment of colonisation. Rather, it is strictly connected with the existence of practices, customs, and traditions integrated in the distinctive culture of the peoples, inherent in the characters of the indigenous society, that already existed at the time of contact with the colonisers.

Because of the distinctive elements of the indigenous rights to the land, the relationship of states with the indigenous peoples living in their territory appears to be similar to those that exist with foreign systems of law. Questions as to how the land should be managed, or relating to the continuity of the use of the land have been addressed in the relevant case law taking into account the quality of the activities carried out by the indigenous people and their consistency with the distinctive characters of the traditional indigenous culture. In the case *Van der Peet*, decided on 21

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<sup>76</sup> See UN Doc. A/54/18, Suppl., March-August 1999, Report of the Committee on the Elimination of Racial Discrimination, Annex VIII, at 6 (Dec. 2/54) (pointing out that the *Australian Native Act* 1993 as amended in 1998 along the case law of the Australian High Court raised reasons of concerns.)

<sup>77</sup> Doc. UN E/CN.4/Sub.2/1997/17, para. 29. However, the High Court of Australia in the case *Wik v. Queensland* (‘Pastoral Leases case’), Judgment 23 December 1996, (1996) 71 ALJR 173 <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1996/40.html>> declared that extinction may result from an act of the state unequivocally having the intention to produce that effect. See statement by Judge Brennan (*ibid.* 76 f.). : ‘Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it. Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title. A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect “unless there be a clear and plain intention to do so”. Such an intention is not to be collected by enquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test’. See also Supreme Court of Canada, *Delgamuukw v. British Columbia*, *supra* note 71, 1120, para. 180 and *passim*: the Canadian Supreme Court asserted that extinction can only be the result of an act of the Crown sufficiently clear as to that effect.



August 1996, the Supreme Court of Canada had to establish whether the practice, custom or tradition related to fishery arising from the prior social organization and distinctive culture of an aboriginal community (named Sto:lo) included also the right to exchange fish for money or other goods. If the latter activity was not significant enough, they should be subject to the same rules and limits as the activities of the same kind carried out by non-indigenous persons.<sup>78</sup>

In the light of the indigenous priorities, the co-existence of concurring titles on the land cannot be definitely excluded, provided the latter do not interfere with the use of the resources and the activities essential to the survival of the group, such as hunting, fishing or pastoralism. Sometimes, restrictions to the use of the land may result from the need to reduce the quantity of resources such as fish to be caught, in order to ensure access to the resources also in favour of other right holders. The essential characters of indigenous traditions entail that the use of the land is intimately connected with the respect of their spiritual values, besides the primary interest to safeguard the continued existence of the group. According to Art. 14 of the ILO Convention no. 169 (1989), exclusivity of use of the land is not essential to qualify a people as indigenous.<sup>79</sup>

In Australia, alternative regimes have been set up on the basis of appropriate consultations between the state and indigenous peoples, also providing for possible restitution of the lands to natives in case of cessation of use by non-indigenous pastoralists. The question was considered in 1999 by the UN Committee on the Elimination of Racial Discrimination with reference to the *Australian Native Act* as amended in 1998.<sup>80</sup> The Committee underlined the existence of pitfalls in the system of the Australian rules

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<sup>78</sup> *R. v. Van der Peet*, Supreme Court of Canada, Judgment 21 August 1996, (1996) 2 S.C.R. 507 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1407/1/document.do>>. The Court confirmed the existence of the aboriginal right to sell fish for sustenance purposes, to be protected under section 35 of the Constitution Act 1982.

<sup>79</sup> ILO Convention No. 169, Article 14: '1. 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. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.'

<sup>80</sup> UN Doc. A/54/18, Suppl., March-August 1999, Report of the Committee on the Elimination of Racial Discrimination, Annex VIII, 112 ff.

governing native rights, and the ambiguities of the case law.<sup>81</sup> The case led to a reconsideration by the Government, which expressed the intention to support the genuine aspirations of indigenous people to achieve greater self-sufficiency, and to ensure that all Australians share equally a common future, which will form the basis of a lasting reconciliation.<sup>82</sup> Relevance has been given to the traditional and cultural system of the indigenous peoples in the management of the resources of the land and the parties tried to find a negotiated solution.

In addition, the unified Nordic Convention on indigenous Saami rights and culture, signed in 2017 between Finland, Norway and Sweden, emphasises the rights of indigenous peoples to use traditional land, as well as the state duty to negotiate in matters of special relevance and to involve the Saami Parliament in decisions that concern the Saami people specifically.<sup>83</sup>

As we see from the practice, problems of sharing the use of the land have been prevalently considered in the light of activities such as recreational fishing and commercial fishing concurring with those carried out by the indigenous peoples to meet food requirements. Nowadays the need to ensure the conservation of resources has emerged under different terms, with the protection of resources against pillage being a common concern both for non-indigenous peoples and the indigenous peoples themselves, though the latter are often the victims of practices that risk endangering or shortening the availability of exhaustible natural resources.<sup>84</sup>

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<sup>81</sup> High Court of Australia, *Wik v. Queensland*, *supra* note 77, holding that the interest of the non-indigenous 'pastoralists' was a limited one, i.e. for 'grazing purposes only', as the leases stated. Such an interest could, in law, be exercised and enjoyed to the full without necessarily extinguishing native title interests. However, according to the Court, in case that evidence and legal analysis lead to inconsistency between the legal interests of the lessee (as defined by the instrument of lease and the legislation under which it was granted) and the native title (as established by evidence), the native title, to the extent of the inconsistency, should be extinguished.

<sup>82</sup> *Tsilhqot'in Nation v. British Columbia*, Supreme Court of Canada, *supra* note 70, 279, para. 34 and paras 48–9 (holding that the presence of titles for other peoples had to be excluded, both under the common law of the Country and the aboriginal rules).

<sup>83</sup> The Convention between Finland, Norway, and Sweden, drafted in 2017, can be read at <<https://www.sametinget.se/105173>>. See Articles 16 and 17. See also Article 34 that considers the case of use by the Saami in association with other users, establishing that 'due regard' will be paid by the Saami and the other users to the interests of each other and the nature of the competing rights.

<sup>84</sup> See R. S. Abate & E. A. Kronk (eds), *Climate Change and indigenous Peoples. The search for legal remedies*, (Cheltenham UK-Northampton, MA-USA: Elgar 2013).

### 3.4. *The Continuity of the Relationship with the Land and the Situation of Nomadic Peoples*

The qualification of indigenous titles as inherent and original is necessarily made on the basis of the indigenous customs and rules. Analogously, in order to establish whether those titles can be considered valid, continuity of the use of the land needs to be ascertained. Two elements have to be considered: 1) the persistency of the quality of the activities performed by indigenous peoples; and 2) the effective occupancy of the land.

As to the element of continuity in the quality of activities, it must be interpreted in a flexible way, acknowledging evolution over time and avoiding an approach favourable to 'frozen rights' dating back to the time of colonisation.<sup>85</sup> The evolution of practices, customs, and traditions into modern forms should not prevent their protection as original rights, provided that continuity with pre-contact practices, customs, and traditions is demonstrated.<sup>86</sup> This means that reference to the indigenous rules is of a dynamic kind, provided the crucial elements of ancient culture and tradition are present.

Coming to the effective occupancy or use, this element is well-known in the international legal practice, being constantly referred to by international courts when charged with the settlement of inter-state border disputes. In comparison to continuity in inter-state relations, the constant occupancy and unbroken use of land can be the object of a burdensome activity to collect testimonials of facts throughout the history of the people. Evidence gathering and mapping are crucial elements in order to obtain a favourable adjudication in a land claim.<sup>87</sup> In order for the element of continuity of occupation to operate there is no requirement of an unbroken chain between current practices and the customs and traditions that existed prior to contact with the colonisers. Such link can be resumed after interruption.<sup>88</sup>

Evidence of continuity of use is problematic with regard to proving the titles of nomad peoples to the use of the resources of the land where they have traditionally had access. In this case, it is most predictable that use

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<sup>85</sup> 'Frozen rights' is the expression used in the *Sparrow* case, decided by the Supreme Court of Canada on 31 May 1990, [1990] 1 SCR 1075, at <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do>> 1093.

<sup>86</sup> *Van der Peet*, *supra* note 80, 557.

<sup>87</sup> See J. Gilbert & B.B. Begbie-Clench, "Mapping for Rights": Indigenous Peoples, Litigation and Legal Empowerment', (2018) 1 *ELR*, 6-13.

<sup>88</sup> *Van der Peet*, *supra* note 78, 510.

of a territory does not have an exclusive character. We already referred to Article 14 of ILO Convention no. 169 (1989), providing that '[p]articular attention shall be paid to the situation of nomadic peoples and shifting cultivators'.<sup>89</sup>

The continuity of the use of the land has been considered in the Advisory Opinion on *Western Sahara* (1975) of the ICJ, concerning the nomad peoples of South-West Sahara. The opinion aimed at determining whether Morocco had acquired sovereign rights. The Court excluded that every nomadic passage or use could give rise to a title on the land. Nonetheless, it held that 'regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources' could suffice to establish title on land. The Court considered the specific situation of the aboriginal group in question, by saying that sufficient occupation is a 'question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used.'<sup>90</sup>

Shifting to national case law, the Canadian Supreme Court of British

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<sup>89</sup> ILO Convention No. 169, Article 14.

<sup>90</sup> *Western Sahara, Advisory Opinion*, 1.C.J. Reports 1975, No. 61, para. 87: 'In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.' and para. 152: 'The information before the Court makes it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a legal character between the tribes of the territory and those of neighbouring regions of the Bilad Shinguitti. The migration routes of almost all the nomadic tribes from Western Sahara, the Court was informed, crossed what were to become the colonial frontiers and traversed, inter alia, substantial areas of what is today the territory of the Islamic Republic of Mauritania. The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of the nomads' way of life, as stated earlier in this Opinion, were in some measure the subject of tribal rights, and their use was in general regulated by customs. Furthermore, the relations between all the tribes of the region in such matters as inter-tribal clashes and the settlement of disputes were also governed by a body of inter-tribal custom. Before the time of Western Sahara's colonization by Spain, those legal ties neither had nor could have any other source than the usages of the tribes themselves or Koranic law. Accordingly, although the Bilad Shinguitti has not been shown to have existed as a legal entity, the nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated.'

Columbia argued that '[t]he fact that aboriginal peoples were non-sedentary ... does not alter the fact that nomadic peoples survived on the land prior to contact with Europeans and, further, that many of the practices, and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.'<sup>91</sup>

When the use of the land involves more than one state, this transboundary use does not represent an obstacle against recognising the rights of indigenous peoples. However, should only one of the states involved be ready to recognise the indigenous rights, the indigenous communities might be tempted to move into the territory of the state having a legislation more favourable to support their rights. This situation may give rise to border disputes and lead to the displacement of the indigenous people from the original lands placed within one of the states involved. In the *Maritime Delimitation* case between Eritrea and Yemen, decided on 17 December 1999, the Arbitral Tribunal considered the presence of a local community using fishing resources since time immemorial across boundaries. Even if the Tribunal abstained from carrying out any investigation about the identification of those peoples as indigenous, it considered that fishing and navigational activities were elements that the states parties should assess in order to guarantee the perpetuation of the traditional fishing regime and peaceful relations.<sup>92</sup>

#### 4. *Self-identification and Membership*

##### 4.1. *Recognition of Individuals as Members of an Indigenous People*

Membership of an indigenous community is primarily a question of self-identification of the group itself in accordance with 'the right of all peoples to be different, to consider themselves different, and to be respected as such' and 'to determine their own identity and membership in accordance

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<sup>91</sup> Supreme Court of British Columbia, *Delgamuukw v. British Columbia* (1997) 1095, para. 139, and *Tsilhqot'in Nation v. British Columbia* (2014) 284, para. 66.

<sup>92</sup> Award of the Arbitral Tribunal in the Second Stage of the Proceedings Between Eritrea and Yemen (*Maritime Delimitation*) 17 December 1999, in 22 *Reports of International Arbitral Awards* (1999) 335–410 <[http://legal.un.org/riaa/cases/vol\\_XXII/335-410.pdf](http://legal.un.org/riaa/cases/vol_XXII/335-410.pdf)> para. 103. For commentary, see S. M. Weldehaimanot and Daniel R Mekonnen, 'Favourable Awards to Trans-Boundary Indigenous Peoples', (2012) 16 *Austrian International Law Review* 60–76 <<http://www.austlii.edu.au/au/journals/AILRev/2012/5.pdf>>

with the traditions and customs of the community'.<sup>93</sup> Practice has developed in the sense of strengthening the role of the indigenous groups in regulating individual membership. In this regard, the Stavenhagen Report has highlighted: 'As regards individual membership, indigenous communities usually apply their own criteria, and whereas some states do regulate individual membership, it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone.'<sup>94</sup>

However, membership in indigenous communities not only implies rights and obligations of the individual vis-à-vis his or her group but also has legal effects in the legal order of the state. Therefore, such identification is of interest to and may necessarily involve the competent organs of the government. This could lead to tensions if state organs do not consider an individual as a member of an indigenous community. Members of a group could be excluded from the list adopted by the state, giving rise to an unequal or discriminatory treatment of different native communities.<sup>95</sup>

The parameters followed by states in compiling lists have been the object of a case raised by the Saami people against Finland submitted to the UN Committee on the Elimination of Racial Discrimination in 2003. The Committee criticised the approach followed by the Finnish authorities as being too restrictive as to the definition of who may be considered a Saami to the effects of enjoying the privileges established in favour of the Saami people by the relevant legislation. It considered that by relying mainly, if not exclusively, on criteria such as the language spoken and the taxes levied on their ancestors, the state party was not taking into account to a sufficient degree the principle of self-identification.<sup>96</sup> The tension has lessened since the establishment by the Nordic Countries involved of a Saami Parliament with consultative role.<sup>97</sup> Those acts have introduced more flexible criteria

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<sup>93</sup> UNDRIP Articles 3 and 33.

<sup>94</sup> Doc. UN E/CN.4/2002/97, quoted *supra* note 15, para. 100.

<sup>95</sup> In the case *Lubicon Lake Band v. Canada*, Merits, Communication No 167/1984, UN Doc. A/45/40, 26 March 1990, one of the complaints was that Canada had determined the Lubicon Lake Band membership in a way that would deny aboriginal rights to more than a half of the Lubicon people, in an unequal and discriminatory way by comparison to the treatment of all other native peoples (para. 27.3).

<sup>96</sup> See Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/63/CO/5, 10 December 2003 (Consideration of Reports Submitted by states Parties under Article 9 of the Convention), paras. 11-12.

<sup>97</sup> Norway Saami Act of 12 June 1987, Finnish Act of the Saami Parliament no. 974 of 17 July 1995 and Sweden Act of 1 January 1993. However, only Sweden has ratified the European Framework Convention for the Protection of National Minorities of 1 February 1995 (entered

for identifying the Saami people.<sup>98</sup> The new 2017 Convention between Finland, Norway and Sweden codifies criteria for identification that are not as restrictive as in the past.<sup>99</sup> Even if this Convention is not yet in force, lacking the ratification on the part of the three states involved, the text epitomises a new attitude that is more in conformity with the standards promoted at the level of the international institutions.

Acquiring evidence of the history of given communities and their distinguishing features of indigeneity can be challenging, especially when the history and relevant elements are obscure or not adequately documented, although such evidence can be acquired through the recollection of historical events by the spiritual leaders. Further research may be needed. In some cases, technical or financial support is due by the state to bear the costs connected with the collection of the evidence of the historical origins of a group. The drafters of the 2007 Declaration encountered this problem, as is evident from the text of Article 40 of the 2007 Declaration.<sup>100</sup>

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in force on 1 December 1998): in the Act of ratification, deposited on 9 February 2000, Saami are listed together with other 'minorities' (Swedish Finns, Roma, Jews and Tornedalers). See S. Errico and B. A. Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sámi People', in F. Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP 2008) 378, highlighting that self-determination has been intended as mainly cultural in kind, acknowledging that their culture and way of life depend on economic activities, such as reindeer herding, hunting and gathering and thus closely rely on the use of land and water.

<sup>98</sup> According to the Norway *Saami Parliament Act* of 1987, the following requisites are necessary in order to be included in the Saami register and to enjoy the right to vote at elections to the Saameting (=Saami Parliament) (Chapter 2, § 2-6- The Saami electoral register): 'All persons who make a declaration to the effect that they consider themselves to be Saami, and who either (a) have Saami as their domestic language, or (b) have or have had a parent, grandparent or great-grandparent with Saami as his or her domestic language, or (c) are the child of a person who is or has been registered in the Saami electoral register, may demand to be included in a separate register of Saami electors in their municipality of residence. The Saami electoral register is drawn up on the basis of the national population register in the municipality, the register of Saami electors at the time of the last election and the demands for inclusion or deletion received during the electoral term. When a person has been included in the Saami electoral register, this may be registered in the national population register.'

<sup>99</sup> Convention between Finland, Norway and Sweden, Article 4: 'Persons to whom the Convention applies. The Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who (1) have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or (2) have a right to pursue Saami reindeer husbandry in Norway or Sweden, or (3) fulfil the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or (4) are children of a person referred to in 1, 2 or 3.'

<sup>100</sup> See European Court of Human Rights, *Handölsdalen Sami Village and others v. Sweden*, Decision 30 March, 2010 (final, 4 October 2010), Application no. 39013/04, 10-1, paras

Problems connected to membership are not confined to lack of governmental recognition. An abuse may also result from an arbitrary extension of the title of indigeneity by the government that *de facto* nullifies the rights of other members of the group. Self-identification may be invoked to block or limit this kind of abusive behaviour of the state. For example, in a case submitted to the UNHR Committee, a number of individuals had been listed by the Finnish government as candidates to the elections for the Saami Parliament, despite not being considered eligible and entitled to vote according to the Saami customs and traditions. According to the Government, that extension was in conformity with Section 3 of the Finnish Act of 1995 and the Supreme Administrative Court had supported that interpretation. Individuals belonging to the Saami people collectively challenged the Government's proposal by submitting a communication to the UNHR Committee, for breach of the 1966 ICCPR. According to the claimants, that extension entailed a 'dilution' of the right of membership, thus jeopardising their right to express their opinion within the indigenous Parliament. For this reason, they denounced that extension as an infringement of the principle of self-determination under Articles 1, 25, 26 and 27 of the Covenant.<sup>101</sup> The Committee endorsed the arguments of the Saami people, highlighting that the Finnish Act provisions related to the electoral rolls of the Saami Parliament had to be interpreted according to reasonable and objective criteria, taking into account the views of the Saami people. The Committee expressed the view that Article 25 of the Covenant had been violated, read alone and in conjunction with its Article 27. Because Article 1 of the Covenant refers to the rights of peoples, it is excluded from the scope of the Optional Protocol of the Covenant. Nonetheless, the Committee held that it could consider Article 1 of the Covenant in deciding on the communication, because the applicants' rights in question possessed not only an individual, but also a collective dimension. Indeed, the dilution of the vote of an indigenous community determined a collective harm that

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48-9: '[A]ccording to the claimants, lacking legal aid put a strain on the economy of the Saami villages.' The Court has not envisaged in the case a violation of Article 6 of the European Convention on Human Rights. See however the partly dissenting opinion of Judge Ziemele (*ibid.* 20).

<sup>101</sup> Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015 by a national of Finland also in her capacity as President of the Saami Parliament of Finland (UN Doc. CCPR/C/124/D/2668/2015 of 20 March 2019) and No. 2950/2017 by 22 members of the Saami people, represented by the Saami Arvuut Organization (UN Doc. CCPR/C/124/D/2950/2017, of 1 February 2019- First unedited version).



‘may injure each and every individual member of the community’.<sup>102</sup>

#### *4.2. The Need for Compliance of the Rules on Indigenous Membership with the Principle of Non-discrimination*

Acts ruling on the individual membership of indigenous groups may be the object of claims for inconsistency with the principle of non-discrimination. The problem has been raised in connection with provisions of the Canadian Indian Act that treated Indian men and women differently to the effect of being registered as a member of an indigenous community: an Indian man could confer status on his non-Indian wife through marriage, while the same was precluded to an Indian woman married to a non-Indian husband. The UNHR Committee, in the case *Lovelace v. Canada*, decided on 30 July 1981, expressed the view that provisions of Art. 27, 2 (1), 3, 23 (paras. 1 and 4) and 26 of the ICCPR had been breached by Canada.<sup>103</sup> According to the Committee, the Canadian Government was obliged ‘to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant’, focusing the right of any person belonging to the minority to claim for the benefits of Art. 27 of the Covenant.’<sup>104</sup> The Committee considered that the Canadian Government was in principle committed to amending the Indian Act. However, it expressed the awareness that restoring consistency with human rights had to be achieved through consultations with indigenous people. Therefore, no quick and immediate legislative action could be expected, considered the need of ‘consultation with the Indians themselves who ... were divided on the issue of equal rights.’

Achieving an equilibrium between the statutory rights of indigenous individuals and the principle of self-identification can be a difficult task for the organs of the state. This problem has emerged in the case *Mclvor v.*

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<sup>102</sup> UN Doc. CCPR/C/124/D/2668/2015, 11, para. 6.9. See also UN Doc. CCPR/C/124/D/2950/2017, 11, para. 8.6.

<sup>103</sup> UN Doc. A/36/40, 1981, 166-175, 1981, paras. 5, 12 and 14. Ms. Lovelace had lost her Indian status in 1970 on marrying a non-Indian. The marriage eventually broke down, and Ms. Lovelace wished to return to live on the reserve, but was denied the right to do so because she no longer had Indian status.

<sup>104</sup> An analogous approach seems expressed in the UNHR Committee’s CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available in <<https://www.refworld.org/docid/453883fa8.html>> para. 5.35: ‘... under the Covenant, the guarantee of equality and non-discrimination extends to both direct and indirect effects of the state party’s conduct in promulgating and maintaining the registration regime’.

*Canada* of 2009 because of the sex-based rule to determine the entitlement to Indian registration status contained in the Canadian Indian Act. The Canadian Court of Appeal of British Columbia had to ascertain the constitutionality of the Act. The Court argued that the question was ‘a complex matter that ha[d] not, to date, been thoroughly canvassed in the case law’. Under those circumstances, the Court held that the Canadian Parliament’s ability to determine the aboriginal status was ‘circumscribed’.<sup>105</sup>

The *McIvor* case was also submitted to the UNHR Committee for infringement of the ICCPR under articles 26 and 27 in conjunction with articles 2(1) and 3, and was considered in the View published on 11 January 2019.<sup>106</sup> The Canadian Government objected to the fact that certain aspects of the communication submitted by the persons excluded from the lists should be considered as inadmissible because the prejudice connected to the provisions of the Indian Act could not be put only on the Government. According to Canada, ‘[t]he impacts on the authors’ social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the authors’ family and larger social and cultural communities, and not to the state.’<sup>107</sup>

The Committee did not accept the arguments of the Canadian Government, stressing the need for the state to adopt ‘positive measures of protection ... not only against the acts of the state itself, whether through its legislative, judicial or administrative authorities, but also against the acts of

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<sup>105</sup> *McIvor v. Canada, (Registrar of Indian and Northern Affairs)*, Court of Appeal for British Columbia, Case 153, Judgment 6 April 2009, para. 66 <<http://www.socialrightscura.ca/documents/legal/mcivor/2009bccal153.pdf>>. The Court held that the Canadian Constitution Act of 1982 (as amended in 1985 to guarantee sex equality before the law) still did not fully satisfy the principle of non-discrimination established in the Canadian Charter on Rights and Freedoms enshrined in that Act. Justice Groberman added the following considerations: ‘We have neither an evidentiary foundation nor reasoned argument as to the extent to which Indian status should be seen as an aboriginal right rather than a matter for statutory enactment. This case, in short, has not been presented in such a manner as to properly raise issues under s. 35 of the Constitution Act, 1982’. Though an amendment of the Indian Act had been adopted, a new case was brought before the Superior Court of the Province of Québec, District of Montreal, *Descheneaux v. Canada (Attorney general)*, Case QQCCS No. 3555, Judgment 3 August 2015 <<http://caid.ca/DesDec2015.pdf>>. The plaintiffs argued that they suffered unlawful discrimination and that the new registration provisions of the Indian Act had not gone far enough to address gender-based inequality. The Court found that the registration provisions of the Indian Act were discriminatory and had to be modified.

<sup>106</sup> UNHR Committee, Communication No. 2020/2010, UN Doc. CCPR/C/124/D/2020/2010.

<sup>107</sup> *Ibid.* para. 4.4.

other persons within the state.<sup>108</sup> This outcome is correct lacking a specific instrument of complaint against the indigenous group. However, the Government's view that it should not be considered as having the exclusive responsibility seems at least in part reasonable. Given that the Canadian Government had to take into consideration the reasons expressed by the communities involved, no quick and immediate legislative action could be expected to modify the law, especially when those communities had revealed their difficulties in finding a new scheme to replace the old one. Some groups feared that a sudden reinstatement of a large number of persons to indigenous status might overwhelm their resources or dilute traditional First Nations culture. In addition, there was a strong movement among First Nations groups to seek a level of control over membership.

The cases considered show the awareness on the part of the Canadian Government and of the UNHR Committee that consistency with the general principles of human rights has to be achieved via positive cooperation between governments and indigenous peoples. Cooperation between states and indigenous peoples in conformity with human rights is vital to implement the spirit of the Declaration, which makes specific reference to the elimination of all forms of discrimination against indigenous children and women<sup>109</sup> and emphasises that the functioning of indigenous institutions should be 'in accordance with international human rights standards'.<sup>110</sup>

In addition, as the 2009 Anaya Report highlights, one should not underestimate the importance of the 'engagement of indigenous peoples with states and the broader political and societal structures' in the implementation of the goals of the 2007 Declaration.<sup>111</sup> Provided that the Declaration is given an appropriate understanding, 'it is a powerful tool in the hands of indigenous peoples to mainstream human rights within their respective societies in ways that are respectful to their cultures and values.'<sup>112</sup> In this connection, the role of the UN human rights institutions, mechanisms, and specialised agencies should be enhanced as instruments to ensure cooperation between the governments involved and indigenous peoples in the activities that affect indigenous interests.

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<sup>108</sup> *Ibid.* para. 7.10.

<sup>109</sup> UNDRIP Article 22.

<sup>110</sup> UNDRIP Article 34.

<sup>111</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. J. Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development*, UN Doc. A/HRC/9/9, 11 August 2008, 25, para. 89.

<sup>112</sup> *Ibid.*, para. 79.

Some steps have been undertaken within the UN in order to get reliable and up-to-date statistics concerning indigenous peoples. This could help avoid possible disputes and encourage the development of a more relaxed relationship with governments.<sup>113</sup> The UN Statistical Commission, supported by the UN Statistics Division, should respond positively and quickly to the various recommendations on indigenous membership adopted by the World Conference on Indigenous Peoples and the Permanent Forum. The responsibility to support these endeavours stems directly from the UN Declaration on the Rights of Indigenous peoples.

## 5. Conclusion

The practice of the UN institutions and the case law of the states hosting indigenous peoples shows that the 2007 Declaration has been widely implemented through the acts of states and the pronouncements of national courts. A broad awareness has developed about the relevance of the indigenous peoples at the international law level.

In the international practice and in the jurisprudence the rights of the indigenous peoples to land and to the natural wealth and resources of the territory in the interest of their well-being and development have been unequivocally recognised. This entails limits to the use and exploitation of natural resources in indigenous land by others. As we have seen, the regime governing indigenous rights within the border of each state may vary and represents the way the indigenous titles, which have an original character, coexist with the titles to the land that are based in the law of the state. Indigenous rights are sometimes covered under the qualification of property rights, though their characters are different. Their distinctive form can be explained by being inherent in the history and tradition of the indigenous peoples, whose rules are founded in the continuity of custom and culture. The rights of indigenous peoples coexist as distinctive systems with (and within) the legal order of the state and as such have been considered and interpreted by the national courts.

Given the 'open' character of the rights to land of indigenous peoples, they are often the object of claims by private owners. Indigenous peoples have not always been granted the instruments to oppose activities carried out in their lands without their consent by national or international

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<sup>113</sup> Information in <<https://core.ac.uk/download/pdf/85165325.pdf>>.

private companies with the support of the state. Sometimes those activities go beyond the limits of ordinary exploitation and have devastating consequences for the territory and the survival of the group.

As to the determination of the membership of individuals to given indigenous groups, the method of registration in the lists of the state that take into account the indigenous rules represents a step towards recognition of the right to self-identification. The UNHR Committee and national courts have recognised the right of indigenous peoples to self-identification and this has resulted in the duty for the state to shape the rules governing the inclusion of candidates in the lists of members in conformity with the criteria belonging to the tradition of the indigenous group involved.

The practice nonetheless shows not only cases where states have infringed the rights of the indigenous peoples but also cases where the rejection of applications for membership in contrast to the principle of non-discrimination has been a consequence of the indigenous rules transposed into the law of a state. In that case, lacking an instrument to take the inconsistency of the indigenous rules before the Human Rights Committee, the only mechanism available for the said Committee was to identify the infringement of the rights by the state because of the discriminatory features of its domestic law.

The chapter also illuminates the interpretation of the principle of self-determination of peoples in international law. In relation to indigenous peoples, that principle should not necessarily be conceived in opposition to given governments or as an aspiration to become fully independent. Only exceptionally does the struggle for independence and the building of a new state receive any explicit support from the UN, as occurred within the decolonisation process or in cases of occupation of territories. In fact, self-determination can also apply to people as a component of the state, meant as a political entity comprehensive of all the different groups that form its social basis, and to indigenous peoples that are not represented in the dominant society.

Indigenous peoples possess distinctive characteristics: their rights are the object of recognition by the states through acts and decisions that identify the indigenous lands, the resources traditionally used by those peoples and the conditions for individuals to be registered as members of the existing indigenous groups. However, the existence and implementation of the indigenous rights is not only relevant within the borders of a state. The chapter shows that the rights of indigenous peoples also matter at the international law level. The proliferation of human rights treaties and

instruments, the extensive involvement of the UNHR Committees, the activities of specialised working groups that focus on indigenous issues, and the views and decisions of human rights treaty compliance bodies and regional human rights courts have all contributed to recognise the rights of indigenous peoples.

The jurisprudence concerning the definition of self-determination as referred to peoples shows that it can be considered as the object of an *erga omnes* right, since it impacts outside the limited framework of the relationships between indigenous peoples and given states, whenever the use of the land and the safeguard of traditional culture of peoples is in question. Therefore, an international agreement between the local state and a third state to use and dispose of the natural resources that jeopardises the rights of peoples to live and practice their traditional culture on their land, without their free, prior, informed consent should be considered as inconsistent with the principle of self-determination.

The case of the *Fisheries Partnership Agreement* between the European Union and the Kingdom of Morocco raised before the EU Court of Justice seems to be particularly significant.<sup>114</sup> That agreement lays down terms and conditions for access to the fishing zone by EU vessels, as part of a general policy to ensure closer economic and social cooperation. In an early text of the agreement approved by the EU no mention was made to the fishery zone adjacent to the coast of Western Sahara.<sup>115</sup> Thus it was unclear whether the binding effects of the agreement as to the fishing activities in the area should be intended as covering also Western Sahara, where Morocco alleges to possess exclusive sovereign rights.<sup>116</sup> The question was submitted to the EU Court, which stated that such an interpretation of the agreement had to be rejected as being inconsistent with the principle of self-determination of the Saharawi people.<sup>117</sup> To overcome this problem, a new version of the agreement has been drafted and approved by the EU Parliament and the Council where the coastal waters of Western Sahara are expressly mentioned. In the explanation given by the Parliament, subsequently endorsed in the Council Decision 2019/441 of 4

<sup>114</sup> The Court of Justice of the EU was requested for a preliminary ruling twice: *Council of the E.U. v. Front Polisario*, C-104/16 P (Grand Chamber), Judgment, 21 December 2016 (ECLI:EU:C:2016:973) and *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of state for Environment, Food and Rural Affairs*, C-266/16, (Grand Chamber) Judgment 27 February 2018 (ECLI:EU:C:2018:1).

<sup>115</sup> See Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141,1).

<sup>116</sup> See *supra*, para. 3.4 and note 90.

<sup>117</sup> Case C-266/16, Judgment 27 February 2018, quoted, para. 79.

March 2019, the new text is considered consistent with the self-determination principle having been drafted following the consultations carried out by the EU Commission with the Saharawi people, also taking into account that the agreement is expected to ameliorate their socio-economic conditions.<sup>118</sup> Although the outcome of the case does not fully dispel the doubts about whether the agreement does in fact ensure compliance with the principle of self-determination,<sup>119</sup> the case provides elements in support of the recognition of the rights of indigenous peoples to the enjoyment of their fishery zones and of their relevance not only in respect of the local state, but also towards third states.

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<sup>118</sup> See EU Parliament Res. 12 February 2018 ([https://www.europarl.europa.eu/doceo/document/A-8-2019-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2019-0027_EN.html) and explanatory statement. The new text of the agreement was authorized by the EU Council decision No. 2019/441, 4 March 2019 ('Sustainable Fisheries Partnership Agreement') in EUOJ 20.3.2019 L 77/4, 8 ff., (<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0441&from=EN>>) the Council stated that 'the Fisheries Agreement should be highly beneficial to the people concerned owing to the positive socioeconomic impact on those people, particularly in terms of employment and investment, and to its impact on the development of the fisheries sector and fish processing sector (Preamble, para. 9).' The Council further declared that the Commission, together with the European External Action Service, had taken 'all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent.' (Preamble, para. 11). However, it seems that the Polisario Front and some other parties did not take part in the consultation process. History and text of the agreement in <[http://www.europarl.europa.eu/doceo/document/A-8-2019-0027\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2019-0027_EN.html)>.

<sup>119</sup> With reference to the former text of the agreement, see the detailed analysis by E. Milano, 'Il nuovo Protocollo di pesca tra Unione europea e Marocco e i diritti del popolo Sahrawi sulle risorse naturali', in (2014) *Diritti umani e diritto internazionale* 8, 505–12.

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### AUSTRALIA

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*Milirrpum v. Nabalco Pty Ltd* (1971) Australian Supreme Court (NT), 17 F.L.R. 141, Judgment 27 April 1971;

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*McIvor v. Canada, (Registrar of Indian and Northern Affairs)*, Court of Appeal for British Columbia, Case No. 153, Judgment 6 April 2009;

*R. v. Sparrow*, Supreme Court of Canada, Case No. 20311, Judgment 31 May 1990;

*R. v. Van der Peet*, Supreme Court of Canada, Case No. 23803, Judgment 21 August 1996;

*Tsilhqot'in Nation v. British Columbia*, Canadian Supreme Court, Case No. 34986, Judgment 26 June 2014;

#### JAPAN

*Kayano et al. v. Hokkaido Expropriation Committee (the Nibutani Dam Judgment)*, Sapporo (Japan) District Court, Civil Division No. 3, Judgment 27 March 1997;

#### NEW ZEALAND

*Te Weekei v. Reg. Fisheries Officer (1)*, High Court of New Zealand, Case M662/85, Judgment 19 August 1986;

*Wi Parata v. The Bishop of Wellington*, New Zealand Supreme Court, Judgment 18 July-17 October 1877;

NIGERIA

*The Bodo Community and Others v. Shell Petroleum Development Company Nigeria*, Supreme Court of Nigeria, Case No. 52/2005, Judgment 5 June 2015;

SOUTH AFRICA

*Aleksor Ltd. v. The Richtersveld Community*, South African Constitutional Court, Case CCT 19/03, Judgment 14 October 2003;

USA

*Lone Wolf v. Hitchcock*, U.S. Supreme Court, Case No. 553, Judgment 5 January 1903.

Valentina Vadi\*

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

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

1. *Introduction*

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

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\* This Article was presented at the Annual Conference of the European Society of International Law, held in Athens on 15 September 2019. The author wishes to thank Antonietta Di Blase, Helen Aitchison, Daniel-Erasmus Kahn, Gabriela Navarro, and Ekaterina Yahyaoui Krivenko for their comments on an earlier draft. The usual disclaimer applies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2. *Sovereignty*

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

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

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

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

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

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

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



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

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

The fact that European states and Indigenous nations signed treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. *Space*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4. *Time*

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

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

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

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

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

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

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

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

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

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

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

<sup>50</sup> Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 5. *Indigenous Sovereignty and Law*

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

## 6. Conclusion

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

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

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

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

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

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

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

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

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Renewal of International Law' (1993) 106 *Harvard Law Review* 1792–1903.

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

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PART II  
INDIGENOUS PEOPLES  
AND HUMAN RIGHTS



Gabriella Citroni\*

*The Indigenous Peoples' Right to Lands and Natural Resources  
in the Inter-American Human Rights System:  
Preserving Cultural Identity while Ensuring Development*

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed an especially progressive jurisprudence on indigenous peoples' rights. In particular, they have recognised the special tie existing between indigenous communities and their ancestral lands and natural resources contained therein as the source of their distinct cultural identity. Thus, ensuring the rights to property, possession, enjoyment and exploitation of ancestral lands and natural resources is pivotal to guaranteeing the physical and cultural survival of the indigenous peoples concerned. However, the preservation of cultural identity and traditional values of indigenous peoples through the protection of their right to lands and natural resources often clashes with state or private companies' projects and development activities. The chapter illustrates the Inter-American jurisprudence with special attention to the use of precautionary and provisional measures and the design of adequate measures of reparation in cases concerning indigenous peoples' right to lands and natural resources. An assessment of whether this jurisprudence can be regarded as successful in striking a balance between the former and the right to development of the country as a whole is provided, arguing that there is a need for reinterpreting the notion of development, going beyond a purely economic meaning and rather encompassing the human dimension.

1. *Introduction*

Over the years, the Inter-American system of human rights has developed a particularly rich - and to a certain extent pioneering - jurisprudence on indigenous peoples' rights. Both the Inter-American Commission on

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\* The author is extremely grateful to Professors Tullio Scovazzi, Antonietta Di Blase and Valentina Vadi for their invaluable comments on earlier versions of this chapter.

Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have dealt with a variety of indigenous peoples' rights, including civil and political rights and fundamental freedoms, as well as social, cultural and economic rights and have analysed violations of both individual and collective nature.<sup>1</sup> Relevant principles of the Inter-American jurisprudence on indigenous peoples' rights can be found in country, thematic, and case reports (the latter concerning admissibility, merits or friendly settlements) adopted by the IACHR, in advisory opinions and judgments of the IACtHR, and in resolutions of both organs concerning respectively precautionary and provisional measures.<sup>2</sup> The wealth of sources and references shows the increasing attention devoted to indigenous peoples' rights in the region.<sup>3</sup> At

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<sup>1</sup> On the notion of 'collective rights', Art. VI of the American Declaration on the Rights of Indigenous Peoples (adopted on 15 June 2016 by the General Assembly of the Organization of American States) establishes that 'indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples. In this regard, the States recognize and respect, the right of the indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources. States shall promote with the full and effective participation of the indigenous peoples the harmonious coexistence of rights and systems of the different population, groups, and cultures'.

<sup>2</sup> An in-depth analysis of country and thematic reports of the Inter-American Commission on Human Rights (IACHR) and advisory opinions of the Inter-American Court of Human Rights (IACtHR) on issues concerning indigenous peoples is beyond the scope of this chapter. In this regard see, among others, the country reports issued by the IACHR on Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay and Peru, as well as IACHR, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II.Doc.44/17, 17 April 2017; *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, OEA/Ser.L/V/II.Doc.47/15, 31 December 2015; *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/Ser.L/V/II.Doc.47/13, 30 December 2013; *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II.Doc.56/09, 30 December 2009; *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, OEA/Ser.L/V/II.Doc.58, 24 December 2009; and *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000; IACtHR, Advisory Opinion No. 23, 15 November 2017 *The Environment and Human Rights*, paras. 48, 59, 67-68, 113, 138, 152, 156, 164, 166 and 169; and Advisory Opinion No. 22, 26 February 2016 *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, paras. 71-84.

<sup>3</sup> Acknowledging the need to devote special attention to the subject of indigenous peoples' rights, in 1990 the IACHR created the Office of the Special Rapporteur on the Rights of Indigenous Peoples <<http://www.oas.org/en/iachr/indigenous/default.asp>>. One of the members of the IACHR is appointed Special Rapporteur and serves

the core of this wealth of resources lies the search for a balance between the preservation of cultural identity and the right to development.

In cases involving indigenous peoples, both Inter-American human rights mechanisms consider that legislation, standards, policies, and practices must be read and interpreted through the lenses of cultural identity. The IACHR affirmed that 'from the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives'.<sup>4</sup> This notion is at the basis of some landmark decisions of the Inter-American organs and, in general, is the pivot of their jurisprudence on indigenous peoples' rights. In fact, they acknowledge the special tie existing between indigenous peoples and their ancestral lands and natural resources therein as the source of their distinct cultural identity. This interpretation has led to a progressive jurisprudence on indigenous peoples' rights over ancestral lands and their resources.

Nevertheless, recent instances show that the approach of the Inter-American human rights mechanisms has been met by increasing discomfort and resistance by states. This is mostly due to the underlying tension between an unrestricted defence of the right to lands and natural resources of indigenous peoples and a thrust towards projects and activities in strategic sectors that, while indisputably clashing with the aforementioned values, may ensure substantial development and improvement of living conditions for society at large.

This chapter aims at providing a stocktaking on whether and to what extent the Inter-American human rights system has been successful in preserving the cultural identity of indigenous peoples through the protection of their rights over ancestral lands and natural resources, while

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in this capacity for two years, mandated to: a) promote the development of the Inter-American human rights system as it applies to the protection of indigenous peoples and, in particular, to advance and consolidate the system's jurisprudence on the matter and to promote the access of indigenous peoples to the system; b) to participate in the analysis of individual petitions and requests for precautionary measures that allege violations of the rights of indigenous peoples or of their members; c) to support onsite visits to member countries of the Organization of the American States (OAS) in order to delve more deeply into the observation of the general situation or to investigate particular situations involving indigenous peoples, as well as to participate in the preparation of the respective reports on such visits; d) to prepare thematic reports on subjects pertaining to the human rights of the indigenous peoples of the Americas; e) to carry out and organise activities aiming at raising awareness and analysing indigenous peoples' rights; and f) until 2016, to collaborate with the OAS Permanent Council's Working Group to draft the American Declaration on the Rights of Indigenous Peoples.

<sup>4</sup> IACHR, *Report on Guatemala*, OEA/Ser.L/V/II.83 Doc. 16 rev., 1<sup>st</sup> June 1993, chapter III.

ensuring development of the country as a whole. The subject is complex and has already been explored by several scholars. Hence, some clarifications on the scope of this chapter are in order. Although in the Inter-American jurisprudence there are numerous reports, resolutions, and Judgments on indigenous peoples that involve enforced disappearance, torture, massacres, and arbitrary killings, this chapter will focus on those cases that deal with violations of a collective nature and concern the right to lands and natural resources in connection with the preservation of the cultural identity of indigenous peoples. In fact, while also other human rights violations affecting members of an indigenous community certainly have consequences on the development of the community as a whole and can be interpreted in the light of the concept of ‘cultural identity’, these aspects have not yet been explored in-depth by the IACHR and the IACtHR.<sup>5</sup> Implications on the cultural identity of indigenous peoples have been mainly considered when dealing with cases concerning the right to property in relation to lands and natural resources and the effects of certain activities and projects (e.g. logging, construction of dams, mining or oil-related activities) on the indigenous community as a whole. This chapter will thus focus on the latter category of cases, moving from the premise that ancestral territories, natural resources, and land in general are among the pillars of the cultural identity of indigenous peoples. In fact, in such cases ensuring indigenous peoples’ rights to property, possession, and exploitation of natural resources is a means to actually guaranteeing the physical and cultural survival of the indigenous communities concerned.

To pursue this objective, the Inter-American human rights mechanisms have attempted to use the tools at their disposal in an original and culturally sensitive manner. On the one hand, precautionary and provisional measures have been used to prevent irreparable harm to the lands and natural resources – and thus eventually to the cultural identity – of indigenous peoples. On the other hand, where violations had already been perpetrated, special

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<sup>5</sup>The IACtHR has concisely referred to the cultural implications for indigenous peoples of certain gross human rights violations, such as enforced disappearance, sexual violence, massacres and forced displacement, in particular with regard to the values relating the respect for mortal remains and their significance, funerals and connected rituals, as well as the relationship between physical and spiritual integrity. In this regard, see, among others, IACtHR, Case *Bámaca Velásquez v Guatemala*, Judgment 22 February 2002, Ser. C No. 91, para. 81; Case *Moiwana Community v Suriname*, Judgment 15 June 2005, Ser. C No 124, paras. 95, 98, 100 and 103; Case *Chitay Nech v Guatemala*, Judgment 25 May 2010, Ser. C No. 212, para. 146; Case *Fernández Ortega et al. v Mexico*, Judgment 30 August 2010, Ser. C No. 215, para. 126; and Case *Río Negro Massacres v Guatemala*, Judgment 4 September 2012, Ser. C No. 250, para. 160.



care has been devoted to the design of measures of reparation directed at addressing the collective dimension of the damage inflicted, at restoring – to the extent possible – the original situation before the violation took place and at preserving the cultural identity of the community at stake. The design and use of precautionary and provisional measures and of measures of reparation in cases concerning the right to lands and natural resources of indigenous peoples will be analysed in this chapter, with the aim of assessing whether they were successful means in granting the preservation of the cultural identity of the indigenous communities concerned while, at the same time, ensuring development and protection of the rights of third parties and society at large.

The first part of the chapter provides a brief overview of the interpretation of key notions and principles concerning indigenous peoples, the rights to lands and natural resources, cultural identity, and development in the jurisprudence of the IACHR and IACtHR. Through the analysis of some seminal resolutions and judgments, the following sections of the chapter illustrate the use of precautionary and provisional measures on the one hand and the design of measures of reparation on the other in cases concerning indigenous peoples' rights. Some concluding observations on the existing jurisprudence and future perspectives are provided, highlighting the challenges to strike an effective balance between the preservation of cultural identity and traditional values of indigenous peoples through the protection of their right to lands and natural resources and the promotion of development activities and projects.

## *2. Key Notions and Principles in the Inter-American Jurisprudence*

In order to better understand the peculiarities of the Inter-American jurisprudence on indigenous peoples and their right to lands and natural resources, this section briefly examines how the IACHR and the IACtHR have developed certain key notions. The interpretative work of the IACHR and the IACtHR is even more relevant bearing in mind that the American Convention on Human Rights (ACHR) does not contain any provision explicitly referring to indigenous peoples, cultural identity, lands, territories, and natural resources.<sup>6</sup>

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<sup>6</sup> In their jurisprudence on cases concerning indigenous peoples, both the IACHR and the IACtHR have referred to other international legal instruments – binding and not – rel-

### 2.1. *Indigenous Peoples, Tribal Peoples, and Afro-Descendent Communities*

While this chapter refers to ‘indigenous peoples’, it is worth noting that the Inter-American jurisprudence on indigenous peoples is also applicable to tribal peoples and Afro-descendent communities. The IACHR and the IACtHR have adopted resolutions, reports, and judgments concerning these subjects. While the Inter-American human rights organs consider that there is no need to establish a precise definition of ‘indigenous peoples’ because, given their immense diversity, it would run the risk of being restrictive, ‘tribal peoples’ are considered those who are ‘not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social cultural and economic traditions different from other sections of the national community, *identifying themselves with their ancestral territories*, and regulating themselves, at least partially, by their own norms, customs and traditions’.<sup>7</sup> The IACtHR held that, pursuant to Art. 1, para. 1, of the ACHR, states parties are under an obligation to adopt special measures that guarantee the full exercise of the rights of members of indigenous and tribal communities.<sup>8</sup>

The Inter-American organs have assimilated peoples of African descent to tribal peoples, noting that

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evant on the subject. In particular, they have interpreted the provisions of the American Convention on Human Rights (ACHR) in the light of the 1989 Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries; the 1992 Rio Declaration on Environment and Development; and the 2007 United Nations Declaration on the Rights of Indigenous Peoples. It has been argued that the IACtHR’s jurisprudence is more conservative than these other international legal instruments. In this sense, see Jo Pasqualucci, ‘International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 27 *Wisconsin International Law Journal* 51, 54 and 81. Furthermore, to better interpret the notion of ‘cultural identity’, reference has been made to a number of instruments adopted by the United Nations Educational Scientific and Cultural Organization (UNESCO), namely: the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it; the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore; the 2001 UNESCO Universal Declaration on Cultural Diversity; the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage; and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

<sup>7</sup> IACtHR, Case *Saramaka v Suriname*, Judgment 28 November 2007, Ser. C No. 172, para. 79 (emphasis added).

<sup>8</sup> *Ibid.* 85.

‘some Afro-descendants remain as ethnically and culturally distinct collectivities that share an identity, a common origin, a common history and tradition, such as for example, the Maroon in Suriname, the *quilombos* in Brazil, or the Afro-descendant communities in Colombia and Ecuador. In some cases, they went through processes of syncretism with indigenous peoples in the region, leading to distinct ethnic groups like the Garifuna that inhabit the Atlantic coast of Honduras, Guatemala and Belize, among others. Therefore, these are dynamic and evolving societies which have undergone processes of change over the years and that maintain in whole or in part their own social, cultural, or economic institutions. [...] *Certain Afro-descendant communities maintain an especial and collective relationship with the territory that they inhabit, which indicates the existence of some sort of consuetudinary land tenure system.* They also have their own forms of organization, livelihoods, language, among other elements, that account for the habitual exercise of their self-determination.’<sup>9</sup>

Self-identification<sup>10</sup> and cultural distinctiveness play a crucial role, together with the relationship with ancestral lands, in determining who should be considered a member of an indigenous or tribal community. Afro-descendent communities can be regarded as tribal peoples ‘regardless of the denomination received internally by the community or that its existence is formally recognized or not, the key element is that it maintains its own traditional cultural practices and its members self-identify as part of a group with a distinct identity’.<sup>11</sup> Moreover, the IACtHR specified that, even in cases where some individual members live outside of the traditional territory and in a way that may differ from other members of the community and in accordance with traditional customs, this does not affect the distinctiveness of the group as a whole.<sup>12</sup> In other words, the lack of individual identification with the traditions, laws, and customs of the community by some members may not be used as a pretext to deny the concerned people their right to juridical personality.

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<sup>9</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 28 and 30 (emphasis added).

<sup>10</sup> In this regard, see also Arts. I, para. 2, and VIII of the 2016 American Declaration on the Rights of Indigenous Peoples.

<sup>11</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 31.

<sup>12</sup> IACtHR, *Case Saramaka*, para. 164.

## 2.2. *Territories and Natural Resources*

In the Inter-American jurisprudence, the concept of ‘territories’ is extensively interpreted so as to encompass not only traditionally used lands, but also natural resources,<sup>13</sup> with the aim to include ‘not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access’.<sup>14</sup>

Moreover, the notion of ‘natural resources’ encompasses living and non-living resources that lie on and within the ancestral lands.<sup>15</sup> Thus, natural resources include air, land, water, natural gas, coal, oil petroleum, minerals, wood, topsoil, fauna, flora, forests, and wildlife. Renewable natural resources are those that reproduce or renew and include animal life, plants, trees, water, and wind. Non-renewable resources are irreplaceable once extracted from water or soil and include gold, silver, fossil fuels, diamonds, natural gas, copper, and ore including forests, fauna, flora, water, minerals, and other potential energy sources, including natural gas and petroleum.<sup>16</sup>

## 2.3. *The Distinct Cultural Identity of Indigenous Peoples and Their Relationship with Lands and Natural Resources*

The distinct cultural identity<sup>17</sup> of indigenous peoples is a crucial element

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<sup>13</sup> *Ibid.*, footnote No. 63.

<sup>14</sup> IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 40.

<sup>15</sup> IACtHR, *Case Saramaka*, para. 122.

<sup>16</sup> IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 41. In particular, on waters, see IACHR, *Annual Report 2015*, Chapter 4.A – *Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System*, para. 26.

<sup>17</sup> Section III of the 2016 American Declaration on the Rights of Indigenous Peoples is devoted to ‘cultural identity’. In particular, Art. XIII establishes that: ‘1. Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. 3. Indigenous peoples have the right to the recognition and respect for all their ways of life, world views, spirituality, uses and customs, norms and traditions, forms of social, economic and political

for their identification, but also a guiding interpretative principle to ensure the effective enjoyment of fundamental rights and freedoms. In this sense, the IACtHR held that 'when [states] interpret and apply their domestic legislation, [they] must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning ... to assess the scope and content of the articles of the American Convention'.<sup>18</sup> Moreover, 'under the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law'.<sup>19</sup>

Both the IACHR and the IACtHR pointed out that the cultural identity of indigenous peoples is inextricably linked to their relationship with the ancestral lands they have traditionally used and occupied and the natural resources therein.<sup>20</sup> In this regard, it has been emphasised that 'land

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organization, forms of transmission of knowledge, institutions, practices, beliefs, values, dress and languages, recognizing their inter-relationship as elaborated in this Declaration'. Moreover, relevant principles are enshrined in Art. XVI, concerning 'indigenous spirituality'; Art. XIX, concerning the 'right to protection of a healthy environment'; and Art. XXVIII, concerning the 'protection of cultural heritage and intellectual property'.

<sup>18</sup> IACtHR, Case *Yakye Axa Community v Paraguay*, Judgment 17 June 2005, Ser. C No. 125, para. 51.

<sup>19</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku v Ecuador*, Judgment 27 June 2012, Ser. C No. 245, para. 213.

<sup>20</sup> Art. XXV of the 2016 American Declaration on the Rights of Indigenous Peoples provides: '1. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources and to assume their responsibilities to preserve them for themselves and for future generations. 2. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 3. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 4. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. 5. Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources in accordance with the legal system of each State and the relevant international instruments. States shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling'.

is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity'.<sup>21</sup> Lands and natural resources are part of the social, ancestral and spiritual essence of indigenous peoples and this consideration deeply influences the Inter-American jurisprudence on the subject, especially concerning the right to property. Since its first landmark Judgment concerning indigenous peoples' right to property over ancestral lands, the IACtHR affirmed that

'among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; *the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*'<sup>22</sup>

The IACtHR also clarified that

[the relationship between indigenous peoples and their ancestral lands] can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and ... that the relationship with the land must be possible. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other elements characteristic of their culture. The second element implies that community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.<sup>23</sup>

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<sup>21</sup> IACtHR, Case *Saramaka*, para. 82.

<sup>22</sup> IACtHR, Case *Mayagna (Sumo) Awas Tingni v Nicaragua*, Judgment 31 August 2001, Ser. C No. 79, para. 149 (emphasis added).

<sup>23</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 148 (emphasis added).

In the IACtHR's words, the possession of ancestral lands is indelibly recorded in the historical memory of the members of indigenous communities and 'their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity'.<sup>24</sup>

Furthermore, the IACtHR affirmed that the cultural identity – and therefore the survival – of indigenous peoples is determined also by their relationship with natural resources present in their ancestral lands:

'the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories *and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.* ... Therefore, the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention [on the right to property].'

In this regard, the Court has previously asserted that the term "property" used in said Article 21 includes those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value'.<sup>25</sup> The IACtHR held that

'the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if *that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living*'.<sup>26</sup>

The protection of the right to own, manage, exploit and develop ancestral lands and natural resources of indigenous peoples is instrumental to prevent their extinction. It has been observed that, while the Inter-American human

<sup>24</sup> IACtHR, Case *Yakye Axa Community*, paras. 215-216.

<sup>25</sup> *Ibid.* 135 and 137 (emphasis added). In the same sense, see Case *Sawohyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006, Ser. C No. 146, para. 121.

<sup>26</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 146 (emphasis added).

rights mechanisms have traditionally relied on Art. 21 of the ACHR (right to property), reaching relevant findings concerning indigenous peoples' right to collective property in accordance with their customs and traditions,<sup>27</sup> the special connection existing between indigenous peoples and their ancestral lands and natural resources would call for a different interpretative principle, namely an analysis under the realm of Art. 4 of the ACHR (right to life).<sup>28</sup> Therefore, this is an area where jurisprudential development could take place.<sup>29</sup> However, it is noteworthy that, pursuant to the Inter-American jurisprudence, the notion of 'survival of indigenous peoples' (although analysed within the realm of Art. 21 of the ACHR), must be interpreted in a broad manner and is not tantamount to mere physical existence. Indeed, it must be understood as the ability of indigenous peoples to 'preserve, protect and guarantee the special relationship that they have with the territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system customs, beliefs and traditions are respected, granted and protected'.<sup>30</sup>

#### *2.4. The Principles Governing the Inter-American Jurisprudence on Indigenous Lands and Natural Resources*

The IACtHR summarised its jurisprudence on indigenous lands and natural resources in the following way:

'1) possession of indigenous peoples' land produces equivalent effects to the formal title to property granted by the state;

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<sup>27</sup> See, among others, IACtHR, Case *Xucuru Indigenous Peoples v Brazil*, Judgment of 5 February 2017 (currently available only in Spanish), Ser. C No. 346, para. 115.

<sup>28</sup> Thomas Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 *University of Pennsylvania Journal of International Law* 115.

<sup>29</sup> *Ibid.* 161-171. For a slightly different reading of the IACtHR's jurisprudence on the issue, according to which the Court would already be duly applying the notion of 'dignified life' in cases involving indigenous peoples, see Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24 *International Journal on Minority and Group Rights* 229; and Tullio Scovazzi, 'Los derechos a la alimentación, al agua y a la vivienda según la Corte Interamericana de Derechos Humanos', in Luis Efrén Ríos Vega, Irene Spigno, Magda Yadira Gómez Robles (eds), *Estudios de casos líderes latinoamericanos* (Tirant Lo Blanch 2019) 213.

<sup>30</sup> IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 233.



2) traditional possession gives indigenous peoples the right to claim the formal recognition of the title to property and its registration; 3) the members of the indigenous communities who, due to causes beyond their control, have left or lost possession of their traditional lands maintain the right of property over them, even in the absence of a formal title, except when the lands have been legitimately transferred to third parties in good faith; 4) the state must delimit, demarcate and grant a title of collective property over the lands to members of indigenous communities; 5) members of indigenous communities who have involuntarily lost possession of their land which has been legitimately acquired by third parties in good faith, have the right to recover their territories or to obtain other lands of equal extension and quality; 6) states must guarantee the effective property of territories to indigenous peoples and refrain from carrying out acts that could lead to agents of the state, or third parties acting with their acquiescence or tolerance, to affect the existence, value, use or enjoyment of such territories; 7) States must guarantee the right of indigenous peoples to effectively control and own their lands without any external interference from third parties; and 8) states must guarantee the right of indigenous peoples to control and use their territory and natural resources.<sup>31</sup>

Therefore, states have a number of obligations, including of a positive nature, in order to ensure the full enjoyment of indigenous peoples' rights to lands and natural resources and, through this, to preserve their cultural identity and, ultimately, their survival. When indigenous peoples have been forced to move from their ancestral lands and to relocate in 'alternative' ones, their foremost right is to recover ancestral territories and, if this is impossible, to enjoy the same right to property over alternative lands.<sup>32</sup> The main challenges arise when third parties – including corporations – are involved, and when the latter or the State, directly or indirectly, claim the use or exploitation of indigenous peoples' lands and natural resources in order to ensure development of the country as a whole. As aptly noted

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<sup>31</sup> IACtHR, Case *Xucuru Indigenous Peoples*, para. 117 (unofficial translation by the author).

<sup>32</sup> IACtHR, Case *Kuna de Madugandí and Emberá de Bayano v Panama*, Judgment of 14 October 2014, Ser. C No. 284, para. 122; and Case *Garífuna de Punta Piedra v Honduras*, Judgment of 8 October 2015, Ser. C No. 304, para. 325.

by the IACHR, ‘historically, the desire of non-indigenous society for such resources has resulted in the removal, decimation or extermination of many indigenous communities’.<sup>33</sup>

### *2.5. Indigenous Peoples and the Right to Progressive Development*

While the ACHR does not contain any explicit definition or reference to the notions of indigenous peoples, lands, territories, cultural identity and natural resources, its Art. 26 concerns ‘progressive development’ and requires states parties 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 the American States as amended by the Protocol of Buenos Aires’. Art. XXIX of the 2016 American Declaration on the Rights of Indigenous Peoples (the 2016 American Declaration) also deals with the right to development, clarifying in its first paragraph that ‘indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own world view. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities’.<sup>34</sup>

The two mentioned provisions show that, while generically speaking of a right to development, there may be a conflict between the right to development of indigenous peoples and that of the rest of society. Paragraphs 3 to 6 of Art. XXIX of the 2016 American Declaration explicitly deal with this potentially troubled relationship and set forth a number of principles, mostly building upon the jurisprudence of the IACHR and the IACtHR on the subject:

‘3. Indigenous peoples have the right to be actively involved in developing and determining development programmes

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<sup>33</sup> IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 179.

<sup>34</sup> Paragraph 2 of Art. XXIX of the 2016 American Declaration on the Rights of Indigenous Peoples reads as follows: ‘This right includes the development of policies, plans, programmes, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organization, norms and procedures, their own world views and institutions’.

affecting them and, as far as possible, to administer such programmes through their own institutions.

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

5. Indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts for the implementation of development projects that affect their rights. Indigenous peoples who have been deprived of their own means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation. This includes the right to compensation for any damage caused to them by the implementation of state, international financial institutions or private business plans, programmes, or projects.<sup>35</sup>

On this delicate relationship, the IACHR further observed that

‘the States of the Americas, and the populations that compose them, have the right to development. Such right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment, but development must necessarily be compatible with human rights, and specifically with the rights of indigenous and tribal peoples and their members. There is no development as such without full respect for human rights. This imposes mandatory limitations and duties on state authorities. In particular, development must be managed in a sustainable manner, which requires that states ensure protection of the environment, and specifically of the environment of indigenous and tribal ancestral territories. As the IACHR has explained, the norms of the Inter-American human rights system neither prevent nor discourage development; rather,

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<sup>35</sup> For a critical reading of this jurisprudence, see Pasqualucci, ‘International Indigenous Land Rights’, 82-96.

they require that development takes place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the [1994] Declaration of Principles of the Summit of the Americas: Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.<sup>36</sup>

Because indigenous peoples' lands are rich in natural resources, the latter have often been extracted, exploited and used in the context of large-scale projects and development activities, including the construction of roads, pipelines, dams, ports or the like, mining, logging, fishing, as well as concessions for the exploration or exploitation of natural resources, including natural gas, oil, and petroleum.<sup>37</sup>

Development projects and activities usually have substantial human, social, health, cultural and environmental impacts. Nonetheless, in the light of indigenous peoples' special relationship with their ancestral lands, such activities may imply an irreparable harm to the cultural identity of indigenous peoples and, eventually, lead to their extinction.

In this context, a first relevant issue concerns who is the right-holder when it comes to the exploitation of natural resources located in the ancestral lands of indigenous peoples and, when such exploitation is carried out by third parties – be they state authorities or private entities, including corporations – what are their obligations vis-à-vis indigenous peoples. Another issue to be addressed concerns the limitations that can be posed to development activities (private, public or of a mixed nature) in case they are likely to produce an irreparable impact on the indigenous peoples' territories and, thus, threaten their survival. The challenge here is to ensure that initiatives that may grant the prosperity of thousands of people are not executed at the expenses of the indigenous communities who own and live in the areas concerned.

### *2.6 States' Positive Obligations to Secure Indigenous Peoples' Rights to Use, Exploit, and Enjoy Their Lands and Natural Resources*

As already mentioned, the natural resources found on and within indigenous peoples' lands are their property. Therefore, indigenous peoples

<sup>36</sup> IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 204.

<sup>37</sup> *Ibid.* 221 and 268.

have the right to use, exploit, and enjoy such resources to preserve their life, lifestyle, and cultural identity. States are under a positive obligation to adopt effective measures, including of a legislative nature, to secure indigenous peoples' rights, also when the indigenous peoples concerned lack a formal title of property over the lands at stake. Indigenous peoples must be formally and effectively enabled to claim such rights over natural resources and lands. In principle, indigenous peoples can decide whether and how to exploit the natural resources present in their lands, nevertheless being under the general obligation to avoid any ecological deterioration and irreparable harm. The indigenous community concerned is entitled to establish priorities and strategies for the use of territories and natural resources, with a view at ensuring self-development.

Granting concessions for the exploration or exploitation of natural resources in indigenous territories that have not been titled, demarcated or protected by the state without complying with the requirements of prior consultation and other related safeguards (including environmental and social impact-assessment and free informed consent) would be a breach of the state's international obligations. Pursuant to the Inter-American jurisprudence, if extraction, exploitation or other development activities are to take place in indigenous peoples' lands, states have:

'(i) the duty to adopt an appropriate and effective regulatory framework, (ii) the obligation to prevent violations of human rights, (iii) the mandate to monitor and supervise extraction, exploitation, and development activities, (iv) the duty to guarantee mechanisms of effective participation and access to information, (v) the obligation to prevent illegal activities and forms of violence, and (vi) the duty to guarantee access to justice through investigation, punishment and access to adequate reparations for violations of human rights committed in these contexts.'<sup>38</sup>

Moreover, states are under a general obligation to prevent environmental damage, which, in the case of indigenous peoples, may have a special impact that goes beyond prejudices to the health of individuals and concerns the physical and cultural survival of an entire community. This positive obligation applies in cases of illegal activities and forms of violence against the indigenous population in ancestral lands affected by development

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<sup>38</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 5.

projects and initiatives.’<sup>39</sup>

The Inter-American human rights mechanisms held that

‘the penetration of settlers and infrastructural or extractive projects in th[e] territories [of indigenous peoples], bring about extremely serious consequences in the field of health, given that the entry of inhabitants who are alien to their territories entails the entry of illnesses for which aboriginal populations lack developed immunological defences. The epidemics which have been unleashed in this manner among different indigenous peoples on the continent have decimated the population, and in some cases they have brought the corresponding ethnic groups to the point of being at risk of disappearance.’<sup>40</sup>

Bearing in mind the extreme vulnerability of indigenous peoples in this regard, states are expected to adopt special preventive measures, in particular when indigenous peoples in voluntary isolation or initial contact are concerned. Such special measures must be effective in the face of activities carried out both by state and non-state actors, including enterprises and, in particular, foreign companies.<sup>41</sup>

When the carrying out of legal extraction, exploitation and development activities – or the issuing of concessions for such purposes – is considered, prior identification and proper monitoring of the impact that a specific project or activity may have, are required, entailing the obligation to provide information, participation of the indigenous peoples concerned in the decision-making process and the establishment of a judicial recourse.

For the purposes of granting extractive concessions or undertaking development and extraction plans and projects over natural resources in indigenous territories, the IACtHR has identified three mandatory conditions that apply when states are considering approval of such plans or projects: (a) compliance with the international law of expropriation, as reflected in Art. 21 of the ACHR; (b) non-approval of any project that would threaten the physical or cultural survival of the group; and (c) approval only after ensuring effective participation –and, where applicable, previous, free and informed consent–, a prior environmental and social

<sup>39</sup> IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, paras. 268-270.

<sup>40</sup> *Ibid.* 271.

<sup>41</sup> On states’ obligations vis-à-vis foreign or transnational companies, see IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 76-81 and 141-148.

impact assessment conducted with indigenous participation, and reasonable benefit-sharing.<sup>42</sup>

Once an authorisation or permit to conduct development or extractive activities in indigenous peoples' lands is issued, ongoing monitoring is required while the project is carried out<sup>43</sup> and if these activities or projects are in the hands of third parties, states retain the obligation to supervise and oversee them. The IACHR has pointed out that

‘to be compatible with the special obligations concerning indigenous peoples ..., supervision and control mechanisms must incorporate guarantees to ensure their specific rights. Such mechanisms must verify whether, once the project is approved, violations of the right to collective property, under the terms developed by the Inter-American system and other applicable international standards, are taking place. As noted by the IACHR, this implies referring not only to the impact on the natural habitat of the traditional territories of indigenous peoples, for example, but also to the special relationship that links these peoples to their territories, including their own forms of economic livelihood, their identities and cultures, and their forms of spirituality. These mechanisms must also enable a determination as to whether the plans or projects being implemented are affecting the ability of indigenous peoples ... to use and enjoy their lands and natural resources in accordance with their customary law, values, customs and mores.’<sup>44</sup>

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<sup>42</sup> On the criteria to be applied on benefit-sharing; prior environmental and social impact assessments; and identification of alternatives and mitigation measures, see, in particular, IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 160 and 213-224; and IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, paras. 186-187 and 237-267. See also IACtHR, *Case Kichwa Indigenous Peoples of Sarayaku*, para. 157; and *Case Garifuna Community Triunfo de la Cruz v Honduras*, Judgment of 8 October 2015, Ser. C No. 305, paras. 156-162. In particular, with regard to environmental and social impact assessment, the IACtHR refers to the 2004 Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Adopted by the Secretariat of the Convention on Biological Diversity and available at <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>43</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 6.

<sup>44</sup> *Ibid.* 102.

Whenever significant ecological or other harm is being caused to indigenous or tribal territories because of development or investment projects or plans or extractive concessions, the latter become illegal and states have a duty to suspend them, repair the environmental damage, and investigate and sanction those responsible for the harm.<sup>45</sup>

Overall, the IACHR and IACtHR have shown particular care in seeking a balance between indigenous peoples' right to lands and natural resources and the legitimate interest to sustainable exploitation of such resources. As a matter of fact, the right to property is not an absolute one and may be restricted for reasons of public utility or social interest. However, restrictions can be applied only under specific and exceptional circumstances<sup>46</sup> and it must be kept in mind that, when exploitation of indigenous peoples' territories is concerned, besides their right to property, their very survival is at stake. The IACHR noted with concern that

'human rights are increasingly perceived as an obstacle to economic development when in fact they are its precondition. ... It is also of concern to the Commission that the majority of the benefits derived from those projects tend to be enjoyed by others and not the indigenous peoples and Afro-descendent communities which are the most negatively affected. Additionally, the zones where extractive projects are implemented report low levels of socioeconomic development.'<sup>47</sup>

Accordingly, the IACHR has aptly suggested that the notion of 'development' itself should be revised and interpreted in a way that goes beyond economic gain and progress, but rather focuses on general human development.

Although the Inter-American jurisprudence is well established and is today reflected and enshrined in the domestic legislation of many states in the Americas, actual violations of the ACHR continue to occur. Precautionary and provisional measures are used respectively by the IACHR and IACtHR in order to prevent irreparable harm and have been granted in several cases concerning indigenous peoples. Similarly, where

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<sup>45</sup> IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 216.

<sup>46</sup> IACtHR, *Case Yaky Axa Community*, para. 144.

<sup>47</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 24.



breaches of states parties' obligations vis-à-vis indigenous peoples' right to land and natural resources have been found, the Inter-American human rights mechanisms have been called to determine the adequate measures of reparation to redress the specific harm caused. Both mechanisms can play a preventive role through precautionary and provisional measures and a restorative function through the determination of measures of reparation. When it comes to provisional measures, the IACtHR has been as proactive as the IACHR and oftentimes its action has been triggered precisely by the IACHR, mostly when the latter's precautionary measures were not being implemented by the state concerned. A similar reasoning holds true with regard to measures of reparation: while indeed, only the IACtHR can order them and quantify the amounts when it comes to determining adequate compensation, also the IACHR recommends measures of reparation in its reports on individual complaints. The interpretation given to the notion of measures of reparation by the two mechanisms is equally comprehensive. Hence, the roles played by the two Inter-American mechanisms in terms of prevention and redress vis-à-vis human rights violations concerning indigenous peoples are complementary and mutually reinforcing.

### *3. The Use of Precautionary and Provisional Measures*

The IACHR can, on its own initiative or at the request of a party, grant the adoption of precautionary measures from states in serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the Inter-American system. Therefore, precautionary measures granted by the IACHR concern cases on which a petition has been lodged, but also situations that have not yet been formally brought to its attention. Art. 25 of the IACHR Rules of Procedure clarifies that 'serious situation' refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the system; 'urgent situation' refers to risk or threat that is imminent and can materialise, thus requiring immediate preventive or protective action; and 'irreparable harm' refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

Precautionary measures aim at protecting persons or groups of persons. The beneficiaries may be determined through their geographic location

or membership in, or association with, a group, people, community or organisation. Throughout the years, the IACHR has requested the adoption of precautionary measures concerning one or more duly identified members of indigenous communities or the entire community as such.

With regard to the IACtHR, pursuant to Art. 63, para. 2, of the ACHR, ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission’.

Although both the IACHR and the IACtHR can grant measures directed at avoiding irreparable harm, this section will make limited reference to provisional measures ordered by the IACtHR and instead focus on precautionary measures granted by the IACHR. The choice is due to the fact that the jurisprudence of the IACHR is broader in its regard and its precautionary measures are usually adopted at an earlier stage, where the preventive function could be exercised at its best – thus allowing a realistic assessment of their potential and impact.

### *3.1. Precautionary Measures to Protect the Life or Personal Integrity of Indigenous Peoples*

On multiple occasions, the IACHR granted precautionary measures where it deemed that external interferences could encompass risks to the life or personal integrity of members of indigenous communities. In these cases, the IACHR used precautionary measures in their most traditional function, i.e. the protection of persons and, in particular, of their right to life or personal integrity. This has played a crucial role in cases where members of indigenous peoples were subjected to harassment, threats or reprisals, a fact that is not infrequent, especially where they protest against certain extractive or development projects.

For instance, in the case of the Teribe and Bribri of Salitre indigenous peoples, in Costa Rica, the IACHR found that the members of these communities were in a ‘serious and urgent situation’ of risk of irreparable damage to their lives and personal integrity because of the actions undertaken to recover their lands<sup>48</sup>. In this case, an NGO (Forests People Programme) lodged the request for the adoption of precautionary measures

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<sup>48</sup> IACHR, Resolution No. 16/15 of 30 April 2015, Precautionary Measures 321-12, paras. 22-30.

on behalf of the members of two indigenous communities.<sup>49</sup> The Teribe community is composed of 621 people living in the South-east of Costa Rica and to whom a formal title of property over ancestral lands has been recognised since 1956.<sup>50</sup> However, almost 88% of their territories has been occupied by third parties and used for development projects, allegedly without any prior consent of the community concerned.<sup>51</sup> The Teribe undertook several actions to claim their ancestral lands and some of their leaders and members have been subjected to harassment and reprisals on various occasions.<sup>52</sup> Since 2010, the Bribri indigenous peoples (who also live in the South-east of Costa Rica) organised themselves and joined the Teribe in their protests and actions to claim their ancestral lands.<sup>53</sup> Again, Teribe leaders have been threatened and attacked and subjected to acts of stigmatisation and disrepute.<sup>54</sup> The situations of risk faced by the Teribe and Bribri concerned the indigenous leaders and other community members who play key roles in the process of claiming their rights, as well as those community members who are more vulnerable, namely young boys and girls.<sup>55</sup> In both cases, threats and attacks had been allegedly perpetrated by state actors (i.e. members of the local police) and private individuals.<sup>56</sup>

The IACHR granted the request, asking Costa Rica to 'a) adopt the necessary measures to guarantee that the life and physical integrity of the members of the indigenous peoples of Teribe and Bribri of Salitre; b) agree on the measures to be adopted with the beneficiaries and their representatives; and c) report on the actions taken to investigate the alleged facts that gave rise to the adoption of the precautionary measures, in order to avoid repetition'.<sup>57</sup>

One interesting aspect of this request of precautionary measures is that, although in their submission to the IACHR the representatives of the indigenous peoples referred to specific incidents and identified some of the members of the two communities at risk because of their position within the indigenous community (e.g. leaders or authorities), the precautionary measures are directed at the protection of all the members of

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<sup>49</sup> *Ibid.* 1.

<sup>50</sup> *Ibid.* 3.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* 4.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* 30.

the Teribe and Bri Bri peoples.

Moreover, the IACHR does not determine which specific measures must be adopted by the state to prevent the irreparable damage to the life or the physical integrity of the persons concerned. Although this lack of precision has been criticised,<sup>58</sup> to a certain extent it reflects the need to consider the peculiarities of each situation and ‘tailor’ the measures bearing in mind the existing circumstances and, above all, the needs and expectations, as well as the cultural sensibility and way of life of the purported beneficiaries of such precautionary measures. Where indigenous peoples are concerned, this flexibility is of particular importance and is instrumental to the preservation of their cultural identity. Finally, the fact that the IACHR requests the state to investigate on the facts that generated the risk in the first place and to report back on the results of such investigations shows the dynamic nature of the process concerning precautionary measures. Moreover, follow-up is envisaged, and this allows the IACHR to respond to changing circumstances. In fact, the IACHR periodically evaluates whether to maintain, modify or lift the precautionary measures in force.

The precautionary measures granted by the IACHR on 14 July 2018 in favour of the authorities and members of the Siona indigenous’ peoples in the Colombian region of Putumayo pursue a similar aim of avoiding irreparable harm, but go as far as finding an ‘imminent danger of being exterminated’ for the entire group concerned.<sup>59</sup> The Siona community has a population of approximately 2,578 members, distributed across six reserves and councils spread across 194,000 hectares of land at the border area between Colombia and Ecuador.<sup>60</sup> Since 2009, the Colombian Constitutional Court declared the Siona, among others, at risk of physical and cultural extermination due to the internal armed conflict and ordered the adoption of various measures to restore their rights over the ancestral lands.<sup>61</sup> In 2016, an Agreement to End Conflict and Build Peace in Colombia was signed.<sup>62</sup> Nevertheless, armed groups – mostly related with the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC) and paramilitary groups – continue operating within the Siona ancestral lands and this generates multiple risks.

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<sup>58</sup> Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, Austin, November 2018, pp. 89-91.

<sup>59</sup> IACHR, Resolution No. 53/18 of 14 July 2018, Precautionary Measures 395-18.

<sup>60</sup> *Ibid.* 4.

<sup>61</sup> *Ibid.* 5.

<sup>62</sup> *Ibid.* See *Acuerdo sobre cese al fuego y de hostilidades bilateral y definitivo y dejación de armas*, in *Comunicado conjunto* No. 76 of 23 June 2016.

Since the beginning of 2018, the said armed groups subjected the Siona to threats, acts of intimidation, illegal occupation of homes, clashes involving firearms, restrictions on their free movement and attempts to forcibly recruit indigenous youths within armed groups.<sup>63</sup> Moreover, anti-personnel landmines and other explosive devices have allegedly been placed in the area and members of the armed groups (guerrilla and paramilitaries) prevent indigenous peoples from carrying out their traditional activities at certain times, making it impossible for them to hold cultural ceremonies and to obtain subsistence items.<sup>64</sup>

In this case, the IACHR considered the special relationship between the Siona and their land as the fundamental basis for their culture, their spiritual life, and hence their integrity and survival.<sup>65</sup> In this perspective, the lack of access to certain areas of their ancestral territories exposes them to precarious living conditions and makes them especially vulnerable.<sup>66</sup> The IACHR noted that this situation has a special impact on the Siona leaders: not only are they allegedly unable to fulfil their mandate, but they are also exposed to various risks due to their leadership.<sup>67</sup> The IACHR hence considered that the overall situation in the area could lead to the extinction of the Siona peoples, in particular bearing in mind the acts targeting youths (reprisals and forced recruitment) which may erase a generation vital to recreate and transmit values, rules, and culture.<sup>68</sup> The IACHR ordered Colombia to adopt culturally appropriate measures to guarantee the lives and physical integrity of the Siona authorities and some families identified by the petitioners; and to adopt culturally appropriate measures to ensure that the Siona can live safely in their lands and carry out their traditional cultural and subsistence activities, free from threats and reprisals.<sup>69</sup> In this regard, the IACHR recommended the adoption of measures aiming at 'ensuring the safe movement of the Siona throughout their territory' so that they can perform their rituals and have access to vital resources.<sup>70</sup> Similarly, the IACHR requested the state to ensure the removal of anti-personnel landmines and other explosive materials and to adopt measures to prevent the forced recruitment of young Siona. Moreover, the IACHR ordered the

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<sup>63</sup> IACHR, Resolution No. 53/18, para. 3.

<sup>64</sup> *Ibid.* 6-7 and 11-12.

<sup>65</sup> *Ibid.* 24.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* 31.

<sup>68</sup> *Ibid.* 25.

<sup>69</sup> *Ibid.* 36.

<sup>70</sup> *Ibid.*

implementation of special measures to protect the Siona leaders.<sup>71</sup> Also in this case, the IACHR requested the state to agree on the measures to be adopted with the beneficiaries, in keeping with the Siona own decision-making mechanisms and self-government system, and to report on the actions taken to investigate the facts that led to the adoption of these precautionary measures.<sup>72</sup>

### *3.2. Precautionary Measures to Protect the Way of Life and Customs of Indigenous Peoples*

The precautionary measures granted in the case of the Siona show a holistic and progressive approach, as they aim at preventing irreparable harm not only to life and physical integrity of indigenous communities, but also to their way of life and customs. In this regard, also the precautionary measures granted in 2006 in the case of the Sitio El Rosario-Naranjo Mayan community can be recalled.

The request of measures was due to the situation of an archaeological site located in Guatemala, which was a sacred place to practice Mayan rituals and spirituality.<sup>73</sup> In 2005, the Office of National and Cultural Patrimony, at the request of a private company, authorised construction works for a housing project near the areas where the Maya performed religious ceremonies.<sup>74</sup> The Supreme Court of Justice declared that building in El Rosario-Naranjo obstructed the holding of Mayan religious and social celebrations, in violation of the Guatemalan Constitution.<sup>75</sup> Nevertheless, the company continued building, arguing that they had not been notified the decision. In the face of this situation, the IACHR granted precautionary measures, ordering Guatemala to adopt all measures to obtain the immediate suspension of the building work on the site.<sup>76</sup>

The IACHR's decision in this case is especially relevant because the risk of irreparable harm identified does not concern the right to life or physical integrity, but concerns entirely the cultural identity and spirituality of the indigenous communities at stake. Moreover, while the order is directed at a state (i.e. Guatemala), the implementation of the precautionary measures

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Resolution of 14 July 2006 (not divided in paragraphs).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

necessarily implies that the said state takes action vis-à-vis a private company with the aim of preserving the integrity of indigenous peoples' territories.

Similarly, in the precautionary measures granted in 2011 in the case Lof Paichil Antriao Community of the Mapuche, the IACHR requested Argentina to adopt all necessary measures to prevent the alteration or destruction of a sacred place known as Rewe and to ensure that, while pending claims concerning communal property of ancestral lands are adjudicated, members of the Lof Paichil Antriao community who need to access the Rewe to perform their rituals can do so, without police forces or other public or private security or surveillance groups hindering their access or their stay for whatever time they wish.<sup>77</sup>

### *3.3 Precautionary Measures to Grant Access to Medical Care to Indigenous Peoples*

The IACHR has used precautionary measures also to address risks of irreparable harm to the health of members of indigenous communities due to the lack of access to medical care. Notably, on 26 January 2017, the IACHR decided to extend the scope of previously adopted precautionary measures in order to benefit pregnant and nursing women who belong to the Wayúu indigenous community in three Colombian municipalities.<sup>78</sup> In this case, the risk of irreparable harm is determined by the lack of access to medical care and the high levels of malnutrition, in conditions associated with the lack of food and water in the area. The IACHR hence ordered Colombia to take all necessary measures to ensure the availability, accessibility, and quality of health services, with a comprehensive and culturally-sensitive approach, and access to clean drinking water and food in sufficient quantity and quality to meet their nutritional needs in a way that is culturally relevant.<sup>79</sup>

Precautionary measures aiming at preventing irreparable harm to the health of members of indigenous peoples have frequently been granted by the IACHR when the risk was determined by development activities or projects conducted in their lands, including by third parties. For instance,

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<sup>77</sup> IACHR, Precautionary Measures 269/08 of 6 April 2011.

<sup>78</sup> For the precautionary measures initially adopted in this case, see IACHR, Resolution 60/15, 11 December 2015, Precautionary Measures No. 51-15 on Children and Adolescents of the Communities of Uribí, Manaure, Riohacha and Maicao of the Wayúu peoples in the department of Guajira, Colombia.

<sup>79</sup> IACHR, Resolution No. 3/17, 26 January 2017, Precautionary Measures 51/15, para. 27.

in the case Tres Islas Native Community of Madre de Dios, the IACHR deemed that the indigenous community concerned (i.e. 125 families of the Shipibo and Ese'jeja peoples) was at serious risk due to the lack of effective, comprehensive and ongoing medical attention given the presence of mercury in their bodies and in their sources of water and the soil, as a consequence of the mining activities carried out in their territory upon concessions issued by the government.<sup>80</sup> The IACHR ordered Peru to conduct medical tests to determine the level of contamination of the members of the Tres Islas community and to provide them medical attention in line with international standards, ensuring access to culturally adequate food.<sup>81</sup> Furthermore, the IACHR ordered Peru to take all necessary steps to mitigate, reduce, and eliminate the source of risk identified.<sup>82</sup>

In the case of 18 Sipakepense and Mam communities of the Maya People of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, the request of precautionary measures also concerned mining activities and the relevant concessions issued by Guatemala.<sup>83</sup> In November 2003, the Ministry of Energy and Mines granted to two companies (Goldcorp and Montana) a license to mine for gold and silver for 25 years, within an area of 20 square kilometres.<sup>84</sup> The environmental and hydrological impact area of the concession would encompass the ancestral lands of at least 18 Mayan communities.<sup>85</sup> Allegedly, the concession was issued without the prior consultation and complete, free and informed consent of the indigenous communities.<sup>86</sup> Nevertheless, Montana and Goldcorp begun constructing the Marlin I Mine in 2003 and extracting gold and silver in 2005.<sup>87</sup> Mining activities affected indigenous peoples by polluting the Tzalá River and its tributaries that were the only sources of water for consumption and subsistence activities.<sup>88</sup> Due to the mining activities, several water wells and springs dried up and the metals present in the water as a result of the said activities affected the health of the members of the indigenous community.<sup>89</sup>

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<sup>80</sup> IACHR, Resolution No. 38/17, 8 September 2017, Precautionary Measures 113/16, paras. 1, 3, and 5-6.

<sup>81</sup> *Ibid.* 43.

<sup>82</sup> *Ibid.*

<sup>83</sup> IACHR, Precautionary Measures 260/07, 20 May 2010 (not divided in paragraphs).

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*



The IACHR ordered Guatemala to suspend mining in the Marlin I Mine and any other activities connected to the 2003 concession.<sup>90</sup> Moreover, it requested to take all measures to decontaminate, to the extent possible, the water sources used by the indigenous communities, and to ensure them access to water fit for human consumption; to address the health problems of the members of the communities, through a health assistance and care programme, aimed at identifying those who may have been affected by the consequences of the water-pollution and at providing them adequate and culturally-sensitive medical attention; and to prevent any additional environmental contamination.<sup>91</sup> These precautionary measures have a far-reaching scope in that, while addressing a state, they have direct implications for third parties, namely domestic and foreign companies. Moreover, they seem to go beyond a purely preventive function, in as much as they also require Guatemala to adopt measures to mitigate damages already occurred. A similar approach has been taken by the IACHR in the precautionary measures granted in the case Community La Oroya in Peru, where the beneficiaries had already been diagnosed a series of health problems stemming from high levels of air, soil and water pollution caused by metallic particles (lead, cadmium and arsenic) released by the complex of metallurgical companies established there.<sup>92</sup>

### *3.4 Precautionary Measures to Prevent the Abuse of Reserves and Protected Areas*

The IACHR has identified patterns of abuse in the establishment of reserves and protected areas.<sup>93</sup> While the latter are allegedly created with the aim to protect indigenous territories, they are administered by states and often used to arbitrarily restrict the use and enjoyment of natural resources found in those lands by indigenous peoples.<sup>94</sup> However, this seems to be an area where the IACHR and IACtHR are still relatively timid in the use of

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> IACHR, Precautionary Measures 271/05, 3 May 2006 and subsequent extensions.

<sup>93</sup> IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 257-259. See also IACtHR, Case *Kaliña and Lokono v Suriname*, Judgment 25 November 2015, Ser. C No. 309, paras. 70-99 and 161-198; and Case *Xákmok Kásek v Paraguay*, Judgment 24 August 2010, Ser. C No. 214, paras. 80-84 and 155-182.

<sup>94</sup> *Ibid.*

precautionary or provisional measures.

For instance, in in the 2018 case *Leaders of the Perla Amazónica Peasant Reserve Zone*, the Colombian government established an environmental reserve in the Colombian region of Putumayo, in the Amazon, where allegedly 90% of the projects in the country related to hydrocarbon exploration and production takes place.<sup>95</sup> The reserve extends over 22,000 hectares and is inhabited by approximately 800 family groups who mostly live by the Putumayo river and its tributaries, which are their sole sources of drinkable water.<sup>96</sup> In 2009, the government granted to the company AMERISUR Exploración Colombia LTD a license for the exploration and exploitation of hydrocarbon over 4,638 hectares (known as 'Platanillo Block') within the reserve.<sup>97</sup> The concession has subsequently been modified and extended on multiple occasions.<sup>98</sup> The families living in the reserve have lodged several claims seeking the suspension of the said licence, as the exploration and extraction activities are allegedly causing a severe environmental impact.<sup>99</sup> The leaders of the families living in the reserve have been subjected to repeated threats and attacks. Attempts to forcibly recruit youths in the armed groups operating in the area have been registered.<sup>100</sup>

The IACHR granted the measures, ordering Colombia to take all the necessary measures to, among others, protect the community leaders.<sup>101</sup> In its resolution, the IACHR does not address in any way the potential abuse of the protected area, nor does it request any specific measure to suspend the exploration and extraction activities that are allegedly polluting the area and generating a risk of irreparable harm to the environment in general and to the life and physical integrity of the inhabitants of the reserve in particular.

A similar situation concerns the Ngöbe, Naso, and Bribri indigenous communities in the Bocas del Toro Region in Panama. Their ancestral territories were declared protected areas and, soon thereafter, the state granted concessions to large power plants, road constructions, and a major hydroelectric project, which implied the flooding of approximately 250 hectares surrounding a river in the ancestral lands of the indigenous peoples

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<sup>95</sup> IACHR, Resolution No. 87/16, 3 December 2018, *Precautionary Measures 204-17*, para. 4.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* 5.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* 6.

<sup>100</sup> *Ibid.* 8.

<sup>101</sup> *Ibid.* 36.

concerned.<sup>102</sup> On 18 June 2009, the IACHR granted precautionary measures for members of the Ngöbe indigenous communities who live along the Changuinola river, in relation to the approval of a 20-year concession for a company to build hydroelectric dams along the river in a 6,215-hectare area within the Palo Seco protected forest.<sup>103</sup> The construction of the dam Chan-75 commenced in 2008 and implied flooding the area of the ancestral lands in which four indigenous communities (with a population of approximately 1,000 people) live.<sup>104</sup> In this occasion, the IACHR requested Panama to adopt the necessary measures to avoid irreparable harm to the right to property and security of the Ngöbe, but it did not order the suspension of the works.<sup>105</sup> Notably, in January 2010, the IACHR submitted a request for provisional measures on this case to the IACtHR and it asked the Court to require Panama to take all measures to, among others,

[p]rotect the life and humane treatment of the members of the Ngöbe indigenous communities ... 2. *[s]uspend the construction works and other activities related to the concession granted to AES-Changuinola along the Changuinola River in the province of Bocas del Toro, until the organs of the Inter-American System of Human Rights reach a final decision on the matter raised in this case; ... 4. [p]rotect the special relationship of the Ngöbe indigenous communities ... with their ancestral territory, especially protect the use and enjoyment of collective property and the existing natural resources, and adopt measures intended to avoid immediate and irreparable damages resulting from the activities of third parties entering the community's territory or exploiting the existing natural resources ...*<sup>106</sup>

The IACtHR rejected the request of the IACHR, holding that the latter failed to provide a minimum degree of detail to allow to assess *prima facie* a situation of extreme gravity and urgency, in particular with regard to the problems that would result from the deforestation and the flood that would affect the communities and the contamination that would result from the construction works.<sup>107</sup> However, in other cases involving indigenous peoples whose ancestral lands were threatened by development projects

<sup>102</sup> IACHR, Precautionary Measures 56/08, 18 June 2009 (not divided into paragraphs)

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> IACtHR, Order 28 May 2010 on the Request for Provisional Measures in the case *Four Ngöbe indigenous communities and their members v Panama*, para.1 (emphasis added).

<sup>107</sup> *Ibid.* 11 and 15.

(namely oil exploration and extraction), the IACtHR ordered very detailed provisional measures, including the suspension of the activities conducted by companies.<sup>108</sup>

### *3.5. Precautionary Measures to Prevent Forced Evictions of Indigenous Peoples*

On 30 November 2009, the IACHR granted precautionary measures in a somewhat related case, in order to protect the life and physical integrity of Naso People leaders and to prevent the continuation of collective forced evictions and removal of dwellings.<sup>109</sup> In March 2009, police and employees of the Ganadera Bocas company arrived at the Naso community to execute an eviction order.<sup>110</sup> In this context, episodes of violence were registered (including the use of tear gas bombs, the firing of gunshots in the air and the destruction of 30 houses, of the Naso cultural centre, of the school, of the church, and of other community facilities); as well as the use of roadblocks to restrict the free movement of community members (which eventually also impeded the delivery of food and water); and the arbitrary arrest of leaders of the Naso community.<sup>111</sup> The IACHR requested Panama to take the necessary measures to prevent the continuation of collective forced evictions and removal of dwellings, and to provide emergency health care and housing to the members of the community subjected to forced eviction and guarantee their access and free movement across the ancestral lands.<sup>112</sup>

It would therefore seem that, while the IACHR issues precautionary measures aimed at preventing forced evictions of members of indigenous communities from their ancestral lands,<sup>113</sup> it gradually became more cautious in requesting the suspension of construction activities or other development

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<sup>108</sup> See e.g. the preventive measures ordered by the IACtHR in the case *Kichwa Indigenous Peoples of Sarayaku v Ecuador* 6 July 2004, 17 June 2005, and 4 February 2010.

<sup>109</sup> IACHR, Precautionary Measures 118/09, 30 November 2009 (not divided into paragraphs).

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> For other precautionary measures also directed at ending forced evictions of indigenous peoples in connection with the construction of hydroelectric plants and the concession of ancestral lands for agricultural exploitation from third parties, see *Q'echi Indigenous Communities in the Municipality of Panzós, Guatemala*, Precautionary Measures 121-11, 20 June 2011, 14

projects, especially when dams and hydroelectric plants are involved.<sup>114</sup> In fact, a turning point in the jurisprudence of the IACHR on precautionary measures in general, and concerning indigenous peoples in particular, is represented by a case involving the construction of a hydroelectric plant which will be discussed in the next section.

### 3.6. *Did Precautionary Measures Collide with Their Limits?*

On 1 April 2011, the IACHR granted precautionary measures in favour of various indigenous peoples – including some communities in voluntary isolation – in the Xingu river basin, in the region of Pará, Brazil.<sup>115</sup> The Brazilian government had approved the construction of a hydroelectric power plant (Belo Monte).<sup>116</sup> The project entailed the deviation of 80% of the river's flow, with the subsequent flooding of the ancestral lands of various indigenous communities.<sup>117</sup> The construction of the dam would allegedly require the displacement of more than 20,000 indigenous people: no prior environmental and social impact-assessment had been conducted and not all the communities involved gave their prior, free, and informed consent.<sup>118</sup>

The IACHR requested Brazil to 'immediately suspend the licensing process for the Belo Monte Hydroelectric Plant and stop any construction work until certain minimum conditions are met'.<sup>119</sup> Furthermore, the IACHR required Brazil to 1) conduct consultation processes, in fulfilment of its international obligations – meaning prior consultations that are free, informed, in good faith, culturally appropriate, and with the aim of reaching an agreement – in relation to each of the affected indigenous communities; 2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to a project's social and environmental impact assessment, in an accessible format, including translation into the respective indigenous languages; and 3) adopt measures to protect the life and physical integrity of the members of the indigenous communities in voluntary isolation in the Xingu Basin, and to prevent the

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<sup>114</sup> In this sense, see Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', 187.

<sup>115</sup> IACHR, Precautionary Measures 382/10 of 1 April 2011 (not divided into paragraphs).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

spread of diseases and epidemics among the indigenous communities being granted the precautionary measures as a consequence of the construction of the Belo Monte hydropower plant.<sup>120</sup> The IACHR specified that this includes any diseases derived from the massive influx of people into the region as well as the exacerbation of transmission vectors of water-related diseases such as malaria.<sup>121</sup>

These precautionary measures collected and implemented all the principles established in the Inter-American jurisprudence on indigenous peoples and their right to lands and natural resources and met the preventive function of this procedural legal tool. However, their enforcement would have produced serious economic repercussions and would allegedly encroach on the right to development of the rest of the Brazilian society. The unprecedented reaction of the Brazilian government to these precautionary measures shows the delicate nature of the issue at stake and, ultimately, the fragility of the system. Not only did Brazil openly declare its intention not to implement the measures requested by the IACHR, but it also withdrew its ambassador to the Organization of the American States (OAS), as well as its candidate for the elections of the new members of the IACHR and threatened with not paying its annual fee (approximately 800,000 US\$) to the OAS until 2012.<sup>122</sup>

The effect was immediate: on 29 July 2011, the IACHR revised and modified the previously granted measures, leaving out any reference to the suspension of the licensing process for the Belo Monte Hydroelectric Plant and the immediate interruption of construction works.<sup>123</sup> It thus required Brazil to 1) adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities, including effective actions to implement and execute the legal/formal measures that already exist, as well as to design and implement specific measures to mitigate the effects the construction of the Belo Monte dam will have on the territory and life of these communities in isolation; 2) adopt measures to protect the health of the members of the Xingu Basin indigenous communities affected by the Belo Monte project, including (a) accelerating

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<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> Interview to Mr. Francisco Eriguren conducted by the Human Rights Clinic of the University of Texas on 25 October 2017 and quoted in Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 97.

<sup>123</sup> *Ibid.*

the finalisation and implementation of the Integrated Programme on Indigenous Health for the Belo Monte region, and (b) designing and effectively implementing the recently stated plans and programmes ordered by domestic authorities; and 3) guarantee that the processes still pending to regularise the ancestral lands of the Xingu Basin indigenous peoples will be finalised soon, and adopt effective measures to protect those ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources.<sup>124</sup>

Moreover, the IACHR decided that the debate between the parties on prior consultation and informed consent with regard to the Belo Monte project had turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures.<sup>125</sup> The modified version of the precautionary measures represents a sharp change in the Inter-American jurisprudence and arguably diminished the preventive function of this procedural legal tool. The former chairperson of the IACHR acknowledged that after the Belo Monte precedent, the IACHR members self-restricted themselves in the adoption of precautionary measures.<sup>126</sup>

In 2011, Brazil pushed for a reform of the IACHR, which led to a modification of the same in 2013. Both scholars and practitioners have criticized the reform process and its outcome, as the changes allegedly weakened the system, among others, with regard to precautionary measures.<sup>127</sup> In the aftermath of the Belo Monte case, the IACHR has not requested other measures explicitly directed at ensuring the protection of indigenous lands and natural resources. It has also refrained from demanding the suspension of any development project, be it related to extraction or excavation activities or hydroelectric dams.<sup>128</sup>

An example is the case of 595 members of the Otomí-Mexica indigenous community of San Francisco Xochicuautla, in Mexico.<sup>129</sup> In 2006, the ancestral lands of this community were declared natural reserve (*Sanctuario*

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<sup>124</sup> IACHR, Precautionary Measures 382/10 as amended (not divided into paragraphs).

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> See, among others, Dina Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5 *Notre Dame International Law and Comparative Law Journal* 1; and Centro por la Justicia y el Derecho Internacional, *Apuntes sobre la reforma al reglamento de la Comisión Interamericana de Derechos Humanos*, Buenos Aires, 2013.

<sup>128</sup> Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 108.

<sup>129</sup> IACHR, Resolution No. 32/16 of 11 May 2016, Precautionary Measures 277-13.

*del agua*) by the government.<sup>130</sup> However, the construction of the Toluca-Naucalpan highway includes a section that cuts across the reserve, where the Otomí-Mexica conduct hunting, gathering, and fishing activities.<sup>131</sup> Allegedly, this project was approved without prior consultation of the members of the community and followed by an expropriation decree and the issuing of a 30-year concession without the community's knowledge.<sup>132</sup> In 2015, the documentation concerning the concession's process was declared confidential.<sup>133</sup> The attempts of the indigenous community to obtain the suspension of the construction of the highway were fruitless and the protests of the members of the community were violently repressed.<sup>134</sup>

The IACHR acknowledged the existence of a risk of irreparable damage and granted precautionary measures, requesting Mexico to adopt the necessary measures to protect the life and personal integrity of some members of the Otomí-Mexica indigenous community; to reach an agreement with the beneficiaries on the measures to be adopted; and to inform the IACHR on the actions taken to investigate the facts that led to the adoption of the measures, so as to avoid recurrence.<sup>135</sup> The IACHR did not request to suspend the construction of the highway nor did it mention any specific measure to protect the ancestral lands of the Otomí-Mexica. The construction works are ongoing and in October 2018 the concession was extended from 30 to 60 years.<sup>136</sup>

A partial exception in the recent jurisprudence of the IACHR is that of the measures granted to the Ayoreo Totobiegosode people in voluntary isolation in the Chaco region, in Paraguay.<sup>137</sup> In this case, a series of third persons' entries to the ancestral lands of these communities were reported in connection with deforestation activities.<sup>138</sup> Bearing in mind the devastating consequences that the presence of third parties may have on indigenous peoples in voluntary isolation, the IACHR required Paraguay to take the necessary actions, among others, to avoid deforestation in the ancestral lands of the Ayoreo Totobiegosode people; to create a mechanism to protect and prevent third parties from entering their territory; and to establish

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<sup>130</sup> *Ibid.* 3.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.* 12-13.

<sup>135</sup> *Ibid.* 19.

<sup>136</sup> See <<https://www.proceso.com.mx/555562/gobierno-de-edomex-extiende-a-60-anos-concesion-de-carretera-toluca-naucalpan-a-hinojosa-cantu>>.

<sup>137</sup> IACHR, Resolution No. 4/16 of 3 February 2016, Precautionary Measures 54-13.

<sup>138</sup> *Ibid.* 3.



special protocols to ensure protection from sighting or unwanted contact.<sup>139</sup> Going beyond the request of more generic measures, the IACHR shows that it can in fact use precautionary measures so as to concretely guarantee the protection of indigenous peoples' lands and natural resources. However, the wording chosen in the case of the Ayoreo Totobiegosode is somewhat timid compared to that of the first precautionary measures granted in the Belo Monte case and suggests that when certain projects or development activities are at stake, the Inter-American human rights mechanisms become less incisive in preserving the cultural identity of indigenous peoples through the defence of their lands and natural resources.

In the case of Belo Monte, since 2011, the construction of the dam has been completed and the reservoirs are being filled.<sup>140</sup> Natural resources in the area have been severely affected and more than 40,000 indigenous people were subjected to displacement. Additionally, the government of the state of Pará issued a licence for a gold mining project in close proximity to the Belo Monte dam, without prior consultation of the indigenous communities still living in the area.<sup>141</sup> The IACHR has not renewed or revised its precautionary measures since July 2011 nor has it ever considered the desirability to invest the IACtHR with the case, through a request of provisional measures. Arguably, in this instance the IACHR relinquished its preventive mandate and will look into the merits of the case, assessing whether there has been any breach of the state's international obligations, trying to quantify and redress the damage through measures of reparation and deciding whether the case deserves being submitted to the contentious competence of the IACtHR. However, it is hard to see how any measure of reparation could be adequate when the damage is, by definition, irreversible or irreparable, such as *permanent* flooding, desertification, deforestation or contamination.

#### 4. *The Challenge of Designing Adequate Measures of Reparation*

The Inter-American jurisprudence on measures of reparation in

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<sup>139</sup> *Ibid.* 41.

<sup>140</sup> Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 109. See also Special Rapporteur on the Rights of Indigenous Peoples, *Report on the Mission to Brazil*, UN Doc. A/HRC/33/42/Add.1, 8 August 2016, paras. 36-46; and IACHR, *Preliminary Report on the Mission to Brazil of November 2018*, available at <<http://www.oas.org/es/cidh/prensa/comunicados/2018/238OPeng.pdf>>, p. 9.

<sup>141</sup> *Ibid.*

general has been praised as being highly innovative.<sup>142</sup> In cases concerning indigenous peoples' claims, the IACtHR has been referred to as 'pioneering' and 'world leader', in the sense that it is a source of inspiration for domestic courts, as well as for other international human rights mechanisms.<sup>143</sup> The IACHR recommends measures of reparation in its reports on the merits of individual petitions and gives a comprehensive interpretation of the notion of measures of reparation.

However, this section of the chapter focuses on the measures ordered in its judgments by the IACtHR pursuant to Art. 63, para. 1, of the ACHR, which sets forth that 'if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedies and that fair compensation be paid to the injured party'.

The choice to focus on the jurisprudence of the IACtHR is due to the fact that, being the Court the last instance within the Inter-American system, the assessment of the level of implementation of the measures at stake is more conclusive.

The design of adequate measures of reparation in cases involving violations of indigenous peoples' rights to land and natural resources poses particular challenges.<sup>144</sup> On the one hand, such measures must be conceived in a manner that considers the ways of life and cultural identity of the peoples concerned, thus also addressing the collective nature of the damages inflicted. On the other hand, these measures may have to redress damages that, by their own nature, are irreparable, with the risk of being doomed to provide only some limited mitigation.

The IACtHR is well aware of the need to reflect the cultural specificity of indigenous peoples when designing measures of reparation in their favour and it affirmed that it considers an important component of the

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<sup>142</sup> See, among others, Thomas Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) *Stanford Journal of International Law* 279.

<sup>143</sup> Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2015) 25 *Duke Journal of Comparative and International Law* 3.

<sup>144</sup> Art. XXXIII of the 2016 American Declaration on the Rights of Indigenous Peoples expressly establishes that 'indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right'.

individual reparation the redress granted 'to the members of the community as a whole'.<sup>145</sup> The recognition of the collective harm<sup>146</sup> in cases involving indigenous peoples led the IACtHR to choose measures meant to benefit the community as a whole, such as the establishment of development funds and community programmes. However, it has been held that the IACtHR does not always sufficiently account for the reality of indigenous petitioners and sometimes fails to have a truly victim-centred and restorative approach.<sup>147</sup>

In general, in its judgments the IACtHR applies a holistic interpretation of the notion of reparation and orders measures aiming at granting compensation, restitution, rehabilitation, satisfaction (with a view at restoring victims' dignity and reputation), and guarantees of non-repetition.<sup>148</sup> In particular, in cases where it found violations of the indigenous peoples' right to lands and natural resources, the IACtHR ordered the respondent states:

- a) the restitution of communal lands and the provision of medical, nutritional, educational and other basic services while the communities concerned remain landless;<sup>149</sup>
- b) the adoption of legislative, administrative and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of communal lands in accordance with the customary law, values, customs and mores of the indigenous community concerned;<sup>150</sup>
- c) the carrying out of the delimitation, demarcation and titling of indigenous peoples' ancestral lands, abstaining from any act that may affect the existence, value, use or enjoyment of their property;<sup>151</sup>

<sup>145</sup> IACtHR, Case *Plan de Sánchez Massacre v Guatemala*, Judgment of 19 November 2004, Ser. C No. 116, para. 86.

<sup>146</sup> On the notion of 'collective victims', see Principle 8 of the United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly through Resolution 60/147 of 16 December 2005 (UN Principles on Reparations).

<sup>147</sup> Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 64.

<sup>148</sup> The IACtHR interprets these notions in line with the UN Principles on Reparations. In particular, see Principles 19-23.

<sup>149</sup> IACtHR, Case *Yakye Axa*, paras. 211-227; Case *Sawhoyamaya*, paras. 229-236; and Case *Xákmok Kásek*, paras. 281-306.

<sup>150</sup> IACtHR, Case *Saramaka*, para. 194; and Case *Kaliña and Lokono*, para. 305 (b).

<sup>151</sup> IACtHR, Case *Mayagna (Sumo) Awas Tigni*, para. 164; Case *Kaliña and Lokono*, para.

- d) the legal recognition of the collective juridical personality corresponding to an indigenous community in order to ensure the exercise and full enjoyment of the right to property of a communal nature;<sup>152</sup>
- e) the adoption of health care programmes;<sup>153</sup>
- f) the adoption of cultural promotion initiatives or the investment of a certain amount of money, through the setting up of communal funds (ranging from 50,000 to 1,500,000 US\$), in ‘works or services of collective nature for the benefit of the community and by common agreement with the latter’, including education, food security, resource management, restoring forests, housing and agricultural projects;<sup>154</sup>
- g) the issuing of public apologies and the carrying out of ceremonies to acknowledge the state’s international responsibility;<sup>155</sup>
- h) the adoption of legislative reforms, in particular to ensure that decisions concerning indigenous peoples’ ancestral lands are taken through prior, effective and fully informed consultations;<sup>156</sup> and
- i) the training of government officials on indigenous rights.’<sup>157</sup>

The IACtHR found that:

‘in the case of the lands claimed that are in the hands of

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279 (b); Case *Garifuna Community Triunfo de la Cruz*, paras. 259-260; and Case *Kuna de Madugandí and Emberá de Bayano*, para. 232.

<sup>152</sup> IACtHR, Case *Kaliña and Lokono*, para. 279 (a); Case *Kaliña and Lokono*, para. 305 (a).

<sup>153</sup> IACtHR, Case *Yakye Axa*, para. 205; Case *Sawhoyamaxa*, para. 146; and Case *Xákmok Kásek*, para. 323.

<sup>154</sup> IACtHR, Case *Mayagna (Sumo) Awas Tigni*, para. 167; Case *Yakye Axa*, para. 205; Case *Sawhoyamaxa*, para. 146; Case *Xákmok Kásek*, para. 323; Case *Garifuna Community Triunfo de la Cruz*, para. 298; Case *Garifuna de Punta Piedra*, para. 335; Case *Kaliña and Lokono*, para. 296; and Case *Saramaka*, para. 201.

<sup>155</sup> IACtHR, Case *Garifuna Community Triunfo de la Cruz*, para. 274; Case *Kuna de Madugandí and Emberá de Bayano*, para. 219; and Case *Kichwa Indigenous Peoples of Sarayaku*, para. 305.

<sup>156</sup> IACtHR, Case *Saramaka*, para. 194; and Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 299-301.

<sup>157</sup> IACtHR, Case *Kaliña and Lokono*, para. 309; and Case *Kichwa Indigenous Peoples of Sarayaku*, para. 302.

non-indigenous or non-tribal third parties, whether natural or legal persons, the state must, through its competent authorities, decide whether to purchase or expropriate the territory in favour of the indigenous peoples, by payment of compensation to those affected as established by domestic law. When deciding this matter, the state authorities should ... bear in mind, in particular, the special relationship that the indigenous peoples have with their lands in order to preserve their culture and ensure their survival. The decision taken by the domestic authorities should *never be based exclusively on the fact that these lands are in private hands or that they are being exploited rationally*.<sup>158</sup>

The IACtHR clarified that if the return of ancestral lands is impossible, exceptionally, and for objective and duly justified reasons, the state must grant collective property titles to the indigenous people concerned on adjoining alternative lands of the same or better quality and size, chosen in agreement with the indigenous community.<sup>159</sup> Mindful of the existing tension between the defence of the right to land and natural resources and development activities and projects, the IACtHR also requested the states concerned to draw up, by mutual agreement with the indigenous peoples in the area, as well as with private third parties, 'rules for peaceful and harmonious coexistence in the territory in question that respect the uses and customs of the ... peoples, and that guarantee their relationship with their traditional areas'.<sup>160</sup>

In cases where the IACtHR found that the indigenous peoples' ancestral lands were illegally occupied by third parties, it ordered the respondent state to 'remove any obstacle or interference in the territory concerned' within a given fixed deadline (e.g. 18 months)<sup>161</sup> and, in the presence of environmental damages, to clean-up the concerned lands.<sup>162</sup> In these instances, the IACtHR additionally ordered the state to take all necessary measures to ensure that the indigenous peoples concerned enjoy

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<sup>158</sup> IACtHR, Case *Kaliña and Lokono*, para. 280 (emphasis added); Case *Garífuna de Punta Piedra*, para. 324; Case *Garífuna Community Triunfo de la Cruz*, para. 261; and Case *Xákmok Kásek*, para. 284.

<sup>159</sup> IACtHR, Case *Xucuru Indigenous Peoples*, para. 196; Case *Garífuna Community Triunfo de la Cruz*, para. 262; Case *Garífuna de Punta Piedra*, para. 325; and Case *Kaliña and Lokono*, para. 281.

<sup>160</sup> IACtHR, Case *Kaliña and Lokono*, para. 283; Case *Garífuna Community Triunfo de la Cruz*, para. 263; and Case *Garífuna de Punta Piedra*, para. 326.

<sup>161</sup> IACtHR, Case *Xucuru Indigenous Peoples*, para. 194 (unofficial translation by the author).

<sup>162</sup> IACtHR, Case *Garífuna de Punta Piedra*, para. 323.

‘immediately and effectively’<sup>163</sup> their right to collective property, preventing ‘any intrusion, interference or involvement by third parties or state agents that may undermine the existence, value, use or enjoyment of their territories’.<sup>164</sup> These orders evidently serve both remedial and preventive purposes.

The IACtHR has paid attention to certain characteristics of the indigenous peoples concerned when designing some of the above-mentioned measures. For instance, when ordering the issuing of apologies to indigenous peoples in the context of public ceremonies or the publication and diffusion of relevant excerpts of its judgments, the IACtHR requested the respondent states to use, besides the national language, that of the community at stake, and to take into account the traditions and customs of the members of the affected communities.<sup>165</sup> In some cases, bearing in mind the broad use of radio-transmissions among certain indigenous communities, besides the usual publications, the IACtHR ordered the broadcasting of a summary of the contents of its Judgments.<sup>166</sup> These details suggest that the IACtHR took into account the peculiarities of the victims, as well as their needs and expectations. However, it has been pointed out that sometimes this attitude may turn into ‘paternalism’,<sup>167</sup> especially when suggesting to the communities concerned how they should use the development funds set up pursuant to the orders of the IACtHR.

In cases where the state created natural reserves in indigenous peoples’ ancestral lands, subsequently jeopardising their right to land and natural resources, the IACtHR ordered the respondent to adopt the sufficient and necessary measures to guarantee, by appropriate mechanisms, the indigenous community’s ‘effective access, use and participation in them, in order to ensure the compatibility of environmental protection and the rights of the indigenous peoples, ... so that maintaining the reserves does not constitute an excessive obstacle to their rights. Thus, any restriction of their rights must comply with the requirements of legality, necessity and

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<sup>163</sup> IACtHR, *Case Xucuru Indigenous Peoples*, para. 193 (unofficial translation by the author).

<sup>164</sup> *Ibid.* (unofficial translation by the author). In the same sense, see IACtHR, *Case Kaliña and Lokono*, para. 282; *Case Garifuna Community Triunfo de la Cruz*, para. 264; *Case Garifuna de Punta Piedra*, para. 324 (b); and *Case Mayagna (Sumo) Awas Tigni*, para. 153.2.

<sup>165</sup> IACtHR, *Case Garifuna Community Triunfo de la Cruz*, para. 274; *Caso Garifuna de Punta Piedra*, para. 338; *Case Kuna de Madugandi and Emberá de Bayano*, para. 219.

<sup>166</sup> IACtHR, *Case Kaliña and Lokono*, para. 313; *Case Garifuna de Punta Piedra*, para. 339; *Case Garifuna Community Triunfo de la Cruz*, para. 272; *Case Kuna de Madugandi and Emberá de Bayano*, para. 217; *Case Yakyé Axa*, para. 277; and *Case Kichwa Indigenous Peoples of Sarayaku*, para. 308.

<sup>167</sup> Antkowiak, ‘A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples’, 36.

proportionality, and the achievement of a legitimate purpose'.<sup>168</sup>

In cases where the illegal and arbitrary exploitation (through activities such as logging, mining, and oil exploration and extraction) of the indigenous peoples' ancestral lands and natural resources had already produced significant environmental damages – some times of an irreversible nature (e.g. destruction of forests) – the IACtHR ordered measures directed at mitigating the consequences and at 'rehabilitating the territory', such as the 'clean-up of the territory', to be conducted in good faith, including in indigenous peoples' ancestral territories occupied by third parties.<sup>169</sup> For instance, in a case where the ancestral lands had been damaged owing to bauxite mining operations, the IACtHR ordered the state, within three years, to

- 'a) implement the sufficient and necessary actions to rehabilitate the area affected. To this end, an action plan for the effective rehabilitation of the area must be drawn up, in conjunction with the company that has been in charge of this rehabilitation, and with the participation of a representative of the Kaliña and Lokono peoples. This plan must include: (i) a complete updated evaluation of the area affected, by an assessment prepared by independent experts; (ii) a timetable for the work; (iii) the necessary measures to remediate any adverse effects of the mining operations, and (iv) measures to reforest the areas that are still affected by those operations, all of this taking into account the opinion of the peoples that have been affected, and
- b) Establish the necessary mechanisms to monitor and supervise the execution of the rehabilitation by the company. To this end, the state must appoint an expert in such matters in order to ensure total compliance with the rehabilitation of the area.'<sup>170</sup>

Similarly, in a case where indigenous peoples' ancestral territories had been deeply affected by exploration activities conducted to exploit crude oil, the IACtHR ordered the respondent state to remove the explosive left throughout the territory and undertake several other clean-up and reforestation measures.<sup>171</sup>

Criticism has been expressed vis-à-vis the amounts of money granted by the IACtHR as compensation for pecuniary and non-pecuniary damages in cases involving violations of the right to lands and natural resources

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<sup>168</sup> IACtHR, Case *Kaliña and Lokono*, para. 286.

<sup>169</sup> IACtHR, Case *Xucuru Indigenous Peoples*, para. 194.

<sup>170</sup> IACtHR, Case *Kaliña and Lokono*, para. 290.

<sup>171</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 293-295.

of indigenous peoples, holding that the sums awarded and the criteria used to calculate them 'frequently disappoint'.<sup>172</sup> An example in this regard is the Judgment issued in the case *Saramaka v Suriname*, where the IACtHR granted 75,000 US\$ to the indigenous community concerned as compensation for material damages.<sup>173</sup> In this case, the IACtHR determined that, due to the states' logging and mining concessions within the ancestral Saramaka lands a considerable quantity of valuable timber had been extracted without any compensation for the community, who was left with a 'legacy of environmental destruction, despoiled substance resources and spiritual and social problems'.<sup>174</sup> The market value of the timber taken from ancestral lands amounted to over ten millions US\$.<sup>175</sup> Yet, the IACtHR rejected the petitioners' requests in this regard and granted 75,000 US\$ 'based on equitable grounds'.<sup>176</sup> Additionally, 600,000 US\$ were awarded for immaterial damages.<sup>177</sup> Similarly, in an already mentioned case where the oil exploration and exploitation concessions issued by the state caused severe environmental damage in the ancestral lands of the Kichwa Indigenous Peoples of Sarayaku, including the destruction of forests, the IACtHR granted 90,000 US\$ for material damages and 1,250,000 US\$ for the suffering caused to the people and their cultural identity.<sup>178</sup> It has been observed that 'by undercompensating indigenous petitioners in these ways, the Court fails to recognise them as full-fledged rights bearers'.<sup>179</sup> This assumption seems somewhat confirmed by the fact that in a case concerning the state's expropriation of the land of a private individual, the IACtHR awarded 18,705,000 US\$ as just compensation for material damages, plus 9,435,757,80 US\$ as interests.<sup>180</sup> Here, a private person's land weights way more than indigenous peoples' ancestral territories. The manner in which the principle of equity has been applied by the IACtHR to determine material damages in cases involving indigenous peoples does not seem to duly take into account the formidable difficulties they face to

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<sup>172</sup> Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 3.

<sup>173</sup> IACtHR, Case *Saramaka*, para. 199.

<sup>174</sup> *Ibid.* 153.

<sup>175</sup> *Ibid.* expert testimony of Dr. Robert Goodland, para. 34.

<sup>176</sup> *Ibid.* 199.

<sup>177</sup> *Ibid.* 201.

<sup>178</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 317 and 323.

<sup>179</sup> Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 3.

<sup>180</sup> IACtHR, Case *Salvador Chiriboga v Ecuador*, Judgment 03 March 2011, Ser. C No. 222, paras. 84 and 101.



produce documents attesting the harm suffered, including environmental and cultural damage. This is often because they lack titles in the first place, as part of the abuses and injustices they have been subjected to.

An aspect where the IACtHR's jurisprudence concerning measures of reparation is evolving over the time is that of benefit-sharing.<sup>181</sup> The Inter-American human rights mechanisms have affirmed that development projects must share a reasonable benefit with the indigenous communities concerned. However, in several judgments, the IACtHR did not include among the measures of reparation the payment of a reasonable percentage of profits to the indigenous peoples affected, most likely due to the difficulties encountered by the petitioners in proving the traditional use of the resources at stake. In its judgment on the *Kaliña Lokono* case, while ordering to Suriname the establishment of a development fund as a measure of reparation for the harm inflicted to the indigenous communities concerned, the IACtHR added that such fund 'is in addition to any other present or future benefit that might correspond to the Kaliña and Lokono peoples as a result of the state's general development obligations'.<sup>182</sup> The IACtHR did not quantify such benefits nor provide criteria to do so in the future, but this should flow as a natural consequence and is an area where further jurisprudential progress can be envisaged.

Compared to its awards on material damages, the IACtHR has been more generous in the sums to be allocated by states for development funds (the highest amount granted so far for such purpose being 1,500,000 US\$). However, the IACtHR's jurisprudence on the matter evolved over the years.<sup>183</sup> In the first Judgments where it ordered to set up the said development funds, the IACtHR itself established the aims for which the fund should be used (e.g. educational or housing projects) and requested the state to set up a 3-member 'implementation committee' to decide how to allocate the budget.<sup>184</sup> In its Judgment on the *Kichwa Indigenous Peoples of Sarayaku* case, the IACtHR eventually abandoned the implementation committee's strategy and declared that the fund could be invested as

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<sup>181</sup> María Augusta León Moreta, 'Analysing Benefit Sharing Scheme as Compensation for Damages Caused by Resource Extraction in Indigenous Territory' (2019) 8 *International Human Rights Law Review* 89; Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 *EJIL* 353.

<sup>182</sup> IACtHR, Case *Kaliña Lokono*, para. 295. In the same sense, see IACtHR, Case *Xucuru*, para. 211.

<sup>183</sup> For a comprehensive summary of this issue, see the Concurring Opinion of Judge H.A. Sierra Porto attached to the IACtHR's Judgment on the Case *Garífuna Community Triunfo de la Cruz*, paras. 36-63.

<sup>184</sup> See, among others, IACtHR, Case *Moiwana*, para. 215.

indigenous peoples see fit, ‘in accordance with [their] own-decision making mechanisms and institutions’,<sup>185</sup> limiting itself to provide suggestions as to how the fund could be used (e.g. educational, cultural, food security, health care, and eco-tourism development projects). Eventually, in a Judgment rendered in 2017, the IACtHR ordered the establishment of a development fund, indicating that ‘the destination of said fund must be agreed with the members of the Xucuru indigenous people for any purpose that they may deem appropriate for the benefit of the indigenous land and its members’.<sup>186</sup> This phrasing appears to move away from a rather paternalistic approach and eventually empower the indigenous peoples affected to autonomously determine what really matters to them. After all, they arguably are those better placed to do so.

## 5. Conclusions

*You do not know the problems of us indigenous peoples. We do not know each other, but the Earth is one and the same and we live on it and It knows us all. From It we live and through It we survive. ... You do not know the indigenous struggles or the indigenous problems, but if we begin to study our problems, each one will begin to know the problem of each other, since the world, the Earth, the land is one and for her no one is alien.*<sup>187</sup>

The jurisprudence of the IACHR and IACtHR with regard to indigenous peoples’ right to lands and natural resources is comprehensive and of a progressive nature. This is certainly important in the face of the systematic abuses indigenous peoples have historically been subjected to throughout the region. However, despite the recognition by the Inter-American human rights bodies of indigenous peoples’ fundamental rights and the clear spelling out of the corresponding states’ international obligations, gross violations continue being perpetrated and their survival is threatened by, among others, development projects.

Instead of upholding the Inter-American jurisprudence and genuinely embracing the criteria set forth therein, states are increasingly showing

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<sup>185</sup> IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 323.

<sup>186</sup> IACtHR, Case *Xucuru*, para. 212 (unofficial translation by the author).

<sup>187</sup> Ángel María Torres., ‘Carta de un dirigente arhuaco’, in Enrique Sánchez Gutiérrez and Hernán Molina-Echeverri (eds), *Documentos para la historia del movimiento indígena colombiano contemporáneo* (Ministerio de Cultura 2010) 79 (unofficial translation by the author).

non-compliance and, in some cases, even open turn against the system—, claiming that such jurisprudence would be too generous towards indigenous peoples. The consistent delays in the enforcement of the IACtHR's orders and the disregard of precautionary and provisional measures granted are a concrete sample of this attitude.

Against this background, cases concerning indigenous peoples' lands and natural resources will likely continue being lodged before the Inter-American human rights mechanisms. It will be crucial for the IACHR and IACtHR to ensure that, while business and investment are encouraged, they are carried out in a manner that enhances and does not undermine human rights. In this regard, a truly victim-centred approach should be embraced. Indigenous peoples are those who know and understand their own reality. Listening to them and understanding their needs, expectations and priorities is the necessary first step to adequately redress injustices, designing meaningful and adequate remedies and, even better, to prevent abuses from happening. The latter aim can be pursued through precautionary and provisional measures that are conceived to avoid the infringement of indigenous peoples' right to lands and natural resources and may require the suspension of certain development projects or activities. This should not be seen as an unsolvable dichotomy, as long as the notion of development is revisited and reinterpreted, going beyond the purely economic meaning and rather encompassing the human dimension. There can be true development only if it benefits everyone and it is not pursued through activities and projects that enrich a few at the expenses of the planet and whose consequences ultimately affect everyone. After all, the Earth is one and the same for all of us. We all live on it and no one is alien to it.

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Carlo Focarelli

*Indigenous Peoples' Rights in International Law:  
The Ogiek Decision by the African Court  
of Human and Peoples' Rights*

On the 26 May 2017, the African Court on Human and Peoples' Rights (ACtHPR) delivered its first judgement on a case concerning indigenous peoples' rights. The judgment has been extensively welcomed as 'historic', a 'huge victory' and a 'landmark' for the protection of indigenous peoples' rights in Africa. This Chapter first examines the status of indigenous peoples under international law in the current 'states' system', both diachronically and synchronically; it then analyses the legal status of the particular indigenous people of the Ogiek in the African context and in light of said ACtHPR's judgement.

1. *Introduction*

On the 26 May 2017, the African Court on Human and Peoples' Rights (ACtHPR) delivered its first judgement on a case concerning indigenous peoples' rights.<sup>1</sup> The case originated in a complaint submitted by the African Commission on Human and Peoples' Rights (ACommHPR) under Article 5(1) of the 1998 Protocol to the African Charter on Human and Peoples' Rights (ACHPR)<sup>2</sup> establishing the Court.<sup>3</sup> The case dealt with the forced eviction of the Ogieks, a Kenyan hunter-gatherer indigenous community

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<sup>1</sup> ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* ('Ogiek case') Judgement of 26 May 2017, App. No. 006/2012.

<sup>2</sup> African Charter on Human and Peoples Rights, adopted on 27 June 1981, entered into force on 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.

<sup>3</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted on 10 June 1998, entered into force on 25 January 2004, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.I rev. 2.

of approximately 20,000 members,<sup>4</sup> from their ancestral lands in the Mau Forest, in the Rift Valley of Kenya. The judgment has been extensively welcomed as 'historic', a 'huge victory', and a 'landmark' for the protection of indigenous peoples' rights in Africa.<sup>5</sup>

Under Article 7 of the Protocol establishing the African Court, cases may be decided by the Court by applying the ACHPR, as well as any other human rights instrument ratified by the state in question. In turn, under Article 45(3) ACHPR the African Commission is mandated to 'interpret all the provisions of the present Charter', while under Article 2 of the Protocol establishing the African Court, this latter shall 'complement the protective mandate' of the Commission, and may arguably take note of the African Commission's decisions and interpretations of the ACHPR.<sup>6</sup>

While the Ogiek's land struggles date back to the 1960s,<sup>7</sup> their condition worsened in the 2000s when they received a 30-days eviction note from the Kenyan government for forest conservation reasons. In 2009, two NGOs, the 'Centre for Minority Rights Development' (CEMIRIDE) and the 'Minority Rights Group International' (MRGI) filed a communication on behalf of the Ogiek with the African Commission. In 2013, the African Court issued an order of provisional measures on grounds that the eviction was of sufficient gravity.<sup>8</sup> Since the Kenyan government failed to conform to an African Commission's Order, the case was transferred by the Commission to the Court under Article 84 of the Rules of the Commission. As a result, while in the Commission proceedings the applicants were the

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<sup>4</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 103.

<sup>5</sup> See, for example, Forest Peoples Programme, 'Ogiek of Kenya Win Landmark Land Rights Case', May 2017, at <<https://www.forestpeoples.org/en/legal-human-rights-rights-land-natural-resources/news-article/2017/ogiek-kenya-win-landmark-land>>; Minority Rights Group International, 'Huge Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights', Press Release, May 2017, at <<http://minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights>>; Cultural Survival, 'African Court Delivers Landmark Judgment on *Ogiek Land Rights* Case against Kenyan Government', June 2017, at <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/african-court-delivers-landmark-judgment-ogiek-landrights>>.

<sup>6</sup> ACommHPR, *Social and Economic Rights Action Centre and Another v. Nigeria* ('Ogoni case'), Comm. No. 155/96, 15th Activity Report 2001-2002; *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* ('Endorois case'), Comm. No. 276/2003, 27<sup>th</sup> Activity Report, June 2009-November 2009.

<sup>7</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 92.

<sup>8</sup> ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya (Provisional Measures)* Order of 15 March 2013, App. 006/2012, para. 20.

above-mentioned NGOs, in the Court proceedings the applicant was the Commission itself. Finally, on the 26 May 2017 the Court found against Kenya for the breach of several ACHPR rules.

## *2. Indigenous Peoples in International Law*

International law traditionally (and still today predominantly, although not exclusively) governs the relations between states, which form a 'states system'. Indigenous peoples challenge this very system at root both conceptually and practically. As a result, the application of international law to 'protect' indigenous peoples requires an accommodation that is quite difficult, and often contradictory. Before examining and assessing the *Ogiek* case and indigenes in Africa, it is convenient to provide a brief sketch of the larger landscape in which it should be seen in terms of international law.

### *a) The Current 'States System'*

A state-centric world governed by the states system is historically a product of injustice since it has been imposed by Europe on all other peoples, displacing their forms of social order and lifestyle. Few European states have dispossessed and embedded peoples, tribes, and other human associations within their structures in the colonial enterprise. Many aboriginal peoples have remained encased in, and subjected to, one or another state, while a number of colonized peoples have attained 'independence' by becoming states under the principle of self-determination. The former have been forced to lose their natural freedom and to obey the encasing state; the latter have been forced to become a state and adjust their original lifestyle to this alien structure. Both have arguably lost their distinctive character for the sake of a more easily governable and, allegedly, more rational global order imagined and built by the European powers for the benefit of those powers. The reasons for the European expansion were exemplarily described by John Westlake when he observed that 'When people of the European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes.'<sup>9</sup> Tribal peoples have never been asked whether they wished to be subjected to, or

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<sup>9</sup> J. Westlake, *Chapters on the Principles of International Law* (Cambridge: CUP 1894) 141–3.

transformed into, a European-style polity to ensure security and transfer wealth to the Europeans who had decided to travel and stay there, nor has their own social order ever been thought to expand to Europe. The state was considered the 'most advanced' form of political organization and 'civilization' that all peoples on earth were supposed to adopt by a sort of 'catching up' effort.<sup>10</sup>

Once embedded in a state or once having attained statehood, non-Western peoples have become part of the global states system and are pressed to meet all the requirements of membership, such as, today, the protection of human rights and democracy. There is no option to exit the states system, nor is there any room on earth left for social organizations other than states to live 'out of the global' dimension. Even those who would like not to live 'globalized' are compelled to do so. There can be no vacuum of power on earth, all humankind must be subjected to one or another state, and all states must be able to rely on others in their ability to carry out what are regarded as the 'typical' functions of a state. Traditional practices at odds with human rights, for example, appear objectively intolerable, while they could be seen as 'physiological' in their original local context and surrounding world environment. The system cannot tolerate 'dysfunctional' states. Once in place, the system needs trust among all its members, hence their basic homogeneity. When a member does not live up to the expectations of all the others, the system necessarily must react for the common good. In so doing, the system seeks to ensure efficiency and justice within itself by limiting the freedom of action of its members on the basis of common rules applying in principle equally to all members. In practice, however, dysfunctional behaviour is far more likely in those members that have been forced to become states regardless of their original features based on geography, climate, etc. Collective reactions by the system may reflect justice within the system itself, yet they blame peoples that prove incapable (or less capable than others) of being a state after statehood has been imposed on them. The problem is not with the state in itself, but with the system of states as a global, rational project to bring all humanity under control.

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<sup>10</sup> F. Vitoria adumbrated that the Indians might be 'unfit to found and administer a lawful State up to the standard required by human and civil claims' but did not 'dare' to either affirm or condemn it. See F. de Vitoria, *De Indis et De Jure Belli Relectiones* [1539] (Washington, DC: Carnegie Institution of Washington 1917) 160–1. In *Leviathan* [1651], I, 13, Thomas Hobbes stated, more explicitly, that 'the savage people in many places of America, except the government of small Families, . . . have no government at all; and live at this day in that brutish manner' with 'no common Power to fear.'

A struggle for justice should pursue not only justice within the system but also the justice of the system itself. Most intra-system inequities are ultimately based on the injustice of the global, all-encompassing states system. Hence, scholars have increasingly emphasized the role that non-state actors, subsidiarity, and pluralism can play in global governance to enhance the participation of non-state actors in the global decision-making process beside and beyond statehood. The debate is often inspired by human rights as demands for justice. Nonetheless, human rights pursue justice within the system and do not dare to challenge the very states system itself. Moreover, there is no way to go back to the past (for instance to a world of tribes and non-state polities) and there is no viable political alternative to the state for the imminent future. The struggle for the justice of the system itself is rather difficult and uncertain for three main reasons. First, the process of state globalization is, at this stage, hardly reversible to the modern pre-statehood status (given the size and density of world population, the human interconnectedness of cyberspace, etc.) and today it is not possible for any people to live without participating in the states system in one way or another. Certainly, existing states are not willing to create a new global system based on structures other than states, especially those which most gain therefrom, notably the great powers. Second, critics of the state system as such will presumably be seen and fought as 'global terrorists' who threaten the order and justice that the system secures. The struggle for the justice of the system is a leap in the dark, as long as there is no credible substitute in sight. Third, non-state actors remain fully dependent on, and presuppose, states in many respects. Subsidiarity and pluralism are, once again, thought of in global terms, giving the existence of states for granted. For the time being, 'genuine' pluralism meant as diversity is not embedded in any global project aimed at regulating the autonomy of the local. Even tribal and indigenous peoples might now be reluctant to abandon the states system.

The short- and medium-term justice under the circumstances is within the states system, although the injustice of the system itself should always be given due weight in order for the root causes of intra-systemic injustice to be identified and better remedies devised.<sup>11</sup> In this sense, international law as the law of the globalized states system can be credited as a law which ensures justice within the system, although it is historically the product of injustice and perpetuates this broader sense of injustice by forcing all peoples on earth to adjust to a system (at least initially) congenial to others. Far from

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<sup>11</sup> B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: CUP 2003) 189–95.

challenging the states system itself, non-state actors take it for granted and operate within the same system.

*b) The International Law of Indigenousness*

Before modern states came into existence, the earth was populated by countless 'peoples'. After subjugation by colonial powers, these peoples became 'indigenous' (or 'native', or 'aboriginal') peoples.<sup>12</sup> The story of indigenous peoples is the story of the dispossession of their lands, i.e. the history of colonialism, most notably (but not limited to) European colonialism, and of the rights reclaimed by these peoples today under international and constitutional law.<sup>13</sup> Many existing states were born out of the extermination of native inhabitants on their territories.<sup>14</sup> While indigenous peoples do raise the problem of colonialism, on a par with decolonized states, most of them do not claim 'decolonization' or secession from the states where they are enclosed, but rather self-government. In fact, indigenous peoples generally do not pursue statehood because they do not conceive themselves in terms of states in the first place. What is claimed is the right to control 'their' ancestral land, to the exploitation of natural resources, to cultural identity and to their own way of life, to representation in the United Nations and on the international stage at large, and to compensation and moral restitution.<sup>15</sup> In recent years the indigenous movement has come under attack on ground that indigeneity is a construction, since the populations concerned no longer live the way they claim they lived in the pre-colonial period.<sup>16</sup>

A workable, albeit non-binding, definition of indigenous peoples was provided in 1983 by UN Special Rapporteur José Martínez Cobo, whereby indigenous communities, peoples, and nations are those which 'having

<sup>12</sup> S. J. Anaya, *Indigenous Peoples in International Law* (Oxford: OUP, 2<sup>nd</sup> ed, 2004) 3.

<sup>13</sup> P. Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: CUP 2003).

<sup>14</sup> H. Rae, *State Identities and the Homogenisation of Peoples* (Cambridge: CUP 2002). For the devastation and genocidal practices of the early European contact with non-European peoples in Latin America, see e.g. D. Batstone, *From Conquest to Struggle: Jesus of Nazareth in Latin America* (Albany: State University of New York Press 1991). See also B. Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven and London: Yale University Press 2007).

<sup>15</sup> Anaya, *Indigenous Peoples in International Law* (note 12 above) 8–9 (arguing for a human rights approach to indigenous peoples within the states in which they are embedded.)

<sup>16</sup> A. Kuper, 'The Return of the Native' (2003) 44 *Current Anthropology* 389; A. Kuper, 'Discussion' (2006) 14 *Social Anthropology* 21. For a critical comment, see J. Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in H. Minde (ed), *Indigenous Peoples: Self-determination Knowledge Indigeneity* (Delft: Eburon 2008) 29, 42–6.

a historical continuity with pre-invasion and pre-colonial societies' that developed on their territories, 'consider themselves' distinct from other sectors of the societies now prevailing in those territories or parts of them and form at present non-dominant sectors of society.<sup>17</sup> A definition of tribal and indigenous peoples is also provided by the ILO 1957 Indigenous and Tribal Populations Convention No 107 and the ILO 1989 Indigenous and Tribal Peoples Convention No. 169.<sup>18</sup> Tribal and indigenous peoples are clearly regarded here as part of independent states and their rights as rights conferred by the states which embed them. No right to independence is granted, as is manifestly envisaged in Article 1(3) ILO Convention No. 169 where the term 'people' is denied 'any implications as regards the rights which may attach to the term under international law'. The 2007 UN General Assembly Declaration on Indigenous Peoples (UNDRIP) even avoids defining indigenous peoples.<sup>19</sup> Terms like indigenous and aboriginal denote different meanings, since some indigenous peoples have subjugated aboriginal peoples.<sup>20</sup> Also the term 'land' of indigenous peoples is difficult to define.<sup>21</sup>

From the sixteenth to the eighteenth centuries indigenous peoples concluded numerous agreements with colonial powers whose status as 'international treaties' has remained controversial.<sup>22</sup> In *Worcester v Georgia* the US Supreme Court characterized the treaties concluded between the United States and the Cherokee as 'international'<sup>23</sup> and described the

<sup>17</sup> UN, 'Study of the Problem against Indigenous Populations, Conclusions, Proposals and Recommendations', 30 September 1983, in UN Doc E/CN.4/Sub.2/1983/21, Add 8, paras 379, 381.

<sup>18</sup> ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted 26 June 1957, entered into force 2 June 1959, 328 *UNTS* 247. As of 29 December 2018, the Convention has been ratified by only 27 states; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, signed 27 June 1989, entered into force 5 September 1991. As of 29 December 2018, the Convention has been ratified by only 23 states.

<sup>19</sup> UNGA Declaration on the Rights of Indigenous Peoples of 13 September 2007, UN Doc A/Res/61/295.

<sup>20</sup> Kuper, 'The Return of the Native' (note 16) 390.

<sup>21</sup> For possible criteria to identify indigenous peoples, see the 2005 Report of the ACommHPR's Working Group of Experts on Indigenous Populations/Communities, at <[www.pro169.org/res/materials/en/identification/ACHPR%20Report%20on%20indigenous%20populations-communities.pdf](http://www.pro169.org/res/materials/en/identification/ACHPR%20Report%20on%20indigenous%20populations-communities.pdf)>, para. 4.2.

<sup>22</sup> A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 2<sup>nd</sup> ed, 1961) 53–4.

<sup>23</sup> US Supreme Court, *Worcester v. Georgia* [1832] 31 US 515, 559–60. Previously, in *Johnson v McIntosh*, Judgment of 10 March 1823, 21 US 543, the Supreme Court had described the Indians as 'fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest', hence 'To leave them in possession of their country was to leave the country a wilderness' (at 590).

Cherokee as ‘a distinct community, occupying its own territory, with boundaries accurately described.’<sup>24</sup> One year earlier, in *Cherokee Nations v State of Georgia*, the Court likened the Indian tribes to ‘domestic dependent nations’ whose relationship to the United States resembled ‘that of a ward to its guardian.’<sup>25</sup> Internationally, in the 1926 *Cayuga Indians Award*, the Arbitral Tribunal stated that the “‘Cayuga Nation”, an Indian tribe...is not a legal unit of international law’ because ‘[t]he American Indians have never been so regarded.’<sup>26</sup> In the 1928 *Island of Palmas Award*, the Arbitrator famously stated that ‘[a]s regards contracts between a State...and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations.’<sup>27</sup> In the 1933 *Eastern Greenland Judgment*, the PCIJ acknowledged the indigenous Inuit population in Eastern Greenland but the Court considered the territory’s legal status to be a matter confined to the competing claims made by Norway and Denmark.<sup>28</sup>

A reverse tendency has emerged in recent decades, especially following the decolonization process in the 1960s. In the *Western Sahara* case the ICJ found that agreements between colonizing states and local rulers were ‘to be regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.’<sup>29</sup> In *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria argued that the pre-colonial city-states in the contested region of Nigeria had enjoyed international treaty-making power.<sup>30</sup> In its 2002 Judgment, however, the ICJ held that the agreements between representatives of Great Britain and local chiefs of the Niger Delta near the end of the nineteenth century were not inter-state treaties.<sup>31</sup> The preamble to the 2007 Declaration on the Rights of Indigenous Peoples asserts ‘the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with

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<sup>24</sup> *Ibid.* 556.

<sup>25</sup> US Supreme Court, *Cherokee Nations v. State of Georgia* [1831] 30 US 1, 17.

<sup>26</sup> American and British Claims Arbitration Tribunal, *Cayuga Indians (Great Britain) v. United States*, Award 22 January 1926, 6 *RIAA* 173, 176.

<sup>27</sup> PCA Arbitral Tribunal, *Island of Palmas Case (Netherlands v. United States)* Award 4 April 1928, 2 *RIAA* 829, 858.

<sup>28</sup> PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)* Judgment 5 April 1933, PCIJ Series A/B No 53, 146–7.

<sup>29</sup> ICJ, *Western Sahara* Advisory Opinion 3 January 1975, [1975] ICJ Rep 12, para. 80.

<sup>30</sup> ICJ, *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* Judgment 10 October 2002, [2002] ICJ Rep 303, 403.

<sup>31</sup> *Ibid.* 405–6.



States', and Article 37(1) of the same UNDRIP provides that indigenous peoples 'have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors.'<sup>32</sup>

The IACtHR has insisted, since 2001 by relying upon the ILO Conventions on indigenous peoples under Article 29 ACHR, that the right to property under Article 21 ACHR also applies (and needs to be balanced against possible conflicting rights to property of single individuals) to indigenous peoples' communal property, lands, and resources,<sup>33</sup> a position upheld by the ACommPHR in the 2009 *Centre for Minority Report*.<sup>34</sup> In the 2007 *Pueblo Saramaka* Judgment, concerning logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people without their full and effective consultation, the IACtHR conceded that Suriname could grant concessions, but had to avoid undermining the Saramaka's survival as a tribal people and provide effective consultations, prior and informed consent, benefit-sharing, and prior and independent environmental and social impact assessment.<sup>35</sup> In the 2007 *Aurelio Cal* Judgment, the Supreme Court of Belize found that the right of indigenous peoples to their lands and natural resources is embodied, in addition to treaty obligations binding on Belize, in customary international law and general principles of international law.<sup>36</sup> In the 2009 *Raposa Serra do Sol* Judgment, the Brazilian Supreme Court ruled that the Raposa Serra do Sol reservation had to be maintained as a single continuous territory exclusively for use by the indigenous population and perpetuation of their livelihoods, subject to conditions such as the need to realize specific infrastructure projects on indigenous lands in the national interest without the prior and informed consent of indigenous communities.<sup>37</sup>

<sup>32</sup> Declaration on the Rights of Indigenous Peoples (note 19 above) preamble, para. 14, and Article 37.

<sup>33</sup> IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Judgment of 31 August 2001, IACtHR Series C No 79, para. 148; *Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005, IACtHR Series C No 125, para. 143; *Sawhoyamaya Indigenous Community v. Paraguay* Judgment of 29 March 2006, IACtHR Series C No 146, para. 120.

<sup>34</sup> ACommHPR, *Endorois* Decision (note 6 above), para. 190.

<sup>35</sup> IACtHR, *Pueblo Saramaka v. Suriname*, Judgment 28 November 2007, IACtHR Series C No 52, para. 129.

<sup>36</sup> Supreme Court of Belize, *Aurelio Cal et al v. Attorney General of Belize* Judgment of 18 October 2007, at <<https://www.elaw.org/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17>>, para 127.

<sup>37</sup> Supreme Court of Brazil, *Raposa Serra do Sol*, Judgment 19 March 2009 (see <<https://www.survivalinternational.org/news/4354>>).

On balance, the limited number of states which have ratified the ILO 1989 Indigenous and Tribal Peoples Convention, the resistance of several states, and the legally non-binding language adopted by the 2007 Declaration on the Rights of Indigenous Peoples suggest that the legal relevance of indigenous peoples remains basically a matter for the domestic constitutional law of the states concerned and, as regards international law, of human rights and environmental justice to be protected within the frameworks of existing states.

### 3. *The Ogiek Judgment*

In the *Ogiek* Judgment, widely endorsing the Commission's allegations, the Court held that the Government of Kenya had violated several of the Ogieks' rights under the ACHPR, including their rights to equality (Article 2), to property (Article 14), to freedom of religion and culture (Articles 8 and 17), to free disposal of wealth and natural resources (Article 21), and to economic, social and cultural development (Article 22). Only with regard to the right to life (Article 4) the Court found no violation.

More specifically, on *jurisdiction*, the Court unanimously dismissed the objections to its material, personal, and temporal jurisdiction, thus declaring its jurisdiction.<sup>38</sup> On *Admissibility*, the Court dismissed four objections to the admissibility of the application on grounds that (a) the matter was pending before the ACommHPR, (b) the Court did not conduct a preliminary examination of the application's admissibility, (c) the Commission was not the aggrieved party in the complaint and, finally, (d) on grounds of failure to exhaust local remedies, thus declaring the application admissible.<sup>39</sup> Turning to the *merits*, to which this article is limited, the Court declared that Kenya had violated Articles 1, 2, 8, 14, 17(2) and (3), 21, and 22 ACHPR but had not violated Article 4 ACHPR. As a result, the Court ordered Kenya to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six months from the date of the judgment; it reserved its ruling on reparations and requested the Commission to file submissions on reparations within 60 days from the date of the judgment, noting that Kenya would have to file its response thereto within 60 days of receipt of

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<sup>38</sup> ACtHPR, *Ogiek* Judgment (note 1 above), paras 47-68.

<sup>39</sup> *Id.* paras 69-100.

the Commission's submissions on Reparations and Costs.<sup>40</sup> This being said, let us now examine any issue concerning the merits of the case.

*a) Definition of the Ogieks as an 'Indigenous Population'*

The Court preliminary focused on the question as to whether the Ogieks are an 'indigenous people', finding that this issue was central to the determination of the merits. The Commission argued that the Ogiek are an indigenous people who 'have been living in the Mau Forest for generations since time immemorial.'<sup>41</sup> Kenya countered that the Ogiek 'are not a distinct ethnic group but rather a mixture of various ethnic communities', indeed an indigenous population but 'different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life', thus 'currently like all other Kenyans.'<sup>42</sup>

The Court noted that the concept of indigenous population is not defined in the ACHPR and that 'there is no universally accepted definition of "indigenous population" in other international human rights instruments', although '[t]here have...been efforts to define indigenous populations.' In this respect, the Court 'drew inspiration' from the work of the ACommHPR through its 'Working Group on Indigenous Populations/Communities', which had adopted certain criteria to identify indigenous populations.<sup>43</sup> The Court 'drew inspiration' also from the approach taken in

<sup>40</sup> Id. paras 101–217. For commentary, see R. Roesch, 'The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?', *EJIL Talk!*, 16 June 2017; R. Rosch, 'Indigenesness and Peoples' Rights in the African Human Rights System: Situating the *Ogiek* Judgement of the African Court on Human and Peoples' Rights', (2017) 50 *Verfassung und Recht in Obersee* (VRO) 242; E. Tramontana, 'The Contribution of the African Court on Human and Peoples' Rights to the Protection of Indigenous Peoples' Rights', *Federalismi*, 14 March 2018.

<sup>41</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 103.

<sup>42</sup> Id. para. 104.

<sup>43</sup> Id. para. 105. See also ACommHPR/IWGIA, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', at <[http://www.achpr.org/files/special-mechanisms/indigenous-populations/un\\_advisory\\_opinion\\_idp\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf)>, para. 12. According to the African Commission 'a definition [of indigenous peoples] is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa', *ibid.* para. 10. The characteristics proposed, as reproduced in the *Ogiek* Judgment, are: 'i. Self-identification; ii. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and iii. A state of subjugation, marginalisation, dispossession, exclusion, or

1996 by E.-I. A. Daes, the former Chairperson of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which set out four criteria to identify indigenous peoples, namely: (a) priority in time with respect to the occupation and use of a specific territory; (b) perpetuation of cultural distinctiveness, including aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, and recognition by other groups or State authorities, as a distinct group; and (d) experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>44</sup> Needless to say, both sets of criteria are not legally binding in themselves, let alone on the ACtHPR. In light of the above, the Court did recognize the Ogiek ‘as an indigenous population . . . deserving special protection deriving from their vulnerability’<sup>45</sup> since, with regard to Daes’ criteria, they ‘have priority in time, with respect to the occupation and use of the Mau forest’,<sup>46</sup> ‘exhibit a voluntary perpetuation of cultural distinctiveness’<sup>47</sup> and ‘have suffered from continue subjugation and marginalisation.’<sup>48</sup>

Undoubtedly, the Ogiek’s indigenous status was one of the most contentious issues in the case. The ACHPR does not refer to ‘indigenous peoples’, although it provides for a number of ‘collective’ human rights pertaining, inter alia, to ‘peoples’ which are potentially applicable to such peoples. On this point, the reasoning of the Court is little persuasive. The Court actually relied on the UN Daes’ criteria rather than on the African Union’s Working Group, thus aligning with the *Endorois* decision by the ACommHPR,<sup>49</sup> without shedding any light on the underlying rationale. It displayed its willingness to align the African human rights system with the UN-backed international concept of indigenous rights. In fact, the two sets of criteria differ remarkably and there certainly is a specific of indigenesness in Africa compared to elsewhere, such as in the Americas, Australia, and New Zealand. In particular, the ‘priority in time’ or aboriginality was one of the

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discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model’.

<sup>44</sup> Id. para. 106. See also Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Working Paper by the Chairperson- Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of “Indigenous People”’, UN Doc. E/CNA/Sub.2/ACA/1996/2, 10 June 1996, para. 69.

<sup>45</sup> Id. para. 112.

<sup>46</sup> Id. para. 109.

<sup>47</sup> Id. para. 110.

<sup>48</sup> Id. para. 111.

<sup>49</sup> ACommHPR, *Endorois* Decision (note 6 above), paras 151, 154, 157.

criteria deliberately rejected by the AU Working Group.<sup>50</sup> Besides, certain UN criteria are open to question. The 'voluntary perpetuation of cultural distinctiveness' and the recognition by other groups or the state are contentious features, while 'cultural distinctiveness' may be considered included in the principle of self-identification and apparently fails to consider that culture is constantly changing through endogenous and exogenous influences. More generally, the concept of indigenesness is particularly controversial in sub-Saharan Africa and the distinction between minorities, indigenous peoples, and 'peoples' is anything but clear.<sup>51</sup> Many African states, scholars and communities, are critical of the idea of indigenous rights in Africa as an 'artificial construction' and fear that it may favour certain ethnic groups over others, reinforce colonial stereotypes and catalyse secessions.<sup>52</sup>

*b) Right to Land (Article 14 ACHPR)*

The Commission contended that Kenya's failure to recognize the Ogiek as an indigenous community 'denied them the right to communal ownership of land as provided in Article 14 of the Charter'.<sup>53</sup> Kenya objected that 'the Constitution of Kenya takes away land rights from the communities concerned and vests it in government institutions like the Forestry Department', that 'other communities such as the Kipsigis, Tugen and the Keiyo also lay claim to the Mau Forest', that the Ogiek could not 'claim exclusive ownership of the Mau Forest' and, in any event, 'were consulted and notified before every eviction was carried out . . . in accordance with the law'.<sup>54</sup>

The Court noted, first, that 'although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities'.<sup>55</sup> Secondly, in order 'to determine the extent of the rights recognised for indigenous communities in their ancestral lands', the Court held that 'Article 14 of the Charter must be interpreted in light of the

<sup>50</sup> ACommHPR/IWGIA, 'Indigenous Peoples in Africa: The Forgotten Peoples?', June 2006, at <[https://www.iwgia.org/images/publications/0112\\_AfricanCommissionSummaryversionENG\\_eb.pdf](https://www.iwgia.org/images/publications/0112_AfricanCommissionSummaryversionENG_eb.pdf)>, 11.

<sup>51</sup> Roesch, 'The Ogiek Case', cit. (note 40 above); Rosch, 'Indigenesness', cit. (note 40 above) 246–247.

<sup>52</sup> F. Mukwiza Ndahinda, *Indigenesness in Africa: A Contested Framework for Empowerment of Marginalized Communities* (The Hague: Springer 2011) 59.

<sup>53</sup> ACtHPR, *Ogiek Judgment* (note 1 above), para. 114.

<sup>54</sup> Id. paras 115–116, and 120.

<sup>55</sup> Id. para. 123.

applicable principles especially by the United Nations,<sup>56</sup> in particular Article 26 UNDRIP.<sup>57</sup> As a result, according to the Court ‘the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning.’<sup>58</sup> As to the public interest Kenyan justification relying on the preservation of the natural ecosystem, the Court stated that Kenya ‘has not provided any evidence to the effect that the Ogieks’ continued presence in the area is the main cause for the depletion of natural environment in the area’ and, in any event, the eviction could not ‘be necessary or proportionate to achieve the purported justification’.<sup>59</sup> The Court concluded that Kenya had violated Article 14 ACHPR.

Undoubtedly, in the *Ogiek* case, land played a key role. The indigenous right to land is expressly recognized by Articles 13 and 14 ILO Convention No. 169 and Article 25 UNDRIP. The ACHPR does not provide for it and in the related previous jurisprudence such right has been impliedly derived from the right to property (Article 14),<sup>60</sup> the right to practice religion (Article 8)<sup>61</sup> and the right to culture (Article 17),<sup>62</sup> besides being found relevant in relation to other ACHPR provisions. In the *Ogiek* case, the Court aligned itself with such jurisprudence and with the jurisprudence of other regional human rights courts, as well as with the ILO Convention No. 169 and the UNDRIP,<sup>63</sup> by deriving a communal right to land from the right to property, as both an individual and a collective right, against the ‘classical’ (supposedly individualistic, Western) understanding of property’.<sup>64</sup>

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<sup>56</sup> Id. para. 125.

<sup>57</sup> Id. para. 126.

<sup>58</sup> Id. para. 127.

<sup>59</sup> Id. para. 130.

<sup>60</sup> ACommHPR, *Malawi African Association and Others v. Mauritania* Decision of 11 May 2000, Comm. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, para. 128; *Ogoni* Decision (note 6 above), paras 61 ff.; *Endorois* Decision (note 6 above), paras. 188–189, 190, 232. Similarly, see e.g. IACtHR, *Mayagna Community (Sumo) Awas Tingni v. Nicaragua* (n. 33 above), para. 148; *Yakye Axa Indigenous Community v. Paraguay* (note 33 above), para. 23; *Sawhoyamaxa Indigenous Community v. Paraguay* (n. 33 above), para. 120.

<sup>61</sup> ACommHPR, *Endorois* Decision (note 6 above), paras. 165, 172, 173.

<sup>62</sup> *Ibid.*, para. 244.

<sup>63</sup> J. Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (Leiden: Brill/Nijhoff, 2016, 2<sup>nd</sup> ed., 2016) 105. For a summary of the relevant international case law and a critical assessment of this section of the *Ogiek* Judgment, see Tramontana, ‘The Contribution’ (note 40 above) 8–10.

<sup>64</sup> ACtHPR, *Ogiek* Judgment (note 1 above), paras 123, 128, 164.

c) *Right to Non-discrimination (Article 2 ACHPR)*

The Commission contended that 'the differential treatment of the Ogieks and other similar indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and right to life, natural resources and development under the relevant laws, constitute[d] unlawful discrimination' and was a violation of Article 2 ACHPR.<sup>65</sup> Kenya denied that any discrimination was carried out against the Ogiek and argued that no evidence had been provided to the contrary.<sup>66</sup>

The Court noted that the Ogieks' 'request for recognition as a tribe goes back to the colonial period', where the then Kenya Land Commission rejected their request in 1933, asserting that the Ogieks 'were a savage and barbaric people who deserved no tribal status'.<sup>67</sup> Furthermore, the Court reiterated that 'the Mau Forest has been allocated to other people in a manner which cannot be considered as compatible with the preservation of the natural environment and that the Respondent itself concedes that the depletion of the natural ecosystem cannot be entirely imputed to the Ogieks'.<sup>68</sup> As a result, the Court concluded that 'by failing to recognise the Ogieks' status as a distinct tribe like other similar groups and thereby denying the rights available to other tribes', Kenya had violated Article 2 ACHPR.<sup>69</sup>

The principle of non-discrimination is firmly established in human rights treaties, such as, at the universal level, in Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, in Article 26 of the International Covenant on Civil and Political Rights and in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. As commonly understood in the international jurisprudence, a differential treatment is unduly discriminatory when there is no objective and reasonable justification and when it is not proportionate.<sup>70</sup> In the *Ogiek* judgement, the Court found that the Ogiek were discriminated against based on their 'ethnicity and/or other status'. As a commentator noted, '[i]t seems to be a rather obvious choice to subsume indigenous groups under ethnicity as a prohibited ground' of non-discrimination, yet the Court failed to rely on the equality of 'peoples' enshrined in Article 19 ACHPR and, as a

<sup>65</sup> Id. para. 134.

<sup>66</sup> Id. para. 135.

<sup>67</sup> Id. para. 141.

<sup>68</sup> Id. para. 145.

<sup>69</sup> Id. para. 146.

<sup>70</sup> Id., para. 139; ACommHPR, *Kenneth Good v. Republic of Botswana* Decision of 26 May 2010, Comm. 313/05, para. 219.

result, to align itself with the African Commission's understanding of non-discrimination and equality.<sup>71</sup>

*d) Right to Life (Article 4 ACHPR)*

According to the Commission 'forced evictions may violate the right to life when they generate conditions that impede or obstruct access to a decent existence'<sup>72</sup> and in the instant case 'the Ogieks relied on their ancestral land in the Mau Forest to support their livelihood, their specific way of life and their very existence'.<sup>73</sup> Kenya objected that 'the Mau Forest Complex is important for all Kenyans, and the government is entitled to develop it for the benefit of all citizens'.<sup>74</sup>

The Court observed that 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'<sup>75</sup> and, although there was 'no doubt that their [Ogieks'] eviction has adversely affected their decent existence in the forest', the Commission had 'not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result'.<sup>76</sup> Consequently, the Court found that there was no violation of Article 4 ACHPR.<sup>77</sup> As hinted earlier, this is the only point that the Court found in favour of Kenya.

The conclusion of the Court reflects the mainstream of international law.<sup>78</sup> The 'special protection' deserved by the Ogiek is not evidently a sufficient justification for going beyond such standard.

*e) Right to Freedom of Conscience and Religion (Article 8 ACHPR)*

The Commission argued that the Ogiek 'practise a monotheistic religion closely tied to their environment and that their beliefs and spiritual practices are protected by Article 8 of the Charter and constitute a religion

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<sup>71</sup> Id.; *Malawi Decision* (note 60 above), para. 131; *Open Society Justice Initiative v. Cote d'Ivoire*, Decision 27 May 2016, Comm. 318/06, para. 155; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Decision 27 May 2009, Comm. 279/03-296/05, para. 222.

<sup>72</sup> ACtHPR, *Ogiek Judgment* (note 1 above), para. 147

<sup>73</sup> Id. para. 148.

<sup>74</sup> Id. para. 150.

<sup>75</sup> Id. para. 154.

<sup>76</sup> Id. para. 155.

<sup>77</sup> Id. para. 156.

<sup>78</sup> Niels Petersen, 'Right to Life', *Max Planck Encyclopaedia of Public International Law*, at <[http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-97801\\_99231\\_690-e841](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-97801_99231_690-e841)>.



under international law'.<sup>79</sup> In fact, according to the Commission, 'the sacred places in the Mau Forest, caves, hills, specific trees areas within the forest were either destroyed during the evictions which took place during the 1980s, or knowledge about them has not been passed on by the elders to younger members of their community, as they can no longer access them'.<sup>80</sup> The Commission added that 'though some of the Ogieks have adopted Christianity, this does not extinguish the religious rites they practise in the forest'.<sup>81</sup> Kenya denied that the Commission had adduced adequate evidence on this point.<sup>82</sup>

The Court recognized that 'the practice and profession of religion are usually inextricably linked with land and the environment'<sup>83</sup> and in the instant case 'the Ogiek population can no longer undertake their religious practices due to their eviction from the Mau Forest'<sup>84</sup>. Besides, according to the Court, 'there were other less onerous measures that the Respondent could have put in place that would have ensured their continued enjoyment of this right while ensuring maintenance of law and order and public health'<sup>85</sup> and 'not all the Ogieks have converted to Christianity'.<sup>86</sup> The Court thus concluded that Kenya had violated Article 8 ACHRP.

On this point the Court, by emphasizing that the 'practice and profession of religion are usually inextricably linked with land and the environment', espoused the African Commission's *Endorois* decision, which found an infringement of the indigenous community's right to access religious sites as a violation of Article 8 ACHRP.<sup>87</sup>

*f) Right to Education and to Participation in Cultural Life (Article 17(2) and (3) ACHPR)*

The Commission contended that Kenya had violated the cultural rights of the Ogieks by restricting their 'access to the Mau forest which hosts their cultural sites'<sup>88</sup>, assuming the broad definition of culture that it had defined in the *Endorois* decision.<sup>89</sup> In this context as well, Kenya objected that 'while

<sup>79</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 157.

<sup>80</sup> Id. para. 158.

<sup>81</sup> Id. para. 159.

<sup>82</sup> Id. para. 161.

<sup>83</sup> Id. para. 164.

<sup>84</sup> Id. para. 166.

<sup>85</sup> Id. para. 164.

<sup>86</sup> Id. para. 168.

<sup>87</sup> ACommHPR, *Endorois* Decision (note 6 above), para. 165.

<sup>88</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 170.

<sup>89</sup> ACommHPR, *Endorois* Decision (note 6 above), para. 241 ('Culture could be taken to

protecting the cultural rights [of the Ogieks], it also ha[d] the responsibility to ensure a balance between cultural rights vis-a-vis environmental conservation in order to undertake its obligation to all Kenyans, particularly in view of the provisions of the Charter and its Constitution'.<sup>90</sup> Furthermore, Kenya contended that the lifestyle of the Ogieks 'has metamorphosed and the cultural and traditional practices which made them distinct no longer exist.' Actually, according to Kenya, they 'no longer live as hunters and gatherers, thus, they cannot be said to conserve the environment' and 'have adopted new and modern ways of living, including building permanent structures, livestock keeping and farming which would have a serious negative impact on the forest if they are allowed to reside there'.<sup>91</sup>

After pointing out that the right to culture in Article 17 ACHPR 'is to be considered in a dual dimension, in both its individual and collective nature',<sup>92</sup> the Court stated that such right 'goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity'.<sup>93</sup> Besides, while '[i]t is natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time', 'the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged'.<sup>94</sup> The Court then noted that Kenya 'has interfered with the cultural rights of the Ogieks through the evictions' and that such interference 'cannot be said to have been warranted by an objective and reasonable justification', Kenya having failed to specify 'which particular activities and how these activities have degraded the Mau Forest'.<sup>95</sup> Therefore, the Court concluded that there was a violation of Article 17(2) and (3).<sup>96</sup>

There is an obvious, often recognized, connection between land rights and cultural/religious rights, on the assumption that the enjoyment and

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mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics').

<sup>90</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 174.

<sup>91</sup> Id. para. 175.

<sup>92</sup> Id. para. 177.

<sup>93</sup> Id. para. 179.

<sup>94</sup> Id. para. 185.

<sup>95</sup> Id. para. 189.

<sup>96</sup> Id. para. 190.

preservation of indigenous peoples' culture and religion require access to their ancestral lands.<sup>97</sup>

*g) Right to Natural Resources and to Food (Article 21 ACHPR)*

The Commission exposed Kenya's alleged breach of the rights of the Ogieks 'to freely dispose of their wealth and natural resources in two ways', that is, '[f]irstly, by evicting them from the Mau Forest and denying them access to the vital resources therein, and secondly, by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits in those resources'.<sup>98</sup> Kenya objected, here again, that 'States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people, and efforts are being made to maintain a delicate balance between conservation, a people-centred approach to utilisation of natural resources and the ultimate control of natural resources'.<sup>99</sup>

The Court first examined the notion of 'peoples' in Article 21 ACHPR, whereby 'All peoples shall freely dispose of their wealth and natural resources', thus posing the question 'whether the notion "people" used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State'.<sup>100</sup> The Court answered in the affirmative, 'provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent'.<sup>101</sup> The Court then observed that Kenya also violated Article 21 ACHPR 'since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands'.<sup>102</sup>

<sup>97</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, 'Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples', UN Doc. E/CN.4/Sub.2/1993/28, 28 July 1993, para. 4. In line with this understanding, see the 'Principles & Guidelines for the Protection of the Heritage of Indigenous People', UN Doc. E/CN.4/Sub.2/1995/26, 21 June 1995, para. 6. On the interplay between land rights and cultural rights see for instance V. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 3 797–889 and Citroni and Vadi's respective chapters in this volume dealing with the linkage between land rights and cultural rights in the jurisprudence of the Interamerican Court and the jurisprudence of investment treaty arbitral tribunals respectively.

<sup>98</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 191.

<sup>99</sup> Id. para. 194.

<sup>100</sup> Id. para. 198.

<sup>101</sup> Id. para. 199.

<sup>102</sup> Id. para. 201.

According to the Court, therefore, indigenous rights in the ACHPR entail no right of secession and, impliedly, the world states system must be maintained. The ‘special protection’ deserved by the Ogiek does not justify secession. In the Court’s view, which follows the African Commission’s case law, communities within a state can well be right holders, providing that they ‘do not call into question the sovereignty and territorial integrity of the State without the latter’s consent’.<sup>103</sup>

As to the right to natural resources, it is widely recognized that indigenous peoples’ distinctive relationship with their ancestral lands encompasses the natural resources found therein.<sup>104</sup> Article 15 ILO Convention No. 169 and Article 26(2) UNDRIP provide for the right to natural resource. In the *Endorois* decision, the African Commission admitted that restrictions to the right to natural resources are possible in the public interest and in accordance with national laws.<sup>105</sup> In the *Ogoni* decision, the Commission asserted that natural resources vest in indigenous peoples inhabiting the land in question even when they do not make use of them.<sup>106</sup>

With regard to the right to food, the Court appears to derive it, as a right of indigenous peoples to use their land for agriculture, from the right to natural resources. This approach is novel compared to the Commission’s *Endorois* decision, which found a violation of Article 21 only in respect of the extraction of ruby, while the applicants had claimed that the ‘fertile soil’ was a natural resource.<sup>107</sup> The *Ogiek* judgment is also innovative on this point in comparison with the common trend espoused in the *Ogoni* decision, where the African Commission derived the right to food from the right to life (Article 4), the right to health (Article 16) and the right to development (Article 22) and found a violation of such rules on grounds that the development activities involved prevented the Ogoni people from feeding themselves.<sup>108</sup>

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<sup>103</sup> Id. para. 199.

<sup>104</sup> See, for example, IACtHR, *Pueblo Saramaka v Suriname* Judgment (note 35 above), para. 122; Sub-Commission for the Promotion and Protection of Human Rights, ‘Indigenous Peoples and Their Relationship to Land – Final Working Paper Prepared by the Special Rapporteur’, UN Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, paras 11-13; ‘Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes’, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004, paras 38–51.

<sup>105</sup> ACommHPR, *Endorois* Decision (note 6 above), para. 267.

<sup>106</sup> ACommHPR, *Ogoni* Decision (note 6 above), para. 48.

<sup>107</sup> ACommHPR, *Endorois* Decision (note 6 above), paras 124, 267.

<sup>108</sup> ACommHPR, *Ogoni* Decision (note 6 above), para. 64 ff.

*h) Right to Development and to Free, Prior, and Informed Consent (Article 22 ACHPR)*

According to the Commission, Kenya had failed to recognize the Ogieks' right to development as indigenous people, 'with the right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions'.<sup>109</sup> Kenya had objected that 'consultations were held with the Ogieks' democratically elected area representatives'.<sup>110</sup>

After reiterating that 'all peoples' in the ACHPR, in particular in Article 22, means 'all populations as a constitutive element of a State',<sup>111</sup> the Court found that 'the Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted' and 'have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them'.<sup>112</sup> The Court concluded that there was a violation of Article 22 ACHPR. As hinted earlier, the lack of 'prior consultations' constituted also a violation of the right to property.<sup>113</sup>

The ACHPR is the only binding international human rights instruments which provides for the right to development. The *Ogiek* judgment has been criticized, in this respect, inasmuch as it failed to develop the jurisprudence of the African Commission, in particular the *Endorois* decision.<sup>114</sup> In contrast, the right to free, prior, and informed consent (FPIC) is not expressly contemplated by the ACHPR, although it has been examined by the African Commission and other regional organizations in the last years.<sup>115</sup> In the *Ogoni* decision, the African Commission derived the obligation to provide information, as well as meaningful opportunities to be heard and to participate from the right to a healthy environment; in particular, the failure to involve the Ogoni people in the oil production also constituted, according to the Commission, a violation of the right to development

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<sup>109</sup> ACtHPR, *Ogiek* Judgment (note 1 above), para. 202.

<sup>110</sup> Id. para. 206.

<sup>111</sup> Id. para. 208.

<sup>112</sup> Id. para. 210.

<sup>113</sup> Id. para. 131.

<sup>114</sup> ACommHPR, *Endorois* Decision (note 6 above), para 277; Tramontana, 'The Contribution' (note 40 above) 17-18.

<sup>115</sup> R. Roesch, 'The Story of a Legal Transplant: The Right to Free, Prior and Informed Consent in Sub-Saharan Africa', (2016) 16 *African Human Rights Law Journal* 505.

set out in Article 21.<sup>116</sup> In the *Endorois* decision the right to consultation was derived from the right to development.<sup>117</sup> The African Commission's 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights' understand the right to self-determination as imposing a duty to obtain the FPIC from indigenous groups for matters concerning their traditional lands.<sup>118</sup> It has been critically observed that the Court 'has missed an opportunity to clarify and extend the African Commission's position on FPIC and to contribute to the development of a coherent understanding of FPIC', when considering that '[c]onsultations do not necessarily amount to consent and generally do not give communities the right to veto development projects' and that '[a]t the same time, the fact that the duty to consult was derived from the right to development and the right to property indicates that the African institutions, unlike the majority of international documents, seem to detach it from the right to self-determination'.<sup>119</sup> However, the *Ogiek* judgment is said to strongly indicate that the African Union organs do not understand the right to self-determination as the only legal source of FPIC, and '[d]espite the vague wording of the judgement, a general move towards the full recognition of FPIC can be observed on the African continent in view of the growing recognition of FPIC both nationally and in the regional organizations'.<sup>120</sup>

*i) Right to the Adoption of Legislative or Other Measures (Article 1 ACHPR)*

The Commission urged the Court 'to apply its own approach' and the one of the Commission itself in their previous jurisprudence in respect of Article 1 ACHPR. Accordingly, 'if there is a violation of any or all of the other Articles pleaded, then it follows that the Respondent is also in violation of Article 1' ACHPR.<sup>121</sup> Kenya made no submission on this point.<sup>122</sup>

The Court noted that Kenya had 'taken some legislative measures to ensure the enjoyment of rights and freedoms protected under the Charter' but 'these laws were enacted relatively recently' and it 'failed to recognise

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<sup>116</sup> ACommHPR, *Ogoni* Decision (note 6 above), para. 53.

<sup>117</sup> ACommHPR, *Endorois* Decision (note 6 above), para. 290.

<sup>118</sup> ACommHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter of Human and Peoples' Rights', November 2010, at <<http://www.achpr.org/instruments/economic-social-cultural>>, para. 44.

<sup>119</sup> See Roesch, 'The *Ogiek* Case', (note 40 above); Roesch, 'Indigenoussness' (note 40 above) 256.

<sup>120</sup> *Ibid.* 256–257.

<sup>121</sup> ACtHPR, *Ogiek* Judgment, para. 212.

<sup>122</sup> *Id.* para. 213.

the Ogieks, like other similar groups, as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under Article 2, 8, 14, 17(2) and (3), 21 and 22', nor had Kenya demonstrated that it had taken other measures to give effect to such rights.<sup>123</sup> The Court thus concluded that there was also a violation of Article 1 ACHPR.

#### 4. Conclusion

The *Ogiek* judgment is a success for the Ogiek people and no doubt reinforces the idea that indigenous rights are gaining importance in the context of the African human rights system, particularly in relation to the right to food under the right to natural resources and the willingness of the African Court to interpret the right to property as a communal right to land. However, the line between indigenous communities, minorities, and peoples (namely, the meaning of indigenes in sub-Saharan Africa) as well as the scope and implications of FPIC remain uncertain and the Court failed to contribute to develop the right to equality and non-discrimination.

Of special interest in the *Ogiek* case is the role played by the Commission, acting like a pro-indigenous people NGO in defence of the Ogiek. Noteworthy, although foreseeable, is the confirmation (and hence, indirectly, a reinforcement) by the Court of the present 'states system'. A change in the system to address the historical injustices suffered by indigenous peoples is clearly not envisaged for the time being, so the only way to protect them is within existing states, although this generates frequent problems.

A most salient aspect of the case, which has not attracted much attention in the literature, is the clash between different and *prima facie* conflicting 'general interests' and the rejection by the Court of all public-interest concerns invoked by Kenya. These included the state's 'responsibilities' to protect the ecosystem, public health, and public order for the benefit of all Kenyan citizens (including future generations). In the *Ogiek* case, the meaning itself of 'public' was basically in issue: whether it referred to either a local-indigenous community, or to the national community, or even to the international community as a whole. In *all* these cases, the interest at stake is indeed 'public', inasmuch as it refers to a 'community' in opposition

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<sup>123</sup> Id. para. 216.

to individual members thereof or private actors, but in different and even antagonist forms. Kenya invoked the 'public' interest of all Kenyans (and their equality, whether indigenous or not), such as the interest in the protection of the ecosystem or order, if not the 'public' interest of the international community to have all forests on Earth protected for the benefit of humankind, whereas the Commission prioritized the 'public' interest (as protected by international law and in particular the ACHPR) of protecting the Ogiek. The Court did not sympathize at all with the 'general interests' relied on by Kenya, finding that either they were unsubstantiated or had to give way to the opposing general interest of protecting the Ogiek as an indigenous population 'deserving special protection'. In sum, the Court found for the Ogieks' public interest, and, while relying on a UN-inspired rather than an African-elaborated concept of indigenesness, apparently proved inclined to protect an international-indigenous rather than a local-state public interest. A more detailed discussion of the issue, notably why certain public-interest values should be prioritized over others, would have been welcome.



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PART III  
INDIGENOUS PEOPLES  
AND INTERNATIONAL ECONOMIC LAW



Valentina Vadi\*

*The Protection of Indigenous Cultural Heritage  
in International Investment Law and Arbitration*

The protection of cultural heritage is a fundamental public interest that is closely connected to fundamental human rights and is deemed to be among the best guarantees of international peace and security. Economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage. However, these phenomena can also jeopardise cultural heritage. Foreign direct investments in the extraction of natural resources have the potential to change cultural landscapes and erase memory, and foreign investments in the cultural industries can induce cultural homogenization. In parallel, international investment law constitutes a legally binding and highly effective regime that demands that states promote and facilitate foreign direct investment. Does the existing legal framework adequately protect indigenous cultural heritage vis-à-vis the economic interests of foreign investors? This chapter aims to address this question by examining recent arbitrations and proposing legal tools to foster a better balance between economic and cultural interests in international investment law and arbitration.

1. *Introduction*

Although the protection of indigenous rights has gained some momentum at the international law level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>1</sup> many of the

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\* An earlier version of this paper was presented at the University of Rome III on 4 December 2017. The author wishes to thank Antonietta Di Blase, Carlo Focarelli, and the participants to the conference for helpful comments on an earlier draft. The usual disclaimer applies. The research leading to these results has received funding from the European Research Council under the European Union's ERC Starting Grant Agreement n. 639564. The chapter reflects the author's views only and not necessarily those of the Union.

<sup>1</sup> United Nations Declaration on the Rights of Indigenous Peoples, (UNDRIP) A/RES/61/295, 13 September 2007. The Declaration was approved by 143 nations, but

estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources. In fact, 'a large proportion of the world's remaining natural resources ... are located on indigenous-occupied lands ... [and] global demand for natural resources has skyrocketed in recent years.'<sup>2</sup>

This chapter explores the clash between economic development and indigenous peoples' rights from the perspective of international investment law. The protection of the rights of indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law. In fact, when a state adopts policies to protect the rights of indigenous peoples that interfere with foreign investments then this may be perceived as to indirect expropriation or a violation of other investment treaty provisions. While traditionally, international investment law and arbitration had developed only limited tools for the protection of human rights through dispute settlement,<sup>3</sup> recent arbitral awards have shown a growing awareness of the need to consider human rights within investment disputes. The incidence of cases in which arbitrators have taken non-economic values into account is increasing.<sup>4</sup>

This chapter will proceed as follows. First, the chapter examines the international norms protecting indigenous cultural heritage with particular reference to the UNDRIP. Second, the international investment law regime will be briefly sketched out. Third, relevant arbitrations will be analysed and critically assessed. Fourth, this contribution offers some legal options to better reconcile the different interests at stake. Fifth, some conclusions shall be drawn. The chapter argues that the collision between investors' rights and indigenous entitlements makes the case for strengthening the current regime protecting indigenous peoples' rights. In particular, the participation of indigenous peoples in the decisions that affect them and their heritage is crucial. In parallel, such interplay also requires further reflection on the

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was opposed by the United States, Canada, New Zealand, and Australia. However, these four nations subsequently endorsed the Declaration.

<sup>2</sup> 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755–1778, 1756.

<sup>3</sup> For a seminal study, see V. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 797–889. See also V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014) 204–36; G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights' (2012) 33 *Michigan Journal of International Law* 627.

<sup>4</sup> Vadi, *Cultural Heritage in International Investment Law and Arbitration*.

emerging contribution of international investment law and arbitration to the development of international law.

The chapter then proposes three principal mechanisms to address the existing power imbalances among indigenous peoples, investors, and states: treaty drafting, treaty interpretation, and counterclaims. While these techniques are more evolutionary than revolutionary, they can prevent conflicts between different treaty regimes and contribute to the humanization of international investment law and the harmonious development of international law.

## *2. The International Protection of Indigenous Heritage*

In the past decades, there has been ‘a paradigm shift in international law.’<sup>5</sup> International law has finally recognised that indigenous peoples are bearers of rights both as individuals and as communities. Not only has international law increasingly regulated indigenous peoples’ matters, but indigenous peoples are directly influencing and contributing to international law making.<sup>6</sup> Existing international law has been interpreted in a way favourable to indigenous peoples<sup>7</sup> and new international instruments have specifically recognized the rights of indigenous peoples.<sup>8</sup> For instance, the 1989 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)<sup>9</sup> and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>10</sup> are special instruments for the protection of indigenous peoples. Indigenous peoples have supported the creation of special forums and bodies that exclusively deal with their situation and focus on their

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<sup>5</sup> M. Åhrén, *Indigenous Peoples’ Status in the International Legal System* 149 (Oxford: OUP 2016) (arguing that the recognition of indigenous peoples as ‘peoples’ ‘for international legal purposes can be described as nothing less than a paradigm shift in international law.’).

<sup>6</sup> K. A. Carpenter and A. R. Riley, ‘Indigenous Peoples and the Jurisgenerative Moment in Human Rights’ (2014) 102 *Berkeley Law Review* 173, at 177 (noting that ‘Indigenous peoples are influencing law around and outside of their communities, all the way up into state and international practice.’).

<sup>7</sup> ‘The Double Life of International Law’, 1758.

<sup>8</sup> *Id.*

<sup>9</sup> International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382.

<sup>10</sup> UNDRIP, *supra* note 1.

rights.<sup>11</sup> For instance, the creation of the United Nations Permanent Forum for Indigenous Issues (UNPFII) reflects the efforts of indigenous peoples ‘to create space for themselves and their issues within the United Nations human rights machinery.’<sup>12</sup> Finally, an emerging jurisprudence of various human rights bodies has coalesced reaffirming their rights.<sup>13</sup>

Among the human rights entitlements of indigenous peoples, cultural entitlements are of particular importance.<sup>14</sup> While the claims and aspirations of indigenous peoples are diverse, they do present a common thread: the quest to safeguard their heritage.<sup>15</sup> For indigenous peoples, cultural heritage is a mix of tangible and intangible elements that contribute to personal identity, life-values, and resilience. On the one hand, for indigenous peoples, cultural heritage has ‘a temporal dimension that moves simultaneously in two directions’: the past and the future.<sup>16</sup> For indigenous peoples, cultural heritage transforms the past into a tool to address present needs and future challenges.<sup>17</sup> On the other hand, indigenous peoples hold a holistic view of land;<sup>18</sup> they do not differentiate between cultural heritage on the one hand and natural heritage on the other.<sup>19</sup> Rather, their cultural traditions ‘are inseparable from their lands, territories, and natural resources.’<sup>20</sup> Tangible and intangible qualities of heritage ‘become blurred when viewed through an indigenous lens’ and ‘fuse into one.’<sup>21</sup> Therefore, the safeguarding of indigenous cultural heritage is indissolubly tied to the ancestral land and human rights of indigenous peoples.

Indigenous heritage appears in a number of international law

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<sup>11</sup> K. Göcke ‘Protection and Realization of Indigenous Peoples’ Land Rights at the National and International Level’ (2013) 5 *Goettingen Journal of International Law* 124.

<sup>12</sup> S. Sargent ‘Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights’ (2012) 16 *International Journal of Human Rights* 123–151, 136.

<sup>13</sup> See Citroni’s chapter in this volume.

<sup>14</sup> L. Westra, *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan 2008) 10.

<sup>15</sup> S. Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22 *EJIL* 121.

<sup>16</sup> T. te Heuheu, M. Kawharu and R. Ariihau Tuheiava, ‘World Heritage and Indigeneity’ (2012) *World Heritage* 17.

<sup>17</sup> J. Josefsson and I.-L. Aronsson, ‘Heritage as Life-Values: A Study of the Cultural Heritage Concept’ (2016) 110 *Current Science* 2091, 2093–95.

<sup>18</sup> ‘Interview with Myrna Cunningham, Chair of the United Nations Permanent Forum on Indigenous Issues’ (2012) *World Heritage* 54–57.

<sup>19</sup> Josefsson and Aronsson, ‘Heritage as Life-Values’, 2098.

<sup>20</sup> ‘Interview with Myrna Cunningham’, *supra* note 18, 54.

<sup>21</sup> te Heuheu, Kawharu and Tuheiava, ‘World Heritage and Indigeneity’, 17.



instruments, and plays a central role in the UNDRIP.<sup>22</sup> The Declaration is the product of two decades of preparatory work and ‘a milestone of re-empowerment’ of indigenous peoples.<sup>23</sup> While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law and/or general principles of law.<sup>24</sup> The Declaration constitutes a significant achievement for indigenous peoples worldwide as it brings indigenous peoples’ rights and cultural heritage to the forefront of international law.<sup>25</sup> Indigenous culture is a key theme of the Declaration. Many articles are devoted to different aspects of indigenous culture; in fact, the word ‘culture’ appears no less than thirty times in its text.<sup>26</sup> Not only does the UNDRIP recognize the dignity and diversity of indigenous peoples’ culture but it also acknowledges its essential contribution to the ‘diversity and richness of civilizations and cultures’, which constitute the ‘common heritage’ of humanity.<sup>27</sup>

The Declaration recognizes the right of indigenous peoples to practice their cultural traditions<sup>28</sup> and maintain their distinctive spiritual and material relationship with the land that they have traditionally owned, occupied, or otherwise used.<sup>29</sup> For most, if not all, indigenous peoples, land is not only the basis of economic livelihood, but also the source of spiritual and cultural

<sup>22</sup> International Labour Organization, Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), adopted 27 June 1989, in force 5 September 1991, 28 *ILM* 1382, Article 13(1).

<sup>23</sup> S. Wiessner, ‘Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 31–63, 31.

<sup>24</sup> On the legal status of the Declaration, see M. Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *ICLQ* 957, 983 (arguing that ‘regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world’s indigenous peoples.’) See also International Law Association, Comm. on the Rights of Indigenous Peoples, Res. No. 5/2012 (August 2012) (noting that ‘UNDRIP as a whole cannot yet be considered a statement of existing customary international law. However, it includes several key provisions which correspond to existing state obligations under customary international law.’)

<sup>25</sup> E. Pulitano, ‘Indigenous Rights and International Law: An Introduction’, in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 25.

<sup>26</sup> See Y. Donders, *The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?*, in I. Boerfijn and J. Goldschmidt (eds.) *Changing Perceptions of Sovereignty and Human Rights* (Intersentia 2008) 99.

<sup>27</sup> UNDRIP preamble.

<sup>28</sup> Id. Article 11.

<sup>29</sup> Id. Articles 8, 11, 12.1, 13.1.

identity.<sup>30</sup> They ‘see the land and the sea, all of the sites they contain and the knowledge and the laws associated with those sites as a single entity that must be protected as a whole.’<sup>31</sup> Because indigenous peoples often have this holistic approach, a UN study acknowledges that ‘[a]ll elements of heritage should be managed and protected as a single, interrelated, and integrated whole.’<sup>32</sup> For the same reason, indigenous culture ‘often cannot be preserved in locations outside traditionally indigenous territories.’<sup>33</sup>

Some scholars caution that emphasizing the cultural entitlements of indigenous peoples can reduce their political rights and limit their claims to self-determination.<sup>34</sup> They warn that there is tendency to treat cultural rights as less fundamental than other human rights. On the contrary, this chapter argues that without the protection of indigenous cultural identity, heritage, and rights, all of the other claims of indigenous peoples lose strength. Cultural claims do not replace other claims; rather, they complement and reinforce them. Not only have cultural rights gradually become more central in current debates, but human rights have long been considered to be indivisible.<sup>35</sup> The UNDRIP acknowledges the importance of indigenous cultures and adopts this holistic understanding of indigenous peoples’ rights. In fact, the protection of the cultural identity of indigenous peoples is at the heart of the UNDRIP,<sup>36</sup> and ‘one can find the cultural rights angle in each article of the Declaration.’<sup>37</sup> Therefore, recognizing the

<sup>30</sup> J. Gilbert, ‘Custodians of the Land – Indigenous Peoples, Human Rights and Cultural Integrity’, in M. Langfield, W. Logan, and M. Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights* (London: Routledge 2010) 31–44.

<sup>31</sup> C. O’Faircheallaigh, *Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia* (2003) 39 *Development & Change* 25, 27.

<sup>32</sup> E.-I. Daes, Special Rapporteur, Comm. On Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN Doc. E/CN.4/Sub. 2/1993/28 (1993) 9.

<sup>33</sup> ‘The Double Life of International Law’, 1759.

<sup>34</sup> K. Engle, *The Elusive Promise of Indigenous Development—Rights, Culture, Strategy* (Durham, NC: Duke University Press 2010) 1–2 (arguing that ‘cultural rights have provided the dominant framework for indigenous rights advocacy since at least the 1990s’ and suggesting that ‘increased cultural rights sometimes lead to decreased opportunities for autonomy and development.’)

<sup>35</sup> A. Sinding-Larsen, ‘Our Common Dignity: Rights-Based Approaches to Heritage Management’ (2012) 68 *World Heritage* 58, 58.

<sup>36</sup> F. Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *EJIL* 9, 15.

<sup>37</sup> E. Stamatopoulou, ‘Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples’, in S. Allen and A. Xanthaki (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing 2011) 387, 392.

importance of indigenous culture is vital for the recognition, protection, and fulfillment of the human rights of indigenous peoples.

Indigenous peoples can raise complaints regarding measures that affect them before national courts and regional human rights courts, as well as through particular complaint mechanisms at the UN level.<sup>38</sup> Several human rights treaties set up international mechanisms for monitoring states' compliance with human rights and some even enable individuals or groups to file complaints before a court or commission alleging state human rights violations.<sup>39</sup> However, none of these mechanisms has jurisdiction over private parties.<sup>40</sup> At best, communities impacted by foreign direct investment (FDI) can 'obtain an award against the state in which violations [of human rights] occurred.'<sup>41</sup> Nonetheless, this 'may be unsatisfactory ... because states sometimes fail to comply with the determinations of human rights bodies, and options for enforcing those determinations are limited or non-existent.'<sup>42</sup> Finally, regional human rights courts have 'a limited geographical scope' and are present only in certain regions of the world.<sup>43</sup> The UNDRIP does not change this situation. Therefore, notwithstanding the major political merits of the Declaration, as one author puts it, 'UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.'<sup>44</sup>

### *3. International Investment Governance and the Diaspora of Indigenous Culture-related Disputes before International Investment Treaty Tribunals*

International investment law is a well-developed field of study within the broader international law framework. As there is no single comprehensive global treaty, investors' rights are defined by an array of bilateral and regional investment treaties and by customary international law, general principles,

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<sup>38</sup> I. Watson and S. Venne, 'Talking Up Indigenous Peoples' Original Intent in a Space Dominated by State Interventions', in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 87, 96, 106.

<sup>39</sup> G. K. Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17 *Lewis & Clark L. Review* 361, 390.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* 391.

<sup>43</sup> *Id.*

<sup>44</sup> K. Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *EJIL* 141, 163.

and other subsidiary sources of law. International investment law provides extensive protection to investors' rights in order to encourage foreign direct investment (FDI) and to foster economic development. At the substantive level, investment treaties provide *inter alia* for: adequate compensation for expropriated property; protection against discrimination; fair and equitable treatment; full protection and security; and assurances that the host country will honour its commitments regarding the investment.

At the procedural level, international investment law is characterised by sophisticated dispute settlement mechanisms. While state-to-state arbitration has been rare,<sup>45</sup> investor–state arbitration has become the most successful mechanism for settling investment-related disputes.<sup>46</sup> Nowadays, international investment agreements (IIAs) provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at depoliticising disputes, avoiding potential national court bias, and ensuring the advantage of effectiveness.<sup>47</sup> Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of their relative investment treaties.

Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by human rights treaties and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, cultural disputes involving the rights of investors and indigenous peoples have been brought before investment treaty arbitral tribunals.<sup>48</sup>

One may wonder whether the fact that cultural disputes tend to be adjudicated before international investment treaty tribunals results in institutional bias. Investment treaty standards are vague and their language encompasses a potentially wide variety of state regulation that

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<sup>45</sup> On state-to-state investment treaty arbitration, *see generally* M. Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?', in S. Lalani and R. Polanco Lazo (eds.) *The Role of the State in Investor–State Arbitration* (Leiden: Brill 2015) 249, 250.

<sup>46</sup> S. Franck, 'Development and Outcomes of Investor–State Arbitration' (2009) 9 *Harvard Journal of International Law* 435–489.

<sup>47</sup> U. Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 *ICSID Review* 14–28.

<sup>48</sup> Obviously, this does not mean that these are the only available fora for this kind of dispute. Other tribunals are available such as national courts, human rights courts, regional economic courts, and traditional state-to-state courts and tribunals such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be more suitable than investor–state arbitration to address cultural concerns. However, given its scope, this study focuses on the jurisprudence of arbitral tribunals.

may interfere with economic interests. Therefore, a tension exists when a state adopts regulatory measures interfering with foreign investments, as regulation may be considered as violating substantive standards of treatment under investment treaties and the foreign investor may claim compensation before arbitral tribunals.

The architecture of the arbitral process also raises significant concerns in the context of disputes involving indigenous peoples. While arbitration structurally constitutes a private model of adjudication, substantively, arbitral awards ultimately shape the relationship between the state, on the one hand, and private individuals on the other.<sup>49</sup> Arbitrators determine matters such as the legality of governmental activity, the degree to which foreign investors should be protected from state action, and the appropriate role of the state.<sup>50</sup> From this, it is clear that disputes determined within this model can potentially affect the inherent rights of indigenous peoples. The following section addresses the question of whether the inherent rights of indigenous peoples play any role in investor-state arbitrations.

#### 4. *When Cultures Collide*

The development of natural resources is growing increasingly in, or very close to, traditional indigenous areas. While development analysts consider extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,<sup>51</sup> for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of the development through reduced access to resources and direct exposure to pollution and environmental degradation. In particular, rising investment in the extractive industries can have a devastating impact on the livelihood of indigenous peoples.<sup>52</sup>

The interplay between investors' rights and indigenous peoples' rights has been discussed by domestic courts,<sup>53</sup> and by human rights bodies at

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<sup>49</sup> G. Van Harten *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2007) 70.

<sup>50</sup> M. Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10 *Canadian Foreign Policy* 1.

<sup>51</sup> OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) 3.

<sup>52</sup> K. Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and The Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73–100.

<sup>53</sup> At the national level, see e.g. *Hupacasath First Nation v. The Minister of Foreign Affairs*

the regional and international level.<sup>54</sup> This jurisprudence and the relevant literature are extensive; what is less known is the emerging jurisprudence of investment treaty arbitral tribunals dealing with elements of indigenous cultural heritage. This chapter contributes to the existing literature by examining and critically assessing a number of recent arbitrations and proposing policy options to reconcile the interests at stake.

Given the impact that arbitral awards can have on indigenous peoples' cultural heritage and rights, and the growing number of investment arbitrations, scrutiny and critical assessment of this jurisprudence is particularly timely and important. On the one hand, such scrutiny illuminates the way international investment law responds to human rights concerns in its operation, thus contributing to the ongoing investigation into the role of international investment law within its broader matrix of international law. On the other hand, this scrutiny calls for strengthening the human rights system to reduce the institutional imbalance with international investment law.

To date, the crossover of international investment law and the rights of indigenous peoples has arisen in three ways.<sup>55</sup> First, as investors, indigenous peoples have filed claims before arbitral tribunals *qua* foreign investors, alleging that the host state failed to consider their human rights.<sup>56</sup> Second, foreign investors have filed claims against the host state contending that regulatory measures protecting indigenous cultural rights or their heritage were in breach of relevant investment treaty provisions. Third, indigenous communities have sought permission to intervene in the proceedings.<sup>57</sup> This

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*Canada and The Attorney General of Canada*, Judgment of 9 January 2015, 2015 FCA 4 (CanLII) (the Canadian Federal Court dismissed an application by the Hupacasath First Nation, an aboriginal band in British Columbia, to stall the Canada–China Investment Treaty until First Nations had been consulted, holding that any potential adverse impacts were non-appreciable and speculative in nature).

<sup>54</sup> See Citroni's chapter in this volume.

<sup>55</sup> For a similar analytical framework, see J. Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples', in F. Baetens (ed) *Investment Law within International Law—Integrationist Perspectives* (Cambridge: CUP 2013) 107–128.

<sup>56</sup> *Grand River Enterprises Six Nations, Ltd. v. United States*, Award, NAFTA Tribunal, 12 January 2011. For commentary, see V. Vadi, 'Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration' (2018) 50 *George Washington International Law Review* 742–744.

<sup>57</sup> See e.g. *Border Timbers Ltd. v. Zimbabwe*, Procedural Order No. 2, ICSID ARB/10/25, 26 June 2012; *Glamis Gold, Ltd. v. United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL, 16 September 2005. For commentary, see Vadi, 'Heritage, Power, and Destiny', 761–4.

chapter focuses on the second type of case, those in which investors have contended that state measures allegedly intended to protect indigenous peoples were in breach of relevant investment treaty provisions. In particular, it proceeds as follows. First, it sheds light on a recent award which declined jurisdiction. Second, it deals with claims of breach of fair and equitable treatment. Third, it discusses claims of unlawful expropriation. Other claims, including violation of full protection and security, are not examined here due to space limitations.<sup>58</sup>

#### 4.1 *Jurisdiction*

In some cases, arbitral tribunals have declined their jurisdiction. In this regard, it may be interesting to examine a recent award, which has been neglected by the literature so far, in which the arbitral tribunal declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard indigenous peoples' rights. In 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the International Center for the Settlement of Investment Disputes (ICSID).<sup>59</sup> The investors contested decisions made by the Panamanian National Land Management Agency about whether the claimants' property was located within the protected area inhabited by the Ngöbe Buglé indigenous peoples in Western Panama.<sup>60</sup> The Ngöbe land originally extended from the Pacific Ocean to the Caribbean Sea and the Ngöbe have traditionally relied on subsistence activities such as farming, fishing, and hunting.<sup>61</sup> Nowadays they mostly live in the Comarca Ngöbe-Buglé, which is a specifically designated area to protect the cultural heritage and the political autonomy of these indigenous communities.<sup>62</sup> The 1997 law

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<sup>58</sup> Other claims include violation of full protection and security. See, e.g. *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID ARB/08/5, 2 June 2010) paras 27–37. For commentary, see Vadi, 'Heritage, Power, and Destiny', 750–1.

<sup>59</sup> *Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID ARB/15/14, 20 April 2015.

<sup>60</sup> See C. Trevino, 'Panama Faces New ICSID Arbitration Over Thwarted Hotel Tourism Development', *Investment Arbitration Reporter* (2015) 1.

<sup>61</sup> C. Campbell, 'Protecting the Ngäbe Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development' (2014) 2 *American Indian Law Journal* 547, 547.

<sup>62</sup> *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, ICSID ARB/15/14, Motivación de la decisión sobre las excepciones preliminares de la demandada en virtud

establishing the Comarca Ngöbe-Buglé recognized the right of indigenous persons to collective ownership of land and prohibited private property within these zones, as well as granting indigenous tribes a certain autonomy.<sup>63</sup> In the region, only land that has been privately-held before 1997 can be sold to private parties, and Comarca's authorities retain a right of preferential acquisition of any privately-owned land for sale.<sup>64</sup> Human rights scholars have interpreted this and similar laws to constitute 'one of the foremost achievements in terms of the protection of indigenous rights in the world.'<sup>65</sup>

The investment at the heart of the dispute 'comprised of four farm properties situated along the Panamanian coast, which the investors planned to develop as an eco-tourist project.'<sup>66</sup> The investors bought these properties, supposedly belonging to the Comarca, from an intermediary who bought such properties and resold them to the investors.<sup>67</sup> Because the press questioned the legitimacy of the acquisition, the National Authority for Lands Administration 'issued a report that officially located two of the claimants' properties outside this special zone.'<sup>68</sup> Reportedly, the Report 'provoked a wave of indignation among the indigenous population'<sup>69</sup> and 'this led to the invasion of these properties.'<sup>70</sup> The claimants alleged that Panama's treatment of their investment constituted an indirect expropriation and a breach of the fair and equitable treatment as well

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de la regla 41(5) de las reglas de arbitraje del CIADI del 27 de enero de 2016, para. 22; *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo 12 October 2018, para. 206.

<sup>63</sup> *Kuna Indigenous People of Madungandi v. Panama*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (ser. C) No. 284, para. 59, Judgment 14 October 2014; *Álvarez y Marín Corporación y Otros*, laudo, para. 208.

<sup>64</sup> *Álvarez y Marín Corporación y Otros*, laudo, para. 209.

<sup>65</sup> J. Anaya, Special Rapporteur on the Rights of Indigenous Peoples, UN Hum. Rts. Council, *The Status of Indigenous Peoples' Rights in Panama*, A/HRC/27/52/Add.1, 3 July 2014, para. 13.

<sup>66</sup> Z. Williams, 'Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections' (2016) *Investment Arbitration Reporter* 2.

<sup>67</sup> D. Charlotin and F. Perez Aznar, 'In previously-unseen *Álvarez y Marín v. Panama* award, reasons are revealed for why a majority declined to take jurisdiction over investment in indigenous territory – and why Grigera Naon dissented', *Investment Arbitration Reporter*, 13 March 2019, 1.

<sup>68</sup> Williams, 'Arbitrators in Panama Eco-Tourism BIT Dispute'; *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la decisión sobre las excepciones preliminares, para. 26.

<sup>69</sup> Charlotin and Perez Aznar, 'In previously-unseen', 1.

<sup>70</sup> *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la decisión sobre las excepciones preliminares, para. 27.



as the full protection and security standards.<sup>71</sup> Panama denied having violated the treaties and raised several jurisdictional objections, arguing mainly that the investments had been unlawfully acquired.

The Arbitral Tribunal declined jurisdiction over the case on the basis of the investors' lack of compliance with domestic law.<sup>72</sup> Although neither of the two treaties invoked by the investors contained an express requirement of legality, the Tribunal held that a legality requirement should be deemed implicit in all investment treaties, so that only investments acquired legally could benefit from a treaty's protection.<sup>73</sup> The Tribunal noted that the Law establishing the Comarca and the Panamanian Constitution aimed at protecting indigenous peoples' cultural, economic, and social well-being.<sup>74</sup> It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of indigenous peoples.<sup>75</sup>

#### 4.2 *Fair and Equitable Treatment*

This subsection examines selected investors' claims of breach of the fair and equitable (FET) treatment.<sup>76</sup> The fair and equitable treatment standard requires host states to treat foreign investors and their investments in good faith. Because of its vagueness and potential comprehensiveness, the standard has become the most popular type of claim today because it is easier to establish than an expropriation claim. A flexible standard, it is susceptible to specification through arbitral practice.

In *Crystalex v. Venezuela*,<sup>77</sup> a Canadian company that had invested in one of the largest gold deposits in the world, the Las Cristinas deposit in Venezuela, claimed that the conduct of Venezuela in relation to the mine

<sup>71</sup> Id. para. 28.

<sup>72</sup> *Álvarez y Marín Corporación y Otros*, laudo, para. 296 ('*El Tribunal ha decidido que no merecen protección ius-internacional aquellas inversiones en las que el inversor, al momento de realizarlas, haya incurrido en un incumplimiento grave de la legislación nacional.*')

<sup>73</sup> *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo 12 October 2018, para. 118 (noting that '*el requisito de legalidad, aunque no expresado explícitamente en los Tratados, forma parte implícita del concepto de inversión protegida.*')

<sup>74</sup> Id. paras. 318–319 (referring to Article 127 of the Panamanian Constitution).

<sup>75</sup> Id. para. 327 ('*Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.*')

<sup>76</sup> For the examination of earlier awards, such as *Glamis Gold v. United States*, Award, UNCITRAL, 8 June 2009, see Vadi, 'Heritage, Power and Destiny', 748.

<sup>77</sup> *Crystalex Int'l Corp. v. Venezuela*, Award, ICSID ARB(AF)/11/2, 4 April 2016.

amounted to an expropriation, a violation of the fair and equitable treatment standard, and a violation of the full protection and security standard.<sup>78</sup> The state authorities denied an environmental permit that Crystallex needed for the exploitation of the mine because of concerns about the project's impact on the environment and on an indigenous community at the Imataca Forest reserve.<sup>79</sup> Yet, the claimant pointed out that the Ministry of Environment had never raised concerns for the environment and indigenous peoples during the four-year approval process and no study supported such concerns or demonstrated that the project would adversely affect the Imataca region.<sup>80</sup> While Crystallex claimed that it had consulted the relevant indigenous communities,<sup>81</sup> Venezuela argued that the company had inadequately addressed issues concerning 'local indigenous culture and traditions.'<sup>82</sup>

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, a letter from the state authorities had created legitimate expectations that the project would proceed.<sup>83</sup> Moreover, the Tribunal found that the subsequent permit denial letter did not sufficiently elucidate reasons for denial; rather, it 'extend[ed] to a mere two and a half pages,' and vaguely referred to 'serious environmental deterioration in the rivers, soils, flora, fauna and biodiversity in general in the plot' and climate change.<sup>84</sup> While the Tribunal did not contest the state's right and responsibility to raise environmental issues in respect of the Imataca Reserve, it held that the specific way the state put forward such concerns in the permit denial letter 'present[ed] significant elements of arbitrariness.'<sup>85</sup>

### 4.3 Expropriation

Two important arbitrations have centered on claims of expropriation. In *Bear Creek Mining Corporation v. Peru*,<sup>86</sup> the claimant, a Canadian company, contended that Peru had failed to afford its investment, the Santa Ana Silver mining project, the protection set out in the Free Trade Agreement (FTA)

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<sup>78</sup> Id. paras 184–203.

<sup>79</sup> Id. paras 204 and 378.

<sup>80</sup> Id. para. 277.

<sup>81</sup> Id. para. 289.

<sup>82</sup> Id. para. 351.

<sup>83</sup> Id. para. 588.

<sup>84</sup> Id. para. 590.

<sup>85</sup> Id. para. 591.

<sup>86</sup> *Bear Creek Mining Corp. v. Peru*, Award, ICSID ARB/14/21, 30 November 2017.

between Canada and Peru. In particular, it claimed that Peru unlawfully expropriated its investment.<sup>87</sup> The Santa Ana project was located in a border region<sup>88</sup> and under Peruvian law, ‘a foreign national can only gain rights to natural resources in border regions when the foreign national makes a case to the Peruvian Government for a public necessity.’<sup>89</sup> After the company ‘initiated the procedure to obtain the necessary mining rights,’<sup>90</sup> a decree declared that the Santa Ana project was ‘a public necessity’ and authorized the claimant to acquire mining concessions.<sup>91</sup>

However, the project was in a region traditionally inhabited by the Aymara peoples, pre-Inca communities who have been in Peru for a long time.<sup>92</sup> For the Aymara, this land is a spiritual space as it includes ‘the guardian mountains (*Apus*), which represent extremely important spiritual sanctuaries for all the population in the area.’<sup>93</sup> Some indigenous communities protested against the project, requiring the cancellation of all mining projects and the protection of Khapia Hill, a sacred place for the Aymaras.<sup>94</sup> After the protest became violent,<sup>95</sup> Peru revoked the finding of public necessity, thereby annulling the legal condition for the claimant’s ownership of mineral concessions.<sup>96</sup>

The claimant contended that it obtained the communities’ support for the Santa Ana project and the ‘social license’ to operate.<sup>97</sup> The company also stressed that it was the state’s duty to consult with local communities before granting rights over their lands.<sup>98</sup> For the claimant, Peru’s actions amounted to an indirect expropriation because it permanently deprived the company of ‘its ability to own and operate its lawfully acquired mining concessions.’<sup>99</sup> For the company, there was disparity between such deprivation and ‘the stated goal of quelling political pressure and social protests.’<sup>100</sup>

<sup>87</sup> Id. para. 113.

<sup>88</sup> *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, 12 September 2017, para. 25.

<sup>89</sup> *Bear Creek Mining Corp. v. Peru*, Award, para. 124.

<sup>90</sup> Id. para. 140.

<sup>91</sup> Id. para. 149.

<sup>92</sup> *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 25.

<sup>93</sup> Id. para. 16 (footnote omitted).

<sup>94</sup> *Bear Creek Mining Corp. v. Peru*, Award, paras 183 and 186 (noting that the government subsequently declared Khapia Hill to be part of the nation’s cultural heritage.)

<sup>95</sup> Id. paras 189–190.

<sup>96</sup> Id. para. 202.

<sup>97</sup> Id. paras 235, 246.

<sup>98</sup> Id. para. 236.

<sup>99</sup> Id. para. 347.

<sup>100</sup> Id.

The Tribunal acknowledged the ‘strong political pressure’ on Peru due to ‘social unrest.’<sup>101</sup> It also questioned whether the claimant took ‘the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed.’<sup>102</sup> It then noted that ‘support for the Project came from communities that were receiving some form of benefits (i.e., jobs, direct payments for land use, etc.) and that those communities that remained silent or objected were either not receiving benefits, were uninformed, or both.’<sup>103</sup>

Yet, the Tribunal noted that ‘[T]he ILO Convention 169 imposes direct obligations only on States... [I]t adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project.’<sup>104</sup> Therefore, the Tribunal concluded that the company ‘complied with all legal requirements with regard to its outreach to the local communities.’<sup>105</sup> Instead, the Tribunal found that Peru’s conduct amounted to an indirect expropriation of the company’s investment.<sup>106</sup> The Tribunal noted that ‘those members of the indigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve the Respondent from paying reasonable and appropriate damages for its breach of the FTA.’<sup>107</sup>

In his partial dissenting opinion, appended to the final award, Arbitrator Professor Sands largely agreed with the conclusions of the Tribunal. In his view, ‘the circumstances which the Peruvian government faced—massive and growing social unrest caused in part by the Santa Ana Project—left it with no option but to act in some way to protect the well-being of its citizens; however, other and less draconian options were available’ to the government, which the respondent did not consider.<sup>108</sup> Nonetheless, Professor Sands disagreed with the other members of the Arbitral Tribunal on how to assess damages, arguing that the assessment of damages should be reduced.<sup>109</sup> For the Arbitrator, ‘the Project collapsed because of the investor’s

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<sup>101</sup> Id. para. 401.

<sup>102</sup> Id. para. 406.

<sup>103</sup> Id. para. 407.

<sup>104</sup> Id. para. 664 (emphasis in original).

<sup>105</sup> Id. para. 412.

<sup>106</sup> Id. paras 416, 447–448.

<sup>107</sup> Id. para. 657.

<sup>108</sup> *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 2.

<sup>109</sup> *Bear Creek Mining Corp. v. Peru*, Award, para. 663.

inability to obtain a “social license,” the necessary understanding between the Project’s proponents and those living in the communities most likely to be affected by it.’<sup>110</sup> As the Arbitrator pointed out, ‘the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support.’<sup>111</sup> However, for the Arbitrator, the company ‘did not . . . take real or sufficient steps . . . to engage the trust of all potentially affected communities’ and this ‘contributed, at least in part, to some of the population’s general discontent with the Santa Ana Project.’<sup>112</sup> The Arbitrator concluded that ‘[t]he Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.’<sup>113</sup>

Referring to the preamble of the ILO Convention 169, to which Peru is a party, Professor Sands highlighted that such preamble ‘recognizes the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.’<sup>114</sup> For him, the preamble also highlights ‘the distinctive contributions of Indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding.’ For Professor Sands, ‘[t]his preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of [I]ndigenous and tribal peoples.’<sup>115</sup>

Although Article 15 of the ILO Convention 169 imposes the duty to consult indigenous peoples on governments, rather than investors, ‘the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.’<sup>116</sup> Rather, the Arbitrator pointed out that ‘human rights ... are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.’<sup>117</sup> He further added that ‘[a]s an international investor the Claimant has

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<sup>110</sup> *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 6.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* para. 19.

<sup>113</sup> *Id.* para. 37.

<sup>114</sup> *Id.* para. 7.

<sup>115</sup> *Id.* (internal references omitted).

<sup>116</sup> *Id.* para. 10.

<sup>117</sup> *Id.* (quoting *Urbaser S.A. v. Argentine Republic*, Award, ICSID ARB/07/26, 8 December 2016, para. 1199).

legitimate interests and rights under international law; local communities of Indigenous and tribal peoples also have rights under international law, and these are not lesser rights.<sup>118</sup>

In *South American Silver Limited (SAS) v Bolivia*, the Bermudan subsidiary of a Canadian company alleged that the host state, *inter alia*, expropriated the company's ten mining concessions near the village of Malku Khota in the Bolivian province of Potosí.<sup>119</sup> Although several indigenous communities had lived in the area of the Project since time immemorial, for the company, the government itself, and not the local Aymara communities, pressed for the nationalization of the project for economic reasons, namely the benefits associated with SAS's discovery of a large deposit of silver, indium, and gallium.<sup>120</sup> For the claimant, the expropriation did not have a public purpose, as 'it b[ore] no logical or proportional relationship with the stated objective of pacifying the area.'<sup>121</sup>

In its Counter-Memorial,<sup>122</sup> the respondent alleged that the claimant had violated the rights of the indigenous communities that lived in the area, and that such violations operated as a jurisdictional or admissibility bar.<sup>123</sup> For Bolivia, the reversion of the concessions to state ownership was justified by a public interest: the need to restore public order in the area and to protect the rights of indigenous peoples.<sup>124</sup> Bolivia noted that according to the Bolivian Constitution indigenous communities have, *inter alia*, the right to land, including 'the exclusive use and exploitation of the renewable natural resources' and the right to the 'prior and informed consultation and the participation in the benefits for the exploitation of the non-renewable natural resources that are located in their territory.'<sup>125</sup> Moreover, they have recognized autonomy, that is, 'the power to apply their own norms, ... and [to define] ... their development in accordance with their cultural criteria and principles of harmonic coexistence with Mother Nature.'<sup>126</sup> Bolivia also

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<sup>118</sup> Id. para. 36.

<sup>119</sup> *South American Silver Limited v the Plurinational State of Bolivia* (hereafter *SAS v Bolivia*), PCA Case No. 2013-15, Claimant's Statement of Claim and Memorial, 24 September 2014, para. 9.

<sup>120</sup> Id. para. 96.

<sup>121</sup> Id. para. 144.

<sup>122</sup> *SAS v Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation).

<sup>123</sup> Id. para. 4.

<sup>124</sup> Id. paras 6–7.

<sup>125</sup> Id. para. 47.

<sup>126</sup> Id.

noted that indigenous peoples consider Malku Khota as ‘a sacred place’,<sup>127</sup> despite the fact that it has been exploited since Spanish colonization,<sup>128</sup> and ‘consider themselves ancestral owners of the minerals of the Andean mountains.’<sup>129</sup> Therefore, the state contended, opposition to the project came from indigenous communities that perceived the project as a violation of their ancestral beliefs and an impending risk to the environment on which their survival depended.<sup>130</sup> From its perspective, the government ‘did not have any other option but to re-establish the public order.’<sup>131</sup>

With regard to the applicable law, the investor argued that international investment law required arbitral tribunals to ‘apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.’<sup>132</sup> Instead, Bolivia expressly required that the Tribunal ‘interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights of the Indigenous peoples.’<sup>133</sup> In this regard, it referred to customary norms of treaty interpretation as restated in the Vienna Convention on the Law of Treaties,<sup>134</sup> requiring adjudicators to take into account the context of a treaty, which included, according to article 31(3)(c) of the same Convention, ‘any relevant rules of international law applicable in the relations between the parties.’<sup>135</sup>

Moreover, Bolivia argued that ‘under international public law, the obligations concerning the fundamental rights of the Indigenous Communities prevail over the obligations concerning foreign investment protection.’<sup>136</sup> In support of this argument, Bolivia relied on *Indigenous Peoples of Sawhoyamaxa v Paraguay*, in which the Inter-American Court of Human Rights held that ‘applying bilateral commercial agreements does not justify breaching State obligations arising out of the American Convention.’<sup>137</sup> Bolivia derived the ‘superior position or special status’

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<sup>127</sup> Id. para. 90.

<sup>128</sup> Id. para. 71.

<sup>129</sup> Id. para. 72.

<sup>130</sup> Id. para. 80.

<sup>131</sup> Id. para. 84.

<sup>132</sup> *SAS v Bolivia*, Claimant’s Statement of Claim and Memorial, para. 116.

<sup>133</sup> *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 192

<sup>134</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, in force 27 January 1980.

<sup>135</sup> *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 193.

<sup>136</sup> Id. para. 202.

<sup>137</sup> Id. para. 203.

of human rights in the international legal system from two pillars. First, article 103 of the Charter of the United Nations provides ‘the supremacy’ of the obligations established in the Charter over any other obligation acquired by its members. Under article 56 of the Charter, its members pledge to take action for the achievement of several purposes, including the respect of human rights.<sup>138</sup> Second, Bolivia argued, norms concerning the fundamental rights of human beings are *erga omnes* obligations.<sup>139</sup> According to Simma and Kill, ‘norms relating to economic, social, and cultural rights could also constitute rules applicable in the relations among States, even if there [was] no independent treaty obligation running between the States in question ... [T]he fact that the Vienna Convention’s preamble proclaims the state parties’ universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale towards a broader conception of applicability.’<sup>140</sup> Bolivia also recalled various international law instruments protecting indigenous rights, including the American Convention on Human Rights,<sup>141</sup> the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization (ILO) Convention 169,<sup>142</sup> and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.<sup>143</sup> It also referred to the United Nations Guiding Principles on Business and Human Rights<sup>144</sup> and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>145</sup> ‘as evidence of the

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<sup>138</sup> Id. para. 205.

<sup>139</sup> Id. para. 206.

<sup>140</sup> Id. quoting B. Simma and T. Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’, in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press 2009) 702.

<sup>141</sup> American States Organization, American Convention on Human Rights, 7 to 22 of November of 1969, 1144 *UNTS* 123; 9 *ILM* 99 (1969).

<sup>142</sup> ILO Convention 169, *supra* note 22.

<sup>143</sup> American States Organization, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994, 33 *ILM* 1534 (1994).

<sup>144</sup> United Nations Guiding Principles on Business and Human Rights Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (2011), developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

<sup>145</sup> J. G. Ruggie and T. Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (Harvard Kennedy School Working Paper No. 15-045 2015).



international public order.’<sup>146</sup>

In its Reply to the respondent’s Counter-Memorial,<sup>147</sup> the claimant denied any allegation of unlawful conduct and restated that ‘[t]he Tribunal ... [should] rely upon the Treaty as the primary source of applicable law.’<sup>148</sup> The claimant did ‘not dispute the basic notion that treaties should generally be construed in harmony with international law’<sup>149</sup> and conceded that ‘a systemic interpretation of the Treaty [was] called for under international law.’<sup>150</sup> Yet, the company contended that ‘Bolivia ha[d] not satisfactorily established why the Tribunal should give primacy to the rights of indigenous communities over the clear terms of the Treaty.’<sup>151</sup> In fact, quoting Bruno Simma, the company contended that Article 31(3)(c) of the VCLT ‘can only be employed as a means of harmonization qua interpretation, and not for the purpose of modification, of an existing treaty.’<sup>152</sup> The claimant thus argued that ‘Bolivia [sought] to use indigenous peoples’ rights as a shield to justify their unlawful conduct.’<sup>153</sup>

The Arbitral Tribunal found that the applicable BIT was ‘the principal instrument by which it [should] resolve the dispute between the Parties.’<sup>154</sup> After noting that both parties agreed that ‘Article 31 of the Vienna Convention sets forth the rules of interpretation for the Treaty’,<sup>155</sup> it held that as a tool for treaty interpretation, systemic interpretation as restated by Article 31(3)(c) of the Vienna Convention should be applied ‘with caution.’<sup>156</sup> The Tribunal recalled Judge Bruno Simma’s warning that ‘systemic interpretation allows for harmonization through interpretation but it cannot be used to modify a treaty.’<sup>157</sup> It then concluded that its jurisdiction could not ‘be extended to cover other treaties via Article 31(3)

<sup>146</sup> *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para 220.

<sup>147</sup> *SAS v Bolivia*, Claimant’s Reply to Respondent’s Counter-Memorial on the Merits and Response to Respondent’s Objection and Admissibility, 30 November 2015.

<sup>148</sup> *Id.* para. 238.

<sup>149</sup> *Id.* para. 245.

<sup>150</sup> *Id.* para. 238.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* para. 245 (quoting B. Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (2011) 60 *International Comparative Legal Quarterly* 573, 584.

<sup>153</sup> *Id.* para. 253.

<sup>154</sup> *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 208.

<sup>155</sup> *Id.* para. 210.

<sup>156</sup> *Id.* para. 212.

<sup>157</sup> *Id.* para. 214.

(c) of the Vienna Convention if the States have not consented to such jurisdiction.’ In other words, the Tribunal held that it could not ‘alter the applicable law through rules of treaty interpretation.’<sup>158</sup> With regard to the applicability of Bolivian law, the Tribunal held that the domestic law was applicable to determine whether an investment was legal; however, it added that it did not ‘find support for a general rule that the provisions of Bolivian law should always prevail over those of the Treaty.’<sup>159</sup> Although the Tribunal acknowledged that the claimant’s community relations program had ‘serious shortcomings’ in its relationship with indigenous communities,<sup>160</sup> it held that the host state’s annulment of mining concessions amounted to an unlawful expropriation because it failed to compensate the company. The Tribunal found that Bolivia did not breach any other treaty standard of protection, and only awarded the investor its sunk costs.

### 5. *Critical Assessment*

What is the relevance of these and similar arbitrations to international investment law and international law more generally? In general terms, while these awards are binding on the parties to the specific disputes they are not binding on future arbitral tribunals as there is no *stare decisis* in international law. Nonetheless, arbitral tribunals usually refer to previous cases. Moreover, the significance of such cases extends beyond international investment law itself. The emerging arbitral jurisprudence concerning indigenous cultural heritage shows that international investment law is not a self-contained regime; rather, it may crossover with other fields of international law. Being part of international law, it can contribute to the development of the same.

From an investment law perspective, these cases show how arbitral tribunals have dealt with (or chosen not to deal with) arguments concerning indigenous peoples’ rights. Some arbitral tribunals have shown some level of deference to state regulatory measures aimed at protecting indigenous cultural heritage. Other tribunals however, have struggled to properly interpret the human rights law requirement of free, prior, and informed consent. Arbitral tribunals have generally ascribed the duty to consult indigenous peoples to

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<sup>158</sup> Id. paras 215–6.

<sup>159</sup> Id. para. 218.

<sup>160</sup> Id. para. 480.

states; but questions arise as to the correctness of their interpretation of the requirement of free, prior, and informed consent. If the right of indigenous peoples to participate in the decisions that affect them is crucial to the protection of their cultural heritage,<sup>161</sup> investor–state arbitration itself constitutes an uneven playing field. The FDI-impacted indigenous peoples do not have direct access to arbitral tribunals; rather, the host state needs to espouse their arguments. Where indigenous peoples respond to investor activities by protest, investors have alleged violations of investment treaty standards. The possibility to file *amicus curiae* briefs does not transform indigenous peoples into parties to a given dispute. Arbitral tribunals have no duty to admit such submissions, or to consider these briefs in their awards. In sum, the voice of indigenous peoples does not reach arbitral tribunals distinctly. Rather, their claims are often hidden among the various arguments and counterarguments of the parties. Recent jurisprudential developments considering compliance with domestic law as a prerequisite for establishing the jurisdiction of the arbitral tribunal should be welcome, as they impede abuse of law.

From a human rights perspective, the interplay between international investment law and human rights law highlights ‘the power imbalance between two international legal regimes’<sup>162</sup> and makes the case for rethinking and/or strengthening the current regime protecting the rights of indigenous peoples. International investment law requires states to grant foreign investors fair and equitable treatment, and nondiscrimination in addition to prohibiting unlawful expropriation and other forms of state misconduct.<sup>163</sup> Human rights law requires the protection of the rights of indigenous peoples and the property rights of the investors. If there is no inherent tension between these different subfields of international law in theory, potential tensions often arise in practice. While the international investment regime is characterized by binding, efficient, and effective dispute settlement mechanisms, the human rights system is characterized by diverse mechanisms for assessing violations of human rights. Human rights mechanisms usually require the exhaustion of internal remedies, which is often time-consuming.<sup>164</sup> Furthermore, certain areas such as South Asia lack regional systems capable of delivering binding judgments.<sup>165</sup> In addition, even where there are regional human rights courts, human rights courts

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<sup>161</sup> UNDRIP Article 18.

<sup>162</sup> ‘The Double Life of International Law’, 1757.

<sup>163</sup> D. Collins, *An Introduction to International Investment Law* (Cambridge: CUP 2017).

<sup>164</sup> F. Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *European Journal of International Law* 729–747.

<sup>165</sup> ‘The Double Life of International Law’, 1770.

face difficulties securing compliance with their judgments. In other words, 'indigenous rights are the subject of much more variable enforcement' than investors' rights.<sup>166</sup> The power imbalance between the two treaty regimes plays a key role in perpetuating the power imbalance between states, foreign investors, and indigenous peoples.

Respondent states can (and have) raise(d) human rights issues 'as a means of justifying [their] action' before arbitral tribunals.<sup>167</sup> Yet, they rarely raise human rights arguments in investment arbitrations 'to avoid the negative repercussions that could result from investors . . . deciding to invest in other states.'<sup>168</sup> When states have asserted human rights arguments on behalf of indigenous communities,<sup>169</sup> the protection of indigenous peoples' rights has not automatically justified the violation of the rights of investors. Rather, states ought to prevent disputes by adopting general transparent regulations that can make any interference with foreign investments foreseeable. The protection of indigenous peoples' rights is certainly a legitimate public objective. The fact that indigenous peoples' rights are recognised in constitutional law instruments and international treaties and customary international law confirms the legitimacy of their protection. However, the modalities of state action should not be arbitrary or unreasonable, rather they should follow the rule of law. This is not to say that states should not protect paramount interests—they have the right and the duty to do so—rather, they should follow transparent, and foreseeable procedures. Before granting concessions, they should condition such granting to the obtainment of free, prior, and informed consent by the relevant indigenous communities and, if such communities gave their consent, compulsorily require foreign investors to share benefits with those communities. Because indigenous peoples may object to proposed developments, states should adopt laws that recognize indigenous self-determination, including economic self-determination, and thus provide for no-development of their land if indigenous peoples so wish. Any permanent alterations to the landscape or impact upon traditional cultural practices that are incompatible with minimal subsistence requirements constitute irreparable harms to indigenous

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<sup>166</sup> Id. 1765.

<sup>167</sup> Id. 1774.

<sup>168</sup> J. D. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77, 108.

<sup>169</sup> See S. Puig and A. Strezhnev, 'The David Effect and ISDS' (2017) 28 *European Journal of International Law* 731–761.

peoples that are difficult, if not impossible to quantify in monetary terms.<sup>170</sup> By adopting general laws and regulations, and implementing their human rights obligations towards indigenous peoples and investors, states can thus shield themselves from international responsibility before human rights courts and before arbitral tribunals alike.

Certainly, the investment law obligations of the state towards foreign investors do not justify violations of its human rights obligations towards indigenous peoples. In the *Sawhoyamaxa* case,<sup>171</sup> the Inter-American Court of Human Rights held Paraguay liable for violating various human rights of the Sawhoyamaxa indigenous community under the American Convention on Human Rights. These communities claimed that Paraguay had, *inter alia*, violated their right to property by failing to recognize their title to ancestral lands.<sup>172</sup> For its part, Paraguay had attempted to justify its conduct contending that the lands in question belonged to German investors and were protected under the Germany–Paraguay BIT.<sup>173</sup> According to the government, the BIT prohibited the expropriation of foreign investors' lands. However, after noting the linkage between land rights and the culture of indigenous peoples,<sup>174</sup> the Court clarified that the investment law obligations of the state did not exempt the state from protecting and respecting the property rights of the Sawhoyamaxa.<sup>175</sup> Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state.<sup>176</sup> Moreover, the Court pointed out that the relevant BIT does not prohibit expropriation; rather, it allows expropriation subject to several requirements including the existence of a public purpose and the payment of compensation.<sup>177</sup> Therefore, the Court found a violation of Article 21 of the Convention<sup>178</sup> and ordered the government to return the land to the Sawhoyamaxa community.

From a general international law perspective, the collision between international investment law and the norms of international law protecting the rights of indigenous peoples constitutes a paradigmatic example of the possible interaction between different treaty regimes. General treaty rules

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<sup>170</sup> Id.

<sup>171</sup> *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations, and Costs) Judgment, IACtHR (ser. C) No. 146, 29 March 2006, para. 248.

<sup>172</sup> Id. para. 2.

<sup>173</sup> Id. para. 115(b).

<sup>174</sup> Id. para. 118.

<sup>175</sup> Id. para. 140.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id. para. 144.

on hierarchy—namely *lex posterior derogat priori*<sup>179</sup> and *lex specialis derogat generali*<sup>180</sup>—may not be entirely adequate to govern the interplay between treaty regimes because the given bodies of law do not exactly overlap; rather, they have different scopes, aims, and objectives.<sup>181</sup> Unless a norm constitutes *jus cogens*,<sup>182</sup> it is difficult to foresee and govern the interaction of different legal regimes.

Can investment treaty tribunals consider and/or apply other bodies of law in addition to international investment law? Given their institutional mandate, which is to settle investment disputes, there is a risk that investment treaty tribunals water down or overlook noteworthy cultural aspects of a given case. International adjudicators may be perceived as detached from indigenous communities and their cultural concerns and may not have specific expertise in human rights law. Furthermore, due to the emergence of a *jurisprudence constante* in international investment law, there is a risk that tribunals do conform to these *de facto* precedents without necessarily considering analogous indigenous cultural heritage-related cases adjudicated before other international courts and tribunals. This is not to say that consistency in decision-making is undesirable; obviously, it can enhance the coherence and predictability of the system contributing to its legitimacy. Yet, the selection of the relevant precedents matters as it can have an impact on the decision.

In conclusion, investment treaty arbitral tribunals are not the best *fora*, let alone the only *fora*, in which to adjudicate this collision of norms. They may not have a specific expertise on indigenous peoples' rights. However, this does not mean that these *fora* cannot take into account other international law obligations of the host state. The collision between international investment law and other fields of international law can be solved through international investment law itself, albeit to a limited extent. The next sec-

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<sup>179</sup> VCLT Article 30.

<sup>180</sup> The concept *lex specialis derogat legi generali* is 'a generally accepted technique of interpretation and conflict resolution in international law.' It indicates that 'whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.' See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251) 408.

<sup>181</sup> D. McRae, 'International Economic Law and Public International Law: The Past and the Future' (2014) 17 *Journal of International Economic Law* 627, 635.

<sup>182</sup> For discussion see V. Vadi, 'Jus Cogens in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388; Vadi, 'When Cultures Collide', 857.

tion will examine three avenues that help to promote the consideration of indigenous entitlements in international investment disputes.

## 6. Policy Options

This section now examines three avenues that can facilitate the consideration of indigenous communities' entitlements in international investment law: (i) a 'treaty-driven approach'; (ii) a 'judicially driven approach';<sup>183</sup> and (iii) counterclaims.

### a) *Treaty-driven Approach to Promote the Consideration of Indigenous Rights in International Investment Law*

A treaty-driven approach suggests reform to bring international investment law better in line with human rights.<sup>184</sup> It promotes the consideration of indigenous rights in international investment law relying on the periodical renegotiation of IIAs. Treaty drafters can expressly accommodate indigenous peoples' entitlements in the text of future IIAs or when renegotiating existing ones.<sup>185</sup> For example, indigenous communities' interests can be mentioned in the preambles, exceptions, carve-outs, annexes, and provisions of IIAs.<sup>186</sup> Such provisions would empower states to adopt measures to protect indigenous peoples' rights. For instance, IIAs might require foreign investors to comply with existing human rights law as a condition for claiming rights under the treaty.<sup>187</sup>

The duty to protect the legitimate exercise of indigenous peoples' cultural rights has led a number of states to include specific indigenous exceptions

<sup>183</sup> M. Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 *Journal of International Dispute Settlement* 42, 45.

<sup>184</sup> S. W. Schill and V. Djanic, 'International Investment Law and Community Interests', Society of International Economic Law Working Paper No. 2016/01 (2016) 4.

<sup>185</sup> Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 277–86.

<sup>186</sup> Schill and Djanic, 'International Investment Law and Community Interests', 15.

<sup>187</sup> 'The Double Life of International Law', 1773–74 (adding that 'in this manner, the mechanism that gives international investment law so much power—dispute settlement—is infused with the need to respect international Indigenous rights'); Foster, 'Investors, States and Stakeholders', 407 ('Given the near-universal endorsement of UNDRIP by the international community, investors could not legitimately claim surprise or prejudice if an investment treaty conferring benefits on them also memorialized an obligation on their part to respect the Indigenous rights enshrined in that instrument, or at least those applicable to the private sector.')

in international environmental law instruments banning the hunting of protected species. 'Aboriginal exemptions' commonly feature in a number of international environmental treaties, which include derogations to their main principles to accommodate the needs of indigenous peoples.<sup>188</sup> For instance, the 1946 International Convention for the Regulation of Whaling retains aboriginal rights to subsistence whaling.<sup>189</sup> Such special measures and forms of differential treatment to protect the rights of indigenous peoples are justified under human rights law. Therefore, there is no theoretical obstacle to prevent the insertion of similar aboriginal exemptions in the context of IIAs.

A parallel inclusive way states can build some safeguards within international investment treaties is by requiring compliance with domestic law. For instance, states can clarify that the relevant investment treaty protects only those investments that comply with domestic law. Such a clause can enable an adaptation of the treaty to the social, cultural, and political needs of the state. Recent international investment agreements tend to add 'legality requirements' – an obligation for foreign investors to conform to and respect the domestic laws of the host state (including human rights).<sup>190</sup> For instance, Article 15.3 of the 2012 Southern African Development Community Model BIT prohibits investors from operating their investment 'in a manner inconsistent with international, environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are the higher.' Analogously, under Article 11 of the 2016 Indian Model BIT, 'the parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation, and disposition of investments.'

IIAs might require compliance with the requirements of free, prior, and informed consent and benefit-sharing for investments taking place in indigenous lands.<sup>191</sup> Under human rights law, the duty of the state to

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<sup>188</sup> See, e.g., Convention on Conservation of Migratory Species, 23 June 1979, 19 *ILM* 11, Article 3.5; Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 *UNTS* 105, Article 7 (describing the aboriginal hunting practices that are exempted by the application of the Convention).

<sup>189</sup> International Convention for the Regulation of Whaling, 2 December 1946, 161 *UNTS* 72, Article III(13)(b) (permitting the taking of various baleen whales by Aborigines, but stipulating that 'the meat and products of such whales are to be used exclusively for local consumption by the Aborigines.')

<sup>190</sup> E. De Brabandere, 'Human Rights and International Investment Law', *Leiden Law School Grotius Centre Working Paper* 2018/75-HRL (2018) 1–22.

<sup>191</sup> On benefit sharing, see E. Morgera, 'The Need for an International Legal Concept of



obtain the free, prior, and informed consent of the indigenous peoples before approving any project affecting them requires *governments* to engage in a meaningful dialogue and consensus-building process with indigenous communities. Nonetheless, nothing precludes states from requiring *investors* to consider the existence of protected groups when assessing the economic risks of a given investment and to obtain a social license to operate.<sup>192</sup> While some scholars have suggested incorporating local communities as a part of multi-actor contracts,<sup>193</sup> other scholars have cautioned that ‘extractive industries can tackle the underlying causes of the growing opposition to their projects . . . by engaging in consent processes with [Indigenous] communities . . . with a view to obtaining their free, prior, and informed consent.’<sup>194</sup>

In this regard, ‘[t]here is a growing trend of seeing business enterprises . . . as having human rights obligations in their own rights, separate and apart from state obligations.’<sup>195</sup> According to the Ruggie’s Framework for Business and Human Rights<sup>196</sup> that is now embedded in the UN Guiding Principles on Business and Human Rights, a company is ‘responsible for respecting all human rights’ and ‘ha[s] the obligation to obtain consent of the local population to its operation in order to ensure its own sustainability.’<sup>197</sup> In

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Fair and Equitable Benefit Sharing’ (2016) 27 *EJIL* 353 (noting that ‘a growing number of international legal materials refer to “benefit sharing” with regard to natural resource use’ and that ‘benefit sharing applies to relations between communities and private companies that may be protected by international investment law’). On the linkage between FPIC and benefit sharing, see Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’, 376 (noting that ‘much remains to be clarified about the interaction between benefit sharing and FPIC. On the one hand, benefit sharing may serve as a condition for the granting of FPIC . . . . On the other hand, benefit sharing may represent the end result of an FPIC process.’)

<sup>192</sup> Krepchev, ‘The Problem of Accommodating Indigenous Land Rights in International Investment Law’, 71.

<sup>193</sup> I. T. Odumosu-Ayanu, ‘Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework’ (2014) 15 *Melbourne Journal of International Law* 473.

<sup>194</sup> L. J. Laplante and S. A. Spears, ‘Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector’ (2008) 11 *Yale Human Rights & Development L.J.* 69.

<sup>195</sup> S. Sargent, ‘What’s in a Name? The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights’, in V. Vadi and B. De Witte (eds), *Culture and International Economic Law* (London: Routledge 2015) 87–103.

<sup>196</sup> J. Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5, 7 April 2008.

<sup>197</sup> *Bear Creek Mining Corp. v. Peru*, Award, ICSID ARB/14/21, 30 November 2017, para. 227 (internal reference omitted).

other words, 'for a social license to exist, there must be consent.'<sup>198</sup> As the *Bear Creek* Tribunal put it, '[e]ven though the concept of "social license" is not clearly defined in international law, all relevant international instruments are clear that consultations with Indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.'<sup>199</sup>

What does free, prior, and informed consent mean? The term *free* indicates that indigenous peoples must be free from violence, intimidation, or harassment by the government or company. The term *prior* indicates that the government (and ideally companies) must seek approval from indigenous communities *before* commencing any economic activity in their lands. The term *informed* signifies that the indigenous community must receive all the information needed to make informed decisions in a language they can understand. As noted by Myrna Cunningham, a former chair of the UN Permanent Forum on Indigenous Issues, '[l]ack of free, prior, and informed consent can have far reaching consequences on th[e] lives and human rights [of indigenous peoples].' In particular, free, prior, and informed consent can be a tool to safeguard indigenous peoples' 'rights over ancestral lands . . . their ability to carry out subsistence activities, and their ability to freely pursue their economic, social, and cultural development in accordance with their right to self-determination.'<sup>200</sup>

Free, prior, and informed consent enables indigenous peoples to decide for themselves whether a given project is suitable to their own needs and aspirations or whether they would prefer not to proceed. It enables them to shape their future and select the development model they prefer. It can also provide indigenous communities with the ability to shape and derive benefits from projects on traditional lands. In parallel, through free, prior, and informed consent, investors can assess the viability of the intended investment. The support of local communities contributes to the viability of a project and even constitutes a necessary condition for its success in the long term. In turn, projects that local indigenous communities veto should not proceed. Finally, through free, prior, and informed consent, states can better implement their human rights obligations towards indigenous peoples and acknowledge their parallel sovereignty (i.e., an indigenous sovereignty that coexists with that of the state).<sup>201</sup>

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<sup>198</sup> Id.

<sup>199</sup> Id. para. 406.

<sup>200</sup> 'Interview with Myrna Cunningham, Chair of the United Nations Permanent Forum on Indigenous Issues', *supra* note 18, 55.

<sup>201</sup> F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006–7) 42 *Texas International Law Journal* 155–189, 156 ('asserting

Free, prior, and informed consent is a legal tool that bridges the gap between international investment law and human rights law and can contribute to the harmonious development of public international law. It is a crucial tool of self-determination: preventing the imposition of economic models that may undermine the cultural identity, human rights, and core values of indigenous peoples. If the UN practice concerning self-determination used to be restrictive, exclusively concerning the decolonization process and the emergence of new states, since the inception of the UNDRIP the concept of self-determination has expanded to include the self-determination of nations within given states.<sup>202</sup> This new understanding of self-determination is consistent with the doctrine of the parallel sovereignty of indigenous peoples within states. In fact, some recognize that ‘the existence of a given degree of indigenous sovereignty [is] parallel to the sovereign power held by the State.’<sup>203</sup> The concept of self-determination also distinguishes ILO Convention 169, the most recent ILO instrument concerning indigenous peoples, from its predecessor ILO Convention 107 (no longer open for signing).<sup>204</sup> ILO Convention 107 contained a major flaw as it supported the eventual assimilation of indigenous persons into the society at large rather than promoting their right to self-determination. ILO Convention 169 overcomes this flaw, assuming that indigenous peoples have the right to determine their own development.

Free, prior, and informed consent prominently features in the UNDRIP, being mentioned six times.<sup>205</sup> Although the instrument is not legally binding, arguably its provisions can be considered as coalescing rules of customary law because a substantial number of states have adhered to it.<sup>206</sup> Article 15 of the ILO Convention 169 has a more conservative wording, providing that indigenous peoples have ‘the right ... to participate in the use, management and conservation’ of the natural resources pertaining to their lands. In cases in which the state retains the ownership of resources, it ‘shall *consult* these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any

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the existence of a given degree of Indigenous sovereignty parallel to the sovereign power held by the state.’)

<sup>202</sup> Id. 160–61.

<sup>203</sup> Id. 156.

<sup>204</sup> International Labor Organization, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107) 26 June 1957, 328 *UNTS* 247.

<sup>205</sup> UNDRIP, Articles 10, 11, 19, 28, 29, and 32.

<sup>206</sup> J. Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen 2009) 79.

programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.’<sup>207</sup>

Although ‘ambiguities persist over whether indigenous land rights encompass a right to veto decisions regarding development projects which are likely to affect indigenous traditional lands and resources,’<sup>208</sup> human rights courts have held that informed *consent* is required for large-scale development projects that would have a major impact on indigenous land.<sup>209</sup> Therefore, for some scholars, the right of indigenous peoples to free, prior, and informed consent does not merely have a procedural nature; rather, it has a substantive function by ‘enabl[ing] indigenous peoples to protect their substantive land rights . . . and culture.’<sup>210</sup> The right to free, prior, and informed consent can enable indigenous peoples to exercise the right to self-determination and determine the model of development they prefer in conformity with their worldview.<sup>211</sup>

A number of international investment agreements include clauses expressly acknowledging the rights of indigenous peoples. For instance, New Zealand has included an exception in its IIAs that recognizes the state’s right to protect the Maori under the Treaty of Waitangi and exempts such measures from the scrutiny of arbitral tribunals.<sup>212</sup> Analogously, the Energy Charter Treaty<sup>213</sup> allows the contracting parties to adopt ‘measures designed to benefit investors who are aboriginal people.’<sup>214</sup> Canada’s new model Foreign Investment Protection Agreement (FIPA) also includes preferential treatment for aboriginals in its annex.<sup>215</sup> Malaysia has similarly excluded measures designed to promote economic empowerment of the Bumiputras

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<sup>207</sup> ILO Convention 169, Article 15 (emphasis added).

<sup>208</sup> G. Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2011) 22 *EJIL* 165, 169.

<sup>209</sup> *Saramaka Peoples v. Suriname*, Judgment, IACtHR (ser. C), No. 172, 28 November 2007, para. 134.

<sup>210</sup> L. Aponte Miranda, ‘The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-based Development’ (2012) 45 *Vanderbilt Journal Transnational Law* 785, 828.

<sup>211</sup> Sargent, ‘What’s in a Name? The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights’, 95.

<sup>212</sup> Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 279.

<sup>213</sup> Energy Charter Treaty, 17 December 1994, 2080 *UNTS* 95.

<sup>214</sup> Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 279–80.

<sup>215</sup> *Id.* 279–80.

ethnic group from the scope of its BITs.<sup>216</sup>

The participation of indigenous representatives in the drafting and renegotiation of IIAs has been recently recommended by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz.<sup>217</sup> After finding that nondiscrimination and expropriation provisions in IIAs have ‘significant potential to undermine the protection of indigenous peoples’ land rights and the strongly associated cultural rights,’<sup>218</sup> she recommended that states develop participatory mechanisms so that indigenous peoples have the ability to comment and provide inputs in the negotiation of IIAs.

Yet, the practice remains relatively scarce. Most of the existing IIAs do not contain any explicit reference to indigenous interests.<sup>219</sup> Moreover, IIAs generally include ‘survival clauses that guarantee protection under the treaty . . . for a substantial period after the treaty has elapsed.’<sup>220</sup> Therefore, treaty drafting can but does not necessarily solve the conflict between international investment law and other community interests on its own.<sup>221</sup> While treaty-drafting can ‘stabilize relations’ between investors, states, and indigenous peoples,<sup>222</sup> it seems crucial to consider other mechanisms to promote the consideration of indigenous rights in international investment law and arbitration.<sup>223</sup>

*b) A Judicially-driven Approach to Promote the Consideration of Indigenous Rights in International Investment Law*

A judicially driven approach suggests that international investment law and arbitration already possess the tools to address the interplay between investors’ and Indigenous peoples’ Rights.<sup>224</sup> Such an approach promotes the consideration of indigenous rights in international investment

<sup>216</sup> Id.

<sup>217</sup> V. Tauli-Corpuz, Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, *Report on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples*, UN Doc A/70/301 (2015).

<sup>218</sup> Id. para. 23.

<sup>219</sup> P. Anand and A. Kumar Sinha, ‘Protecting the Rights of Tribals’, *The Hindu* 22 February 2017, <<http://www.thehindu.com/opinion/op-ed/protecting-the-rights-of-tribals/article17372134.ece>> (noting that ‘none of the 80-plus BITs signed by India contains . . . [a] provision on the rights [of Indigenous peoples]. Even the 2015 Model Indian agreement does not contain any such provision.’)

<sup>220</sup> Schill and Djanic, ‘International Investment Law and Community Interests’, 16.

<sup>221</sup> Id.

<sup>222</sup> Foster, ‘Investors, States and Stakeholders’, 420.

<sup>223</sup> Schill and Djanic, ‘International Investment Law and Community Interests’, 16.

<sup>224</sup> Id. 4.

arbitration relying on the interpretation and application of international investment law by arbitral tribunals. Its implicit assumption is that '[w]hile [international investment law] is a highly specialized system, it is not a self-contained one, but forms part of the general system of international law.'<sup>225</sup>

Arbitral tribunals are of limited jurisdiction and cannot adjudicate on the eventual infringement of indigenous peoples' rights. They lack the jurisdiction to hold states liable for breach of their human rights obligations. Rather, they can only determine if the protections in the relevant investment treaty have been breached.

However, this does not mean that indigenous rights are and/or should be irrelevant in the context of investment disputes. IIAs are international treaties; they belong to international law. Therefore, arbitral tribunals can and should interpret international investment law in conformity with international law.<sup>226</sup> Because international investment law constitutes an important field of international law, it should not frustrate the aim and objectives of the latter. Several international law instruments recognize and protect the human rights of indigenous peoples, including the UNDRIP, the Universal Declaration of Human Rights (UDHR),<sup>227</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>228</sup> the Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>229</sup> and ILO Convention 169.<sup>230</sup>

Arbitral tribunals should interpret international investment law by taking into account 'any relevant rules of international law applicable in the relations between the parties.'<sup>231</sup> In fact, according to customary rules of treaty interpretation as restated by the VCLT, when interpreting a treaty, arbitrators can take other international obligations of the parties into account.<sup>232</sup> This provision expresses the principle of systemic integration within the international legal system, indicating that treaty regimes are

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<sup>225</sup> Id. 16.

<sup>226</sup> Id.

<sup>227</sup> Universal Declaration of Human Rights (UNDHR) G.A. Res. 217A, 10 December 1948, Article 17.

<sup>228</sup> International Covenant on Civil and Political Rights, 16 December 1966, 6 *ILM* 368, 999 UNTS 171.

<sup>229</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 6 *ILM* 360, 993 UNTS 3.

<sup>230</sup> ILO Convention 169, *supra* note 22.

<sup>231</sup> VCLT, Article 31(3)(c).

<sup>232</sup> For commentary, *see generally* C. McLachlan, 'Investment Treaties and General International Law' (2008) 57 *ICLQ* 361, 369 (explaining the key relevance of this provision for defragmenting international law); T. Hai Yen, *The Interpretation of Investment Treaties* (Leiden: Brill 2014) 55–61.

themselves creatures of international law.<sup>233</sup> Therefore, arbitral tribunals have some interpretative space to consider other international law rules, especially when the host state invokes them. In fact, customary rules of treaty interpretation require that international law protecting indigenous peoples' rights serve as an interpretive context if they are relevant to the interpretation of the respective international investment law provisions. As the *Urbaser* Tribunal put it, IIAs 'ha[ve] to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.'<sup>234</sup>

International law provisions protecting indigenous peoples' rights include both hard law and soft law. Examples of binding cultural entitlements abound. For instance, Article 1 of both the ICCPR and the ICESCR recognize the right of self-determination in referring to the peoples' right to 'freely determine their political status and freely pursue their economic, social and *cultural* development.'<sup>235</sup> The same provision also clarifies that international economic cooperation is 'based upon the principle of mutual benefit[] and international law' and that 'in no case may a people be deprived of its own means of subsistence.'<sup>236</sup> Significantly, the principle of self-determination is commonly regarded as a *jus cogens* rule.<sup>237</sup> Other norms protecting indigenous rights with *jus cogens* status include the prohibitions of discrimination and genocide.<sup>238</sup> No protection can be granted to investment that violate *jus cogens* or human rights law.<sup>239</sup>

If certain indigenous rights have acquired the status of *jus cogens* norms, those norms should prevail in case of conflict with international

<sup>233</sup> C. McLachlan, 'The Principles of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279–320, 280.

<sup>234</sup> *Urbaser v. Argentina*, ICSID ARB/07/26, Award 8 December 2016, para. 1200.

<sup>235</sup> ICCPR, Article 1.1; ICESCR, Article 1.1 (emphasis added).

<sup>236</sup> ICCPR, Article 1.2; ICESCR, Article 1.2.

<sup>237</sup> A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006) 51 (noting that '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance'). *But see* M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review* 609, 610 (noting that 'international lawyers continue to be troubled by the question of whether or not any aspect of the legal norm has *jus cogens* status.')

<sup>238</sup> VCLT, Article 53 (recognizing a *jus cogens* norm as one 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is possible.'). On *jus cogens* and international investment law, see V. Vadi, '*Jus Cogens* in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388.

<sup>239</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID/ARB/06/5, Award 15 April 2009, para. 78.

investment law.<sup>240</sup> International public order requires arbitral tribunals to consider whether the proceedings do not violate competing international law obligations of a peremptory character. Yet, the present role of *jus cogens* norms in the context of investment arbitration remains unsettled at best and peripheral at worst. Rarely have the parties contended that a norm of *jus cogens* has been violated, and even when they have done so, arbitral tribunals have declined to adjudicate on the matter, stating that they have a limited mandate and cannot adjudicate on human rights claims.<sup>241</sup> Moreover, in some arbitrations, the host states have preferred to make reference only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful about invoking *jus cogens* as the same arguments could be used against them in other contexts, such as before national constitutional courts, regional human rights courts, and international monitoring bodies. Nonetheless, in the recent practice, there have been far-sighted attempts to justify domestic measures in the light of the host state human rights obligations.<sup>242</sup> Arbitral tribunals do not contest the legitimacy of protecting indigenous peoples' rights. Rather, they have focused on the modalities of such policies, emphasizing that states should also respect their investment treaties.

There are more instances of nonbinding cultural entitlements.<sup>243</sup> For instance, indigenous culture plays a central role in the UNDRIP. Although the UNDRIP is not binding *per se*, it can become customary international law and therefore become binding. Some of its contents already express customary international law or repeat provisions appearing in (binding) treaty law. Moreover, judicial decisions constitute a subsidiary source of international law. Over the past twenty years, there has been a robust development of jurisprudence regarding the land rights of indigenous peoples under international law. Such jurisprudence 'generally emphasizes the unique and enduring cultural relationship of peoples to their territory.'<sup>244</sup> '[F]or Indigenous peoples, the ability to reside communally on

<sup>240</sup> VCLT Article 64 (stating that treaties which violate peremptory norms are null and void)

<sup>241</sup> *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 *ILR* 184, 203.

<sup>242</sup> Vadi, 'Jus Cogens in International Investment Law and Arbitration', 357–388.

<sup>243</sup> On the effectiveness of soft law in international investment law, see e.g., A. K. Bjorklund, 'Assessing the Effectiveness of Soft Law Instruments in International Investment Law', in A. K. Bjorklund and A. Reinisch (eds), *International Investment Law and Soft Law* (Cheltenham: Edward Elgar 2012) 51–81.

<sup>244</sup> Aponte Miranda, 'The Role of International Law in Intrastate Natural Resource



their lands . . . is inextricably tied to the preservation of communal identity, culture, religion and traditional modes of subsistence.<sup>245</sup> In this regard, the recognition of the linkage between indigenous land rights and indigenous cultural identity is a significant milestone reached by the Arbitral tribunal in *Álvarez y Marín Corporación S.A. v. Republic of Panama*. Although there is no binding precedent in international law, the jurisprudence of human rights courts and tribunals can have persuasive relevance in investment treaty arbitration.<sup>246</sup> Vice versa, the holding of this tribunal can contribute to the consolidation of human rights law, and the consolidation of indigenous land rights as customary international law.

In conclusion, international investment law does not pay too much attention to culture, at least when it comes to the current texts of IIAs. International arbitral tribunals have no specific mandate (or a limited mandate at best) to protect indigenous peoples' rights. Nonetheless, interpretation in conformity with general international law is required by the principle of systemic integration as restated in Article 31(3)(c) of the VCLT. Therefore, human rights law and general international law can influence the interpretation and application of international investment law. This argument is even stronger with regard to cultural entitlements that are binding or have a peremptory character. Because arbitral tribunals often seem reticent when referring to, let alone considering, such rights, increased efforts by all actors involved—treaty negotiators, arbitrators, academics, and indigenous peoples—are needed to foster such consideration.

### c) Counterclaims

A third way to insert cultural concerns in the operation of investor–state arbitration is by raising counterclaims for eventual violations of domestic law protecting cultural entitlements. States have increasingly tried to assert counterclaims against investors, even though 'their efforts have tended not to be successful.'<sup>247</sup> While most treaties do not have broad enough dispute resolution clauses to encompass counterclaims, 'drafting treaties to permit closely related counterclaims would help to rebalance investment law.'<sup>248</sup>

Some investor–state dispute settlement provisions confer on tribunals the power to hear 'any dispute between an investor of one contracting

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Allocation', 825.

<sup>245</sup> Id. 814.

<sup>246</sup> V. Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016).

<sup>247</sup> A. K. Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 *Lewis & Clark Law Review* 461, 464.

<sup>248</sup> Ibid. 461.

party and the other contracting party in connection with an investment.’<sup>249</sup> Other investment treaties provide that the law applicable in investor–state arbitration is the domestic law. If domestic law is the applicable law, ‘international law plays a supplemental and corrective function in relation to domestic law.’<sup>250</sup> Not only does international law ‘fill the gaps in the host state’s laws’, but in case of conflict with the latter it prevails.<sup>251</sup> In any case, even if the applicable law was not domestic law, investors remain under an obligation to abide by domestic laws of the state in which they operate, because of the international law principle of territorial sovereignty. These and similar textual hooks seem to enable counterclaims. The ICSID Convention also expressly contemplates the possibility of counterclaims ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’<sup>252</sup> Analogously, the 2010 UNCITRAL Arbitration Rules also enable arbitral tribunals to hear counterclaims, provided they have jurisdiction over them.<sup>253</sup>

In practice, arbitral tribunals have adopted diverging approaches regarding the possibility of counterclaims.<sup>254</sup> Most tribunals have declined jurisdiction to hear counterclaims, focusing on whether counterclaims were within the scope of the consent of the parties.<sup>255</sup> While most tribunals are still reluctant to hear counterclaims, recent arbitral tribunals have been more willing to hear such claims.<sup>256</sup> If consent to jurisdiction was explicitly granted,<sup>257</sup> or if

<sup>249</sup> India–Netherlands Agreement for the Promotion and Protection of Investments, 6 November 1995, Article 9.1.

<sup>250</sup> Y. Kryvoi, *Counterclaims in Investor–State Arbitration*, LSE Law, Society, and Economy Working Paper 8/2011 (2011) 17.

<sup>251</sup> *Ibid.*

<sup>252</sup> Convention on the settlement of investment disputes between States and nationals of other States (ICSID Convention), Washington DC 18 March 1965, in force 14 October 1966, 575 UNTS 159, Article 46 (stating that ‘[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute, provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’)

<sup>253</sup> UNCITRAL Arbitration Rules, Article 21(3).

<sup>254</sup> Bjorklund, ‘The Role of Counterclaims’, 473.

<sup>255</sup> J. Kalicki, ‘Counterclaims by States in Investment Arbitration’ *Investment Treaty News*, 14 June 2013, 5.

<sup>256</sup> *Burlington v Ecuador*, ICSID ARB/08/5, Decision on Counterclaims, 7 February 2017, para. 275 (holding Burlington liable for violating Ecuador’s domestic law implementing international standards); *Urbaser v Argentina*, ICSID ARB/07/26, Award, 8 December 2016, para. 1192 (holding that a bilateral investment treaty ‘[is] not a set of rules defined in isolation without consideration given to rules of international law.’)

<sup>257</sup> *Burlington v Ecuador*, Decision on Counterclaims, para. 60 (affirming jurisdiction on

it was deemed to exist implicitly, at least in those cases where the applicable law is the domestic law,<sup>258</sup> investment tribunals could allow states to raise breaches of cultural policies in their counterclaims against investors, and investor–state arbitration could prompt investors to comply with domestic (and international) cultural norms.<sup>259</sup> If investors knew they could be held liable for harm to cultural heritage in the event of a dispute, they would be more likely to develop investment projects that safeguard or at least respect the cultural entitlements of indigenous communities.

## 7. Conclusions

The effective protection of indigenous cultural heritage is crucial for the effective protection of the rights of indigenous peoples. The UNDRIP has emphasized the importance of indigenous peoples' cultural entitlements and highlighted the linkage between the protection of their cultural identity and their human rights.<sup>260</sup> Although the Declaration is not binding *per se*, it may be or become so, insofar as it reflects customary international law, general principles of law, and/or *jus cogens*. At the very least, the UNDRIP constitutes a standard that states should strive to achieve.

The interplay between FDI on the one hand, and indigenous cultural heritage on the other in international investment law is coming to the forefront of legal debate. The arbitrations analyzed in this chapter provide a snapshot of the clash of cultures between international investment law and international law instruments requiring the protection of indigenous heritage. Investment disputes concerning indigenous cultural heritage often involve the conflict between the rights of the investors and the rights of indigenous peoples under different branches of international law. Therefore, arbitral tribunals may not be the most suitable *fora* to settle this kind of dispute. They may face difficulties in finding an appropriate balance between

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counterclaims, as the claimant did not object to the Tribunal's jurisdiction).

<sup>258</sup> *Al-Warraq v Indonesia*, UNCITRAL, Final Award, 15 December 2004, para. 155 (allowing Indonesia to bring a counterclaim to seek compensation for the investor's failure to comply with domestic law).

<sup>259</sup> For a similar argument, see A. Sundararajan, *Environmental Counterclaims: Enforcing International Environmental Law through Investor–State Arbitration* (Lloyd N. Cutler Center for the Rule of Law, Salzburg Global Seminar Paper 2017–2018).

<sup>260</sup> I. Schulte-Tenckhoff, 'Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights', in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 64, 67.

the different interests concerned. They are courts of limited jurisdiction and cannot adjudicate on state violations of indigenous peoples' entitlements.

This does not mean, however, that arbitrators should not consider indigenous entitlements. This chapter has identified three main avenues for considering indigenous peoples' concerns in the context of investment treaty arbitration. First, *de lege lata*, according to Article 31(3)(c) of the VCLT, arbitrators can interpret international investment law by taking into account other international law commitments of the state. Second, *de lege ferenda*, states can negotiate future IIAs and renegotiate existing ones to facilitate the consideration of indigenous rights in investor–state arbitration. This process is already under way; states have increasingly shaped their investment treaties referring to important values in treaty preambles, exceptions, carve outs, and annexes. Of particular importance are the requirements of free, prior, and informed consent and benefit sharing. Such provisions protect paramount interests and facilitate tribunals' duty to consider international law when interpreting and applying international investment provisions. Finally, while the possibility to raise counterclaims remains debated, arbitral tribunals should not dismiss such possibility, provided they have jurisdiction on the same. Counterclaims can constitute a mechanism through which they could not only defend but also enforce human rights law against private parties, potentially resolving some of the tensions within international law.

In conclusion, this chapter does not exclude the potential for FDI to represent a positive force for development. At the same time, however, international investment law risks maximizing and/or perpetuating power asymmetries among states, investors, and indigenous peoples. Therefore, this chapter proposes avenues for enabling the protection of FDI and ensuring the protection of indigenous cultural heritage and human rights. Only by interpreting international investment law in conformity with international law and/or fine-tuning its language can international investment law develop its potential to enable peaceful and prosperous relations among nations and contribute to the development of international law.

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International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 171;

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International Labour Organization, Convention Concerning the Protection

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Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, Report on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, UN Doc A/70/301 (2015);

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), General Assembly Res. 61/295, 13 September 2007;

Universal Declaration of Human Rights, General Assembly Res. 217A, 10 December 1948;

United Nations Guiding Principles on Business and Human Rights Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises;

Vienna Convention on the Law of Treaties (VCLT) 23 May 1969, 1155 *UNTS*, 331.



Pia Acconci

*The Safeguard of Indigenous Peoples within  
International and EU Law on Investment. An overview*

The present contribution discusses regulatory changes within international investment law due to the political shift in the approach of a number of states and of the European Union. These changes have revised the traditional pro-investor framework and attributed relevance to a few non-investment concerns related to sustainable development. The safeguard of the specific interests of indigenous peoples can be seen as one of these concerns. However, this safeguard has been mostly indirect, in light of the widely-accepted market-oriented conceptualization of sustainable development and of the regulatory diversification typical of international law. A few concluding remarks highlight the main reasons why a multilateral approach to international investment law might contribute to enhance the safeguard of the specific interests of indigenous peoples.

1. *Introductory Remarks*

At the time of the worldwide expansion of the process of liberalization and interdependence, over the nineties of the last century and at the beginning of this Millennium, the United Nations, particularly the General Assembly, the Secretary General and the Human Rights Council, and several international organizations belonging to the United Nations system, such as the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), the World Bank Group, the UN Educational, Scientific and Cultural Organization (UNESCO), endorsed the protection of indigenous peoples.<sup>1</sup> This occurred through the insertion

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<sup>1</sup> For an overview, see, among others, M. C. Lãm, 'Minorities and Indigenous Peoples' in T. G. Weiss and S. Daws (eds), *The Oxford Handbook of the United Nations* (2nd edn, Oxford University Press 2018) 619; A. O. Jegede, 'Protecting Indigenous Peoples' Land Rights in Global Climate Governance' in S. Duyck, S. Jodoin and A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 199; B. Powless, 'The Indigenous Rights Framework and Climate Change' in S. Duyck, S. Jodoin and

of specific provisions in international conventions on the protection of the environment, such as the 1992 Convention on Biodiversity,<sup>2</sup> through the adoption of specific acts, like the 2007 Declaration on indigenous peoples,<sup>3</sup> and through the establishment of *ad hoc* monitoring mechanisms, such as the Permanent Forum on Indigenous Issues in 2000, the Special Rapporteur on the Rights of Indigenous Peoples in 2001 and the Expert Mechanism on the Rights of Indigenous Peoples in 2007.<sup>4</sup>

However, this specific international protection has not prevented or mitigated conflicts of interests due to certain foreign private activities of explorations and exploitations of rural lands and other natural resources in developing countries. Particularly in Central and Latin America, Africa and Asia, the territorial states allowed foreign investors to use large tracts of land for the implementation of their projects in the mining, oil, gas, hydroelectric and agribusiness sectors.<sup>5</sup>

Some of these activities have had a detrimental impact on the access to land, water, other natural resources, food and/or religious sites by indigenous peoples and have therefore been considered contributing factors to the commodification of those resources and assets when an adequate protection of the interests of indigenous peoples lacked at the domestic regulatory level.<sup>6</sup> Other conflicts of interests have arisen from the exploitation of

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A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 213.

<sup>2</sup> See the 1992 Convention on Biological Diversity, particularly its preamble, Articles 8, (j), 17, para. 2, and 18, para. 4.

<sup>3</sup> See the UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295, Resolution adopted by the UN General Assembly on 13 September 2007.

<sup>4</sup> For further information, see Di Blase's chapter in this book.

<sup>5</sup> See, among others, World Bank, International Finance Corporation and Multilateral Investment Guarantee Agency, *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience* (Washington, D.C., 2005) < [ifcln1.ifc.org/ifcext/oeg.nsf/Content/EIE](http://ifcln1.ifc.org/ifcext/oeg.nsf/Content/EIE) > (accessed 30 March 2019) especially 98; Asian Development Bank, *Indigenous Peoples Safeguards* (Special Evaluation Study, February 2007) especially 113.

<sup>6</sup> For an overview, see, among others, J. P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal*, 261; M. A. Geer, 'Foreigners in Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs' (1998) 38 *Virginia Journal of International Law*, 331; J. M. Wagner and N. A. F. Popovic, 'Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Explosives' (1998) 38 *Virginia Journal of International Law*, 401; G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights' (2011-2012) 33 *Michigan Journal of International Law*, 627; A. Tomaselli, 'Natural Resources Claims, Land Conflicts and Self-Empowerment of



traditional knowledge of indigenous peoples in the industrial production of pharmaceuticals and/or cosmetics by foreign companies. A number of non-governmental organizations have endorsed the complaints of the affected indigenous communities and expressed their discontent, by referring to such activities as ‘land grabbing’, ‘bio-colonialism’ or ‘bio-piracy’, and by calling for international regulatory and policy responses. As a result, certain international organizations adopted specific guidelines and/or principles of conduct to prevent such conflicts by influencing the conduct of host states and/or private investors and by facilitating the respect of traditional practices of local indigenous peoples. Important examples are the ‘Operational Policy 4.10’ of the World Bank,<sup>7</sup> the ‘Performance Standard No. 7’ of the International Finance Corporation,<sup>8</sup> the Recommendation of the OECD Council on ‘Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’<sup>9</sup> and the ‘Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries’ of the FAO.<sup>10</sup>

Conflicts of interests related to the safeguard of indigenous peoples

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Indigenous Movements in the *Cono Sur* - The Case of the Mapuche People in Chile’ (2012) 19 *International Journal on Minority and Group Rights*, 153; S. Smis, D. Cambou and G. Ngende, ‘The Question of Land Grab in Africa and the Indigenous Peoples’ Right to Traditional Lands, Territories and Resources’ (2012-2013) 35 *Loyola L.A. International and Comparative Law Review*, 493; V. Jaichand and A. A. Sampaio, ‘Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil’ (2013) 35 *Human Rights Quarterly*, 408; R. Pereira and O. Gough, ‘Permanent Sovereignty over Natural Resources in the 21<sup>st</sup> Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law’ (2013) 14 *Melbourne Journal of International Law*, 451; U. Khatri, ‘Indigenous Peoples’ Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by *Sara Yaku v. Ecuador* and Its Potential to Delegitimize the Belo Monte Dam’ (2013-2014) 29 *American University International Law Review*, 165; K. Cordes, ‘Investments and Human Rights in the Agricultural Sector’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing 2018) 414; V. Vadi, ‘Power and Destiny: the Protection of Indigenous Heritage in International Investment Law and Arbitration’ (2018) 50 *George Washington International Law Review*, 101.

<sup>7</sup> The ‘Operational Policy 4.10’ of the World Bank was prepared for the staff of the Bank in 2005 and revised in 2013, with the aim of injecting the safeguard of local indigenous communities within the implementation of the Development Policy Lending and Program-for Results-Financing of the World Bank.

<sup>8</sup> See, specifically, the ‘Performance Standards’ adopted by the International Finance Corporation in 2012.

<sup>9</sup> The Guidance was amended on 17 July 2012. For further information, see < [oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf](http://oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf) > (accessed 30 March 2019).

<sup>10</sup> The 2015 text is available on < [fao.org/3/a-i4356en.pdf](http://fao.org/3/a-i4356en.pdf) > (accessed 30 March 2019).

within international trade law have arisen with regard to the implementation of the Trade-related Intellectual Property Rights (TRIPS) Agreement. These conflicts have prompted further relevant discussions within the WTO TRIPs Committee, conferences and special reports, but not international disputes before the WTO Dispute Settlement Body (DSB) so far.<sup>11</sup>

The Special Rapporteur on the Rights of Indigenous Peoples has planned to submit three Reports on the ‘impact of international investment agreements on the rights of indigenous peoples’ to the Human Rights Council. The first and the second of these Reports clarify how the safeguard of the ‘rights’ of indigenous peoples – mainly provided in non-binding regulatory instruments – has been neglected or subordinated to the safeguard of the ‘rights’ of foreign investors that are ensured by international treaties, that is international binding rules.<sup>12</sup> The different regulatory intensity of the level of protection results in a phenomenon referred to as ‘regulatory chill’ upon the host state.

According to the Special Rapporteur on the Rights of Indigenous Peoples, the inclusion of ‘the right to regulate in the public interest’ of the host state into international investment treaties would be an adequate solution to mitigate the different interests and concerns at stake.<sup>13</sup> In her

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<sup>11</sup> For further information, see <https://www.wto.org/english/tratop-e/trips-e/art27-3b-e.htm> (accessed 12 November 2019).

<sup>12</sup> Special Rapporteur on the Rights of Indigenous Peoples, second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’ – submitted to the Human Rights Council on 11 August 2016 (A/HRC/33/42) – para. 81 (underlining that ‘[h]armonizing international investment law with international human rights law is a fundamental precondition to addressing this legitimacy crisis, to respecting indigenous peoples’ rights and to ensuring a coherent body of international law’) and para. 85 (adding that ‘[t]he outdated belief of States that they are in a position to guarantee security for investors while ignoring the human rights of indigenous peoples must be debunked. Investors must take responsibility for assessing the social and political risk associated with their investments. Otherwise, their expectations cannot be legitimate’). The Special Rapporteur also submitted a Report on the same topic to the UN General Assembly on 7 August 2015 (A/70/301, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the ‘Impact of international investment and free trade on the human rights of indigenous peoples’).

<sup>13</sup> Second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’, para. 82, stating that ‘[a] synergy therefore exists between protecting the State’s right to regulate in the public interest and ensuring the protection of indigenous peoples’ rights, as recognizing indigenous peoples’ rights provides a means through which States can limit the abrogation of control over decisions pertaining to natural resources to foreign investors and to tribunals charged with protecting their interests’; paras 86-87, requiring ‘properly constructed clauses in relation to the right to regulate’; para. 93, requiring ‘[a]ppropriate consultation procedures and mechanisms’ and ‘[h]uman rights impact assessments’,

second Reports to the Human Rights Council the Special Rapporteur underlines that a number of international regulatory instruments on the protection of indigenous peoples provide for the establishment of ‘culturally appropriate mechanisms’, for the ‘effective participation of indigenous peoples in all decision-making processes that directly affect their rights’ and for ‘good-faith consultations to obtain their free, prior and informed consent’.<sup>14</sup> The third report will be about the relevance of international investment law for the safeguard of the ‘rights’ of indigenous peoples, in light of a possible interaction among international investment law, international human rights law and the sustainable development agenda. The Report will make proposals on how a coherent regulatory interaction between the rules on the protection of investment and those on the safeguard of indigenous peoples might be designed at an international law level.

States and international organizations have adopted a market-based approach to sustainable development. Instead, a number of non-governmental organizations, indigenous minorities and other non-state actors would have preferred an ecological approach to the promotion of development, in conformity with the spirit of the 1982 ‘World Charter for Nature’. According to an ecological approach, the preservation of the eco-system, the satisfaction of the basic needs of indigenous peoples, and the safeguard of their religious and cultural traditions would have prevailed over economic interests within the international political and legal frameworks. Such an ecological approach would have facilitated the protection of practices, as well as cultural diversity of indigenous peoples, because of their traditional connection - both spiritual and economic - to land and its resources.

As will be illustrated in the following section of this chapter and also in another chapter of this book,<sup>15</sup> relevant cases before investment treaty-based arbitral tribunals have arisen when a host state adopted a regulatory

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with the aim of establishing how international investment agreements might be a tool for the observance of human rights of indigenous peoples, such as ‘the right to consultation’; para. 96, specifying how ‘[i]nvestment dispute settlement bodies addressing cases having an impact on indigenous peoples’ rights should promote the convergence of human rights and international investment agreements’; and para. 97, requiring states to ‘[a]ppoint arbitrators with knowledge of indigenous peoples’ rights and cooperate jointly to interpret relevant international investment agreements in relation to indigenous peoples’ rights’.

<sup>14</sup> Second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’, para. 17, specifying that the free, prior and informed consent by indigenous peoples should be a requirement that ‘applies prior to the enactment of legislative or administrative measures, the development of investment plans or the issuance of concessions, licenses or permits for projects in or near their territories.’ See also para. 22 of such a Report.

<sup>15</sup> See Vadi’s chapter in this volume.

measure for the benefit of specific local indigenous communities in terms of access to natural resources,<sup>16</sup> cultural and/or religious sites.<sup>17</sup> This has occurred in host states where indigenous communities live, during the implementation of a foreign investment project.<sup>18</sup> The competent treaty-based arbitral tribunals have not been consistent in relation to the relevance of the specific needs of local indigenous communities for the settlement of these cases. In *Grand River Enterprises Six Nations Limited and Others v. The United States* the Arbitral Tribunal did not consider the needs of indigenous peoples to be relevant for the final decision on the merits of the case. In effect, the local indigenous community unsuccessfully claimed that the domestic regulatory measures of the United States for the protection of public health had a detrimental impact on its investment in terms of loss of tax preferential treatments.<sup>19</sup> The complexity of the contentious facts at the root of such disputes and the different intensity and effectiveness of the international regulatory safeguards for foreign investors, on the one hand, and for indigenous peoples, on the other, appear to have been the main reasons for the arbitral approach.

Treaty-based arbitrations arising from the need of a host respondent

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<sup>16</sup> See, for instance, *Bear Creek Mining Corporation v. The Republic of Peru*, ICSID Case No. ARB/14/21, Award 30 November 2017 and *South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018.

<sup>17</sup> See, for instance, *Glamis Gold Limited v. The United States*, NAFTA/UNCITRAL Arbitration, Award, 8 June 2009.

<sup>18</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Second Report on the 'Impact of international investment agreements on indigenous peoples' rights'* illustrating how conflicts of interest and hence conflicts of norms have arisen and become disputes before international investment treaty-based arbitral tribunals and noting at para. 27 that '[t]ypically, the host states involved employ economic development policies aimed at the exploitation of energy, mineral, land or other resources that are predominantly located in the territories of indigenous peoples. The government agencies responsible for implementing those policies regard such lands and resources as available for unhindered exploitation and actively promote them as such abroad to generate capital inflows. Recognition of indigenous peoples' rights in the domestic legal framework is either non-existent, inadequate or not enforced. Where they exist, institutions mandated to uphold indigenous peoples' rights are politically weak, unaccountable or underfunded. Indigenous peoples lack access to remedies in home and host states and are forced to mobilize, leading to criminalization, violence and deaths. They experience profound human rights violations as a result of impacts on their lands, livelihoods, cultures, development options and governance structures, which, in some cases, threaten their very cultural and physical survival. Projects are stalled and there is a trend towards investor-state dispute settlements related to fair and equitable treatment, full protection and security and expropriation.'

<sup>19</sup> *Grand River Enterprises Six Nations Limited and Others v. The United States*, NAFTA/UNCITRAL Arbitration, Award 12 January 2011.

state to protect a general interest related to non-investment concerns, such as a local indigenous community, have contributed to discontent and criticism towards the typical structure of international investment treaties and, as will be seen, encouraged its revision by a few states and by the European Union.<sup>20</sup>

The chapter proceeds as follows. Section 2 will discuss the main features of foreign investment as a special field of international law. Section 3 will examine and critically assess its on-going revision since the 2008 worldwide financial crisis. Finally, a few concluding remarks will discuss the reasons why regulatory diversification – typical of international law – has to be attained for the safeguard of heterogeneous interests, that is economic and non-economic interests. The attainment of regulatory diversification through a multilateral approach would contribute not only to prevent conflicts of norms and possibly of interests, but also to enhance the predictability and perceived legitimacy of international investment law.

## *2. The Features of International Investment Law at the Time of the Expansion of the Liberalization Process*

Since the end of World War II, international investment law has been a specific field of international law in light of the conclusion of a huge number of investment treaties, mainly bilateral, between industrialized states, usually potential home states of a foreign investor, and developing states, that is, potential host states. Since the nineties of the last century, investment chapters have also been included in ‘regional’ agreements establishing free trade areas.

In order to encourage private initiatives, all these treaties have been designed to protect the interests of foreign investors and to promote their activities worldwide. The traditional regulatory structure of investment

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<sup>20</sup> See, among others, A. Dimopoulos, ‘EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 565; N. Lavranos, ‘How the European Commission and the EU Member States Are Reasserting Their Control over Their Investment Treaties and ISDS Rules’ in A. Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press, 2017) 309; D. M. Trubek, ‘Foreign Investment, Development Strategies, and the New Era in International Economic Law. An Afterword’ in F. Morosini (ed), *Reconceptualizing International Investment Law from the Global South* (Cambridge: CUP 2017) 284.

treaties has been almost the same. Such treaties provide for open-ended definitions of 'foreign investment', for non-discriminatory treatment standards, that is 'most-favoured-nation' and 'national' treatment standards, for the 'fair and equitable' treatment standard, for the obligation of the payment of compensation, in accordance with market-oriented requirements, in case of an expropriation or any other measure tantamount to an expropriation. Most treaties also provide for 'direct arbitration' for the settlement of disputes between a contracting state and a foreign investor national of another contracting state, referring to the International Centre for the Settlement of Investment Disputes (ICSID) and/or the International Chamber of Commerce (ICC) and/or the United Nations Commission on International Trade Law (UNCITRAL). These regulatory commonalities have established a stable and predictable legal environment and facilitated foreign investments.<sup>21</sup>

Because of international regulatory diversification, many investment treaties do not include provisions on the safeguard of non-investment concerns such as human rights, the environment, public health, cultural heritage, and indigenous peoples. Separate instruments protect all these interests at the international law level.

Such a regulatory diversification and the consequent different regulatory intensity of the applicable rules for the protection of foreign investment, chiefly binding rules, and for the safeguard of indigenous peoples, commonly non-binding rules both at the international and domestic law levels, have impacted on the settlement of the cases concerning the safeguard of indigenous peoples before treaty-based arbitral tribunals. Non-binding instruments protecting the rights of indigenous peoples have been ineffective before treaty-based arbitral tribunals.<sup>22</sup> The competent

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<sup>21</sup> See, among others, I. F. I. Shihata, 'Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank' (1991) 6 *ICSID Review*, 484; P. Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 *Recueil des cours* VI, 11; G. Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours*, 251; P. Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*' (2000) 15 *ICSID Review*, 401; P. Kahn, 'Les investissements internationaux, nouvelles donnes: un droit transnational de l'investissement' in P. Kahn and T. W. Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 3.

<sup>22</sup> Special Rapporteur on the Rights of Indigenous Peoples, second Report on the 'Impact of international investment agreements on indigenous peoples' rights', para. 22 highlighting that '... implementation of those commitments remains poor, and issues remain surrounding the interpretation of indigenous peoples' rights, in particular the right to give or withhold free, prior, and informed consent.'

investment treaty-based arbitral tribunals did not endorse the interests of indigenous peoples, as a non-investment concern. One reason was that the applicable investment treaties did not include provisions on the safeguard of these interests.<sup>23</sup>

The breach of one treaty obligation on the protection of foreign investments due to the adoption of a domestic regulatory measure for the protection of human rights and/or on the environment and/or on indigenous peoples could be justified by a host respondent state if such a measure could be seen as compliance with an international *jus cogens* customary rule. The invocation of such a rule would justify the breach of a specific obligation provided in the applicable investment treaty.

However, the ascertainment of a *jus cogens* customary rule is difficult and, to some extent, unlikely, especially in cases concerning indigenous peoples that may not have an adequate legal support.

In effect, arbitral tribunals have not engaged in this line of reasoning. After the ICSID revised its Arbitration Rules in 2006, with the inclusion of Articles 36 and 37, to enhance the openness of its arbitral proceedings, through the admission of *amici curiae* briefs,<sup>24</sup> a few tribunals have admitted the submission of such briefs by local non-governmental organizations for the safeguard of the interests of allegedly affected indigenous peoples. Specifically, a few non-governmental organizations have used this procedural innovation to request, as *amici curiae*, competent arbitral tribunals specific interpretations of the applicable international investment treaty, in accordance with relevant international instruments on the safeguard of the non-economic concerns at stake. For instance, a group of local non-governmental organizations submitted an *amici curiae* brief for the safeguard of affected local indigenous communities in *von Pezold et al. v. Zimbabwe*<sup>25</sup> and in *Border Timbers v. Zimbabwe*.<sup>26</sup> According to the *amici curiae* brief,

<sup>23</sup> See, among others, M. Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 *Journal of International Dispute Settlement*, 42.

<sup>24</sup> See <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx>. For an overview, see A. Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 *ICSID Review*, 427.

<sup>25</sup> See *Bernhard von Pezold and Others v. The Republic of Zimbabwe*, ICSID Case No ARB/10/15. The ICSID tribunal published its award on this case on 28 July 2015. The application for annulment of this award submitted by Zimbabwe was dismissed (Decision on annulment, ICSID *ad hoc* Committee, 21 November 2018).

<sup>26</sup> See *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/25. This case was joined with *Bernhard von Pezold and Others v. The Republic of Zimbabwe*.

the applicable investment treaties should have been interpreted and implemented in line with a few international instruments on the protection of human rights and indigenous peoples, such as the UN Covenant on the Protection of Economic, Social and Cultural Human Rights and the 2007 UN Declaration on the Rights of Indigenous Peoples. The consideration of these instruments would have led the tribunal to reject or, at least, to mitigate the requests of the claimants, in particular those related to the amount of compensation. The competent arbitral tribunal did not admit the request of the petitioners to make a submission as *amici curiae*, finding that the petitioners - the group of non-governmental organizations - did not have 'a significant interest in the proceeding'.<sup>27</sup> The text of the applicable investment treaties, the 1995 bilateral investment treaty between Germany and Zimbabwe and the 1996 bilateral investment treaty between the Swiss Confederation and Zimbabwe, including rules applicable both to the procedural and the substantive matters of the case, did not contain useful provisions for the adoption of a 'pro-indigenous peoples' approach. The Tribunal could confine itself to the letter of such applicable law as the root of its jurisdiction. In *Glamis Gold Limited v. The United States* the Arbitral Tribunal reached the same conclusion as to the report submitted by third parties as *amici curiae*.<sup>28</sup>

However, in the *Glamis* case the respondent state succeeded in challenging the requests made by the claimant. In brief, the Arbitral Tribunal concluded that the host state's domestic regulatory measures aimed at safeguarding a traditional religious site, the California Desert Conservation Area, for the local indigenous community, the Quechan Indian Tribe, did not constitute

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<sup>27</sup> The ICSID Tribunal found that the petitioners – the group of non-governmental organizations – did not have a 'significant interest in the proceeding.' The Tribunal did not admit the request of the petitioners to make a submission as *amici curiae*. According to the petitioners, the cases 'raise[d] critical questions of international human rights law, which engage[d] both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous peoples' (*Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. The Republic of Zimbabwe*, ICSID ARB/10/25, Procedural Order No. 2, 26 June 2012, in particular para. 61). The petitioners also aimed to protect the capacity of local indigenous peoples to manage the land where they lived and to exploit local natural resources in accordance with the UN Declaration on the Rights of Indigenous Peoples. The Tribunal denied the relevance of such a Declaration in the arbitral proceedings (paras 56-63, especially paras 58-59, of the same Procedural Order).

<sup>28</sup> The Tribunal confined itself to the 'letter of the law' of the NAFTA Treaty that was at the base of its jurisdiction and did not refer to other international rules, as requested by a group of interested non-disputing parties. *Glamis Gold Limited v. The United States*, NAFTA/UNCITRAL Arbitration, Award 8 June 2009, para. 8.



a breach of the fair and equitable treatment standard as provided in Article 1105 of the NAFTA Treaty.<sup>29</sup> This Treaty was at the base of the jurisdiction of the arbitral tribunal. The respondent state also succeeded in *Burlington v. The Republic of Ecuador*.<sup>30</sup> The dispute arose because of the opposition of local indigenous communities to hydrocarbon operations related to the realization of the foreign investment project. According to the claimant, the host state had breached the applicable international investment treaty, the 1993 Bilateral Investment Treaty between the United States and Ecuador, as it had failed to provide full protection and security against such an opposition. After reviewing the relationship between the foreign investor and the host state at the time of the opposition of local indigenous communities, the Tribunal concluded in favour of the host state, as Ecuador had assisted the claimant during that period of time, by making efforts to find a compromise between its interests and those of the local indigenous communities.<sup>31</sup>

Instead in *Copper Mesa Mining Corporation v. The Republic of Ecuador* and *South American Silver Ltd. v. Bolivia* both respondent states did not succeed. In *Copper Mesa Mining Corporation v. The Republic of Ecuador* the respondent state did not succeed in persuading the arbitral tribunal - established in accordance with the 1996 Bilateral Investment Treaty between Canada and Ecuador - that its conduct was in conformity with the 'fair and equitable treatment' and 'full protection and security' standards under the Canada-Ecuador BIT.<sup>32</sup> The Tribunal, however, reduced the awarded compensation by 30%, as this acknowledged that Copper Mesa had engaged in 'reckless escalation of violence... particularly with the employment of organised armed men in uniform using tear gas canisters and firing weapons at local villagers and officials.'<sup>33</sup> To justify its decision to award compensation, the Tribunal clarified that the office of the local

<sup>29</sup> Id., paras 824-829.

<sup>30</sup> See *Burlington Resources Incorporation v. The Republic of Ecuador (formerly Burlington Resources Incorporation and Others v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID ARB/08/5, Decision on Jurisdiction, 2 June 2010.

<sup>31</sup> Id., para. 298 specifying that '[w]hile Claimant's expectation is conceivably a diplomatic request for further assistance in connection with the indigenous opposition in the Block, this request for assistance does not express disagreement with the manner in which the Respondent has fulfilled its obligation to provide protection and security in the Block. In and of itself, a request for assistance does not express disagreement on the parties' rights and obligations are, unless the surrounding context suggests otherwise, i.e. that the party whose assistance is requested has thus far failed to abide by its duty to assist.'

<sup>32</sup> *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award 15 March 2016, Part 6, paras 6.82-6.85.

<sup>33</sup> Id., para. 4.265.

subsidiary, rather than the ‘negligent’ management of the Canadian claimant, was responsible for such a ‘malicious and reckless’ conduct.<sup>34</sup>

In *South American Silver Ltd. v. Bolivia* the respondent state did not succeed in ‘meet[ing] its burden of proof that indigenous rights prevail over the protections granted to the Claimant under the Treaty in case of conflict’.<sup>35</sup> The respondent state relied on a ‘systemic interpretation’ of the applicable investment treaty, the 1988 Bilateral Investment Treaty between the United Kingdom and Bolivia, based on Article 31(3)(c) of the Vienna Convention’ to highlight that the compliance with its international human rights obligations explained the breach of its obligations under the applicable investment treaty.<sup>36</sup> The Arbitral Tribunal denied that this kind of interpretation could justify the reversion of the ownership of the investment project, more specifically could justify the conduct of Bolivia under the principles of proportionality and necessity.<sup>37</sup> The Tribunal concluded that the reversion of the ownership of the investment project had been tantamount to an expropriation, in accordance with the applicable investment treaty, rather than the exercise of the host state’s police powers for the protection of the human rights of the local indigenous community.<sup>38</sup> However, the arbitrator Mr. Osvaldo Cesar Guglielmino did not agree with this conclusion by attaching his dissenting opinion to the award. In order to show the lack of jurisdiction, both *ratione materiae* and *ratione personae*, of the Arbitral Tribunal under the Bilateral Investment Treaty between the United Kingdom and Bolivia, the dissenting arbitrator underlined that the claimant – a company based in Bermuda – was a shell company. This company was different from the Canadian company that, by relying, among others, on its pro-sustainable development approach, managed

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<sup>34</sup> Id., para. 6.100.

<sup>35</sup> The claimant had pointed to the failure of the respondent host state in showing the prevalence of the human rights of the local indigenous communities over the treaty protection of the investment (*South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018, especially para. 189). The claimant also succeeded in showing that in other cases, such as the *Glamis Gold Limited v. The United States* and *von Pezold v. The Republic of Zimbabwe* cases, ‘international arbitration tribunals have had an opportunity to make issues of indigenous peoples’ rights outcome-determinative, and have declined to do so’ (*South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018, para. 191).

<sup>36</sup> Id., paras 195-196, as to the host state’s counter-claim based on the importance of international obligations on human rights for the protection of the local indigenous community.

<sup>37</sup> Id., paras 217-218.

<sup>38</sup> Id., paras 519-526, 541, 622-630. See also Professor Francisco Orrego Vicuña’s separate opinion.

the relationship with Bolivia and the implementation of the investment project.<sup>39</sup>

In *Bear Creek Mining Corp. v. Peru* the respondent state, Peru, also did not succeed in relying on the opposition of a part of the local indigenous community to justify its choice to terminate the foreign investment.<sup>40</sup> The Arbitral Tribunal decided that Peru had to pay ‘reasonable and appropriate damages for its breach’ of the applicable international treaty, that is the 2008 Free Trade Area Agreement between Canada and Peru.<sup>41</sup>

In addition to such international treaty-based investment arbitral cases, there have been a few relevant cases arisen from a foreign investment before the Inter-American Court of Human Rights.<sup>42</sup>

<sup>39</sup> At para. 74 of his dissenting opinion, the arbitrator Mr. Osvaldo Cesar Guglielmino points out that ‘[t]he facts as analyzed above establish the following: a Canadian company that is not a party to this arbitration (SASC) asserts ownership of the purported investment and performs all of the management and control acts attributable to an actively involved company that owns the purported investment. However, the party appearing before this Tribunal as an investor is not the Canadian company, but another company from Bermuda (territory covered by the scope of the BIT between Bolivia and the United Kingdom), a shell company with a negligible capital and a nominal and passive shareholding in Bahamian companies and in connection with which no active involvement in the object of this dispute was established.’

<sup>40</sup> *Bear Creek Mining Corporation v. The Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, paras 231-250 (as to the position of the claimant), para. 244 (as to the sustainability of its investment project), and paras. 251-266, particularly paras 257-259 (as to the position of the respondent state).

<sup>41</sup> *Id.*, para. 657 rejecting the claimant’s request for ‘punitive damages’, in accordance with the ‘discounted cash flow’ method, and (para. 656) deciding that ‘this Award will focus on the value of what Claimant actually invested’. *Id.*, paras 663-668, as to the conclusion of the majority of the arbitrators in relation to the assessment of damages. See also Professor Philippe Sands’s dissenting opinion.

<sup>42</sup> For further information, see Citroni’s and Focarelli’s respective chapters in this volume. For an overview of relevant cases, see, among others, S. J. Anaya and R. A. Williams Jr., ‘The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System’ (2001) 14 *Harvard Human Rights Journal*, 33; P. Nikken, ‘Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights’ in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 246; R. Polanco and R. Mella, ‘Investment Arbitration and Human Rights Cases in Latin America’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing, 2018) 41.

### *3. The Revision of International Investment Law after the 2008 Financial Crisis, with Particular Regard to the Position of the European Union*

Over the last decade, international investment law has no longer focused on the protection of a foreign investor's interests only. Regulatory changes have occurred because of the political shift in the approach of international organizations and of a number of states, such as the United States (at the time of the Obama Administration), Canada, Australia, and India. The EU institutions, mainly the Commission and the European Parliament, have also referred to the importance of the safeguard of a few general interests related to the quality of the development process within the exercise of the EU competence on foreign direct investment provided in the 2007 EU Lisbon Treaty.<sup>43</sup>

This has led to changes in international investment treaty practice to provide states adequate regulatory spaces for the safeguard of certain non-investment concerns through the adoption of specific public policies. A number of investment treaties have been revised, in order to include, for instance, non-relaxation clauses,<sup>44</sup> general exceptions to treaty obligations on the treatment of investors as 'non-precluded measures',<sup>45</sup> specific exceptions to treaty obligations on performance requirements,<sup>46</sup> special clauses on the safeguard of the environment<sup>47</sup> and on the 'right to regulate'

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<sup>43</sup> See, in particular, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Towards a comprehensive European international investment policy', COM/2010/0343 final; the 'Conclusions on a comprehensive European international investment policy' adopted by the EU Council on 25 October 2010; and the Report on the 'Future European International Investment Policy' adopted by the Committee on International Trade of the European Parliament on 22 March 2011.

<sup>44</sup> See, for instance, Article 9, para. 9, ch. 9, of the 2011 Korea-Peru Free Trade Agreement; Article 10, para. 20, of the 2011 India-Malaysia Comprehensive Economic Cooperation Agreement; Article 12, para. 5, of the 2012 US Model BIT; Article 15 of the 2019 Australia-Uruguay BIT.

<sup>45</sup> See, among others, Article XVII of the 1997 Canada-Armenia BIT; Article 11, para. 3, of the 1998 Switzerland-Mauritius BIT; Article 5, para. 3, of the 1999 New Zealand-Argentina BIT; Article 10, para. 1, of the 2004 Model BIT of Canada; Article 19, para. 1, of the 2018 Kazakhstan-Singapore BIT; Article 4, para. 2, of the 2018 Cambodia-Turkey BIT.

<sup>46</sup> See, for instance, Article 5, para. 3, letter c, of the 2003 Australia-Singapore Free Trade Agreement; Article 8, para. 3, letter c, of the 2012 US Model BIT; Article 14.10, para. 3, letter c, of the 2018 agreement among Canada, Mexico and the United States (USMCA); Article 9.10, para. 3, letter d, of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

<sup>47</sup> See Article 12 of the 2012 US Model BIT.

of contracting states.<sup>48</sup>

As mentioned, the ICSID Arbitration Rules were revised to render arbitral proceedings more inclusive.

The UNCITRAL has enhanced the transparency of treaty-based investment arbitration, by adopting special rules on its arbitral proceedings.<sup>49</sup>

Provisions on the safeguard of indigenous peoples, and more specifically on the safeguard of their relationship with land and natural resources, have been included in certain relevant treaties. A few 'comprehensive and trade' agreements signed or concluded by the European Union, as a new influential player,<sup>50</sup> and by a few economic advanced states, such as

<sup>48</sup> See, for instance, Article 20, para. 8, of the Investment Agreement for the 2007 COMESA Common Investment Area; Article 20 of the 2012 SADC Model BIT; Article 4 (b) of the Annex B to the 2012 US Model BIT; the preamble of the 2016 Comprehensive Economic and Trade Agreement (CETA) among the European Union, its Member States and Canada; Article 23, para. 1, of the 2016 Nigeria-Morocco BIT; the preamble of the 2019 Australia-Uruguay BIT; the preamble of the 2019 Facilitation and Cooperation Investment Agreement between Brazil and the United Arab Emirates.

<sup>49</sup> See, in particular, the 2014 UNCITRAL 'Rules on Transparency in Treaty-based Investor-State Arbitration' <<https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>> (accessed 12 November 2019).

<sup>50</sup> See, for instance, the 2008 Economic Partnership Agreement between the European Union, its Member States and the CARIFORUM States, that is Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and Grenadine, Saint Christopher and Nevis, Suriname and Trinidad and Tobago. Its Article 45 reads as follows: '1. [t]he Parties respecting and promoting their national, regional and international obligations agree that cooperation activities shall enhance the protection and promotion of the rights and fundamental freedoms of indigenous peoples, as recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Further, cooperation activities shall enhance and promote the human rights and fundamental freedoms of persons belonging to minorities and ethnic groups. 2. Special attention should be paid to poverty reduction, and to the fight against inequality, exclusion and discrimination. Relevant international documents and instruments addressing the rights of indigenous peoples such as United Nations Resolution 59/174 on the Second Decade of the World's Indigenous Peoples, and, as ratified, the International Labour Organization 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries, should guide the development of cooperation activities, in line with the national and international obligations of the Parties. 3. The Parties further agree that cooperation activities shall systematically take into account the social, economic and cultural identities of these peoples and shall ensure as appropriate their effective participation in cooperation activities, in particular in those areas most relevant to them, notably sustainable management and use of land and natural resources, environment, education, health, heritage and cultural identity. 4. Cooperation shall contribute to promoting the development of indigenous peoples. Cooperation shall also contribute to promoting the development of persons belonging to minorities and ethnic groups organisations. Such cooperation shall strengthen as well their negotiation, administrative and management capacities.' Relevant provisions are also included in the 2012 Trade

Canada,<sup>51</sup> are important examples.

The objective of connecting the safeguard of certain non-investment concerns and that of foreign investments has also been pursued through voluntary rules. International organizations have published non-binding acts and reports in order to support such a revision of international investment law. Specifically, the UNCTAD has engaged in publishing specific statistics, annual reports, technical notes, and principles of conduct, like the 2012 *Investment Policy Framework for Sustainable Development* to support the mainstreaming of sustainable development within the negotiations of international investment treaties. The UNCTAD has also organized annual *Forum* and managed databases to facilitate the search of relevant materials by government officials, scholars, and any other interested actor. The website of the UNCTAD is a significant tool for useful materials and updates on the main trends in the international regulatory and policy framework on investment.<sup>52</sup> A few companies have adopted principles of ‘responsible’ conduct and/or established special initiatives to ‘build alliances’ with indigenous people communities.<sup>53</sup> Academic actors and civil society groups have also contributed to this new approach.<sup>54</sup>

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Agreement between the European Union, its Member States, Colombia and Peru. A Protocol of Accession to this Agreement was signed with Ecuador in 2016.

<sup>51</sup> See the 2016 Investment Treaty between Canada and Senegal, Annex I which safeguards the ‘right to regulate’ of Canada in favour of ‘the rights or preferences provided to aboriginal peoples, where the measure does not conform with the obligations imposed by Article 4 (National Treatment), Article 5 (Most-Favoured-Nation Treatment), Article 8 (Senior Management, Boards of Directors and Entry of Personnel) or Article 9 (Performance Requirements) of this Agreement.’ A similar provision is included, for instance, in Annex X-07 of the 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, the European Union and its Member States; in Annex II of the 2015 Investment Treaty between Canada and the Republic of Serbia and in Annex II of the 2009 Free Trade Agreement between Canada and Peru.

<sup>52</sup> See <<https://unctad.org/en/Pages/Home.aspx>> (accessed 12 November 2019).

<sup>53</sup> See, for instance, the ‘Smallholder and Agri-Small and Medium Enterprise (SME) Finance and Investment Network (SAFIN)’, that is an inclusive partnership for supporting the investment capacity of smallholders and agri-SMEs. For further information, see <[safinetwork.org](http://safinetwork.org)> (accessed 30 May 2019); and the ‘Michelin’s Strategic Partnership with Indigenous People’ among Michelin Canada, Aboriginal organizations, the Government of Canada and the Government of Nova Scotia. For further information, see <[evalorix.com/boutique/outils-pedagogiques/etudes-de-cas-en-management-et-de-la-strategie/michelin-strategic-partnership-indigenous-peoples-2-2/](http://evalorix.com/boutique/outils-pedagogiques/etudes-de-cas-en-management-et-de-la-strategie/michelin-strategic-partnership-indigenous-peoples-2-2/)> (accessed 30 May 2019). Cf., in particular, J. Mandelbaum and J. Loutit, ‘Extractive Industry Investments and Human Rights’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing, 2018) especially 402-404.

<sup>54</sup> See, in particular, P. Acconci, ‘The Integration of Non-investment Concerns as an

#### 4. Concluding Remarks

Arbitral treaty-based cases have shown how international regulatory diversification can be a contentious issue where non-economic and economic interests clash.

The reorientation of the approach of a few states to the design of international investment treaties and the innovative approach of the EU Commission have been an important change over the last decade. This has contributed to the promotion of friendly relations between foreign investment and a host state's general interests.

The safeguard of the specific interests of indigenous peoples within the international and EU regulatory frameworks on the protection of foreign investments however appears to be mostly indirect, through the preservation of certain non-investment concerns, such as sustainable development, the environment, and public health.

The broad acceptance of sustainable development, as the chief macro-economic objective at the time of globalization, and of the possible deglobalization<sup>55</sup> of today, has not been enough. The market-based approach to sustainable development has been the regulatory reference point since the 'World Conference on Sustainable Development' organized by the UN Secretary General in Rio de Janeiro in 1992. As far as the safeguard of the interests of indigenous peoples is concerned, the reconceptualization of the market-based approach to the promotion of sustainable development would be desirable. This would integrate health, labour rights, the environment and the conservation, use and management of natural resources, as 'public

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Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?' in G. Sacerdoti, P. Acconci, M. Valenti and A. De Luca (eds), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 165; C. S. Levy, 'Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective' (2015) 3 *Groningen Journal of International Law*, 59; M. Langford, D. Behn and O. Kristian Fauchald, 'Backlash and State Strategies in International Investment Law' in T. Aalberts and T. Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge University Press, 2018) 70.

<sup>55</sup> The reduction of interdependence and integration among states and other actors of transnational economic relations and the parallel decline of trade and investment may bring about a deglobalization process, together with policy choices in favour of nationalism, populism and unilateralism. Cf. W. Bello, *Deglobalization: Ideas for a New World Economy* (Zed Books, 2005); J. Harold, 'Deglobalization: The Rise of Disembedded Unilateralism' (2018) 10 *Annual Review of Financial Economics*, 219; P. A. G. van Bergeijk, *Deglobalization 2.0. Trade and Openness During the Great Depression and the Great Recession* (Edward Elgar Publishing, 2019).

policy priorities', into international actions for growth and development through foreign investments and would thus prevent an inconsistent orientation.

Regulatory diversification cannot be overcome by the revision of the typical structure of international investment treaties through the inclusion of references to relevant non-investment concerns in their preambles, exceptions, and special safeguards. This method has not been satisfactory so far.

Diversification preserves and prolongs differences in the intensity of regulatory and adjudicatory safeguards provided in international law instruments in relation to the protection of foreign investments, on the one hand, and indigenous peoples, on the other. Foreign investors can rely on binding rules that they can enforce through a strong remedy like 'direct arbitration', in particular the ICSID arbitration, whereas indigenous peoples depend on the possible counter-actions of their territorial states within investment arbitration proceedings and/or can file claims before international courts, such as the Inter-American Court of Human Rights. The latter may also not be an adequate remedy because this Court can judge the conduct of the contracting states of the Inter-American Convention of Human Rights but not that of private parties, like a foreign investor national of one of those states. Besides, the different intensity and effectiveness of the international regulatory safeguards for foreign investors and for indigenous peoples contributes to the complexity of international law, especially with regard to its effective implementation and predictability. That appears to be the main reason why representatives of indigenous peoples and/or interested non-governmental organizations have preferred to take direct actions before domestic courts of their territorial states and/or of the national state of a foreign investor. However, this kind of litigation can be difficult, lengthy, expensive, and ineffective, as the *Chevron v. Ecuador* case has shown.<sup>56</sup>

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<sup>56</sup> See *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23. This case arose from the alleged misconduct by the host respondent state during a proceeding before a Lago Agrio court against Texaco Petroleum Corporation for remediation of the environmental contamination due to its crude oil production in that region of Ecuador. The claimants brought the case before the Permanent Court of Arbitration on 23 September 2009, in accordance with the UNCITRAL arbitration clause provided in the 1993 Bilateral Investment Treaty between the United States and Ecuador. On 26 July 2010, Ecuador submitted its Memorial on Jurisdictional Objections. Later, on 22 October 2010, Fundación Pachamama and the International Institute for Sustainable Development (IISD) submitted a petition for participation as non-disputing parties and, on 2 November 2010, an *Amici Curiae* report to show, in particular, the "extraordinary nature" of the case, in light of the environmental and human rights matters at stake, and the lack of



Because of international regulatory diversification, the mainstreaming of sustainable development policy priorities, including the protection of the environment, public health, and cultural heritage, into international investment law, through the adoption of multilateral non-binding instruments and/or a multilateral convention, would facilitate the connection between the promotion of developmental needs and the safeguard of private interests within arbitration proceedings.

The revision of the traditional regulatory structure of international investment treaties through the adoption of a multilateral regulatory instrument, even non-binding, would contribute to dealing with most of the political risks that undermine the relationship between host states and foreign investors. This would also contribute to the prevention of conflict of interests, as well as of conflict of norms, eventually improving the international climate for foreign investments and the safeguard of the special relationship of indigenous peoples with the earth.

In addition, a reform of the typical investor-state dispute settlement, that is 'direct arbitration', would be desirable. The Special Rapporteur on

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jurisdiction of the arbitral tribunal under the US-Ecuador BIT. Since then, the disputing parties raised different procedural questions. The case was also brought before domestic courts of various states - specifically, the United States, Ecuador, Argentina, Brazil, the Netherlands - and finally, on 30 August 2010, decided by the Permanent Court of Arbitration in favour of the claimants. See the Second Partial Award on Track II, 30 August 2018, para. 8.78 deciding that 'the Respondent is liable to make reparations to each of Chevron and TexPet for injuries caused by the breaches of the FET standard and customary international law in Article II(3)(a) of the Treaty and for breaches of the Umbrella Clause in Article II (3) (c) of the Treaty, as further addressed in Parts IX and X below.' However, para. 8.80 of the 'Postscript' at the end of the Award underlines that '[i]f the Claimants' assessment (above) of the full costs of remediating environmental damage in the concession area were correct (as to which the Tribunal here expresses no conclusion), it is deeply regrettable that individual claims for personal harm caused by such damage were not amicably settled long ago, without the massive costs expended on the multiple lawsuits and arbitrations (including this arbitration) and, also, without the involvement of non-party funders and other third persons. The latter groups ostensibly rank in priority far above the Lago Agrio Plaintiffs for any proceeds from the Lago Agrio Litigation, as to which, again in the words of the Respondent's Counsel, the 'real plaintiffs' with 'real claims' are likely to receive nothing after 25 years of continuous litigation.' The 'Postscript' 'does not form part of the reasons in this Award, or its Operative Part,' as specified at para. 8.79 of the same Award. For all the materials of the case, see <[italaw.com/cases/257](http://italaw.com/cases/257)> (accessed 30 April 2019). Cf. also L. Johnson, 'Case Note: How *Chevron v. Ecuador* is Pushing the Boundaries of Arbitral Authority' (April 13, 2012) *Investment Treaty News*, <[iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/](http://iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/)> (accessed 30 May 2019).

the Rights of Indigenous Peoples favours such a reform,<sup>57</sup> stressing that '[d]ispute resolution systems can no longer exclude those who are most affected by the disputes they purportedly resolve, otherwise their awards lack legitimacy. Full and effective participation of indigenous peoples in accordance with their right to give or withhold consent, together with ensuring equity of remedies, are key principles in moving beyond the current unbalanced and incoherent system.'<sup>58</sup> So far, the Special Rapporteur has not referred to the *post*-Lisbon EU approach to this matter based on the establishment and functioning of a permanent investment court.<sup>59</sup>

An international organization would be a significant framework to promote specific discussions and negotiations for a multilateral regulatory instrument on investment. In particular, the UNCTAD would be able to give operational and technical support to member states that have indigenous communities within their territories, also with the aim of effectively implementing the 'prior, free, and informed consent' tool, by involving representatives of indigenous peoples.

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<sup>57</sup> Special Rapporteur on the Rights of Indigenous Peoples, second Report on the 'Impact of international investment agreements on indigenous peoples' rights', para. 84 (highlighting that '[m]echanisms aimed at resolving disputes between investors and states that extend to affected communities and individuals through the use of fact-finding and mediation, and possibly through judicial powers, modelled on a body such as the Inter-American Court of Human Rights, have been proposed').

<sup>58</sup> *Id.*, para. 85.

<sup>59</sup> Following public consultations on investment protection and investor-to-state dispute settlement in the TTIP agreement, in 2015 the EU Commission published a 'Concept Paper' on 12 May named '*Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*' and an unofficial document on 16 September providing for an informal proposal to the United States as to a revision of the TTIP draft investment chapter suggesting the establishment of a permanent investment court system. See European Commission, 'Public Consultations on Modalities for Investment Protection and ISDS in TTIP', Consultation Document (2014), available on the EU website. The 2016 Comprehensive Economic and Trade Agreement among the European Union, its Member States and Canada (CETA), at Articles 8.22-8.43 of its 'Investment Chapter', refers to a permanent investment arbitral tribunal for the settlement of disputes between Canada, the European Union or one of its Member States and an investor of another Contracting Party. The CETA, at Article 8.29 of its 'Investment Chapter', also refers to the possible "establishment of a multilateral investment tribunal and appellate mechanism" between its Contracting Parties and 'other trading partners.' For the settlement of the same kind of disputes, 'Chapter 3 on Dispute Settlement' of the Investment Protection Agreement signed by the European Union, its Member States and Vietnam in 2018 provides for the establishment of an 'Investment Tribunal System' (Article 3.38), and of a 'permanent Appeal Tribunal' (Article 3.39).

In conclusion, these proposed reforms might accommodate heterogeneous interests, overcoming the reluctance of certain states to recognize, protect, and fulfil indigenous rights and hear the ‘voice’ of indigenous communities in their territories also in relation to the establishment of special mechanisms for ‘sharing’ the benefits generated by a foreign investment.<sup>60</sup>

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<sup>60</sup> Cf., among others, E. Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law*, 353; F. Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill 2019).

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Simone Vezzani

*Protection of Traditional Knowledge of  
Agricultural Interest in International Law*

*Seeing property is an act of imagination<sup>1</sup>*

*Five hundred years after Columbus, a more secular version of the same project  
of colonization continues through patents and intellectual property rights.<sup>2</sup>*

This chapter deals with the international protection and promotion of indigenous traditional knowledge (TK) associated with agriculture, with a special focus on biodiversity-related knowledge. Interest in this knowledge has intensified greatly over the past two decades, along with a growing awareness of the contribution it can make, in a time of climate and environmental change, towards developing more sustainable models of agriculture and contrasting the erosion of both biodiversity and cultural diversity. The chapter analyzes the international legal framework for TK protection, as well as current international efforts to develop *sui generis* protection systems that are culturally more appropriate and capable of valorizing the collective and intergenerational nature of TK. In this context, the protection of indigenous TK is put against the backdrop of the protection of TK held by rural communities of peasants, shepherds, and fishermen. The chapter finally investigates the role of intellectual property in preserving indigenous peoples' TK and promoting their economic empowerment. More precisely, attention is paid to the question as to whether TK falls within the boundaries of protected property under international human rights law.

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<sup>1</sup> C.M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview Press 1994) 296.

<sup>2</sup> V. Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Boston, MA: South End Press 1997) 126.

## 1. *Preliminary Remarks*

This contribution tackles the international protection and promotion of indigenous traditional knowledge (TK) associated with agriculture, i.e. the set of knowledge and practices accumulated and transmitted from generation to generation of the 'First Nations' to face the challenges of the natural environment. Interest in this knowledge has intensified greatly over the past two decades, along with a growing awareness of the contribution it can make, in a time of climate and environmental change, towards developing an agriculture more sustainable than those intensive and industrialized models with high environmental impact, which are at the origin of a worrisome erosion of biodiversity and of the cultural diversity associated with it. The extreme drought that has gripped California over the last few years is just one of the numerous episodes that cast light on the fragility of agricultural systems even in industrialized countries.<sup>3</sup> All this has increased awareness of the important role for global food security of traditional genetic strains resistant to water stress, as well as irrigation techniques developed by rural populations that for centuries have had to grapple with adverse environmental conditions.<sup>4</sup>

Traditional knowledge is marked by considerable diversity. On the one hand, its diversity is due to its development by a large variety of social groups. On the other hand, it also depends on the purpose of TK, which may comprise techniques of soil protection and fertilisation, systems for managing forests, terracing, irrigation and water harvesting, handicraft skills for tool making, farming and breeding methods (including inter-cropping and polyculture systems), and so on.<sup>5</sup>

However, knowledge associated with genetic resources is particularly important. Local landraces and farmers' varieties, with their inherently broad genetic base, are in fact more resilient and resistant under adverse growing

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<sup>3</sup> On the risks (also in terms of loss of biodiversity and soil erosion) connected to the spread of industrial modes of agricultural production see the Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, UN Doc. A/HRC/25/57, 24 January 2014 and Bioversity International, *Mainstreaming Agrobiodiversity in Sustainable Food Systems: Scientific Foundations for an Agrobiodiversity Index* (Fiumicino: Bioversity International 2017).

<sup>4</sup> See IFAD, 'The Traditional Knowledge Advantage. Indigenous Peoples' Knowledge in Climate Change Adaptation and Mitigation Strategies' (Rome: IFAD 2016) <[https://maintenance.ifad.org/documents/38714170/40320989/traditional\\_knowledge\\_advantage.pdf/58c15785-2072-4265-993f-3ac7ae9127c9](https://maintenance.ifad.org/documents/38714170/40320989/traditional_knowledge_advantage.pdf/58c15785-2072-4265-993f-3ac7ae9127c9)> accessed 4 May 2019.

<sup>5</sup> For some best-practices, see the Traditional Knowledge World Bank's inventory, at <[www.tkwb.org](http://www.tkwb.org)> accessed 4 May 2019.

conditions than the more uniform and improved cultivars provided in the centralized seed supply system in industrialized countries; they can therefore serve as a precious source of material for plant breeding.<sup>6</sup> Two examples among many are provided by the recent use of traditional Ethiopian wheat varieties for plant breeding purposes<sup>7</sup> and by the patenting of the aluminium tolerance gene obtained from a Tanzanian farmers' variety of sorghum.<sup>8</sup> In the livestock sector as well, pastoral communities have contributed to the selection and improvement of resilient breeds, often suited to harsh environments, which are a precious reservoir of genetic diversity.<sup>9</sup>

A rather broad body of international treaty and customary rules governs the safeguarding and promotion of this knowledge, which is presently the object of studies and intergovernmental negotiations within the framework of various international organizations. The Western system for protecting intellectual property rewards scientists' intellectual work and guarantees remuneration of businesses' investment in research and development. Yet, it does not provide adequate protection for the practical knowledge and collective innovations handed down from generation to generation within indigenous peoples or local communities embodying traditional lifestyles. This asymmetry of legal protection lies at the origin of the phenomenon commonly known as 'biopiracy' – a neologism that indicates the exploitation, by individuals or enterprises, of TK related to biodiversity, obtained without the prior informed consent of, and with no remuneration to, TK holders.<sup>10</sup> In more general terms, entirely similar forms of unlawful

<sup>6</sup> O. De Schutter, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity, Encouraging Innovation. Background document to the Report (A/64/170)* Presented by Prof. Olivier De Schutter, Special Rapporteur on the Right to Food, at the 64<sup>th</sup> Session of the UN General Assembly (October 2009), <[http://www.srfood.org/images/stories/pdf/officialreports/20091021\\_report-ga64\\_seed-policies-and-the-right-to-food\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf)> accessed 4 May 2019.

<sup>7</sup> D. K. Mengistu and M. E. Pè, 'Revisiting the Ignored Ethiopian Durum Wheat (*Triticum Turgidum* Var. *Durum*) Landraces for Genetic Diversity Exploitation in Future Wheat Breeding Programs' (2016) 8 *Journal of Plant Breeding and Crop Science* 45–59.

<sup>8</sup> E. Hammond, 'Africa's Granary Plundered: Privatization of Tanzanian Sorghum Protected by the Seed Treaty (African Centre for Biosafety 2009)' <[http://acbio.org.za/wp-content/uploads/2015/02/ACB\\_Briefing\\_Privatising-Tanzanian-Sorghum\\_sbMATE-Gene\\_Dec\\_2009.pdf](http://acbio.org.za/wp-content/uploads/2015/02/ACB_Briefing_Privatising-Tanzanian-Sorghum_sbMATE-Gene_Dec_2009.pdf)> accessed 4 May 2019.

<sup>9</sup> For further information see B. D. Scherf and D. Pilling, *The Second Report on the State of the World's Animal Genetic Resources for Food and Agriculture* (Rome: FAO 2015) <[www.fao.org/3/a-i4787e.pdf](http://www.fao.org/3/a-i4787e.pdf)>; <[www.pastoralpeoples.org](http://www.pastoralpeoples.org)> both accessed 4 May 2019.

<sup>10</sup> See, among others, P. R. Mooney, *Seeds of the Earth: A Private or Public Resource* (Ottawa and London: Canadian Council for International Co-operation and the International Coalition for Development Action (ICDA) 1979); V. Shiva, *Biopiracy: The Plunder of*

exploitation may regard all knowledge and techniques of agricultural interest, in terms of engineering or plant protection, or of any other nature.

The process of 'extracting value' from the TK held by the communities often passes through third parties securing patents and other exclusive rights to inventions obtained thanks to the preponderant contribution of TK. This can take place in two distinct ways. First, in certain cases, intellectual property rights (IPRs) are erroneously attributed for claimed inventions or creative works that actually make no contribution to the state of the art. An instructive case that became notorious in international public opinion involved the European patent issued to a United States firm for the fungicidal properties of the neem tree, whose leaves had been used for decades by rural populations in India for the preparation of plant protection extracts.<sup>11</sup> Second, and more frequently, traditional knowledge and practices have been used by third parties to make products and procedures that meet all the requirements normally established for obtaining patents or other intellectual property rights, with no benefit to TK holders.

The phenomena just described are rife with geopolitical implications, as the interests of poor countries rich in biodiversity and TK (located mostly in the Southern hemisphere) clash with those of industrialized countries that are poor in biodiversity but have advanced technologies.<sup>12</sup> This polarization is also reflected in international law, which – as we shall see – plays an ambivalent role in combating biopiracy. From one standpoint, the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>13</sup> at the World Trade Organization (WTO) has fostered expansion trends in the area of intellectual property, by extending Western protection models on a global scale. Regulation of international trade has therefore made a decisive contribution to what Boyle defined as the 'Second Enclosure Movement.'<sup>14</sup> Scholars discuss the 'commodification' of genetic resources – caused by extending the area of patentable subject matter to living

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*Nature and Knowledge* (Boston, MA: South End Press 1997); R. Chandra, *The Cunning of Rights. Life, Law and Biocultures* (Oxford: Oxford University Press 2016).

<sup>11</sup> See V. Shiva and R. Holla-Bhar, 'Piracy by Patent: the Case of the Neem Tree', in J. Mander and E. Goldsmith (eds), *The Case Against the Global Economy: And for a Turn Toward the Local* (San Francisco: Sierra Club Books 1996) 146–159.

<sup>12</sup> Cf. I. Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: UBC Press 2006); L. Whitt, *Science, Colonialism and Indigenous Peoples. The Cultural Politics of Law and Knowledge* (New York: Cambridge University Press 2014).

<sup>13</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299.

<sup>14</sup> J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemporary Problems* 33–74.

organisms and their (micro and macro) components – that is depriving millions of farmers of control over productive cycles, to the benefit of the restricted number of large agrochemical companies that dominate much of the seed market.<sup>15</sup> Moreover, under Free Trade Agreements (FTAs), a number of developing countries have been required to introduce protection standards even higher than those required by WTO law. In particular, some trade agreements expressly include ‘TRIPS-plus’ provisions, requiring the Contracting Parties to introduce the patentability of plants and animals into their own legal systems.<sup>16</sup>

From another standpoint, international law can also constitute a tool of redistribution and solidarity, by protecting the cultural, economic, and social rights of farming communities and of indigenous peoples, as well as safeguarding global food security. As we shall see, recent years have seen a particularly intense effort to adopt international instruments aimed at promoting the ‘bio-cultural’ rights of indigenous peoples and farming communities, by also creating *sui generis* forms of protection of TK.

This chapter will examine emerging trends in the protection of TK held by indigenous peoples after the adoption of the United Nations Declaration on Indigenous Peoples’ Rights (UNDRIP)<sup>17</sup>. In particular, it will analyse the role of intellectual property in preserving indigenous peoples’ TK and promoting their economic empowerment. In this context, attention will be paid to the decisive question as to whether TK falls within the boundaries of protected property under international human rights law.

<sup>15</sup> On the relationship existing between patentability of plant genetic resources and the right to food, see J. Douwe Van der Ploeg, *The New Peasantries: Struggles for Autonomy and Sustainability in an Era of Empire and Globalization* (London and Sterling, VA: Earthscan 2008); S. Vezzani, ‘Le risorse fitogenetiche per l’alimentazione e l’agricoltura nel dibattito sui *global commons*’ (2013) 31 *Rivista critica del diritto privato* 433–464. The concentration and integration of the agro-chemical and of the seed industry has undergone unprecedented acceleration in recent years, most recently with the merger between Bayer and Monsanto.

<sup>16</sup> For some concrete examples: S. Mullapudi Narasimhan, *Towards a Balanced ‘Sui Generis’ Plant Variety Regime: Guidelines to Establish a National PVP Law and Understanding of TRIPS-plus Aspects of Plant Rights* (New York: UNDP 2008) <[www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/toward-a-balanced-sui-generis-plant-variety-regime/TowardsABalancedSuiGenerisPlantVarietyRegime.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/toward-a-balanced-sui-generis-plant-variety-regime/TowardsABalancedSuiGenerisPlantVarietyRegime.pdf)> accessed 4 May 2019, 25; A. G. Micara, ‘International Law on Plant Genetic Resources for Food and Agriculture: Towards a New Balance?’, in M. Alabrese, M. Brunori, S. Rolandi, and A. Saba (eds), *Agricultural Law* (Cham: Springer 2017) 53–82.

<sup>17</sup> Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

## 2. *Passive Protection of Traditional Knowledge*

TK is safeguarded first by means of defensive strategies aimed at preventing it from being wrongfully exploited by third parties. In these circumstances, the aim of indigenous peoples is not to obtain exclusive rights over their knowledge (active protection), but to ensure that IPRs are not granted for inventions based on previously known traditional knowledge (passive protection). Essential here is the monitoring of the patent offices' activity, with a view to challenging patents that do not meet the requirements of novelty and/or of involving an inventive step. The revocation of the patent for the fungicidal properties of the neem tree shows that this strategy can be successful in contrasting biopiracy; however, it is very costly for indigenous peoples and above all comes up against the difficulty of demonstrating, through adequate proof, the prior use of knowledge and practices that in most cases are transmitted orally.<sup>18</sup>

For TK holders and the NGOs representing their interests, extrajudicial strategies may be preferable, such as: *i*) the creation of databases to bring TK into the public domain and/or to assist patent examiners in foreign patent offices in carrying out prior art searches,<sup>19</sup> or *ii*) campaigns of denunciation and raising public awareness, aimed at making patent holders relinquish controversial patents. In fact, 'naming, blaming, and shaming' is often the only possible solution in cases where IPRs have been properly accorded to third parties on the basis of the applicable law.

In intellectual property law, a preventive mechanism to combat biopiracy consists of establishing an obligation, for those applying for patents, trademarks, or certificates of production of plant varieties for products or procedures that use genetic or biological resources, to declare

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<sup>18</sup> See S. Vezzani, 'Conoscenze tradizionali e attività inventiva: due recenti decisioni del Board of Appeal dell'Ufficio europeo dei brevetti riaccendono il dibattito sulla "biopirateria"' (2005) 88 *Rivista di diritto internazionale* 773–777.

<sup>19</sup> See, for instance, the Indian *Traditional Knowledge Digital Library*, accessible to patent examiners in all the patent offices that have concluded with it an agreement to that effect (see the website of the Library: <www.tkdl.res.in>). For further discussion on the role of databases and platforms to preserve and protect TK, see A. Haider, 'Reconciling Patent Law and Traditional Knowledge: Strategies for Countries with Traditional Knowledge to Successfully Protect Their Knowledge From Abuse' (2016) 48 *Case Western Reserve Journal of International Law* 347–370; WIPO, 'Report on the Compilation of Materials on Databases Relating to Genetic Resources and Associated Traditional Knowledge', Doc. GRTKF/IC/37/8 Rev., 1 August 2018. On the importance of databases to prevent biopiracy, see V. Vadi, 'Intangible Heritage, Traditional Medicine and Knowledge Governance' (2007) 2 *Journal of Intellectual Property Law and Practice* 682–692.

the origin of the resources in question, and any use of TK, when filing the application. These disclosure obligations are contemplated by a number of domestic laws, including for example those of the Member States of the Andean Community<sup>20</sup> and South Africa.<sup>21</sup> Moreover, since the late 1990s, there has been discussion on amending Article 27, para. 3, letter *b*), of the TRIPs Agreement, expressly legitimating states (or requiring them) to introduce procedural obligations of this kind, and to exclude the patenting of inventions resulting from biopiracy.<sup>22</sup> Scholars have also argued that by virtue of the principle of mutual supportiveness between international trade law and human rights, there is a genuine international obligation for states to cooperate in good faith to facilitate the such amendment.<sup>23</sup> Unfortunately, the modifications to the TRIPs Agreement proposed in this sense have not attracted sufficient support yet. Therefore, compliance with WTO law by regulations excluding the patentability of the inventions made with the decisive contribution of TK (obtained without the consent of the rights holders and/or in violation of the laws in the country of origin) remains in doubt: according to some, these regulations are incompatible with the TRIPs Agreement, because they introduce an additional requirement of patentability on top of those listed as mandatory by its Article 27.<sup>24</sup>

<sup>20</sup> Decision n. 486/2000 issued by the Commission of the Andean Community, available at <[www.comunidadandina.org/Seccion.aspx?id=83&tipo=TE&title=propiedad-intelectual](http://www.comunidadandina.org/Seccion.aspx?id=83&tipo=TE&title=propiedad-intelectual)> accessed 4 May 2019, Article 26, letters *b*) and *i*).

<sup>21</sup> Cfr. Patents Amendment Act 2005, 9 December 2005, entered into force on 14 December 2007 (Act No. 20 of 2005), in *Government Gazette*, No. 28319.

<sup>22</sup> The revision of Article 27, para. 3, letter *b*), was envisaged by the Doha Agenda (Doc. WT/MIN(01)/DEC/1, 20 November 2001, para. 19). Among the proposals made by states, see the communication presented to the TRIPs Council by Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe (Doc. IP/C/W/356, 24 June 2002), commented by W. Abdelgawad, 'Brevetabilité du vivant, commerce de la biodiversité et protection des savoirs traditionnels: les pays africains et le réexamen de l'article 27:3 b) de l'Accord sur les ADPIC de l'OMC' (2004) 12 *African Yearbook of International Law* 121–167.

<sup>23</sup> R. Pavoni, 'Biodiversity and Biotechnology: Consolidation and Strains in the Emerging International Legal Regime', in F. Francioni and T. Scovazzi (eds) *Biotechnology and International Law* (Oxford/Portland, OR: Hart 2006) 29–57, 54.

<sup>24</sup> According to a thesis regrettably not accepted by the majority of patent offices and national judges, the refusal to grant patents for inventions obtained through the misappropriation of TK might be justified on morality or public order grounds (S. Vezzani, 'Le risorse fitogenetiche per l'alimentazione e l'agricoltura nel dibattito sui *global commons*', 776–7). One might also argue that obligations under international customary law concerning the protection of TK relating to genetic resources, prevail over obligations stemming from the TRIPs Agreement according to the principle *lex specialis derogat generali*. On this argument, see S. Vezzani, 'Normative brevettuali e accesso alle risorse

States are discussing the suitable ways to ensure the passive protection of the traditional knowledge associated with biodiversity in another intergovernmental forum as well: the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO Committee), instituted in 2000 by the World Intellectual Property Organization. The WIPO Committee has adopted a consolidated document relating to intellectual property and genetic resources, most recently revised on 23 March 2018, that might in the future take on the form of an international convention.<sup>25</sup> According to this document, the objective of combating biopiracy should be pursued: *i*) by fostering patent offices' access to information on TK to prevent the erroneous granting of patents;<sup>26</sup> *ii*) by requiring, when filing the patent applications, disclosure of the origin of the genetic resources and of the TK used, accompanied by appropriate administrative sanctions in the event of violations;<sup>27</sup> *iii*) by promoting the creation of TK databases;<sup>28</sup> *iv*) by fostering international cooperation and technical assistance.<sup>29</sup> The WIPO Committee's consolidated document is composed of several parts still in square brackets and articles which contain possible alternative formulations. To date, in fact, the states represented in the Committee have been unable to reach agreement as to such basic questions as whether the disclosure is obligatory or optional, whether and what kind of sanctions there should be, or whether to require patent offices to put in place measures aimed at ascertaining that TK has been acquired

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biologiche e genetiche: ripartizione giusta ed equa dei vantaggi o "biorazzia"?, in N. Boschiero (ed), *Bioetica e biotecnologie nel diritto internazionale e comunitario. Questioni generali e tutela della proprietà intellettuale* (Torino: Giappichelli 2006) 261–281, 270.

<sup>25</sup> WIPO, Doc. GRTKF/IC/35/REF/FACILITATORS TEXT REV. 2, 'Consolidated Document Relating to Intellectual Property and Genetic Resources, Rev. 2 (clean)', 23 March 2018, available at <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_35/wipo\\_grtkf\\_ic\\_35\\_ref\\_facilitators\\_text\\_rev\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_35/wipo_grtkf_ic_35_ref_facilitators_text_rev_2.pdf)> accessed 4 May 2019. See also the Information note prepared by Mr. Ian Goss, the Chair of the WIPO Committee, for its 2018 session <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_37/wipo\\_grtkf\\_ic\\_37\\_chair\\_info\\_note.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_chair_info_note.pdf)> accessed 4 May 2019, and WIPO, 'The Protection of Traditional Knowledge: Updated Draft Gap Analysis', Doc. GRTKF/IC/37/6, 20 July 2018. On the works of the WIPO expert committee see D. F. Robinson, A. Abdel-Latif and P. Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore* (New York: Routledge 2017).

<sup>26</sup> 'Consolidated Document Relating to Intellectual Property and Genetic Resources, Rev. 2 (clean)' Article 8.

<sup>27</sup> *Ibid.* Article 6.

<sup>28</sup> *Ibid.* Article 8, para. 2.

<sup>29</sup> *Ibid.* Articles 11–13.



with the consent of the rights holders.

### 2.1. *Litigation before Domestic Courts: The Murmuru Case*

In 2002, a distinguished scientist suggested establishing a special UN-sponsored tribunal to resolve disputes relating to the misappropriation of TK.<sup>30</sup> However, this suggestion has never been seriously taken into consideration by states and international organizations. In the (*prima facie*) absence of effective international remedies, many legal scholars have discussed possible remedies that indigenous peoples might pursue before domestic courts in the event of biopiracy.<sup>31</sup> In particular, it has been emphasized that, in case of misappropriation of secret TK, infringements may give rise to a civil action for unfair competition, in order to obtain a ban on the commercialization of the products and compensation for material loss. Furthermore, compensation might be claimed for damages related to the non-material harm suffered as a consequence of the divulgation of sacred knowledge, for breach of confidence, or for breach of the moral right to be recognized as the authors of a creative work.<sup>32</sup> Because TK is generally handed down from a generation to another orally, it is quite difficult for plaintiffs to prove the existence of TK and they often have to produce reports by anthropologists and ethnobiologists.

Overall, little attention has been paid to the few known cases of TK abuse litigated before domestic courts.<sup>33</sup> Among them, particularly worthy of discussion is the *murmuru* case, decided by a Brazilian federal court.<sup>34</sup>

<sup>30</sup> I. M. Verma, 'Biopiracy: Distrust Widens the Rich-Poor Divide' (2002) 5 *Molecular Therapy* 95.

<sup>31</sup> For a *tour d'horizon*, see S. Vezzani, 'Sciamani e "cacciatori di geni": proprietà intellettuale e diritti dei popoli indigeni', in I. Papanicolopulu (ed) *Incontro di studio dei giovani cultori delle materie internazionalistiche* (Milano: Giuffrè 2008) 85–123.

<sup>32</sup> See F. Fontanarosa, 'Common property rights e traditional knowledge: appunti comparatistici in tema di diritti di proprietà intellettuale delle collettività locali' (2016) 12 *Agricoltura istituzioni mercati* 136–174.

<sup>33</sup> See, however, S. Bhutani and K. Kohli, 'Litigating India's Biological Diversity Act. A Study of Legal Cases' (2016) <[https://www.aipia.org/committees/committee\\_pages/Biotechnology/GeneticResources/Shared%20Documents/India\\_s\\_Biological\\_Diversity\\_Act-List\\_of\\_legal\\_cases.PDF](https://www.aipia.org/committees/committee_pages/Biotechnology/GeneticResources/Shared%20Documents/India_s_Biological_Diversity_Act-List_of_legal_cases.PDF)> accessed 4 May 2019.

<sup>34</sup> Third Court of the Judicial Section of the Acre State, *Ministério Público Federal v. Fábio F. Dias – ME, Chemyunion Química Ltda., Natura Cosméticos S.A., Instituto Nacional de Propriedade Industrial (INPI)*, ação civil pública2007.30.00.002117-3, Judgment 22 May 2013 <<http://portal.trf1.jus.br/sjac/comunicacao-social/imprensa/noticias/justica-federal-profere-sentenca-no-caso-murmuru.htm>> accessed 4 May 2019. On the *murmuru* case see

Murmuru is an Amazonian plant that produces a palm fruit used by the Ashaninkas for food and cosmetic purposes. In 2007, the Federal Public Ministry initiated an *ação civil pública* against four legal persons who had allegedly unlawfully accessed indigenous TK relating to murmuru, in order to obtain patents (granted by the Brazilian National Institute of Industrial Property) for products and processes concerning uses of murmuru to produce soap and other cosmetic products with emollient and moisturizing properties. The Public Ministry asked the court either to declare the said patents null and void, or to declare an association representing the indigenous people as holder of the patents; the court was also asked to award the Ashaninka people part of the economic income deriving from the sale of products incorporating their TK.

The court rejected the argument that the Ashaninka could claim intellectual property rights over TK concerning the emollient properties of murmuru, ruling that information concerning these properties was widely disseminated and described in old publications, and thus belonged to the public domain.<sup>35</sup> However, the judgment found that murmuru nuts and related information concerning their potential commercial value had been accessed in the framework of a research programme carried out under an agreement between the Ashaninka and an NGO. The agreement required prior informed consent and benefit sharing. In light of all this, the court thus condemned the respondents to pay an indemnity to the indigenous people, corresponding to 15% of the profit gained from the sale of products obtained from murmuru. It also ruled that the National Institute of Industrial Property had to rectify the patent application, indicating the association representing the Ashaninka as the applicant.<sup>36</sup>

This judgment is notable, as it is the only known case in which a court has ruled that an indigenous community should be considered the owner of patent granted to a company that has wrongfully obtained biodiversity-associated knowledge held by that community. It reveals that, even in the absence of *ad hoc* legislation, indigenous peoples may successfully bring proceedings in circumstances where third parties have exploited TK (whether or not in the public domain) shared in confidence or used in

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M. C. Vidotte Blanco Tarrega and R. Donizete Franco, 'Os conhecimentos tradicionais associados e a propriedade intelectual da biotecnologia: reflexões a partir do caso do murmuru' <<http://www.publicadireito.com.br/artigos/?cod=dabd8d2ce74e782>> accessed 4 May 2019.

<sup>35</sup> Third Court of the Judicial Section of the Acre State, *Ministério Público Federal v. Fábio F. Dias*.

<sup>36</sup> *Ibid.* 52.

breach of a contract. Conversely, the impact of this case is limited by the fact that, as acknowledged by the judgment itself, in most cases patents resulting from biopiracy fail to satisfy patentability requirements.

### 3. *Active Protection*

Turning to the ‘active’ protection, the need of *sui generis* systems capable to safeguard and promote TK, enabling rights holders to share the benefits derived from its use, has been noted for some time in the international community.<sup>37</sup> Numerous treaties and soft law instruments contemplate the protection of TK of agricultural interest.<sup>38</sup> Moreover, as far as the knowledge held by indigenous peoples is concerned, protection is also provided by general international law.

It is often argued that, by failing to recognize collective rights and being based on a market value system, intellectual property rights are ill-suited to protect TK.<sup>39</sup> Nevertheless, it cannot be completely ruled out that local communities or indigenous peoples can strategically use select elements of

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<sup>37</sup> On the emerging principle of benefit sharing, see E. Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law* 353–383.

<sup>38</sup> See, for instance, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 *UNTS* 1, Article 2(2) (d) (also including in the notion of intangible cultural heritage ‘knowledge and practices concerning nature and the universe’). The Convention’s List of Intangible Heritage includes culinary traditions and traditional practices related to agriculture, such as ‘Traditional Knowledge and Technology Relating to the Growing and Processing of the Curagua’, inscribed in 2015.

<sup>39</sup> See, for instance, G. Aguilar, ‘Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples’ (2001) 4 *Environmental Science & Policy* 241–256, 250–251. A more multifaceted analysis is made by Coombe in her scholarly output. On one hand, she has noted that the use of Western intellectual property language may unintentionally serve neoliberal ideology and the mainstream agenda: ‘[t]he CBD recognition of indigenous and local communities’ traditional knowledge as relevant to the conservation of biological diversity, for example, is embedded in a neoliberal regime that defines the latter as a ‘resource’ for humankind best valued through market mechanisms’ (R. J. Coombe, ‘Possessing Culture: Political Economies of Community Subjects and their Properties’, in V. Strang and M. Busse (eds), *Ownership and Appropriation* (Oxford/New York: Berg 2011) 105–127, 112). On the other hand, she has emphasized that proprietary claims have in some places been linked to emancipatory struggles for resistance to hegemonic globalization, and for recognition and social justice (ibid).

IPRs for safeguarding collective TK.<sup>40</sup> Traditional IPRs that can protect TK in the agricultural field are geographical indications, trade secrets, plant breeders' rights, collective trademarks, denominations of origin, and (for inventions developed thereof) patents.<sup>41</sup> For example, indigenous peoples obtained the protection of the fine Rooibos tea from South Africa through a geographical indication.<sup>42</sup> Several domestic laws also protect TK as industrial secrets, if such knowledge has been kept confidential and does not belong to the public domain.<sup>43</sup>

However, the main challenge is to develop *sui generis* protection systems that are culturally more appropriate and capable of better valorizing the collective and intergenerational nature of the rights claimed by communities to their own heritage of knowledge, even in cases where the relevant practices and knowledge do not satisfy the requirement of novelty. A number of states, especially developing and least developed countries, have adopted *ad hoc* legislation to protect 'intellectual community rights', particularly as regards knowledge associated with biodiversity.<sup>44</sup> The adopted solutions diverge considerably. For example, some legislations have filing procedures

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<sup>40</sup> See, for instance, I. Mgbeoji, *Global Biopiracy: Patents, Plants and Indigenous Knowledge*; L. Whitt, *Science, Colonialism and Indigenous Peoples. The Cultural Politics of Law and Knowledge*, 12 and A. K. Gupta, 'Conserving Biodiversity and Rewarding Associated Knowledge and Innovation Systems: Honey Bee Perspective', in T. Cottier and P. C. Mavroidis (eds), *Intellectual Property: Trade, Competition and Sustainable Development* (Ann Arbor: The University of Michigan Press 2003) 373–402.

<sup>41</sup> For some concrete examples concerning use of traditional IPRs to protect indigenous peoples' TK, see *Protect and Promote Your Culture. A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (Geneva: WIPO 2017).

<sup>42</sup> L. Daniels, 'Local Rooibos Tea Growers Take Charge in Effort to Gain GI Protection', *Intellectual Property Watch*, 12 January 2016. More in general, on the potential of geographical indication to protect TK, see A. Di Blase, 'I diritti di proprietà intellettuale applicabili alla cultura indigena e tradizionale' (2008) 9 *Direito e Democracia* 4–38, 34–35; D. Gervais, 'Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications' in P. Drahos and S. Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (Canberra: Australian National University Press 2012) 121–146.

<sup>43</sup> See on this point G. Aguilar, 'Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples', 254; P. D. Farah and R. Tremolada, 'Diritti di proprietà intellettuale, diritti umani e patrimonio culturale immateriale' (2014) 63 *Rivista di diritto industriale* 21–47, 39–40.

<sup>44</sup> For an overview of some domestic legislation, see E.C. Kamau and G. Winter, *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (London and Sterling, VA: Earthscan 2009); C. Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Alphen aan den Rijn: Kluwer Law International 2009).

or other administrative obligations for the purposes of granting exclusive rights,<sup>45</sup> while most merely identify the facts giving rise to the rights not subject to registration. Quite different is the role entrusted to the state authorities and to indigenous peoples' representatives, both in negotiating the 'mutually agreed terms' with the persons interested in the use of TK, and in subsequently sharing the (monetary and non monetary) benefits with the rights holders. Some legislative systems, such as the 2002 Peruvian law on access to biological diversity and related TK, also require a base percentage of gross sales stemming from the marketing of goods developed thanks to TK to be paid to the community of origin, in order to avoid abuses by outside parties having much stronger bargaining power.<sup>46</sup> Also highly variable is the effectiveness recognized for indigenous law, which in many cases contains detailed rules on accessing TK.<sup>47</sup>

At the international level, some regionally-based organizations have developed model laws on the protection of traditional technologies and knowledge in the form of recommendations. Distinguished among these are those developed by the African Union<sup>48</sup> and by the Pacific Islands Forum.<sup>49</sup> Moreover, in 2010, the African Regional Intellectual Property Organization (ARIPO) adopted a full-blown international agreement on the protection

<sup>45</sup> See, e.g., the South African legislation, which imposes no formality upon TK bearers: 'Protection, Promotion, Development and Management of Indigenous Knowledge System Bill, 2014', *Government Gazette*, 20 March 2015, n. 38574.

<sup>46</sup> Peru, Law No. 27811 of 10 August 2002, 'The Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous People' <<http://www.wipo.int/wipolex/en/details.jsp?id=3420>> accessed 4 May 2019, Article 8. On this law see R. G. Alvarez Núñez, 'Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience' (2008) 12 *Max Planck Yearbook of United Nations Law* 485–549, 536–547.

<sup>47</sup> Cf. B. Tobin, 'The Role of Customary Law in ABS and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries' (WIPO and United Nations University, 2013) <[www.ip-watch.org/weblog/wp-content/uploads/2013/04/customary\\_law\\_in\\_abs\\_and\\_tk\\_governance\\_perspectives\\_from\\_andean\\_and\\_pacific\\_island\\_countries.pdf](http://www.ip-watch.org/weblog/wp-content/uploads/2013/04/customary_law_in_abs_and_tk_governance_perspectives_from_andean_and_pacific_island_countries.pdf)> accessed 4 May 2019. See also P. Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge: Cambridge University Press 2014) (examining ancestral systems of knowledge governance).

<sup>48</sup> 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000).' For commentary, see T. Kongolo, *Unsettled International Intellectual Property Issues* (Alphen aan den Rijn: Kluwer Law International 2008) 79–86.

<sup>49</sup> 'Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002', available at <[www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprsnsofCulture20021.pdf](http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprsnsofCulture20021.pdf)> accessed 4 May 2019.

of TK, the Swakopmund Protocol, which entered force in May 2015.<sup>50</sup> The Protocol enshrines the right of local and indigenous populations – as well of the individuals who, within these populations, have made an innovative contribution to the development of new practices and knowledge<sup>51</sup> – to exclude others from using their knowledge, without requiring entry in registers or any other formality.<sup>52</sup> In a highly flexible manner, the Protocol entrusts the communities with negotiating the licensing contracts containing agreements as to the amount of the fee and/or other non-financial benefits.<sup>53</sup> The role of the relevant administrative authorities is reduced to mediating between the parties, in order to help achieve fair and equitable benefit sharing.<sup>54</sup> The jurisdictional authorities are thus tasked with ascertaining, should disputes arise, whether the necessary prerequisites exist so that a given knowledge might be called traditional pursuant to the Protocol and, in that case, what community can claim ownership of the *ius excludendi*.

As we shall see, a variety of universal international instruments also contain provisions on the protection and promotion of TK. However, the heterogeneous nature of the solutions upheld by the individual domestic legal systems reveals how hard it is to work out a universal convention that contemplates, in a detailed way, uniform protection instruments. An attempt in this sense is underway within the WIPO; regrettably, however, the intergovernmental negotiation has thus far failed to yield appreciable results.

#### 4. *Conventions Aimed to Face Loss of Biological Diversity and Climate Change*

Obligations to safeguard TK are put in place by the two international conventions adopted after the 1992 Rio ‘Earth Summit’: the Convention on Biological Diversity (CBD)<sup>55</sup> and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought

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<sup>50</sup> Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO), 9 August 2010, <[www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=201022](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=201022)> accessed 4 May 2019. The Protocol entered into force on 11 May 2015.

<sup>51</sup> Swakopmund Protocol, section 6.

<sup>52</sup> *Ibid.* section 5 (also encouraging states to maintain registers of TK for the sake of transparency)

<sup>53</sup> *Ibid.* sections 7–9.

<sup>54</sup> *Ibid.* section 9.2.

<sup>55</sup> Convention on Biological Diversity, Rio de Janeiro, 5 June 1992 (1992) 31 *International Legal Materials* 818.

and/or Desertification, particularly in Africa (Convention to Combat Desertification).<sup>56</sup>

The CBD is mainly based on the idea that the sharing of the benefits deriving from genetic resources is a matter for states to decide, as a matter of state sovereignty.<sup>57</sup> Nevertheless, Article 8, letter *j*) of the CBD requires the Contracting Parties, subject to their national legislation, to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

A provision similar in content may be found in the Convention to Combat Desertification: under Article 18, para. 2, it requires the parties to protect the technology, knowledge, know-how, and practices of use to combat desertification, using inventories to be made with the participation of local populations and, where appropriate, in collaboration with relevant inter-governmental and non-governmental organizations.<sup>58</sup> With the aim of spreading knowledge potentially useful for all humanity, the Convention encourages the improvement and dissemination of such knowledge and practices,<sup>59</sup> also with a view to their integration with modern technologies.<sup>60</sup> In any event, it provides that the parties must 'ensure that such technology, knowledge, know-how, and practices are adequately protected and that local populations benefit directly, on an equitable basis and as mutually agreed, from any commercial utilization of them or from any technological development derived therefrom.'<sup>61</sup> More recently, an important reference to the role of indigenous peoples' TK in facing climate changes has been included in the

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<sup>56</sup> United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris, 17 June 1994 (1994) *International Legal Materials* 1328.

<sup>57</sup> See D. S. Tilford, 'Saving the Blueprints: The International Legal Regime for Plant Resources' (1998) 30 *Case Western Reserve Journal of International Law* 373–446, 440–442 (referring to Brazil's opposition, during the *travaux préparatoires*, to mentioning indigenous peoples' rights in the Convention.)

<sup>58</sup> *Ibid.* Article 18, para. 2, letter *a*). See also Article 17, para. 1, letter *c*).

<sup>59</sup> *Ibid.* Article 18, para. 2, letter *c*).

<sup>60</sup> *Ibid.* Article 18, para. 2, letter *d*).

<sup>61</sup> *Ibid.* Article 18, para. 2, letter *b*).

2015 Paris Agreement on Climate Change.<sup>62</sup>

The CBD institutionalized international cooperation, favouring, among other things, in-depth studies as to the procedures for guaranteeing an equitable sharing of the benefits (monetary and otherwise) derived from the use of TK.<sup>63</sup> In 2002, the Sixth Conference of the Parties (COP) developed the ‘Bonn Guidelines’,<sup>64</sup> a non-binding document recommending some good practices for the states and other stakeholders, and containing an indicative list of standard clauses to be included in the Mutually Agreed Terms (MATs), i.e. contracts on the supply of genetic materials.

The protection afforded by Article 8, letter *j*) of the CBD was strengthened – albeit in a circumscribed context – by the 2001 Food and Agriculture Organization (FAO) Treaty on Plant Genetic Resources for Food and Agriculture (also known as the ‘Seed Treaty’),<sup>65</sup> the first binding international instrument to expressly recognize farmers’ rights.<sup>66</sup> Adopted to permit an adequate international flow of germplasm indispensable for guaranteeing global food security, the Treaty requires the Contracting Parties to guarantee facilitated access to the samples of sixty-four species of fundamental agricultural interest, and institutes a trust fund to finance projects benefitting small farmers in developing countries.<sup>67</sup>

All three of these treaties have common features. They identify as their objective the equitable sharing of the benefits that derive from the use of TK, through the involvement of the rights holders. However, the Contracting Parties are left a very broad margin of discretion in identifying the most appropriate means to guarantee achieving this objective. Moreover, the protection obligation is set out in extremely loose terms, and is above all

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<sup>62</sup> Paris Agreement on Climate Change, Paris, 12 December 2015 (2016) 55 *International Legal Materials* 740–755, Article 7, para. 5.

<sup>63</sup> CBD, Article 8, letter *j*). See in particular the works of the *Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity* <[www.cbd.int/traditional](http://www.cbd.int/traditional)> accessed 4 May 2019. To date (December 2018), the Convention has obtained 196 ratifications, by almost all the states in the international community, with the major exception of the United States.

<sup>64</sup> *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization* (COP 6 Decision VI/24).

<sup>65</sup> FAO Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, *United Nations Treaty Series*, I-43345. On the FAO Treaty, with a special focus on farmers’ rights, see C. Chiarolla, *Intellectual Property, Agriculture and Global Food Security* (Cheltenham-Northampton: Elgar 2011).

<sup>66</sup> With special regard to TK, see the FAO Seed Treaty, Article 9, para. 2, letter *a*).

<sup>67</sup> Cf. FAO, *Report on the First Round of the Project Cycle of the Benefit-sharing Fund* (FAO: Rome 2013) <[www.planttreaty.org/node/4355](http://www.planttreaty.org/node/4355)> accessed 4 May 2019.



conditioned upon compliance with national legislation.<sup>68</sup>

### 5. *The Nagoya Protocol*

After having discussed the combined role that the CBD, the Convention to Combat Desertification, and the Seed Treaty play in protecting TK, this section will now examine the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)<sup>69</sup>. This instrument was adopted in 2010 by the tenth COP, in order to reinforce and better detail the content of the CBD's access and benefit sharing provisions. In reality, the most significant obligations that the Protocol places upon the Contracting Parties are of a procedural nature. The Protocol provides the issuance by the national authorities of internationally recognized administrative authorizations or certificates of compliance, attesting the compliance with the regulations of the state of origin in the matter of access to genetic resources and benefit sharing (ABS regulations), which is to say respect for prior informed consent and the establishment of MATs.<sup>70</sup> The Protocol also requires states other than those of origin of the genetic resources to put in place measures aimed at verifying compliance with the obligations incumbent upon the users,<sup>71</sup> through designated checkpoints at stages of the genetic resources' value-chain.<sup>72</sup>

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<sup>68</sup> The two UN conventions, of 1992 and 1994, use respectively the expression '[s]ubject to [their] national legislation' (Convention on Biological Diversity, Article 8, letter *j*) and 'according to their respective capabilities, and subject to their respective national legislation and/or policies' (Convention against Desertification, Article 18, para. 2). Also the 'Seed Treaty', after stating that responsibility for the protection of farmers' rights is incumbent upon national Governments, uses a very loose expression, little more than optative, providing that '[i]n accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights...' (Article 9, para. 2).

<sup>69</sup> Adopted by the COP to the Convention on Biological Diversity on 29 October 2010, the Protocol entered into force on 12 October 2014 and has obtained 109 ratifications. Its text can be read at <[www.cbd.int/abs](http://www.cbd.int/abs)>. In the vast literature existing on the Protocol, see E. Morgera, E. Tsioumani and M. Buck (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective. Implications for International Law and Implementation Challenges* (Leiden/Boston, MA: Martinus Nijhoff 2013).

<sup>70</sup> Nagoya Protocol, Article 6, para. 3, letter *e*) and Article 17, paras. 2–4.

<sup>71</sup> *Ibid.* Articles 15 and 16.

<sup>72</sup> *Ibid.* Article 17, para. 1.

As for the states' substantial obligations in the matter of safeguarding TK, the Nagoya Protocol marks a timid step forward from the three conventions discussed in the previous section. Unlike the CBD, the Protocol expressly requires access to TK to take place with prior informed consent or with the approval and involvement of indigenous and local communities.<sup>73</sup> Another difference concerns the reference to domestic law. Both the CBD and the Convention to Combat Desertification required the adoption of those measures necessary to ensure a fair and equitable benefit sharing in accordance with the mutually agreed terms, 'subject to domestic law.' Conversely, in the Nagoya Protocol the same obligation is in part decoupled from subordination to domestic law.<sup>74</sup> Lastly, the Protocol encourages the adoption of contractual models and the development, by indigenous and local communities, of 'Community Protocols,' which we will see to be one of the most innovative instruments for the protection of TK.<sup>75</sup>

*De lege ferenda*, Article 10 of the Nagoya Protocol requires the parties to consider the appropriateness of instituting a global mechanism for sharing the benefits derived from the use of TK spread in transboundary situations, or for which it was not possible to obtain the prior informed consent of the rights holders. With a view to global solidarity, a fund of this kind might be contributed to by utilizers of widely disseminated TK (starting from patent holders for inventions made with the preponderant contribution of said knowledge), for which it is difficult to identify mechanisms for involving the affected populations.

Despite the positive aspects just discussed, the Protocol presents many ambiguities and weaknesses.<sup>76</sup> In the first place, the substantial obligations for the states remain rather generic: for example, the Protocol does not identify the content of the sanctioning measures that the states must adopt when they find a violation of the regulations of the country of origin.<sup>77</sup> Furthermore, the very object of protection is undefined. As Flavia Zorzi Giustiniani has observed, in the absence of a clear and precise definition of the notions of 'traditional knowledge linked to genetic resources' and

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<sup>73</sup> *Ibid.* Article 7.

<sup>74</sup> *Ibid.* Article 5, para. 5. Some other provisions (Article 6, para. 2; Article 7 and Article 12, para. 1) still contain a reference to domestic legislation, although the CBD's formula 'subject to domestic law' has been replaced with another, more nuanced one: 'in accordance with domestic law.'

<sup>75</sup> *Ibid.* Article 15, para. 3, letter *a*).

<sup>76</sup> See *inter multos* T. Burelli, 'Faut-il se réjouir de la conclusion du Protocole de Nagoya?' (2012) 37 *Revue juridique de l'environnement* 45–61; Drahos, *Intellectual Property, Indigenous People and Their Knowledge*, 83.

<sup>77</sup> Nagoya Protocol, Article 17.

of 'local communities',<sup>78</sup> there is a risk that some Contracting Parties will circumvent their obligation, by excluding certain categories of TK from the Protocol's sphere of application. For example, they might exclude TK for which no well-delimited community of reference can be identified, or even TK belonging to the public domain.<sup>79</sup> Moreover, in an 'effort of creative ambiguity',<sup>80</sup> the negotiators managed to include a definition of 'derivative products (i.e. products derived from genetic resources)<sup>81</sup> in the Protocol, without using this notion elsewhere in the Protocol. Left open, then, was the question – one that was highly debated and risked scuttling the talks – of whether the obligation to share the benefits also regards the use of the biochemical compounds expressed by the genetic resources.<sup>82</sup>

Also the mechanism for monitoring compliance with the Protocol is highly unsatisfactory. Pursuant to Article 27 of the CBD, referenced by the Protocol under Article 30, disputes may be submitted to jurisdictional mechanisms only under the condition that the disputing parties have made a declaration accepting the jurisdiction of an arbitral tribunal or of the International Court of Justice. Article 30 of the Protocol referred the preparation of procedures and mechanisms to promote implementation of the Protocol to the first meeting of the parties, during which a Compliance

<sup>78</sup> On the problems of definition relating to the notion of 'local communities', see also the note of 17 September 2013 of the Executive Secretary of the Biodiversity Convention, Doc. UNEP/CBD/WG8J/8/INF/10/Add.1 <[www.cbd.int/doc/meetings/tk/wg8j-08/information/wg8j-08-inf-10-add1-en.pdf](http://www.cbd.int/doc/meetings/tk/wg8j-08/information/wg8j-08-inf-10-add1-en.pdf)> accessed 4 May 2019.

<sup>79</sup> F. Zorzi Giustiniani, 'Protezione delle conoscenze tradizionali dalla biopirateria: quali prospettive dopo l'adozione del Protocollo di Nagoya?', in *Diritto internazionale e pluralità delle culture*, XVIII Convegno SIDI di Napoli, 13-14 giugno 2013 (Napoli: Editoriale scientifica 2014) 315–330. In the same sense Burelli also stresses that the Protocol regulates exclusively access to TK associated with genetic resources. (Burelli, 'Faut-il se réjouir de la conclusion du Protocole de Nagoya?'). As a consequence, according to him, the Protocol has a more restricted ambit of application than Article 8, letter j), of the CBD, which protects all knowledge and practices of interest for the conservation of biological diversity not directly associated with specific genetic resources, relating for instance to the functioning of natural ecosystems or to the struggle against climate change.

<sup>80</sup> J. Beqiraj, 'L'equa condivisione dei benefici derivanti dall'utilizzo delle risorse genetiche secondo il Protocollo di Nagoya: fra obblighi degli Stati e diritti delle comunità indigene' (2011) 5 *Diritti umani e diritto internazionale* 188–193, 190.

<sup>81</sup> Nagoya Protocol, Article 2, letter e).

<sup>82</sup> E. Morgera, E. Tsioumani, and M. Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Leiden/Boston: Brill 2014) 65–71; S. Brizioli, 'Shifting Variables in Regulating Genetic Resources: Definition, Legal Status and Access', *forthcoming in Diritto e Processo*.

Committee,<sup>83</sup> patterned after the mechanisms established by numerous multilateral environmental agreements,<sup>84</sup> was created. However, according to the instituting decision, the non-compliance procedure can be set in motion only by the states that are party to the agreement, or by the Conference of the Parties.<sup>85</sup> Considering the nature of the interests that the Protocol aims to protect, it would have been decidedly preferable to grant NGOs and representatives of indigenous peoples the power to activate the procedure as well, on the basis of a triggering mechanism inspired by that of the Aarhus Convention. On the other hand, also domestically, no monitoring obligations by national checkpoints are provided for with regard to the misappropriation of genetic resources-related TK.<sup>86</sup>

Consequently, the Protocol's entire approach is state-centric: it only requires states to verify compliance with the Access and Benefit Sharing (ABS) regulations of the country of origin, regardless of whether these regulations adequately protect TK holders, in accordance with what international law requires. Also, very little importance is given to customary indigenous law: after a reference in the preamble to the 2007 UNDRIP, the Protocol merely states that the customs of indigenous peoples must be taken 'into consideration.'<sup>87</sup>

Pursuant to Article 4(1) of the Nagoya Protocol, '[its] provisions ... shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.' As noted by Di Blase, a state might exceptionally derogate from obligations under the TRIPs Agreement, in the event that the granting of a patent would result in a serious infringement of TK. However, as noted by the same author, the term 'serious' has been left undefined<sup>88</sup> and 'there is the risk that an IPRs-oriented approach might

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<sup>83</sup> See 'Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance', MOP-1, Decision NP-1/4.

<sup>84</sup> See, on this point T. Treves, L. Pineschi, A. Tanzi, C. Pitea, C. Ragni, and F. Romanin Jacur (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: Asser Press 2009).

<sup>85</sup> MOP-1, Decision NP-1/4, point D, n. 1.

<sup>86</sup> Nagoya Protocol, Article 17.

<sup>87</sup> *Ibid.* Article 12, para. 1.

<sup>88</sup> A. Di Blase, 'Traditional Knowledge: Cultural Heritage or Intellectual Property Right?', in V. Vadi and B. de Witte (eds), *Culture and International Economic Law* (London: Routledge 2015) 143–159, 147.

prevail in a case before the WTO bodies for TRIPs infringement.<sup>89</sup>

### 5.1. *The Protocol's Implementation in the European Union*

The Nagoya Protocol's entry into force was the occasion for adopting ABS legislation in Europe. In a sector where Africa, Latin America, and Asia are in the vanguard, this is a continent lagging far behind, both because poorer in biodiversity and related TK, and because hosting multinational companies that have benefited a lot from biopiracy.<sup>90</sup>

In the European Union, the Protocol was implemented by regulation no. 511/2014.<sup>91</sup> This regulation states that all users of genetic resources and associated TK should exercise due diligence to ascertain whether genetic resources and traditional knowledge associated with them have been accessed in accordance with applicable legal or regulatory requirements,<sup>92</sup> and tasks the competent authorities in the individual Member States with ascertaining that the users have obtained prior informed consent and established mutually agreed terms.<sup>93</sup> Going beyond what the Protocol requires, the regulation extends the monitoring measures to TK as well, obligating the users – during the stage of final development of a product incorporating this knowledge – to declare, and to prove where required, that they have fulfilled their obligations.<sup>94</sup>

On the other hand, as regards regulating access to European genetic resources and to the TK associated with these genetic resources, the competence belongs to the Member States. In this connection, draft legislation is currently under debate in several national parliaments, also in the EU Member States that have yet to ratify the Protocol, like Italy.<sup>95</sup>

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<sup>89</sup> *Ibid.*

<sup>90</sup> Cf. B. Coolsaet, F. Batur, A. Broggiato, J. Pitseys, and T. Dedeurwaerdere (eds), *Implementing the Nagoya Protocol. Comparing Access and Benefit-sharing Regimes in Europe* (Leiden: Brill Nijhoff 2015).

<sup>91</sup> Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union Text with EEA relevance, OJ L 150, 20.5.2014, 59–71. For commentary, see I. R. Pavone, 'Il Protocollo di Nagoya e l'attuazione del principio di *Access and Benefit Sharing* con particolare riferimento all'*user compliance pillar*' (2018) 5 *BioLaw Journal* 251–273.

<sup>92</sup> Regulation (EU) No 511/2014, Article 4.

<sup>93</sup> *Ibid.* Article 7.

<sup>94</sup> *Ibid.*

<sup>95</sup> Italy has signed the Protocol on 23 June 2011.

## 6. Specificities relating to Indigenous Peoples' Traditional Knowledge

At this juncture, the specificities concerning the international protection of the knowledge held by indigenous peoples are worth discussing. Unlike other farming communities, indigenous peoples have an articulated organizational structure and are bearers of a non-state law. The safeguarding of indigenous knowledge, which is often subject to cultural limits and taboo, is closely linked to the preservation of the group's collective identity and to its survival as a people.<sup>96</sup>

The international legal framework governing indigenous peoples' rights establishes a particularly advanced level of protection, founded upon the innovative recognition of the collective dimension of rights.<sup>97</sup> As regards TK specifically, protection is contemplated, albeit in rather generic terms, in ILO Convention no. 169/89.<sup>98</sup> Overcoming the old assimilationist approach, its very preamble enshrines the need to safeguard the social and cultural identity of indigenous and tribal peoples, with a view to promoting cultural diversity. Pursuant to Article 23, para. 1 of the Convention,

<sup>96</sup> On the protection of TK there is a vast bibliography: see *inter multos* H.-P. Sambuc, *La protection internationale des savoirs traditionnels. La nouvelle frontière de la propriété intellectuelle* (Paris: l'Harmattan 2003); S. von Lewinski (ed), *Indigenous Heritage and Intellectual Property. Genetic Resources, Traditional Knowledge and Folklore* (The Hague/London/New York: Kluwer Law International 2004); G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (London: Earthscan 2004); H. Ullrich, 'Traditional Knowledge, Biodiversity, Benefit-Sharing and the Patent System: Romantics v. Economics?', EUI Working Paper LAW No. 2005/07 <<https://core.ac.uk/download/pdf/41100902.pdf>> accessed 4 May 2019; C. Oguamanam, *International Law and Indigenous Knowledge. Intellectual Property Rights, Plant Biodiversity and Traditional Medicine* (Toronto/Buffalo/London: University of Toronto Press 2006); A. Di Blase, 'I diritti di proprietà intellettuale applicabili alla cultura indigena e tradizionale' (2007) 23 *Comunicazioni e studi* 511–563; R. J. Coombe, 'First Nations' Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law', in C. Bell and R. Patterson (eds), *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press 2009) 247–277; F. Macmillan, 'The Protection of Cultural Heritage: Common Heritage of Mankind, National Cultural "Patrimony" or Private Property?' (2013) 64 *Northern Ireland Legal Quarterly* 351–364; G. Singh Nijar, 'Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?' (2013) 24 *European Journal of International Law* 1205–1221; C. Mayorga Muñoz and F. Treggiari (eds) *Biodiversidad y conocimientos tradicionales. Perspectivas históricas, socioculturales y jurídicas* (Temuco: Ediciones Universidad de la Frontera 2018).

<sup>97</sup> See Di Blase's chapter in this edited volume.

<sup>98</sup> ILO Convention No. 169/89 Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989, *United Nations Treaty Series*, vol. 1650, 83.

[h]andicrafts, rural and community-based industries, and subsistence economy and traditional activities of [indigenous] peoples ..., such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

Far more incisive is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>99</sup> whose Article 31 is worth reproducing here in full:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The Declaration was adopted by the UN General Assembly, by a very large majority, on 13 September 2007.<sup>100</sup> Like all the UN declarations, though not formally binding, the UNDRIP bears witness to the existence of a widespread *opinio juris* and must also be thought of as codifying, in many of its parts, the general international law in force<sup>101</sup>. If accompanied

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<sup>99</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, UN Doc. A/61/295.

<sup>100</sup> The Declaration has been adopted with 143 votes in favour, 4 against (Australia, Canada, New Zealand and United States) and 11 abstentions.

<sup>101</sup> See M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957–983; Id., *Seeking Justice in International Law. The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London and New York: Routledge 2016).

by the states' uniform practice, it can contribute in the future, in its remaining parts, towards forming new customary rules.<sup>102</sup> Aside from the correspondence of Article 31 of the UNDRIP with customary law, eminent scholars suggest that the recommendations of international organizations produce a 'lawfulness effect.'<sup>103</sup> In other words, if states adopt measures to protect the TK of indigenous peoples in accordance with the UNDRIP, they will not incur international responsibility, even where such measures, harmful to the interests of foreign investors, fail, in and of themselves, to comply with WTO law and/or with any TRIPS-plus agreements.

In 2016 also the General Assembly of the Organization of American States (OAS) adopted the American Declaration on the Rights of Indigenous Peoples.<sup>104</sup> Although generally welcomed for its contribution to the consolidation of international customary law in this field, this instrument has been also criticized by many observers, who have stressed that some of its provisions represent a step back from the 2007 UNDRIP.<sup>105</sup> In any event, this criticism cannot be applied to the provisions about TK protection. Article XXVIII of the American Declaration on the Rights of Indigenous Peoples is worded in terms similar to Article 31 of the UNDRIP, but places more emphasis on the need for states to engage in consultation with indigenous peoples to obtain their free, prior and informed consent before adopting 'measures necessary to ensure that national and international agreements and regimes provide recognition and adequate protection of indigenous peoples and intellectual property associated with that heritage.'<sup>106</sup>

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<sup>102</sup> It is no coincidence that many international instruments and domestic legislations refer to the UNDRIP: see, for instance, the references made in the Preamble of the Nagoya Protocol and in Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ: JOL\_2009\_286\_R\_0036\_01, recital n. 14.

<sup>103</sup> B. Conforti, *Diritto internazionale* (8<sup>th</sup> ed, Napoli: Editoriale Scientifica 2010) 161; F. Salerno, *Diritto internazionale. Principi e norme* (5<sup>th</sup> ed, Milano: Wouters Kluwer 2019) 127.

<sup>104</sup> American Declaration on the Rights of Indigenous Peoples: AG/RES.2888 (XLVI-O/16), adopted on 15 June 2016.

<sup>105</sup> In particular, it has been noted that Article XXV of the American Declaration on the Rights of Indigenous Peoples, entitled 'Traditional forms of property and cultural survival. Right to land, territory, and resources', conflicts with Article 26 of the UNDRIP. In fact, it recognizes the states' prerogative to establish the appropriate methods to recognize and protect indigenous peoples' property rights, obliging them merely to take into consideration the customs, traditions, and land tenure systems of the indigenous peoples concerned (B. Clavero, 'La Declaración Americana sobre Derechos de los Pueblos Indígenas: el reto de la interpretación de una norma contradictoria' (2016) 21 *Pensamiento Constitucional* 11–26).

<sup>106</sup> American Declaration on the Rights of Indigenous Peoples, Article 31(3).



This circumstance is not surprising if one considers that, unlike the United Nations, the OAS is mainly composed of TK-providing states, where the indigenous component of the population is particularly substantial. While states hosting indigenous communities are very cautious in affirming rights (such as the right to land) that strongly impact upon the conflicting interests of domestic non-indigenous constituencies, in the case of TK, their prevailing interest is to reinforce international regimes of protection against misappropriation by foreign states and companies.

### *7. Biocultural Community Protocols*

One of the most significant trends in the area of international environmental law consists of granting 'local communities' a set of 'biocultural' rights associated with the management of lands and of natural resources.<sup>107</sup> The objective pursued by the multilateral environmental agreements (MEAs) that safeguard these rights is the conservation and the sustainable, shared management of ecosystems, through the involvement of the affected communities in the decision-making processes, and by enhancing the identities, values, and cultural manifestations these communities express. Borrowing the definition given by the Colombian Constitutional Court, one may define biocultural rights as

the rights of ethnic communities to administer and exercise autonomous guardianship over their territories – in accordance with their own laws [and] customs – and the natural resources that make up their habitat, where their culture, traditions and way of life are developed based on the special relationship they have with the environment and biodiversity. Indeed, these rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation.<sup>108</sup>

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<sup>107</sup> See S. Kabir Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (New Delhi: Oxford University Press 2014) (noting the convergence between environmental/post-colonial movements and indigenous peoples' claims in the emergence of bio-cultural rights.)

<sup>108</sup> Colombia, Constitutional Court, *Caso de comunidades étnicas que habitan la cuenca del río Atrato y manifiestan afectaciones a la salud como consecuencia de las actividades mineras*

As Giulia Sajeve has observed, although biocultural rights have a certain affinity with the collective rights of indigenous peoples, they guarantee less intense protection – a protection conditioned, moreover, upon the pursuit by local communities of the general interest in respecting the environment.<sup>109</sup> As mentioned, the Nagoya Protocol aims at furthering benefit sharing through ‘Biocultural Community Protocols’ (BCPs).<sup>110</sup> Developed by local communities after a broad consultation process that generally involves specialized non-governmental organizations, like Natural Justice<sup>111</sup> or the Global Diversity Foundation,<sup>112</sup> such instruments set out the communities’ preferences with regard to sharing TK and the resulting benefits. In particular, BCPs specify how communities intend to relate to researchers and enterprises that wish to use the genetic resources and TK held by them. BCPs promote the conclusion of MATs that respect the local communities’ concrete needs and cultural preferences. In the case of BCPs elaborated by indigenous peoples, they codify, to a great degree, unwritten indigenous law. In the end, however, respect for the indications contained in the BCPs depends on the users’ good will in all those cases where applicable national laws and regulations (ABS legislation or *ad hoc* laws on the protection of TK) fail to sanction breaches of the said protocols.

Of the BCPs whose implementation has produced more positive results, an example is usually made of Peru’s ‘Potato Park’ Protocol which helped strengthen a democratic, shared management of the numerous

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*ilegales*, judgment 10 November 2016, case T-622/16, para. 5.11, translation of the author (in the original Spanish version: ‘*derechos que tienen las comunidades étnicas a administrar y a ejercer tutela de manera autónoma sobre sus territorios - de acuerdo con sus propias leyes, costumbres - y los recursos naturales que conforman su hábitat, en donde se desarrolla su cultura, sus tradiciones y su forma de vida con base en la especial relación que tienen con el medio ambiente y la biodiversidad. En efecto, estos derechos resultan del reconocimiento de la profunda e intrínseca conexión que existe entre la naturaleza, sus recursos y la cultura de las comunidades étnicas e indígenas que los habitan, los cuales son interdependientes entre sí y no pueden comprenderse aisladamente*’).

<sup>109</sup> G. Sajeve, ‘Rights with Limits: Biocultural Rights – between Self-determination and Conservation of the Environment’ (2015) 6 *Journal of Human Rights and the Environment* 30–54; *Eadem*, *When Rights Embrace Responsibilities. Biocultural Rights and the Conservation of Environment* (New Delhi: Oxford University Press 2018).

<sup>110</sup> The text of many BCPs can be read at <[www.community-protocols.org](http://www.community-protocols.org)>. For further analysis see K. Bavikatte and D. F. Robinson, ‘Towards a People’s History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing’ (2011) 7 *Law, Environment and Development Journal* 35–51 <<http://www.lead-journal.org/content/11035.pdf>> accessed 4 May 2019.

<sup>111</sup> See <[www.naturaljustice.org](http://www.naturaljustice.org)>.

<sup>112</sup> See <[www.global-diversity.org](http://www.global-diversity.org)>.

varieties of potato selected and conserved by the farmers belonging to six Andean indigenous communities.<sup>113</sup> Many other experiences are known of community level seed activities involving indigenous peoples, carried out to conserve and manage local crop varieties through the creation of community seed banks.<sup>114</sup>

While BCPs are developed largely with regard to local plant varieties, there is no shortage of protocols adopted by herding communities to regulate access to animal genetic resources and associated traditional practices. Noteworthy among these is the BCP adopted in 2009 by the *Raika*, an indigenous population of Rajasthan (Northwestern India)<sup>115</sup> that has practised nomadic pastoralism for more than 700 years, helping to preserve the territory's delicate ecological balances. Over the centuries, the Raikas have selected and preserved breeds of camel, sheep, and goat that are particularly resistant to the region's pathogens and arid climate,<sup>116</sup> and whose genetic material has become momentous for ensuring food security in a time of global warming. The Protocol sets out what procedures are established by indigenous law for gaining access to animals for reproductive purposes, as well as to indigenous veterinary knowledge and to selection and breeding techniques.<sup>117</sup>

<sup>113</sup> Cfr. A. Argumedo *et al.*, *Community Biocultural Protocols. Building Mechanisms for Access and Benefit Sharing among the Communities of the Potato Park based on Quechua Customary Norms. Detailed Case Study*, March 2012 <<http://pubs.iied.org/pdfs/G03340.pdf>> accessed 4 May 2019.

<sup>114</sup> R. Feyissa, 'Community Seed Banks and Seed Exchange in Ethiopia: A Farmer-Led Approach', in E. Friis-Hansen and B. Sthapit (eds), *Participatory Approaches to the Conservation and Use of Plant Genetic Resources* (Rome: IPGRI 2000) <[https://www.biodiversityinternational.org/fileadmin/\\_migrated/uploads/tx\\_news/Participatory\\_approaches\\_to\\_the\\_conservation\\_and\\_use\\_of\\_plant\\_genetic\\_resources\\_603.pdf](https://www.biodiversityinternational.org/fileadmin/_migrated/uploads/tx_news/Participatory_approaches_to_the_conservation_and_use_of_plant_genetic_resources_603.pdf)> accessed 4 May 2019, 142–148; M. Worede, 'Establishing a Community Seed Supply System: Community Seed Bank Complexes in Africa', in L. Li Ching, S. Edwards and N. El-Hage-Sciallaba (eds), *Climate Change and Food Systems Resilience in Sub-Saharan Africa* (Rome: FAO 2011) 361–377; O. T. Coomes *et al.*, 'Farmer Seed Networks Make a Limited Contribution to Agriculture? Four Common Misconceptions' (2015) 56 *Food Policy* 41–50.

<sup>115</sup> *Raika Biocultural Protocol-2009* <[www.community-protocols.org/wp-content/uploads/documents/India-Raika\\_Community\\_Protocol.pdf](http://www.community-protocols.org/wp-content/uploads/documents/India-Raika_Community_Protocol.pdf)> accessed 4 May 2019.

<sup>116</sup> *Ibid.* 5 and 15–17.

<sup>117</sup> *Ibid.* 7–14 (referring to indigenous customary law).

## 8. *Towards a Uniform International Regulation?*

With the sole exception of the Swakopmund Protocol, the international agreements reviewed here set out obligations to safeguard TK of agricultural interest in various sectors. Nonetheless, their content remains vague and generic. All these agreements leave it to the states to identify the instruments most suited for ensuring the protection (active and passive) of the knowledge in question, at most making reference to the principles of consultation and of the prior informed consent of the rights holders. In other words, they establish an *obligation of result* (achieving an equitable sharing of the benefits to the advantage of TK holders), leaving the states great freedom to identify the means suitable for achieving this objective.

For 18 years the representatives of national governments sitting on the already mentioned WIPO Committee have been negotiating the text of an international convention that should place upon the Contracting Parties more precise obligations of means. The latest version of the Draft Articles dates to 31 August 2018.<sup>118</sup> However, like previous versions, the draft remains highly provisional and contains a variety of alternative formulations. Virtually all the main sticking points remain unresolved. In particular, agreement has yet to be reached as to the procedures for purchasing the rights attributed to the communities that hold them, or as to the need for a registration procedure or other formalities.<sup>119</sup> Differences of opinion also persist on the highly delicate points of the role of indigenous customary law<sup>120</sup> and of introducing disclosure requirements for users of TK.<sup>121</sup> As for the sphere of *ratione materiae* application, the question still remains open of whether protection should also be accorded to widely diffused TK.<sup>122</sup>

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<sup>118</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Articles Facilitators' Rev. 2*, 31 August 2018 <[https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_37/wipo\\_grtkf\\_ic\\_37\\_facilitators\\_text\\_tk\\_rev\\_2.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_facilitators_text_tk_rev_2.pdf)> accessed 4 May 2018.

<sup>119</sup> *Ibid.* Article 11.

<sup>120</sup> *Ibid.*, Article 1 (definition of 'misappropriation', Alt. 3); Article 5(1) (Alt. 2); Article 7 (Alt. 1 e Alt. 2). A vague reference to the exigency to respect 'the cultural norms and practices of the beneficiaries' appears at Article 5(2) (Alt. 3). Regrettably, no reference to indigenous customary law is present in the various alternative versions of Article 2, entitled 'Objectives.'

<sup>121</sup> *Ibid.* Article 7.

<sup>122</sup> *Ibid.* Article 5. See C. Oguamanam, 'Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions The Evolution of a Concept', CIGI Papers No. 185 — August 2018 <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.185web.pdf>> accessed 4 May 2019 (arguing that one of the most innovative results of the intergovernmental negotiation is the emergence of a differentiated approach,

The effort for the adoption of an international convention with universal scope, that puts obligations in place that are substantial and more stringent than the Nagoya Protocol, appears appreciable. However, the scanty results that have been achieved after many years of preparatory work leaves much scepticism as to the possibilities for the negotiation to have a positive outcome. Some countries, *in primis* the United States, staunchly oppose adopting a binding instrument, which would, in its opinion, offer excessive protection to public domain knowledge, thereby throwing up excessive obstacles to technological innovation and compromising the interests of the companies using genetic resources and the associated knowledge. Added to this are the objective difficulties encountered by negotiators grappling with the apparent paradox of an instrument aimed at safeguarding and promoting cultural diversity through the preparation of uniform protection instruments.<sup>123</sup>

The extremely flexible solution upheld in the Swakopmund Protocol, not requiring registration by TK holders or any other formality, is a useful reference point, and is particularly suited for protecting the knowledge held by indigenous peoples or traditional communities. Nevertheless, as regards protecting the knowledge held by local communities, especially in the industrialized countries, forms of registration might be useful for avoiding a situation of legal uncertainty that would risk giving rise to major litigation. Moreover, in the case of knowledge held by diverse communities (considering, for example, farming communities covering portions of Italian territory comparable in area to provinces or regions), problems inevitably arise in connection with identifying a representative entity able to express prior informed consent and negotiate MATs, in addition to taking legal action in cases of unauthorized use of knowledge subject to protection.<sup>124</sup> A realistic solution might be to precisely identify, on an international level, the object of protection, while also indicating alternative modes of protection to be calibrated to the various types of knowledge and of rights holders.

In any case, to remain in line with the most recent trend in international

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whereby TK should be classified in reference to its degree of diffusion - secret, sacred, narrowly or widely diffused - and be subjected to different legal regimes).

<sup>123</sup> A. Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge', in K. E. Maskus and J. H. Reichmann (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press 2005) 521–564, 525–527.

<sup>124</sup> Unsurprisingly, the question was not addressed by Italian Law No. 194 of 1<sup>st</sup> December 2015, on the conservation and enhancement of agricultural and food biodiversity, for a critical analysis of which see L. Paoloni, 'Biodiversità e risorse genetiche di interesse agroalimentare nella legge nazionale di tutela e valorizzazione' (2016) 1 *Diritto agroalimentare* 151–176.

practice, inaugurated by the Philippines,<sup>125</sup> any WIPO Convention should necessarily require Contracting Parties to give importance to indigenous law and decision-making systems in the matter of accessing indigenous TK, as well as to the BCPs prepared by the local communities at the conclusion of a shared consultation procedure. Otherwise adoption by states of complex rules to regulate indigenous knowledge systems, requiring high levels of technical expertise, is not developmental for indigenous peoples and rather drives them ‘into the arms of lawyers.’<sup>126</sup>

### 9. *Protection of Knowledge of Agricultural Interest, and Peasants’ Rights*

A brief scrutiny of the initiative by the UN Human Rights Council for the adoption of a Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN Declaration on the Rights of Peasants) completes this overview of the international instruments for the safeguarding of TK. After many years of talks, on 17 December 2018, the UN General Assembly finally adopted a document prepared by the Human Rights Council in the form of a declaration of principles.<sup>127</sup>

Despite attracting relatively little attention among legal scholars, as compared to the adoption of the UNDRIP, the UN Declaration on the Rights of Peasants is of considerable interest. It expresses a general reconceptualization of individual rights in their specific social dimension. This is one of the latest evolutionary trends in the protection of fundamental rights – one that can be seen in the new constitutionalism of the Latin American states and, albeit with less emphasis, in the EU Charter of Fundamental Rights.<sup>128</sup> The UN Declaration on the Rights of Peasants represents one of the most significant examples of ‘international law from

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<sup>125</sup> Cf. Indigenous Peoples Right Act of 1997, section 35: ‘Access to indigenous knowledge ... shall be allowed within ancestral lands and domains ... only with a free and prior informed consent of such communities, *obtained in accordance with customary laws of the concerned community*’ (section 35, emphasis added).

<sup>126</sup> Drahos, *Intellectual Property, Indigenous People and Their Knowledge*, 96.

<sup>127</sup> UN General Assembly, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, 17 December 2018, UN Doc. A/RES/73/165 <<https://www.un.org/en/ga/73/resolutions.shtml>> accessed 4 May 2019.

<sup>128</sup> See L. Paoloni and S. Vezzani, ‘La Dichiarazione ONU sui diritti dei contadini e delle altre persone che lavorano nelle aree rurali: prime riflessioni’ (2019) 1 *Federalismi.it – Focus Human Rights* 1–33.

below,<sup>129</sup> as its adoption was mainly promoted by Via Campesina, a movement of peasants and indigenous peoples' organizations from all over the world, engaged in promoting food sovereignty and alternative agro-food models.<sup>130</sup> In an historical juncture characterized by the weakening of social and economic rights, the adoption of this Declaration reveals the decisive role that international civil society can play in counterbalancing the lobbying activity of corporations and in promoting the collective interests of the international community.

The UN Declaration on the Rights of Peasants sets out the states' obligation to respect, protect, and promote the TK of peasants and other people working in rural areas, with particular regard to knowledge relevant to plant genetic resources. It contains several references to peasants' rights over TK, notably 'traditional ways of farming, fishing, livestock rearing and forestry to develop community-based commercialization systems';<sup>131</sup> practices concerning local climate change adaptation and mitigation;<sup>132</sup> TK relevant to plant genetic resources;<sup>133</sup> and conservation and sustainable use of biological diversity.<sup>134</sup> Drawing inspiration from the UNDRIP, it states at Article 26:

1. Peasants and other people working in rural areas have the right to enjoy their own culture and to pursue freely their cultural development, without interference or any form of discrimination. They also have the right to maintain, express, control, protect and develop their traditional and local knowledge, such as ways of life, methods of production or technology, or customs and tradition. No one may invoke

<sup>129</sup> The expression is borrowed from B. Rajagopal, *International Law from Below. Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press 2003).

<sup>130</sup> On social struggles for food sovereignty see D. Thivet, 'Peasants' Transnational Mobilization for Food Sovereignty in La Via Campesina', in C. Counihan and V. Siniscalchi (eds), *Food Activism: Agency, Democracy and Economy* (London/New York: Bloomsbury 2014) 193–209; N. C. S. Lambek, P. Claeys, A. Wong and L. Brilmayer (eds), *Rethinking Food Systems: Structural Challenges, New Strategies, and the Law* (Dordrecht/Heidelberg/New York/London: Springer 2014); J.L. Vivero-Pol, T. Ferrando, O. De Schutter, U. Mattei (eds), *Routledge Handbook of Food as a Commons* (London/New York: Routledge 2019).

<sup>131</sup> UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, Article 16, para. 1.

<sup>132</sup> *Ibid.* Article 18, para. 3.

<sup>133</sup> *Ibid.* Article 19, para. 1, letter *a*).

<sup>134</sup> *Ibid.* Article 20, para. 2.

cultural rights to infringe upon the human rights guaranteed by international law or to limit their scope.

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.

3. States shall respect, and take measures to recognize and protect, the rights of peasants and other people working in rural areas relating to their traditional knowledge and eliminate discrimination against the traditional knowledge, practices and technologies of peasants and other people working in rural areas.

With specific regard to the right to seed, the UN Declaration on the Rights of Peasants also stipulates, at Article 19(8) that 'States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.'<sup>135</sup> The emphasis placed on seed policies is particularly appreciable.<sup>135</sup> As noted above, community-managed genetic resources conservation and improvement through community seed banks is one of the most interesting attempts of social innovation in the agricultural field, aimed at promoting the emancipation of indigenous and small farmers through a cooperative and solidaristic model of agriculture. Yet, seed legislation in many countries constitutes an obstacle to the marketing of farmers' seeds.<sup>136</sup>

The UN Declaration on the Rights of Peasants also remarkably emphasizes the need to counter discriminatory practices against women.<sup>137</sup> This calls for some considerations in terms of gender equality, which is still an underexplored perspective in international legal studies. Indeed, in many indigenous societies there is a diversification of TK held by man and woman, and women play a fundamental role in the conservation and

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<sup>135</sup> C. Golay, 'Legal Analysis on the Rights of Peasants and Other People Working in Rural Areas. The Right to Seeds and Intellectual Property Rights', 19 May 2016 <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPeasants/Session3/StatementsPresentations/Cristophe\\_Golay\\_GENEVA\\_ACADEMY.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPeasants/Session3/StatementsPresentations/Cristophe_Golay_GENEVA_ACADEMY.pdf)> accessed 4 May 2019.

<sup>136</sup> See O. De Schutter, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity, Encouraging Innovation*. Background Document to the Report (A/64/170) Presented by Prof. Olivier De Schutter, Special Rapporteur on the Right to Food, at the 64<sup>th</sup> Session of the UN General Assembly (October 2009), paras 48–51.

<sup>137</sup> See in particular Article 4 of the Declaration.



development of TK in the field of food and agriculture.<sup>138</sup> Accordingly, they should play an active role in the decision-making process and reap the economic benefits deriving from the exploitation of TK. As also recognized by the UNESCO Universal Declaration on Cultural Diversity<sup>139</sup> and the UNDRIP,<sup>140</sup> cultural diversity and indigenous customary law should never be invoked to infringe upon internationally recognized human rights, including the equality principle.

### 10. *Traditional Knowledge and Property Rights*

Lying in the background of the debate on the ways to protect TK is the question of whether to rely on the proprietary scheme to convey the collective interests connected with the management of intangible assets. Italian legal doctrine is not foreign to this debate, having also explored the effectiveness of the institution of civic uses as an instrument for granting farming communities powers for managing the intangible heritage connected with traditional plant varieties.<sup>141</sup>

In the past, *fora* of international discussion have seen strong cultural resistance, by the representatives of indigenous peoples, to extending proprietary logic to knowledge and practices considered – in a holistic sense – as an expression of a deeply-rooted cultural identity.<sup>142</sup> Still today, part of the doctrine underlines the risk for forced epistemological assimilation.<sup>143</sup> A

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<sup>138</sup> C. Mayorga-Muñoz, H. Pacheco-Cornejo, and F. Treggiari, 'El rol de la mujer indígena mapuche en la preservación de recursos genéticos y conocimientos tradicionales asociados. Un análisis jurídico desde la perspectiva de género' (2017) 14 *Revista Jurídicas* 29–45; A. Guzmán Jiménez, 'Conocimientos tradicionales de mujeres mapuches en la agricultura tradicional, territorio Naqche de La Araucanía, Chile', in C. Mayorga Muñoz and F. Treggiari (eds) *Biodiversidad y conocimientos tradicionales. Perspectivas históricas, socioculturales y jurídicas* (Temuco: Ediciones Universidad de la Frontera 2018) 97–110.

<sup>139</sup> UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001, (2002) 41 *International Legal Materials* 57, Article 4.

<sup>140</sup> UNDRIP Articles 34 and 46.

<sup>141</sup> L. Paoloni, *Diritti degli agricoltori e tutela della biodiversità* (Torino: Giappichelli 2005) 142–148.

<sup>142</sup> See also K. McAfee, 'Selling Nature to Save It? Biodiversity and Green Developmentalism' (1999) 17 *Environment and Planning D: Society and Space* 133–154, 148–152 (criticising the IPR and the 'marked-based' solution as extending the post-neoliberal environmental-economic paradigm).

<sup>143</sup> On the emergence of the concept of intellectual property within an indigenous context, see C. Oguamanam, 'Local Knowledge as Trapped Knowledge: Intellectual

paradigm shift, however, was inaugurated by the aforementioned UNDRIP, which makes express reference to the now widely accepted notion of ‘intellectual property.’ This approach has been confirmed and consolidated by the American Declaration on the Rights of Indigenous Peoples.<sup>144</sup>

As argued elsewhere,<sup>145</sup> in an anti-hegemonic perspective of combating biopiracy and the ‘enclosure’ of commons through IPRs, the claim of collective property rights to TK appears quite appropriate, being grounded upon a multicultural reinterpretation of property rights as safeguarded by the leading international instruments for the protection of human rights.<sup>146</sup> A development of this kind would be consistent with the jurisprudence of many international bodies tasked with monitoring compliance with human rights treaties, *in primis* the Inter-American Court, which has interpreted property rights, as to protect the collective exploitation of ancestral lands on the basis of indigenous customary law.<sup>147</sup>

In a perspective similar to the ‘politics of recognition’<sup>148</sup> of the Inter-American Court, General Comment no. 17/2005 of the Committee on Economic, Social, and Cultural Rights carved out, from Article 15, para. 1, letter c), of the UN Covenant of 1966, the obligation to protect

the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account

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Property, Culture, Power and Politics’ (2008) 11 *The Journal of World Intellectual Property* 29–57; J. E. Anderson, *Law, Knowledge, Culture - The Production of Indigenous Knowledge in Intellectual Property Law* (Cheltenham/Northampton, MA: Edward Elgar 2009).

<sup>144</sup> American Declaration on the Rights of Indigenous Peoples, Article XXVIII.

<sup>145</sup> S. Vezzani, ‘I saperi tradizionali e le culture popolari alla luce del paradigma dei “beni comuni”’, in M. R. Marella (ed) *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (Verona: Ombre Corte 2012) 149–160, 156–160.

<sup>146</sup> On the point, see also *inter alios* W. P. Nagan, E. J. Mordujovich, J. K. Otvos and J. Taylor, ‘Misappropriation of Shuar Traditional Knowledge (TK) and Trade Secrets: A Case Study on Biopiracy in the Amazon’ (2010) 15 *Journal of Technology Law & Policy* 9–63.

<sup>147</sup> See the leading case *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, judgment 31 August 2001, reproduced in *Arizona Journal of International and Comparative Law* (2002) 415. The connection between land rights and progress on the protection of indigenous knowledge has been emphasized by P. Drahos and S. Frankel, ‘Indigenous Peoples’ Property: The Issues’, in P. Drahos and S. Frankel (eds), *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development* (Camberra: Australian National University Press 2012) 1–28, 12 and 17.

<sup>148</sup> See C. Taylor, ‘The Politics of Recognition’, in A. Gutmann (ed), *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press 1992) 25–73.

their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.<sup>149</sup>

Thus far, international human rights courts and quasi-judicial bodies have not directly decided allegations by indigenous peoples of interferences in the ability to use, share, and possibly market TK. Yet, especially in cases of forced evictions – where allegations were made of violations of the right to property over ancestral lands, or of other rights (to family, to a decent existence, to enjoy their own culture and religion, etc.) – such courts have emphasized the spiritual and physical link between ancestral lands and natural resources and the conservation of TK, as a fundamental component of indigenous culture.<sup>150</sup> Indeed, in 2005, representatives of the Inuit communities in the United States and Canada submitted a petition to the Inter-American Commission, seeking relief from violations resulting from global warming caused by acts and omissions of the United States.<sup>151</sup> In that context, they alleged that, by failing to take effective action to reduce greenhouse gas emissions, the United States had interfered with the ‘Inuit’s

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<sup>149</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17/2005, ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)’, UN Doc. E/C.12/GC/17, 12 January 2006, para. 32.

<sup>150</sup> See, for instance, Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of the judgment on preliminary objections, merits, reparations and costs) para. 41, which also refers to the ‘Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities’, adopted by the COP to the Rio Convention and dealing extensively with the protection of biodiversity-related TK.

<sup>151</sup> Petition submitted on 7 December 2005.

intellectual property, in the form of their traditional knowledge,' considered to be 'a valuable intangible possession protected under the definition of protected property described in the *Awes Tingni* decision.'<sup>152</sup> Unfortunately, the case was not decided on the merits.

In 2011, the Waitangi Tribunal reached an interesting verdict. As is known, the tribunal is tasked with inquiring, at the petition of individuals or of groups belonging to New Zealand's indigenous population, into compliance by New Zealand with the Treaty of Waitangi, an international agreement concluded between the British government and representatives of the Maori tribes in 1840.<sup>153</sup> Article 2 of the Treaty guarantees the Maori 'the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties [in the Maori linguistic version: "*taonga*"] which they may collectively or individually possess.' This provision has been broadly construed by the Tribunal to cover the property rights claimed by the Maori not only to lands and fisheries, but also to such intangible assets as radio frequencies.<sup>154</sup> Moreover, in the *wai 262* report of 2 July 2011, the Tribunal found a violation by New Zealand of Article 2, for not having protected indigenous TK regarding fauna and flora, assets that indigenous law requires the Maori to safeguard as cultural guardians (*kaitiaki*).<sup>155</sup> The long report makes reference to certain specific cases of biopiracy, i.e. the granting to third parties, by the New Zealand authorities, of plant breeders' rights for certain plant varieties used by the Maori since ancestral times. The Waitangi Tribunal thus fully upheld the claims of the six petitioning tribes, which had reported a violation of the right to respect for their own (intangible) assets, a right protected by the '*Māturanga Māori*' – the set of unwritten rules aimed at maintaining the secrecy of certain ancestral knowledge and at keeping unauthorized persons from gaining possession of the tangible assets that incorporate it.

While the reports of the Waitangi Tribunal have no binding force, they must be taken into due consideration by the New Zealand authorities. In the case in point, a few months after the *wai 262* report, the New Zealand Parliament adopted the 2013 *Patents Act*, in order to provide at least a partial response to the recommendation to modify intellectual property law so as to prevent the wrongful use of TK. The legislative reform instituted the Māori

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<sup>152</sup> *Ibid.* 84.

<sup>153</sup> For further information, see the website of the Tribunal, [www.justice.govt.nz/tribunals/waitangi-tribunal](http://www.justice.govt.nz/tribunals/waitangi-tribunal) (displaying all the reports issued by the Tribunal.)

<sup>154</sup> See the reports relating to the cases *wai 26* (1990) and *wai 776* (1999).

<sup>155</sup> J. C. Lai, *Indigenous Cultural Heritage and Intellectual Property Rights. Learning from the New Zealand Experience?* (Cham: Springer 2014) 223–276.

Advisory Committee, which intervenes in the phase prior to the granting of patents, thus reinforcing the passive protection of the *Mātuaranga Māori*. The Committee performs a consultative function, being called upon to adopt opinions as to whether the claimed inventions run counter to public order and morality, when these inventions make use of Maori TK or indigenous plants or animals.<sup>156</sup>

### 11. *Final Observations*

A number of international instruments require states to safeguard, protect, and promote knowledge and practices of agricultural interest that are the fruit of the intellectual work of indigenous peoples and local communities. However, these instruments contain lax rules, leaving the states the task of identifying the solutions suitable for ensuring effective protection of TK. To date, the most advanced laws have been adopted by DCs and LDCs, where most of the planet's biodiversity – as well as indigenous peoples and communities that express traditional lifestyles – are concentrated. Europe and the United States lag considerably. Almost everywhere, the regulation of access to genetic animal resources and to the associated TK is still undeveloped.

The entry into force of the Nagoya Protocol and its progressive ratification by the industrialized countries present a challenge for national lawmakers, who are called upon to adopt ABS regulations and to prepare mechanisms to monitor compliance with the regulations in the countries of origin by the users of the genetic resources under their jurisdiction.

As for passive protection, pending an amendment of the TRIPs Agreement, or the adoption of a convention by the WIPO, it would be quite appropriate for lawmakers to introduce disclosure obligations. There may also be hopes for generalizing what we might define as the 'New Zealand model' in industrialized countries, through the creation of committees of experts in TK, tasked with assisting the patent examiners' activity.

Turning now to active protection, the stalled WIPO talks cast light on how complicated it is to reach an agreement on a global scale that identifies uniform solutions to the challenge of governing TK. In any event, especially in the current globalization phase, the preparation of effective protection instruments and the recognition of the suitability of TK as the

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<sup>156</sup> *Patents Act 2013*, 13 September 2013, *Public Act 2013*, n. 68, sections 225–228.

subject matter of intellectual property are a necessary counterweight to the expansionistic trends in patent law, also from the perspective of a fair and equitable benefit sharing.

In a phase of economic globalization characterized by strong legal protection of property rights, it is all the same legitimate to wonder whether exclusive rights over TK will have to encounter limitations.<sup>157</sup> Like patents for plants, restricted access to TK might also produce a 'logjam',<sup>158</sup> leading to an underuse of assets functional to the satisfaction of basic rights. This increasingly seems more to be the case as the object and scope of protection broadens: consider, in particular, the case in which very large local communities are granted, with no time limits and requiring no formality, an exclusive right to the use of TK in the public domain. It must be kept in mind that Article 15 of the CBD rightly states that access to genetic resources must not be limited by restrictions that run counter to the objectives of the Convention. Similarly, the very Convention to Combat Desertification identifies, among its objectives, the goal of disseminating and perfecting the TK deemed useful for the well-being of humankind. The above considerations should not be used to lower the level of protection of TK or to restrict the object of protection. Rather, they should spur the establishment of mechanisms aimed at guaranteeing that exclusive rights granted to local communities and indigenous peoples do not conflict with social utility and with the pursuit of the international community's collective interests.

Both patent law and the laws for the protection of plant breeders contain rules limiting exclusive rights for reasons of public interest. In particular, among the interests to be taken into account public health has a prominent role. In this connection, one should consider that traditional medicine can help developing medicines to cure rare illnesses (the so-called orphan drugs) or even diffused and lethal diseases. The Swakopmund Protocol admits the possibility of an intervention by the public authorities through institutions similar to those of compulsory licensing, in cases where rights

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<sup>157</sup> See F. Lenzerini, 'Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge', in F. Francioni and M. Scheinin (eds), *Cultural Human Rights* (Leiden: Martinus Nijhoff 2008) 119–149, 145–149 and Vadi, 'Intangible Heritage, Traditional Medicine and Knowledge Governance' (both posing this question with regard to traditional medicine (TM) which, if kept secret, might prejudice the enjoyment of the fundamental right to health).

<sup>158</sup> Cf. M. Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books 2008).

holders wrongfully deny access to traditional knowledge.<sup>159</sup> Exceptions to exclusive rights are also contemplated in the WIPO Draft Articles,<sup>160</sup> albeit to a limited degree and without mentioning the possibility of compulsory licensing. Precisely with reference to the latter, it would, however, be highly appropriate to introduce a specific measure that grants the states the power to limit the communities' right to exclude others (*ius excludendi*) in order to protect the right to food and the right to health.

As Vincenzo di Cataldo has observed making reference to the classical instruments for the protection of intellectual property, '[o]nly by evolving towards a greater willingness to serve collective interests, including interests other than those (of incentivizing research) for which the protection was born, or at least not to hinder them, will the patent system be able to fully legitimate – and thus conserve – its role.'<sup>161</sup> The same may also be stated with regard to the more recent *sui generis* forms of protection of intellectual property over TK. Such forms of protection will become more and more robust and obtain broad social acceptance, if adequate institutions are established to promote the collective interests of indigenous peoples and peasants' communities, while at the same time ensuring the social function of intellectual property and safeguarding other relevant public interests protected under international law.

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<sup>159</sup> See, in this sense, section 12 of the Protocol: '12.1. Where protected traditional knowledge is not being sufficiently exploited by the rights holder, or where the holder of rights in traditional knowledge refuses to grant licences subject to reasonable commercial terms and conditions, a Contracting State may, in the interests of public security or public health, grant a compulsory licence in order to fulfil national needs. 12.2. In the absence of an agreement between the parties, an appropriate amount of compensation for the compulsory licence shall be fixed by a court of competent jurisdiction.'

<sup>160</sup> A possible option envisaged by the WIPO Draft Articles is the faculty for the state to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals (WIPO, *Draft Articles*, cit., Article 9(3) (Alt. 2). Moreover, one of the alternative versions of Article 9.3 contemplates, at letter c), an exception 'in the case of a national emergency or other circumstances of extreme urgency, to protect public health or the environment [or in cases of public non-commercial use].'

<sup>161</sup> V. Di Cataldo, *Biotecnologie e diritto. Verso un nuovo diritto, e verso un nuovo diritto dei brevetti*, in *Studi di diritto industriale in onore di Adriano Vanzetti. Proprietà intellettuale e concorrenza* (Milano: Giuffrè 2004) volume I, 443–524, 523 (translation from Italian of the author).

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This book highlights the cogency and urgency of the protection of indigenous peoples and discusses crucial aspects of the international legal theory and practice relating to their rights. These rights are not established by states; rather, they are inherent to indigenous peoples because of their human dignity, historical continuity, cultural distinctiveness, and connection to the lands where they have lived from time immemorial. In the past decades, a new awareness of the importance of indigenous rights has emerged at the international level. UN organs have adopted specific international law instruments that protect indigenous peoples. Nonetheless, concerns persist because of continued widespread breaches of such rights.

Stemming from a number of seminars organised at the Law Department of the University of Roma Tre, the volume includes contributions by distinguished scholars and practitioners. It is divided into three parts. Part I introduces the main themes and challenges to be addressed, considering the debate on self-determination of indigenous peoples and the theoretical origins of 'indigenous sovereignty'. Parts II and III explore the protection of indigenous peoples afforded under the international law rules on human rights and investments respectively. Not only do the contributors to this book critically assess the current international legal framework, but they also suggest ways and methods to utilize such legal instruments towards the protection, promotion and fulfilment of indigenous peoples' rights, to contribute to the maintenance of peace and the pursuit of justice in international relations.

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