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Indigenous Peoples’ Rights and Their
Mechanisms of Protection
A Study on their Implementation at International, Regional and National Levels

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# Table of Contents

Abstract .......................... 4

Introduction ......................... 9

Indigenous Rights .................... 15

1.1 Defining indigenous peoples ... 15
   1.1.1 Difference between “ethnic groups”, “national minorities” and “indigenous peoples” ... 15
   1.1.2 The UN definition of indigenous peoples ................................. 16

1.2 The history of indigenous rights ... 19
   1.2.1 The early period ........................................ 20
   1.2.2 From Westphalia to the Creation of the League of Nations ......... 22
   1.2.3 The League of Nations Approach .............................. 25
   1.2.4 The UN Framework .................................. 26

1.3 The 2007 UN Declaration on the Rights of Indigenous Peoples ... 30
   1.3.1 The Pathway to the Adoption of UNDRIP .......................... 30
   1.3.2 The General Content of the Declaration ......................... 31
   1.3.3 The Legal Status of the Declaration ............................. 35

1.4 The Regional Systems’ Approach to Indigenous Peoples .......... 37
   1.4.1 The Inter-American System ................................ 38
   1.4.2 The African Commission on Human and Peoples’ Rights ........ 40
   1.4.3 The European Court of Human Rights ............................ 41
## Indigenous Peoples and Human Rights

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 Collective Rights</td>
<td>43</td>
</tr>
<tr>
<td>2.1.1 Defining Collective Human Rights and their Difference with Individual Human Rights</td>
<td>44</td>
</tr>
<tr>
<td>2.1.2 Issues Concerning Indigenous Collective Rights</td>
<td>46</td>
</tr>
<tr>
<td>2.2 The Right to Self-Determination</td>
<td>49</td>
</tr>
<tr>
<td>2.2.1 The Scope and the Content of the Right to Self-Determination</td>
<td>52</td>
</tr>
<tr>
<td>2.2.2 Indigenous Peoples as Subjects of this Right</td>
<td>54</td>
</tr>
<tr>
<td>2.3 The Right to Development</td>
<td>57</td>
</tr>
<tr>
<td>2.3.1 Indigenous Right to Land</td>
<td>59</td>
</tr>
<tr>
<td>2.3.2 Indigenous Right to a Healthy Environment</td>
<td>64</td>
</tr>
<tr>
<td>2.4 Indigenous Cultural “Clashes”</td>
<td>68</td>
</tr>
<tr>
<td>2.4.1 Indigenous Women’s Rights</td>
<td>69</td>
</tr>
<tr>
<td>2.4.2 Indigenous Traditional Practices Against Animal Rights</td>
<td>73</td>
</tr>
<tr>
<td>2.5 The Right to Cultural Diversity</td>
<td>76</td>
</tr>
<tr>
<td>2.5.1 Cultural Diversity in Human Rights Law</td>
<td>77</td>
</tr>
</tbody>
</table>

## Indigenous Cultural Rights and Heritage

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1 Indigenous Cultural Rights</td>
<td>85</td>
</tr>
<tr>
<td>3.1.1 Indigenous Cultural Rights and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions</td>
<td>87</td>
</tr>
<tr>
<td>3.1.2 Indigenous Cultural Rights and the UNDRIP</td>
<td>89</td>
</tr>
<tr>
<td>3.1.3 The Endorois Case – An Exemplary Case of Jurisprudence on Indigenous Cultural Rights</td>
<td>93</td>
</tr>
<tr>
<td>3.2 Indigenous Cultural Heritage</td>
<td>96</td>
</tr>
<tr>
<td>3.2.1 Defining Tangible and Intangible Cultural Heritage</td>
<td>97</td>
</tr>
<tr>
<td>3.2.2 Characteristics of Intangible Cultural Heritage</td>
<td>100</td>
</tr>
</tbody>
</table>
Abstract

Questa tesi esamina i diritti dei popoli indigeni. In particolare, la ricerca si basa sull’analisi del funzionamento dei sistemi legali internazionali, regionali e nazionali nel contesto della protezione di questi diritti.

La prima parte è dedicata alla storia dei diritti dei popoli indigeni. Partendo dall’identificazione del “concetto” di popoli indigeni, in quanto non esiste una definizione ufficiale, si analizza come la comunità internazionale ha considerato le popolazioni indigene, quali diritti venivano attribuiti a questi soggetti nel passato, a partire dalla scoperta dell’America nel 1492, e quali cambiamenti sono avvenuti fino ai giorni odierni, in particolare fino all’adozione della Dichiarazione ONU sui Diritti dei Popoli Indigeni (UNDRIP) nel 2007.

Da un’iniziale considerazione delle comunità indigene come soggetti del diritto internazionale, la filosofia giuridica cambia con la pace di Vestfalia nel 1648, data che sancisce la nascita dello Stato Moderno. Con l’affermazione dello Stato Moderno nasce anche il diritto pubblico internazionale, il quale si basava sulla dicotomia stato-individuo. Essendo i popoli indigeni delle collettività, essi non venivano considerati soggetti del diritto pubblico internazionale e, di conseguenza, non potevano avere diritti. Successivamente, invece, con la nascita dell’Organizzazione delle Nazioni Unite (ONU) nel 1945 e con l’affermazione internazionale dei diritti umani grazie alla Dichiarazione Universale dei Diritti Umani del 1948, i popoli indigeni hanno cominciato a reclamare i loro diritti.

A livello internazionale la loro voce ha iniziato a essere ascoltata nel 1971 quando l’ECOSOC chiese alla Sottocommissione per la Prevenzione della Discriminazione e la Protezione delle Minoranze di presentare uno studio sul problema della discriminazione dei popoli indigeni. A partire da questa data si susseguono diverse negoziazioni che portarono nel 2007 all’affermazione ufficiale dei diritti indigeni con l’adozione dell’UNDRIP, primo strumento internazionale a loro completamente dedicato.

I diritti per cui i popoli indigeni hanno lottato vengono spiegati nella seconda parte di questa tesi. All’interno della dicotomia stato-individuo, i diritti garantiti ai popoli indigeni erano solo quelli individuali. Invece, l’identità delle
popolazioni indigene è legata al loro essere un gruppo che condivide ogni aspetto della vita. Di conseguenza, la natura dei loro diritti deve essere collettiva per effettivamente proteggere la loro identità, la quale è essa stessa un loro diritto. Per questo motivo, essi hanno lottato per il riconoscimento dei loro diritti collettivi, i quali vengono presentati per primi nelle loro linee generali. Successivamente si entra nel dettaglio di quelli relativi alle popolazioni indigene.

Il primo diritto analizzato è il diritto all’autodeterminazione. I popoli indigeni hanno diritto ad autodeterminarsi all’interno dello stato in cui vivono, senza però obbligatoriamente chiedere la secessione. Strettamente connesso al diritto all’autodeterminazione è il diritto allo sviluppo, ovvero hanno il diritto di poter sviluppare la loro società, la loro economia e la loro cultura. Per compiere tutto ciò è fondamentale garantire loro il diritto alla terra e alle risorse naturali e il diritto a un ambiente salubre. Questi diritti sono affermati e protetti a livello internazionale e regionale ma manca ancora un’efficace implementazione a livello nazionale.

Un’altra importante tematica è quella degli “scontri culturali”. Infatti, i diritti collettivi dei popoli indigeni sono stati spesso accusati di violare alcuni dei diritti umani individuali. In particolare, la giurisprudenza internazionale e regionale ha stabilito tramite interpretazioni, sentenze e commenti generali che essi sono preservati e protetti solo se non vanno contro i diritti umani fondamentali. Questa clausola è stata sottolineata in conseguenza a casi in cui la situazione descritta è andata effettivamente a verificarsi, come ad esempio nel caso dei diritti delle donne, i quali non sono stati rispettati a causa di quei diritti culturali delle comunità indigene che mettono in pericolo l’indipendenza e il principio di non-discriminazione femminile. Un altro problema si riscontra nella violazione dei diritti degli animali attraverso le pratiche di caccia e i riti religiosi comprendenti sacrifici animali. In questo campo la giurisprudenza non si è ancora pienamente espressa ma tende a riconoscere la superiorità dei diritti indigeni piuttosto di quelli animali, considerati da molti studiosi una mera narrazione occidentale.

L’ultima categoria analizzata sono i diritti culturali delle popolazioni indigene, i quali possono essere definiti l’essenza stessa della loro identità e, di conseguenza, di tutti i loro diritti. I diritti culturali indigeni sono basati sul principio generale del diritto alla diversità culturale. L’UNESCO riporta che esistono
cinquemila culture indigene differenti. Gli studiosi e gli indigeni stessi continuano a sottolineare come le loro culture, il loro patrimonio culturale, le tradizioni e le conoscenze tramandate di generazione in generazione siano fondamentali per la loro sopravvivenza e per la protezione della loro integrità. Infatti, i diritti culturali occupano una posizione di rilievo tra i diritti protetti dalla Dichiarazione ONU sui Diritti dei Popoli Indigeni (UNDRIP). Inoltre, l'UNESCO ha adottato diverse convenzioni che proteggono il patrimonio culturale delle popolazioni indigene, sia quello tangibile che quello intangibile.

Trattando la questione del patrimonio culturale, per quanto riguarda i popoli indigeni, ci sono delle problematiche da affrontare. Di particolare importanza sono il problema delle restituzioni dei resti umani e degli oggetti presi illecitamente dai territori indigeni, della gestione dei Siti Patrimonio dell'Umanità UNESCO, dei diritti di proprietà intellettuale nell'ambito delle conoscenze tradizionali indigene e della loro diversità biologica. Oggi giorno la questione del rimpatrio degli oggetti e dei resti umani indigeni è protetta su tutti i livelli di giurisdizione internazionale, regionale e nazionale. Invece, la gestione dei Siti UNESCO esclude completamente la partecipazione dei popoli indigeni che vivono i territori dove sono ubicati i Siti stessi, andando contro il principio del consenso libero, informato e preventivo che i popoli indigeni devono sempre avere sulle loro terre.

Nella quarta parte dell'elaborato si presenta l'ambito dei diritti di proprietà intellettuale e del loro rapporto con i diritti umani. Questi diritti vengono usati per la protezione della parte intangibile del patrimonio culturale, in particolare della conoscenza tradizionale. Di conseguenza, si analizza l'efficienza della proprietà intellettuale come meccanismo di difesa della conoscenza tradizionale dei popoli indigeni. In particolare, si prende in considerazione il quadro regolamentare elaborato da WIPO, l'Organizzazione Mondiale per la Proprietà Intellettuale. Le conclusioni che si traggono riflettono il poco sviluppo avvenuto in questo campo nella protezione dei diritti culturali e umani, piuttosto che quelli economici, su cui si basano i diritti di proprietà intellettuale.

Gli strumenti utilizzati per sostenere la tesi sono i trattati, le convenzioni, le dichiarazioni e le risoluzioni degli organi del diritto internazionale. Inoltre, sono prese come fonti fondamentali i discorsi e i report dei relatori speciali ONU sulle
varie tematiche trattate. Le pubblicazioni degli studiosi più famosi e dei professori più rilevanti di diritto internazionale sono stati utilizzati per le argomentazioni più distaccate dalla pura analisi degli strumenti di natura legale. Grande importanza viene occupata dalle fonti regionali del diritto e si tengono in considerazione anche fonti nazionali, che riguardano in particolare il diritto alla terra e il patrimonio culturale tangibile. Infine, fondamentali sono state le sentenze riguardanti i popoli indigeni delle corti internazionali e regionali dei diritti umani e i commenti interpretativi degli organismi ONU il cui compito è monitorare l'implementazione dei trattati sui diritti umani – gli UN Treaty Bodies. Queste ultime due fonti riescono a far comprendere cosa comporta nella pratica la protezione e la promozione dei diritti dei popoli indigeni.

Nell'ultima parte della tesi in questione si arriva a concludere che, nonostante l'affermazione ufficiale dei diritti dei popoli indigeni sia avvenuta soltanto nel 2007, la protezione era in realtà già cominciata in precedenza con le interpretazioni di diversi articoli di vari strumenti legali internazionali tramite gli UN Treaty Bodies. A livello internazionale esiste sicuramente una piena protezione e promozione su diversi aspetti, fanno eccezione i siti UNESCO e la proprietà intellettuale con fini economici.

Per quanto riguarda il livello regionale, i sistemi di protezione dei diritti umani regionali, in particolare quelli africano e inter-americano, hanno implementato a pieno i diritti dei popoli indigeni. I diritti dell’UNDRIP sono stati implementati tramite interpretazioni delle corti e protocolli ad hoc, e vengono inoltre difesi dalle corti in diverse sentenze, nelle quali gli stati sono dichiarati violatori dei diritti indigeni.

In ultimo, a livello nazionale devono essere ancora implementati sistemi efficaci di protezione dei popoli indigeni e dei loro diritti, in particolare per quanto riguarda i diritti alla terra e alle risorse naturali e di partecipazione nell’ambito dell’autodeterminazione. Inoltre, vengono sottolineati continue discriminazioni e abusi delle donne con origini indigene. A livello nazionale fa eccezione il sistema legato ai meccanismi per rimpatriare il patrimonio culturale tangibile dei popoli indigeni.
Di conseguenza la tesi finale dimostra come i diritti indigeni siano affermati, protetti e promossi a livello internazionale e regionale, ma che non riescano ad essere veramente implementati senza un supporto e un cambiamento a livello nazionale della giurisprudenza, livello dove avvengono le discriminazioni più gravi nei confronti delle popolazioni indigene.
Introduction

This dissertation examines the rights of indigenous peoples. In particular, this research is based on the analysis of the functioning of the international, regional and national legal systems when dealing with these rights. As a consequence, the purpose of this inquiry is to evaluate how the various levels of jurisprudence implement, or not, indigenous peoples’ rights.

In order to make this thesis as more comprehensive as possible, it has been divided in four parts. The first chapter starts with the vital identification of who are the indigenous peoples in order to clarify who are the subjects of the rights successively analyzed. After a description of the rights’ holders, which is not given by an official definition in order not to violate indigenous principle of self-identification, the history of how indigenous people were considered at the international level during the past centuries is elaborated. The beginning of this historical excursus starts with the discovery of America and finishes at contemporary times. Within this excursus, five phases have been identified that have been articulated taking into account the changes in legal philosophies and doctrines, which provoked variations in how indigenous peoples were considered at the international level.

Although an initial partial recognition as subject of international law, indigenous peoples were rapidly discharged of this title with the birth of the Modern State and of the Law of Nations after the peace of Westphalia in 1648. This was due to the establishment of the dichotomy state-individual that had alienated group entities from international law till the 20th century. As a matter of fact, interest for minorities and groups was manifested within the League of Nations, the first international organization created in 1919. However, the advent of the Second World War put an end to the life of the organization. Although it can be argued that the United Nations took the place of the League of Nations, it did not embrace the interest in minorities and groups entities the former had had. Indeed, the UN resulted still embedded in the individual-state dichotomy of the Law of Nations.
Nevertheless, the UN established the human rights regime with the adoption of the Universal Declaration on Human Rights in 1948, through which indigenous peoples could start claiming for their rights that were not satisfied by the individual ones enshrined in all human rights legal instruments. Their voice started to be listened to in 1971 when UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities was asked to investigate on discrimination against indigenous peoples. This was the very first step that made a series of negotiations start that finally resulted in the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, more than 30 years later.

As previously pointed out, the rights for which indigenous peoples struggled are their collective rights, which could not be protected by the individualistic human rights approach enshrined in the dichotomy state-individual. These indigenous collective rights are presented in the second chapter of this study. At first the general description of the characteristics of collective rights is given. Successively, indigenous collective rights are examined. Those are, namely, the rights to self-determination, to self-identification and to self-governance, the right to development from which derives the right to land and natural resources and the right to a healthy environment, and the right to cultural diversity.

As far as collective rights are concerned, they have been accused by scholars to enter into conflict with individual human rights and this is why their recognition took long time to occur. Nevertheless, jurisprudence identified non-derogable individual rights that have to be always respected even at stake of collective ones. It is the example of women’s rights. Indeed, cultural collective rights of indigenous peoples have often been accused of violations of women’s rights. This is an example of indigenous “cultural clashes” with the dominant society. Besides, cultural clashes with the dominant society also occur as far as animal’s rights are concerned.

To the topic of cultural collective rights of indigenous peoples is dedicated the end of the second chapter and both the third and the forth chapters. Indeed, this dissertation has taken a deep cultural perspective on indigenous rights. This
choice of underlining the importance of indigenous cultural rights is simple. As a
matter of fact, the protection of cultural rights is vital for the survival of indigenous
peoples. All indigenous rights can be interpreted to be cultural ones. Moreover,
culture is the funding pillar of indigenous identity. As a consequence, denying
indigenous peoples of their cultural rights means denying them of their identity,
integrity and survival. As a matter of fact, jurisprudence at the international and
regional levels have affirmed this cultural nature of all indigenous rights.

Historically, the first indigenous cultural right to have been affirmed at the
international level was the right to cultural diversity. Successively, the right to the
diversity of cultural expressions was recognized by the international community.
Finally, within indigenous cultural rights, it is enshrined the right to protect their
cultural heritage and traditional knowledge. After the general presentation of the
indigenous cultural rights enshrined in several UN and UNESCO legal instrument
and in particular in the UNDRIP, the debate passes to focus on indigenous
cultural heritage and traditional knowledge, which hold a relevant part in this
dissertation being the argument of most of the third chapter and the whole forth
one.

The protection of cultural heritage, both tangible and intangible, and of
traditional knowledge, which is a form of expression of intangible cultural heritage,
is supported at the international level by the work of two UN specialized agencies;
namely, UNESCO and WIPO. As a matter of fact, the mandate of UNESCO
embeds the protection of cultures as one of its fundamental ideals. For this
reason, the organization adopted a significant number of declarations and
conventions dealing with the protection of cultural heritage. The two most relevant
ones are the 1972 UNESCO Convention concerning the Protection of the World
Cultural and Natural Heritage and the 2003 UNESCO Convention for the
Safeguarding of the Intangible Cultural Heritage. These two conventions
established two systems of protection of cultural heritage – the World Heritage
Committee, with its World Heritage Lists, dealing with the tangible aspects of
cultural heritage, and the Intergovernmental Committee for the Safeguarding of
Intangible Cultural Heritage entitled to manage the Lists of Intangible Cultural
Heritage and of the Register of Good Safeguarding Practices. The dissertation is
going to analyze in chapter three whether these systems of protection created by UNESCO are effectively adequate for the safeguarding of indigenous cultural heritage.

As far as WIPO is concerned, its action is the core of the argumentation of chapter 4. Indeed, it deals with the protection of cultural heritage, traditional cultural expressions and traditional knowledge through the use of intellectual property rights. Indeed, WIPO is the acronym of World Intellectual Property Organization. The organization established the Intergovernmental Committee on Intellectual Property and Genetic resources, Traditional Knowledge and Folklore (IGC) in order to face issues arising from the application of the intellectual property framework to traditional knowledge. As a matter of fact, indigenous peoples and other non-Western communities alleges the intellectual property rights regime not to effectively provide for safeguarding of their traditional cultural expressions and traditional knowledge. On the contrary, it has also been accused of favoring misappropriation and misuse. This is why WIPO and the IGC have decided to create a treaty on traditional knowledge and intellectual property rights. The thesis tries to answer whether the intellectual property rights framework is able to promote cultural and human rights, or only economic ones.

As a consequence, in the conclusion, the dissertation is presenting how all systems of human rights protection, both at the international and regional levels, and national legislations deal with the protection and promotion of the indigenous rights discussed all along the thesis. Moreover, it focuses on the aspects that should be subject of further implementation.

The instruments and resources that have been used for this research and that make solid the conclusion of this dissertation, are of different natures. As a matter of fact, the basis of this analysis are several international legal instruments, concerning human rights protection and UNESCO and WIPO policies and programs, that have been adopted till nowadays. Not only those regarding indigenous rights per se, but also those that have been considered precursors and basis for their adoption. Nevertheless, vital importance has been given to the analysis of the 2007 UN Declaration on the Rights of Indigenous Peoples. These instruments have been used for presenting how the indigenous rights framework
has evolved till contemporary times. All the other frameworks, such as the one of cultural heritage protection and the intellectual property rights one, have been examined with the aim of verifying how they deal with indigenous issues. Connected to this second category of international legal instruments, there are the interpretations, called General Comments, of these instruments by their respective UN Treaty Bodies. The importance of these interpretations lies on the fact that they helped paving the way for the affirmation of indigenous rights.

Moreover, great relevance has been dedicated to international and regional jurisprudence. Indeed, the merits of cases dealing with violations of rights towards indigenous peoples are vital for understanding how indigenous rights have to be actually implemented and protected at the national level. In particular the Human Rights Council, at the international level, and the Inter-American Court – and Commission – on Human Rights and the African Court – and Commission – on Human and Peoples’ Rights, at the regional level, are the three systems of human rights protection that jurisprudence on indigenous rights the most, even before the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007. As far as jurisprudence is concerned, for the topics of cultural heritage protections, land rights and intellectual property rights, attention has also been given to national legislations. As a matter of fact, it is important to take into consideration national legislation because states are the direct subjects asked to implement law concerning these fields, in order to get to the actual protection of indigenous rights.

Furthermore, the studies and reports of UN Special Rapporteurs, as José R. Martinez Cobo, James Anaya, and Radhika Coomaraswamy, Independent Experts, such as Arjun Sengupta and Farida Shaheed, and Chairperson-Rapporteurs, like Erica-Irene A. Daes, have been used for the comprehensive understanding of indigenous identities, cultures, self-determination, development and all other issues.

Finally, the works of the most relevant scholars on minorities, indigenous peoples, cultural heritage, intellectual property rights, human rights and international law have been used for the basis of the argumentations that are not
strictly connected to the pure analysis of international legal instruments and jurisprudence.

To conclude, it must be reminded that the indigenous issues taken into consideration and the methods of research used in this dissertation have not to be considered as all-comprehensive. Nevertheless, they are fundamental for the understanding of the nature of indigenous people’s rights and of the practical measures states are sked to implement in order to protect these rights. Whether this protection is effective or nor and if there should be more implementation of indigenous rights is discussed in the conclusive part of the thesis.
Chapter 1
Indigenous Rights

1.1 Defining indigenous peoples

Nowadays, it is estimated that the number of indigenous people is around 370 million worldwide. They are spread in more than 70 countries, where they “retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live.”\(^1\) Among the most well-known indigenous peoples, there are the Maori of New Zealand, the Aborigines of Australia, the Mayas of Guatemala, the Maasai of Kenya and Tanzania, the Inuit of the circumpolar region, and the Saami of Northern Europe.

1.1.1 Difference between “ethnic groups”, “national minorities” and “indigenous peoples”

In order to actually understand indigenous peoples, their identity and their rights, it is vital to highlight the difference between ethnic groups, national minorities and indigenous peoples. Firstly, ethnic groups are based on the belonging to the same ethnicity and, within a state, are usually made up of immigrant groups. Moreover, ethnic groups are to a large extent characterized by the desire of integrating into the larger society. Furthermore, they do not want to become a self-governing group; rather, they want to change the institutions in a way to make the dominant society more easygoing about different cultures.\(^2\)

On the other hand, national minorities within a state actually wish to remain a distinct society from the dominant one. In addition, they demand for forms of

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autonomy from the state, as political participation and territorial jurisdiction. National minorities have the right to self-governance and internal self-determination according to international law. If states do not grant such rights to minorities, they are entitled to ask for secession. Examples of national minorities are the Quebecers in Canada and the Catalans in Spain.

As far as indigenous peoples are concerned, they obviously are national minorities. However, it is reductive to define them in such a way. As a matter of fact, indigenous peoples are defined as the descendants of peoples who inhabited a given area before and during the arrival of culturally and, or, ethnically different people. Furthermore, enshrined in this definition, there is the fact that the latter became dominant over the former through means of occupation. In addition, a vital characteristic of indigenous peoples, differentiating them from national minorities, is their connection to the land. Not only do they have unique knowledge of sustainable use of natural resources, but also their ancestral land is a fundamental element for the survival of indigenous societies and cultures. Although indigenous peoples have the right to self-determination, they are often neglected from the dominant society and they struggle for the recognition of their identity.

1.1.2 The UN definition of indigenous peoples

At present, there is not an official UN definition of indigenous peoples and there are clear reasons for which none of the UN bodies has adopted it.

In 1986, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R. Martinez Cobo, elaborated the conclusions, recommendations and proposals related to his Study on the Problem of Discrimination against Indigenous Population (E/CN.4/Sub.2/1986/7/Add.4), in which he presented a working definition of indigenous peoples reading as follows:

Indigenous communities, peoples and nations are 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.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

a) Occupation of ancestral lands, or at least of part of them;

b) Common ancestry with the original occupants of these lands;

c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);

d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

e) Residence on certain parts of the country, or in certain regions of the world;

f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and
accepted by these populations as one of its members (acceptance, by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.\(^6\)

This definition was, and still is, of such an importance that it was being used within the UN years apart, more or less till the adoption of the UN Declaration on the Rights of Indigenous Peoples. Moreover, nowadays, it is still considered the more all-comprehensive one.\(^7\)

However, indigenous peoples strictly opposed to the adoption of this formal definition in international law owing to their need, desire and right to define themselves.\(^8\) Although indigenous peoples fought against adopting a definition, they did, and still do, stress the importance of providing protection for their collective identity in international law.\(^9\) Consequently to this protest, the former Chairperson-Rapporteur of the Working Group on Indigenous Populations, Erica-Irene A. Daes, stated that a formal definition is something unnecessary for protecting the identity of indigenous peoples at the international level, underling the fact that indigenous communities have the right to self-identification, which has never been granted to them because of the imposition of their definition by the other, usually dominant, societies.\(^10\) As a matter of fact, also the Secretariat of the Permanent Forum on Indigenous Issues prepared a paper for the UN

Department of Economic and Social Affairs in 2004 within which the approach of not formally defining indigenous peoples is argued to be the most suitable one.\(^{11}\)

Nevertheless, the Chairperson-Rapporteur Daes identified some vital factors for the modern understanding of indigenous peoples. At first, the presence of the principle of self-identification as indigenous peoples, both by individuals and by the communities of themselves and their members, is one of the key element to take into consideration when determining indigenous characteristics. Secondly, indigenous peoples have historical continuity with pre-colonial and, or, pre-settler societies. Moreover, indigenous communities have strong links to their ancestral territories and share a deep respect for natural resources and wildlife. Furthermore, with respect to the dominant society, indigenous peoples have distinct social, economic and political systems, language, culture, and beliefs. Finally, they are a non-dominant group of society, within which they are neglected and marginalized. However, Erica-Irene A. Daes highlights the non-comprehensive nature of these factors for a formal all-comprehensive definition, while stressing the adequacy of a more practical approach to the concept of “indigenous”.\(^{12}\)

As a matter of fact, it is vital to underline that even in the UN Declaration on the Rights of Indigenous Peoples (2007) there is no definition. Eventually, although the adoption of an official human right instrument on indigenous peoples, the UN bodies decided not to provide for a formal definition, in order to respect indigenous will. Actually, this was the best choice to take, as with a definition the treaty would contain a violation of the indigenous human right to self-identification.

1.2 The history of indigenous rights

Indigenous peoples have always been a matter of discussion within international law issues since its beginning. As a consequence, to fully understand the position of indigenous peoples and their rights in contemporary international law, it is vital to analyze the evolution of discourse and practice

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related to them in the international legal system’s history. However, this attempt to trace a temporal line is not to be considered as a thorough history of indigenous peoples’ rights. In order to understand this temporality, it is beneficial to create a temporal division, which can be identified as follows: the early period from the discovery of America to the 40s of the 17th century; from the Peace of Westphalia (1648), with the establishment of the modern state system, to the creation of the League of Nations; the brief period under the League of Nations; and the development of the UN framework till nowadays. The criteria on which this division is based are essentially the prevailing legal philosophies that succeeded one another in time and the most relevant turning-point events in the formation and development of the international system.

1.2.1 The early period

It was after the discovery of America, with the beginning of European explorations and conquest, that European intellectuals started questioning about the relationship between Europeans and the indigenous peoples they came across. During that period, the Renaissance, some legal ideas and philosophies had just been theorized. A relevant quantity of scholars set out the definition of a natural legal order that was perceived as pre-existing human society. This school of thought, professing the existence of a law given by nature independently by human behavior, is commonly referred to as the natural law school. Within this school of thought, there were some scholars that examined the legality of European settlers’ claims over the “New World” and the indigenous peoples living in the discovered lands. Among them, it is vital to remember Bartolomé de las Casas, Francisco de Vitoria and Hugo Grotius.

Bartolomé de las Casas (1474-1566) was a Dominican cleric that defended the rights of indigenous peoples. He passed some time of his life as a missionary in Spanish encomiendas and, in his work History of the Indies (1561), he reported how Spanish colonization and settlement in America was happening. The

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encomienda system, granting Spanish colonists a part of the newly discovered lands and the right to exploit indigenous labor, was described by Bartolomé de las Casas as a vivid enslavement and massacre of the Indians of America. De las Casas denounced this situation affirming the equal humanity of indigenous peoples to that of the colonists, which was given by the law of nature.\textsuperscript{15}

The same belief was initially shared by the legal scholar and theology primary professor, Francisco de Vitoria (1486-1547). The historical jurisprudential frame posed to the scholar the question of whether or not American indigenous peoples were rational human beings to be considered equal to the Europeans. The answer of Vitoria was that Indians “are not unsound mind, but have, according to their kind, the use of reason,” which is reflected in the presence of rules dealing with “marriage and magistrates, overlords, laws, and workshops and a system of exchange.”\textsuperscript{16} In other words, Vitoria stated that indigenous peoples possessed political rights under international law and underlined that these rights were handed down by God. Consequently, indigenous peoples were entitled of the right to their lands, which European colonists had to respect.\textsuperscript{17} Nevertheless, Vitoria affirmed that colonists could take authority over indigenous lands owing to the fact that indigenous peoples did not exercise full sovereignty – in the European sense of hegemony and civilization.\textsuperscript{18} Furthermore, the scholar introduced the concept of “just war”, which was based on the European value system of that time. This concept gave authority to colonists of starting wars against indigenous peoples that were not able to meet certain standards within the interests of the European realms.\textsuperscript{19} As a consequence, the initial human equal rationality attributed to indigenous peoples by Vitoria weakens with these argumentations.

\textsuperscript{17} Mattias Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, Oxford University Press, Oxford, 2016, p.8-9
Hugo Grotius (1583-1645), well-known for being one of the founding fathers of international laws, was of the same opinion of Vitoria. As far as Grotius was concerned, he stated that indigenous peoples had their own rights by the “dictate of right reason” in accordance with the social nature of all human beings. Nevertheless, he still supported the concept of just war due to the perceived mild structure of indigenous societies, which were not considered as efficient as European ones.

To conclude, what can be inferred by the early legal practice of international law in its relationship with indigenous peoples is the fact that they were considered as international legal subjects with rights and duties. As a matter of fact, in that period, different treaties were signed between indigenous communities and European realms; so, they actually had full international legal status. However, it is vital to highlight that this does not necessarily consist of recognition by the Europeans of indigenous peoples’ civilizations and societies as equal to theirs. Indeed, Europeans used the loophole of just war to promote colonization over indigenous peoples.

1.2.2 From Westphalia to the Creation of the League of Nations

In the era of the modern state system, the European legal approach to indigenous peoples dramatically changed. The emergence of the modern state international framework occurred after the Peace of Westphalia of 1648, which signed a transformation in the naturalist way of thinking, giving birth to the liberal thought. Liberal scholars rejected the idea of a legal order created by nature – or God – and affirmed a legal system based on the natural rights of the individuals and the natural rights of the states at all levels of legal systems.

Thomas Hobbes (1588-1679), one of the major leading scholars of that period, elaborated a vision of humanity based on the dichotomy individual-state.

The philosopher, in his masterpiece *Leviathan* (1651), argued that individuals were in a warlike situation in their natural state and that they decided to aggregate and create the civil society, identified with the modern state. According to Hobbes, individuals actually decided to have the state as the holder of their natural rights. Hobbes's work was the source of the so-called social contract theories.

Legal liberal theorists as Samuel Pufendorf (1632-1694) and Christian Wolff (1679-1754) took the social contract theories and applied them to international law, developing a body of law focused on the modern state as the main element, which was called “Law of Nations”.²⁴ In practical terms, liberalism provided a theory that acknowledged modern states – which had been created through force, wars, and imposed frontiers at Westphalia – as being the only international legal subjects. Moreover, within the Law of Nations states were legitimized with the sovereign right to rule over individuals and territories. Therefore, the negative aspect of this legal doctrine was that peoples, meaning groups of individuals with common ethnic and cultural backgrounds, were no more subjects of international law. In addition, international law started to define “peoples” exclusively as the combination of the populations of the different states. Consequently, within that system, relevance was no more attributed to minorities and indigenous peoples.²⁵

To deeply understand how the modern state was considered with respect to international law in this historical period, it is vital to analyze the work of Emmerich de Vattel (1714-1767) who was the most influential legal scholar of the 18th century. The scholar defined the Law of Nations in his masterpiece as, “the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights.”²⁶ Thus, the Law of Nations enshrined the state sovereignty as the constitutional principle of international law. Furthermore, it granted states’ action to become law.

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As a consequence of the previous argumentations, in this legal environment, indigenous peoples to maintain their collective rights and independence were to be considered as modern states. The status of indigenous peoples within the Vattellian international law was framed by jurisprudence. In particular, three decisions by Chief Justice John Marshall of the United States Supreme Court contributed to this framework. In *Johnson v. M’Intosh* (1823), a case about a claim on a piece of land, Marshall applied the so-called discovery doctrine, for which the US had full title to acquire indigenous lands by means of purchase or conquest. Successively, in *Cherokee Nation v. Georgia* (1831) the Cherokee community sued the state of Georgia for having executed and enforced its state laws over a Cherokee territory, which was recognized by a treaty with the US government. Marshall concurred that the Cherokee were not a foreign state according to the US constitution because, due to the previously mentioned treaty, the tribe had put itself under the protection of the United States. Nevertheless, Marshall did not fully deny the sovereignty of the Indian tribe over its territories, describing them as a kind of “domestic dependent nations”. As a matter of fact, in *Worcester v. Georgia* (1832), Chief Justice Marshall concurred that Georgia legislation was not applicable within the Cherokee territories.

However, Vattellian international law rejected the idea that indigenous communities could qualify as states, owing to their being far from European modern state model. Consequently, they could not have full sovereignty over their lands. For instance, indigenous peoples were not subjects of international law and could not contribute to its shaping. In addition, they could neither claim for their rights. Indeed, rights were perceived to arise from the dichotomous relationship between individuals and the state. In this strict legal environment there was no consideration for groups, which were not regarded as subjects of law. As a result, international law gave force – and juridical basis – to the colonization

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stream and the “civilizing doctrine”, building up Western hegemony over indigenous peoples.\(^{30}\)

### 1.2.3 The League of Nations Approach

During the 20\(^{th}\) century, the so-called democratic theory spread and brought to little changes for the position of indigenous peoples within the international legal system. As a matter of fact, democracy theory made a change of perspective about the polities holding democratic power. It was no more the state but its aggregate populations.\(^{31}\)

The spread of democracy theory resulted in the decision of forming the first world organization, the League of Nations, in 1919, with the aim of preserving peace worldwide. The creation of this organization surely affirmed the position of the state as central, arguing that international law is the product of states’ consent. However, at the same time, it marked the first acceptance of non-European and non-Western polities as relevant at the international level.\(^{32}\)

As the birth of the League of Nations occurred after the First World War, its main goal was to reframe the international system, even the legal part. As a consequence, there was a break with the tradition of international law. For instance, the organization took into consideration the situation of minorities. Moreover, within the League of Nations there was the first discussion on the principle of self-determination, which the US President Woodrow Wilson linked to the rights of minorities. However, in the Covenant of the League of Nations (1919) member states did not include the right to secession to minorities. Whereas, as far as indigenous peoples are concerned, the Covenant included in article 23 a “native inhabitants’ clause”. Under this clause, states had to “secure the just treatment of the native inhabitants of territories under their control.”\(^{33}\) The use of the sentence “under their control” let evince that indigenous peoples could not

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legally occupy an independent territory. Consequently, democracy theory and the League of Nations framework made no impact over the consideration of indigenous peoples in international law.  

The end of the League of Nations arrived with the outbreak of the Second World War, which also marked the temporary end of the democracy theory.

1.2.4 The UN Framework

With the creation of the United Nations in 1945, the international community committed again to the protection of international peace and security and the protection of human rights, as stated in article 1 of the UN Charter (1945). The engagement of the international legal system in protecting human rights was successively echoed by the adoption of the Universal Declaration on Human Rights in 1948.

In these two powerful documents, the international community included the right to self-determination and the principle of equality of human beings. Although the revolutionary essence of these rights, the focus of the documents was still based on the dichotomy state-individual. As a matter of fact, all human rights enshrined in the Universal Declaration on Human Rights have an individualistic dimension. Further, the right to self-determination did not refer to groups within a state; on the contrary, it pertained to a state-to-state perspective. Consequently, there was a break with the League of Nations period, during which interest for groups’ rights was emerging.

In the 1950s, decolonization started and based its propaganda on the right to self-determination. Even though this could have been the chance to protect and affirm cultural and social diversity at the international level, decolonization universalized the Western model. The right to self-determination was applied on colonial territories, not on the different nations and peoples living in the colonies.

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As a consequence, decolonization had no positive impact on indigenous peoples within the international society.\(^{37}\)

How the international community looked at indigenous peoples in the 1950s can be clearly evinced by the content and language of the 1957 ILO\(^{38}\) Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, No. 107 – commonly called ILO Convention No. 107. Notwithstanding the ratification of the Convention by only twenty-seven countries, it is of maximum relevance because it is the very first international convention dealing with indigenous peoples’ rights and has a legally-binding nature.\(^{39}\) However, the rights protected in the Convention have to be interpreted through a particular lens, the one of integration. The protection – and not the promotion – of indigenous culture, heritage, knowledge, and institutions is put in parallel with the opportunity of integration of indigenous individuals into the dominant society. As a matter of fact, article 2.1 urges that:

> governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.\(^{40}\)

However, even if provision 2.2(c) does not envisage artificial assimilation, there are no defined parameters of the mentioned integration policies. In addition, there is no reference to measures promoting only voluntary integration and blocking involuntary one. Also, this provision enshrines a paternalistic approach of states towards indigenous peoples, which are subordinated to states’ decisions. Further, there is no sign in the Convention of perceiving indigenous peoples as a group, so


\(^{38}\) International Labor Organization


there is still an individualistic approach to human rights. Integration, paternalism and individualism are elements that with respect to indigenous peoples nullify the protection of the rights enshrined in the Convention.\textsuperscript{41}

A change in the individualistic nature of human rights happened during the 1970s, when the right to self-determination started to be associated with national minorities. nevertheless, it was still the state the subject dealing with its practical implications. A deeper variation occurred in 1986 with the adoption of the UN Declaration on the Right to Development. In this declaration peoples are entitled to pursue their economic, social, cultural, and political development.\textsuperscript{42} Furthermore, in the same years, states recognized indigenous peoples to be different from national minorities because of their connection to their ancestral lands and their continuous preservation of distinct ways of life, both socially and culturally.\textsuperscript{43}

The UN interest for indigenous issues officially started in 1971 when the UN Economic and Social Council (ECOSOC) asked the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities to present a study on the “problem of discrimination against indigenous populations.”\textsuperscript{44} Special Rapporteur José R. Martinez Cobo presented several partial reports since 1981 and completed its Study on the Problem of Discrimination against Indigenous Populations in 1986. Cobo repelled the integration approach of ILO Convention No. 107 and identified self-governance as the founding principle for indigenous self-determination and preservation of indigenous identity, integrity, culture, social traditions, knowledge and heritage.\textsuperscript{45} A vital step was the establishment of the UN Working Group on Indigenous Populations (WGIP) in 1982,\textsuperscript{46} which met annually

\textsuperscript{43} Mattias Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, Oxford University Press, Oxford, 2016, p.84
\textsuperscript{44} UN, ESC Res 1589(L), 21 May 1971, UN ESCOR, 50th Session, Supp No 1, UN Doc E/5044 (1971)
\textsuperscript{46} Asbjørn Eide, \textit{The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples}, in Claire Charters and
till its abolition in 2006. In 1985, the Working Group on Indigenous Populations was put in charge of drafting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Ten years later, the Commission on Human Rights with its Resolution 1995/32 created the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, which had the task of negotiating at the political level the adoption of the UNDRIP by Member States. Besides, it is vital to highlight General Assembly Resolution 49/214 on the International Decade of the World’s Indigenous Peoples that promoted indigenous participation in the Working Group of the Draft Resolution.

UN bodies’ will of drafting a declaration on indigenous rights witnesses that international legal experts had begun familiarizing with the idea of a right to self-determination applicable not only in a state-to-state perspective, but also in the context of indigenous peoples and minorities. Moreover, this change of attitude was applied for the first time in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) of 1989. The most important contribution of this convention is its emphasis on collective rights of indigenous peoples, on perceiving indigenous communities as equal to individuals pertaining to the dominant society, and on the principle of self-identification. ILO Convention No. 169 was certainly taken as a basis for the draft of the UNDRIP.


1.3 The 2007 UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13th September 2007. It is an instrument of soft law that, together with other mechanisms, as jurisprudence and regional standards, contributed to the creation of a new international legal order and customary law with new international subjects, namely indigenous peoples.

1.3.1 The Pathway to the Adoption of UNDRIP

In 2006, after more than ten years of negotiations, the Working Group on the Draft Declaration on the Rights of Indigenous Peoples finally adopted the draft of the UNDRIP. The draft passed to the Human Right Council, which substituted the Commission on Human Rights in the same year, during its First Session. On 29th June 2006, the Human Rights Council adopted the draft Declaration through Resolution 2006/2 with only two votes against by Canada and Russia.53 Successively, the adopted draft was submitted to the General Assembly and analyzed during the 61st Session of 2006 by the Third Committee – the Social, Humanitarian and Cultural Committee.54

The discussion for the amendment and adoption of the UNDRIP was set for 28th November 2006. One month later, the Third Committee adopted a draft resolution to be discussed in the Plenary of the General Assembly.55 The version of the draft resolution was sponsored by Peru, supported by European and Latin American countries, and was envisaged to be adopted in little time. However, Namibia and other African countries presented amendments to the draft resolution.56 Consequently, the General Assembly decided to get time to make

55 Victoria Tauli-Corpuz, How the UN Declaration on the Rights of Indigenous Peoples Got Adopted, in Tebtebba Magazine volume 10, 2007, p.4-23
56 Luis Alfonso de Alba, The Human Rights Council’s Adoption of the United Nations Declaration on the Rights of Indigenous Peoples, in Claire Charters and Rodolfo Stavenhagen, Making the
more consultations. Nevertheless, Member States committed to reach the adoption of the UNDRIP before the end of the 61st Session, scheduled for 17th September 2007.57

Eventually, on 13th September 2007, the UN Declaration on the Rights of Indigenous Peoples got adopted after almost 25 years of negotiation and discussion. The vote resulted in 143 Member States in favor with respect to only 4 against (Australia, Canada, New Zealand and the United States) and 11 abstentions. However, successively, also the four Member States that voted against the adoption of the Declaration publicly gave support to the UNDRIP, strengthening its value in international law.58

1.3.2 The General Content of the Declaration

The UN Declaration on the Rights of Indigenous Peoples is made of a broad preamble and 46 articles. Although the Declaration may be considered not deeply comprehensive of all indigenous issues at stake within the international debate, it satisfies with a minimum standard all fields of claims brought about by indigenous representatives to the Working Group. The thematic taken into consideration and the enshrined rights are within those relating indigenous life, non-discrimination, self-determination, self-identification and self-governance; collective rights concerning institutional issues, land rights, cultural heritage and indigenous property rights.59

As a matter of fact, Article 2 refers to basic already widely recognized rights, namely the right of non-discrimination and the right to equality, arguing that “Indigenous peoples and individuals are free and equal to all other peoples and individuals” and that they shall be “free from any kind of discrimination” when

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exercising all their rights that are all “based on their indigenous origin or identity.”

Furthermore, Article 3 readily affirms the struggled right to self-determination, which officially put an end to the dichotomy state-individual, by stressing that “Indigenous peoples have the right to self-determination” and that “they freely determine their political status and freely pursue their economic, social and cultural development.” Moreover, the right to self-determination acquires more power with Article 4, which entitles indigenous peoples with the right to self-government as fundamental part of their self-determination, arguing that “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” In addition, Article 5 amplifies the scope of the right to self-governance with respect to indigenous peoples; while, at the same time, it entitles indigenous peoples the right to take part in governance of the dominant society, affirming that “have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” and that, based on their choice, they can “participate fully (...) in the political, economic, social and cultural life of the State.”

Besides, Article 7 is divided in two provisions that affirm the right to life, the right to liberty and the one to security of indigenous peoples. The first provision refers to individual rights of indigenous persons; whereas, on the other hand, provision two provides for collective rights of the indigenous groups. Indeed, “indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person” and that their collectivity nature should not be the basis for “any act of genocide or any other act of violence.”

Further, Article 10 claims that State cannot force indigenous peoples to abandon their ancestral lands or their occupied territories, stressing that “Indigenous peoples shall not be forcibly removed from their lands or territories”. Moreover, all kind of relocation must occur only after indigenous peoples give their “free, prior and informed consent,” “agreement on just and fair compensation,” and “the option of return.”\textsuperscript{65}

As for Article 11, it refers to indigenous traditions, cultural heritage, traditional knowledge and intellectual property, affirming the right to protect and develop them, arguing that they have “the right to practise and revitalize their cultural traditions and customs” through their “archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.” In particular, the second provision argue that States are entitled to create a \textit{sui generis} system for redressing through restitution of indigenous property or compensation, particularly of their “cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”\textsuperscript{66}

In addition, Article 23 entitles indigenous peoples with the right to development, which in practice is composed of “the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.”\textsuperscript{67} Connected to the right to development, Article 26 affirms the indigenous right to land and the right to use natural resources, “which they have traditionally owned, occupied or otherwise used or acquired,” according to their traditions. Moreover, states are required to ensure protection for indigenous territories through “legal recognition and protection to these lands, territories and resources” conducted respecting the

\textsuperscript{65} UN, \textit{Declaration on the Rights of Indigenous Peoples}, UN Doc. A/RES/61/295, 2007, Article 10, p.6
“customs, traditions and land tenure systems of the indigenous peoples concerned.” 68

Furthermore, Article 31 is an amplification of what previously stated in article 11. It claims the cultural rights of indigenous peoples and the right to protect 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. 69

In addition, indigenous peoples can also pursue the creation of indigenous intellectual property rights, which states shall “take effective measures to recognize and protect the exercise of these rights.”70

Finally, Article 34 is relevant because it underlines the right of indigenous people to self-governance, cultural traditions and development; however, at the same time, it stresses the fact that indigenous peoples in practicing these rights must be “in accordance with international human rights standards.”71

A relevant aspect of the Declaration is the free, prior and informed consent. This principle can be recognized as another indigenous right. In practical terms, indigenous peoples must give the states consent to some issues before action is taken by the latter. This consent has to be free, without any constrictions; prior, indigenous peoples have to be consulted before anyone else; and informed, all kind of information about consequences of the actions have to be submitted to indigenous peoples. Free, prior and informed consent must be given to states as result of consultation in two particular cases. Namely, for the adoption of

legislation and administrative policies concerning indigenous peoples, as for Article 19, and for projects affecting indigenous rights to land, territories and resources, as for Article 32. Furthermore, the Declaration compels states to get free, prior and informed consent for the relocation of indigenous peoples from their lands and territories – Article 10 – and for the storage or disposal of hazardous materials on indigenous land and territories – Article 29. Finally, as for articles 11 and 28, indigenous peoples are entitled to ask states for redress, through restitution and compensation, with respect to confiscated, damaged and occupied lands and territories, and cultural, intellectual and spiritual property.\footnote{Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, \textit{The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions}, 2013, p.26-27}

All previously described rights and other ones enshrined in the Declaration will be further analyzed, discussed and connected to jurisprudence in the following parts of the research.

\subsection*{1.3.3 The Legal Status of the Declaration}

The UN Declaration on the Rights of Indigenous Peoples was adopted through a resolution, and, contrarily to treaties and conventions, it is not a legally-binding instrument. Consequently, the UNDRIP is an instrument of soft law, which cannot be legally binding \textit{per se} but that turn to be legally binding through customary international law and state practice. For this reason, in 2008, the Acting High Commissioner for Human Rights Kyung-wha Kang and the Special Rapporteur on the Rights of Indigenous Peoples James Anaya made a joint statement to call states to implement policies in favor of indigenous peoples, manifesting their commitment to the UNDRIP. As a matter of fact, the Declaration cannot change the life of indigenous peoples without states engagement in implementing indigenous-friendly national legislation. On the contrary, for the improvement of indigenous well-being within the dominant society:

\begin{quote}
\textit{We need the political commitment of States, international cooperation, and the support and goodwill of the public at large, to create and implement a range of intensely political}\n\end{quote}
programmes, designed and undertaken in consultation with indigenous peoples themselves.\textsuperscript{73}

Nowadays, although the UNDRIP is an instrument of soft law, there is relevant evidence of the existence of some factors adding strength and legitimacy to the Declaration. At first, the four states that originally voted against the adoption of the UNDRIP – Australia, Canada, New Zealand and the United States – successively made an official statement giving their support for the implementation of the Declaration. Moreover, the fact that the negotiation process of the UNDRIP concerned both states and indigenous representatives gives a special legitimacy to the Declaration itself, as there was the free, prior and informed consent of indigenous peoples to adopt it. Last but not least, a vital quantity of scholars has argued that indigenous rights were already part of customary international law.\textsuperscript{74}

Of further relevance is the endorsement of the Declaration by several UN bodies and other institutions, underlining the UNDRIP conformity with international law. As a matter of fact, the Office of the High Commissioner on Human Rights committed to assist states during the implementation of policies favoring the protection of the rights enshrined in the UNDRIP. Moreover, the UN Food and Agriculture Organization (FAO) engaged in observing, and implementing when possible, the Declaration in all its activities concerning contact with indigenous peoples. In addition, the UN Global Compact created a guide for how to manage business when indigenous peoples are concerned. Finally, UNESCO and WIPO have committed to safeguarding indigenous cultural heritage and traditional knowledge, implementing in their policies the rights enshrined in the UNDRIP.

Besides, the International Law Association (ILA) – an international non-governmental organization whose aim is to study the development of international


law – decided to establish a Committee on the Rights of Indigenous Peoples during its 72nd Biennial Meeting in 2006.\textsuperscript{75} In 2010, the Interim Report of the ILA Committee on the Rights of Indigenous Peoples addressed state practice and opinion juris related to the implementation of indigenous rights. The final version of this report was used to draft a resolution, which was adopted during the 75th ILA Biennial Meeting in 2012. ILA Resolution No. 5/2012 enshrines indigenous right to self-determination; the right to autonomy and self-governance; the right to cultural identity of indigenous peoples; indigenous land rights as vital for indigenous culture; free, prior and informed consent; and reparation and redress for wrongs.\textsuperscript{76}

Finally, also the majority if the regional systems of human rights protection engaged in aligning with the UNDRIP and they have actually already started to implement it.

1.4 The Regional Systems’ Approach to Indigenous Peoples

The regional legal systems throughout the world are based on the protection and promotion of human rights. These regional systems are namely the African Commission on Human and Peoples’ Rights, with its African Court on Human and Peoples’ Rights; the Arab Human Rights Committee; the ASEAN Intergovernmental Commission on Human Rights; the European Court of Human Rights; the European Committee of Social Rights; and the Inter-American Commission on Human Rights, with its Inter-American Court of Human Rights.\textsuperscript{77}

As far as indigenous rights are concerned, some of these regional legal systems are to be considered sort of precursors to the UN Declaration on the Rights of Indigenous People. As a matter of fact, several of the rights enshrined in


the UNDRIP have been proclaimed within regional processes before the adoption of the Declaration in 2007.\textsuperscript{78}

The Inter-American Court of Human Rights, together with the Inter-American Commission on Human Rights, are for sure the regional courts with more jurisprudence on indigenous rights. Also, the African Commission on Human and People’s Rights has dealt with several cases concerning indigenous peoples’ rights. Compared to the Inter-American system and the African one, the European Court of Human Rights has little jurisprudence with regard to indigenous peoples. Whereas, the ASEAN Intergovernmental Commission on Human Rights lacks processes where indigenous peoples are concerned. The same occurs with respect to Arab Human Rights Committee. As far as Oceania is concerned, it does not exist an Oceanian regional system, but national processes reveal that the states of that region recognize indigenous rights.\textsuperscript{79}

1.4.1 The Inter-American System

Within the Inter-American system, the Commission and the Court examined several cases concerning indigenous peoples, in particular those living in the areas of the Latin America. The Inter-American system has to be considered the major precursor of the UN Declaration on the Rights of Indigenous peoples, as with its jurisprudence already granted basic human rights to indigenous peoples, both as individuals and as collectivities, long before the adoption of the UNDRIP.

Example of this jurisprudence is the merits of the Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. As a matter of fact, the Inter-American Court of Human Rights, in its judgement of 31\textsuperscript{st} August 2001 concerning merits, reparations and costs, found Nicaragua guilty of violation of “the right to judicial protection enshrined in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni

Moreover, the Court “finds that the State violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community.”

The Mayagna (Sumo) Awas Tingni Community was actually legally entitled with the right to judicial protection and the right to property of their traditional lands and natural resources. However, the specification of “the members” of the Community may not enshrine the collective aspect of these rights.

Another significant example of jurisprudence is the merits issues by the Inter-American Commission on Human Rights concerning the case Maya Indigenous Communities of The Toledo District v. Belize of 12th October 2004. The Commission concluded that Belize:

violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people, by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists.

Furthermore, “the State violated the right to equality before the law, to equal protection of the law, and to nondiscrimination enshrined in Article II of the American Declaration to the detriment of the Maya people.” In addition, Belize is convict of having violated the right to judicial protection. As a consequence, with respect to this case, for the language used in the report’s conclusions, the

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81 Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001 (Merits, Reparations and Costs), p.82
83 Inter-American Commission on Human Rights, Report Nº 40/04, Case 12.053, Merits, Maya Indigenous Communities of The Toledo District V. Belize, October 12, 2004
Commission argues that Belize violated the collective rights of the Maya people to their ancestral land, to non-discrimination and to equality before the law.

1.4.2 The African Commission on Human and Peoples’ Rights

As far as the African Commission on Human and Peoples’ Rights is concerned, it has been dealing with a relevant quantity of cases concerning indigenous peoples and the violations of their rights. What is vital to highlight is the change of view of the Commission with respect to indigenous rights. This change occurred within the time of adoption of the 2007 UNDRIP.

In 1992, in case 75/95 Katangese People’s Congress v. Zaire, the Commission had to decide whether the Katangese people had the right to self-determination or not. As for the African Charter on Human and Peoples’ Rights (1981), the merits claimed that:

*All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect.*

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So, the Katangese people was not entitled with the right to self-determination because they did not compose the aggregate population of a state. Moreover, the Commission added when the right to self-determination was applicable, “independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully conscious of other recognized principles such as sovereignty and territorial integrity.”

85 Consequently, the initial vision with respect to the right to


85 African Commission on Human and People’s Rights, 75/95 Katangese People’s Congress v. Zaire, 1992
self-determination did not envisage indigenous people. Rather, it was related to
the individual state dichotomy and did not compel collective rights.

Nevertheless, as previously stated, the African Commission changed its
mind with respect to indigenous right. It is clearly evident in case 276/2003 Centre
for Minority Rights Development (Kenya) and Minority Rights Group International
on behalf of Endorois Welfare Council v. Kenya. In the Commission’s final
decision, taken on 25th November 2009, the Endorois people is legally entitled
with the right to land, the right to natural resources traditionally used and the right
to cultural identity. Further, Kenya is required to pay compensation for the loss
suffered by the indigenous community because of the actions of the state taken
without free, prior and informed consent.86

1.4.3 The European Court of Human Rights

As for the European system of protection of human rights based on the
European Convention on Human Rights by the Council of Europe, it is rare that a
case deals with indigenous peoples’ rights. The reason is due to the very little
quantity of indigenous peoples in Europe with respect to all the other continents of
the world.

Nevertheless, when the European Court of Human Rights has been called
to judge about issues concerning indigenous rights, it has generally taken a
comprehensive approach.87 As a matter of fact, both in Case of Loizidou v. Turkey
(Application no. 15318/89) and in Case of Chassagnou and Others V. France
(Applications nos. 25088/94, 28331/95 and 28443/95) the Court concurred for the
actual violation of human rights among the allegations.

Besides, in G and E v. Norway, the European Commission on Human
Rights entitled indigenous peoples to have their particular lifestyles respected by

86 African Commission on Human and People’s Rights, 276/2003 – Centre for Minority Rights
Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare
(accessed 15 July 2018)
87 Mattias Åhrén, Indigenous Peoples’ Status in the International Legal System, Oxford University
Press, Oxford, 2016, p.110
states. Further, the Court is considered to take this position in its judgment for the case *Handölsdalen Sami Village AO v. Sweden*. 88

As far as the European Union is concerned, little has been argued within it with respect to indigenous peoples. However, in the Northern Dimension Action Plan the EU claims the right to self-determination of indigenous peoples. 89 As for the states of Northern Europe, which are the ones where European indigenous peoples lives, Finland, Norway and Sweden are collaborating and negotiating the adoption of a Nordic Sami Convention, dealing with the indigenous Sami human rights already affirmed in the international legal system.

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Chapter 2
Indigenous Peoples and Human Rights

2.1 Collective Rights

Historically, human rights legislation was born within the context of the individual-state dichotomy that dominated the international legal system since the peace of Westphalia. As a matter of fact, the first generation of human rights – civil and political ones – and the second generation – economic, social and cultural rights – were designed on individualism.\textsuperscript{90}

However, during the 90s, some scholars – among which Will Kymlicka is the most influent – started analyzing the rights of minority groups.\textsuperscript{91} This change in perspective is witnessed at the international level by the adoption of the UN Declaration Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992.\textsuperscript{92} The broadening of the human rights focus on minority groups led to the claim by indigenous peoples of considering their collective aspect of aggregation and way of living as a fundamental element for effectively granting them their human rights. This claim was possible owing to the participation of indigenous representatives in the Working Group of the Draft Declaration on the Rights of Indigenous Peoples.\textsuperscript{93}

Although a strong debate started about whether or not to entitle indigenous peoples with collective rights\textsuperscript{94}, indigenous communities obtained the recognition of their collective rights with the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples.\textsuperscript{95}

\textsuperscript{90} Mattias Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, Oxford University Press, Oxford, 2016, p.28-29
\textsuperscript{92} General Assembly Resolution 47/135 of 18 December 1992
\textsuperscript{93} General Assembly Resolution 49/214 of 23 December 1994
\textsuperscript{95} UN, \textit{Declaration on the Rights of Indigenous Peoples}, UN Doc. A/RES/61/295, 2007, Preamble, para. 22
2.1.1 Defining Collective Human Rights and their Difference with Individual Human Rights

Even though human rights were based on an individualistic approach, collective rights have been accepted by the international legal system nowadays.\(^9^6\) These rights include “the right to self-determination, development, peace, co-ownership of the common heritage of mankind, a healthy environment and the culture of mankind.”\(^9^7\)

Indeed, already early binding legal instruments of human rights protection took into consideration some collective elements. The first one was the Convention on the Prevention and Punishment of the Crime of Genocide (1948), as genocide itself enshrines the concept of collectivity.\(^9^8\) Other ones were the 1969 International Convention on the Elimination of All Forms of Racial Discrimination, taking into consideration ethnic groups, the 1970 ECOSOC Resolution 1503 on Procedure for dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms, and the UN Declaration on Rights Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Moreover, the UNESCO Declaration on Race and Racial Prejudice (1978) affirms in Article 1.2 that “all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such.”\(^9^9\) Furthermore, the Rio Declaration on Environment and Development (1992) recognizes the role of minority and indigenous collectivities in international environmental law.\(^1^0^0\)

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Finally, the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples enshrine collective rights of indigenous communities.

Generally, it has been argued that minorities’ claims on collective rights are of two natures. On the one hand, the first type has been defined as “internal restrictions” and corresponds to those collective rights which aim is to protect communities from the impact of “internal dissent”. On the other hand, the second type has been referred to as “external protections” and is made of those collective rights which goal is to protect the group from the influences, economic decisions and policies of the dominant society.\(^{101}\) However, it is vital to underline that the two types of claims do not necessarily need to be considered jointly. As a matter of fact, not all minorities claim for both internal restrictions and external protections. Increasingly, minorities and indigenous peoples are asking for external protections in order to maintain their integrity and identity. Nevertheless, there are still communities that look for obtaining more power over their members.\(^{102}\)

Due to the possible empowerment of minorities and indigenous peoples as consequence of the recognition of collective rights, some scholars have found several arguments against them. Firstly, scholars have investigated whether or not collective rights are really necessary. Some theorists argue that collective rights are already protected by individual rights whose interpretation can apply to collective aspects of the lives of the individuals.\(^{103}\) In addition, the most influent argument against collective rights' recognition is the possible restriction and violation of individual rights that can derive from the protection of collective ones. In particular, scholars believe that it is the protection of the collective rights that Kymlicka has defined as “internal restrictions” that may result in the violation of individual human rights, such as women’s rights.\(^{104}\)


Consequently, within this debate, also Kymlicka provide his idea on the issue affirming that “liberals can and should endorse certain external protections, where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices.”

Whereas, according to Alexandra Xanthaki and Avigail Eisenberg, the real solution to this debate can be provided by jurisprudence, which should find a way to preserve the core elements of both collective and individual rights and should apply them in order not to have any kind of discrimination or violence. Besides, Xanthaki defines as “cultural imperialism” a system where human rights are only considered through an individualistic approach. As a matter of fact, Western liberal cultures are the sole ones prioritizing individual. While, the majority of other worldwide cultures give priority to the collective elements of life rather than the individual ones.

Nevertheless, as it is going to be analyzed successively, even if jurisprudence has recognized collective rights, it has argued that fundamental individual rights cannot be derogated in the name of collective one, in particular for cases dealing with strong “cultural clashes”.

2.1.2 Issues Concerning Indigenous Collective Rights

Collective rights are characteristic of minorities’ rights, but they become more prominent and vital as far as indigenous peoples are concerned. As a matter of fact, indigenous peoples aspire to live in community all aspects of their lives. Consequently, indigenous peoples claim that the recognition and protection of their collective rights is an essential aspect for their survival and development. Indeed, in 1989, during the negotiations for the UN Declaration on the Rights of Indigenous Peoples, indigenous peoples unanimously declared:

The concept of indigenous peoples’ collective rights is of paramount importance. It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the most important purposes of this Declaration. Without this, the Declaration cannot adequately protect our most basic interests. This must not be compromised.109

The reason why indigenous rights are so different from traditional human rights based on Western culture lies on the fact that indigenous societies are horizontal and based on a framework of relationships that interconnects the whole community. This horizontal network of relationships is what the collective rights of indigenous peoples are designed to protect.110

As a consequence, the recognition of indigenous collective rights is essential for establishing an effective instrument aimed at the preservation, protection and promotion of indigenous ways of life, identity and integrity.111 In addition, entitling indigenous peoples with collective rights means granting them their development in the context of the right to self-determination. In practical outcomes, this results in the recognition of indigenous control over the fields of everyday life forming cultural membership, as education, language, lands, heritage and traditional knowledge.112

Furthermore, indigenous peoples’ collective rights are recognized by the Rio Declaration on Environment and Development (1992) as vital for the management of different environments and for the development of environmental-

friendly policies.\textsuperscript{113} This particular relationship is due to the fact that environment is perceived as part of the identity of indigenous communities themselves.\textsuperscript{114}

Within the context of the previously presented political debate on whether or not collective right are a threat for individual human right, many indigenous communities have given their own opinion on the issue. Generally, they argue that, as far as indigenous rights are concerned, there is an interdependence of both individual and collective rights. Therefore, indigenous communities do not refuse the individual human rights regime. As a matter of fact, they believe that individual rights and collective ones are “mutually interactive rather than in competition.”\textsuperscript{115}

From this argumentation, it can be evinced that a human rights system based only on an individualistic approach violates the collective nature of indigenous peoples. Indeed, their right to self-determination, their principle of self-governance, their land rights, and their cultural membership are undermined and partly violated if restricted only to rights of the individual, as they are the pillars of indigenous collectivity.\textsuperscript{116}

Nowadays, almost all scholars, even the strongest opponents to the implementation of collective rights, have recognized the necessity for indigenous peoples to have their collective rights protected due to their connection to survival, identity and integrity. As a matter of fact, there is the common acknowledgement that indigenous peoples must be preserved in all their typical aspects because their “way of life is fragile, under attack, and fundamentally incompatible with mainstream legal and social institutions.”\textsuperscript{117}

Indeed, indigenous collective rights are embedded in the UN Declaration on the Rights of Indigenous Peoples (2007). Actually, in the preamble, there is


one clause stating that the states party to the Declaration recognize both the individual and the collective nature of indigenous rights without any form of discrimination.\textsuperscript{118} Moreover, in Article 1, indigenous peoples are entitled of all rights both as individuals and as collectivities.\textsuperscript{119} Furthermore, in Article 7.2, the Declaration entitles indigenous peoples with the collective right to live as distinct peoples, which shall not be discriminated.\textsuperscript{120} Finally, as for Article 40, indigenous peoples are entitled to have access “to effective remedies for all infringements of their individual and collective rights.”\textsuperscript{121}

This change in the perspective through which collective rights are dealt with within the international community has permitted the affirmation and protection of indigenous rights at the international level. Besides, it reflects a detachment from Western-based ideas and the increasing interest of the international society in cultural diversity’s preservation and promotion.

2.2 The Right to Self-Determination

The right to self-determination was firstly brought under consideration within the international legal system by the US President Woodrow Wilson and encouraged by Vladimir Lenin during the First World War. The first phase of this right was embedded in the individual-state dichotomy and determination was conceived as states’ independence and sovereignty.\textsuperscript{122} Afterwards, the UN Charter – in Article 1 paragraph 2 – affirmed the principle and right of self-determination of peoples.\textsuperscript{123} Moreover, the shared Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that “all peoples have

\begin{itemize}
  \item[119] UN, \textit{Declaration on the Rights of Indigenous Peoples}, UN Doc. A/RES/61/295, 2007, Article 1, p.4
  \item[123] UN, \textit{The Charter of the United Nations}, 1945, Article 1.2
\end{itemize}
the right of self-determination.”\textsuperscript{124} Thus, self-determination became a human right for all intents and purposes, enshrining universality, inalienability and indivisibility in its scope.\textsuperscript{125}

Nevertheless, during the majority of the 20\textsuperscript{th} century, the right to self-determination was only related to independence regarding authority and territory of states. It was embedded in the individual-state dichotomy, which was dominating the international legal system of that time. The fact that individual state-dichotomy was present in the context to self-determination is witnessed by the 1966 General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965), which states that “every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.”\textsuperscript{126} In the context of self-determination, this provision entails that external self-determination is recognized and states have positive obligations, whereas the internal one is not considered by the international system.\textsuperscript{127}

For the right to self-determination to be operative under international law, a clear definition of the subject of the right – so, of peoples – was to be provided. As a matter of fact, a discussion about how to consider the term “people” occurred within the international community.\textsuperscript{128} However, most scholars and commentator of the time agreed on the fact that there was no general accepted meaning for the


Nowadays, the right to self-determination is considered to apply to peoples without any exception of the term. However, the misconception of self-determination is still dominant. The primary cause of this misconception is decolonization. Indeed, during the decolonization period, new states obtained independence over colonial authorities. However, this independence was based on a territorial approach and the peoples living the decolonized territories were not considered. The territorial approach used for the decolonization is not in accordance with the scope and content of the right to self-determination of peoples.\footnote{130}{S. James Anaya, \textit{Indigenous Peoples in International Law}, Oxford University Press, New York, 2004, p.103-104}

Several positive aspects of self-determination have been elaborated in relation to the national power framework. First of all, self-determination is believed to avoid the problems related to discriminating comparisons and choices. Moreover, self-determination is able to prevent states from registering individuals according to ethnic or other group membership, which would, thus, create discrimination. In addition, the principle of self-determination is defined as being naturally flexible and self-adjusting; consequently, self-determination would not create conflicts within the state. Finally, the implementation of self-determination is believed to be the basis for equal chances to all segments of society and also to groups and individuals who explicitly reject their insertion in the society through segmental basis.\footnote{131}{Arden Lijphart, \textit{Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems}, in Will Kymlicka, \textit{The Rights of Minority Cultures}, Oxford University Press, New York, 1995, p.284-286}
2.2.1 The Scope and the Content of the Right to Self-Determination

The right to self-determination is a human right, as it is enshrined in several human rights international legal instruments. As a consequence, its scope is universal, inalienable, and indivisible. Most importantly, the right to self-determination – once properly detached from the minimalist approach based on the individual-state dichotomy and the decolonization misconception – is a collective right of which all peoples are entitled.

The principle of self-determination has both an internal and an external dimension. The internal one mainly refers to the right of political participation of a people within the government and the institutions of a state. Whereas, the external primarily claims for freedom from alien domination. As a matter of fact, the International Court of Justice (ICJ) argued that

*the international law of self-determination developed in such a way as to create a right to independence for peoples of non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation.*

As a consequence, the right to self-determination does not necessarily imply independence through secession, as for the case of indigenous peoples’ self-determination, which can be reached simply with the implementation of their claim for self-government.

Moreover, former Special Rapporteur on the Rights of Indigenous Peoples James Anaya identified self-determination as being made by substantial aspects

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and remedial ones. The substance of the norm is made of constitutive and ongoing self-determination, which – according to Anaya – “apply throughout the spectrum of multiple and overlapping spheres of human association, and that both have implication for the inward- and outward-looking dimensions of units of human organization.” 137 On the one hand, the constitutive element of the substance of self-determination is the creation and, or, the change of the governmental institution of the communities claiming the right itself. On the other hand, the ongoing aspect of substantial self-determination is composed by the governing institutional order within which the right can be exercised by the peoples entitled with this right. Finally, self-determination is also represented by the remedial actions taken as a consequence of the violation of the right itself. 138

To conclude, it is important to argue that the right to self-determination has to be considered as an interrelation of other human rights and principle. As a matter of fact, self-determination’s core values are freedom and equality. Consequently, this right shall be promoted through the implementation of the rights to non-discrimination, justice, democracy, and good governance. 139 Furthermore, the right to self-determination has no standard modalities through which it can be applied, protected and promoted. Nevertheless, it is this interrelation of rights and principles, associated with the diversity of application modalities, that constitutes the richness of the right itself. 140 In particular, all these elements are fundamental as far as indigenous self-determination is concerned.

2.2.2 Indigenous Peoples as Subjects of this Right

At the international level, indigenous peoples have been entitled with the right to self-determination by jurisprudence of the Human Rights Committee and in the UN Declaration on the Rights of Indigenous Peoples.\(^{141}\)

As far as the Human Rights Committee (HRC) is concerned, an evolution took place. The first approach used by the Committee was to entitle indigenous peoples with the right to self-determination only in cases where the state “had itself addressed indigenous peoples as peoples or as having a right to self-determination.”\(^{142}\) So, the HRC initially respected the voluntary recognition by states of indigenous peoples and the principle of self-determination. Explicatory are the HRC concluding observations on Norway of 1999, which demanded the state to address the Sami claims for self-determination and to report on the developments of its achievement to the Human Rights Committee because Norway had officially recognized the Sami as an indigenous people.\(^{143}\)

Nevertheless, successively, the Human Rights Committee has increasingly considered indigenous peoples as being subjects of the right to self-determination under Article 1 of the ICCPR and the ICESCR in several concluding observations.\(^{144}\)

After its first affirmation at the international level through the previously mentioned jurisprudence of the Human Rights Committee, the right to self-determination of indigenous peoples was finally proclaimed official in the UN Declaration on the Right of Indigenous Peoples (2007) and it is enshrined in Article 3, which stresses that indigenous peoples can “freely determine their

\(^{141}\) Timo Koivurova, From High Hopes to Disillusionment: Indigenous Peoples’ Struggle to (re)Gain Their Right to Self-Determination, in International Journal on Minority and Group Rights, Vol. 15, No. 1, Brill, 2008, p.3

\(^{142}\) Timo Koivurova, From High Hopes to Disillusionment: Indigenous Peoples’ Struggle to (re)Gain Their Right to Self-Determination, in International Journal on Minority and Group Rights, Vol. 15, No. 1, Brill, 2008, p.7

\(^{143}\) Human Rights Committee, Concluding Observations on Norway, CCPR/C/79/Add. 112,1999, para. 17

\(^{144}\) Canada CCPR/C/79/Add. 105 (1999); Mexico CCPR/C/79/Add. 109 (1999); Norway CCPR/c/79/Add.112 (1999); Australia CCPR/CO/69/AUS (2000); Denmark CCPR/CO/70/DNK (2000); Sweden CCPR/CO/74/ SWE (2002); Finland CCPR/CO/82/FIN (2004); USA CCPR/C/USA/Q/3/CRP.4 (2006)
political status and freely pursue their economic, social and cultural development."\textsuperscript{145}

Being entitled with the right to self-determination is a vital achievement for indigenous peoples. According to Prosper Nobirabo Musafiri, guaranteeing indigenous self-determination means restoring their historical and inherent sovereignty, which was denied to them by the dominant society. Moreover, self-determination of indigenous communities is vital for the preservation of their "pre-modern way of life".\textsuperscript{146} Most importantly, this right has been identified for being the "prerequisite for the full enjoyment of all human right of indigenous peoples."\textsuperscript{147}

As a matter of fact, the right to indigenous self-determination is such a relevant one for indigenous human rights protection because it is argued to be based on their political, economic, and social framework and relationships, as well as their cultures, spiritual and religious practices, beliefs and philosophies; so, on their identity.\textsuperscript{148}

In general, there have been two main arguments that brought to the recognition of indigenous self-determination. The first argumentation sustain that the recognition of indigenous self-determination is justice for the policies of destruction and assimilation imposed over indigenous peoples by the states for centuries. The second line of argument claims that the recognition of self-determination of indigenous peoples is respect for their identity, as indigenous identity can survive only in a context where self-determination and indigenous control over certain issues is granted.\textsuperscript{149}

What does self-determination mean for indigenous peoples from a practical point of view? Actually, indigenous self-determination does not aim at secession

\textsuperscript{145} UN, \textit{Declaration on the Rights of Indigenous Peoples}, UN Doc. A/RES/61/295, 2007, p.4
as final goal. On the contrary, former Chairperson-Rapporteur Erica-Irene A. Daes and former Special Rapporteur James Anaya both detect indigenous self-determination as a rightful representation of indigenous communities within states’ institutions and government, recognition of the status of equality with respect to the major society, and the end of assimilation policies. As a consequence, indigenous self-determination can be described as autonomy from the state in the fields that are vital for the survival of indigenous peoples themselves. Therefore, the right to self-determination of indigenous peoples enshrines the right to deal with and control their own development in the fields of politics, economics, society and culture. In particular, self-government, participation in the state’s activities regarding indigenous issues through consultation and the establishment of the free, prior and informed consent are elements reflecting the practice of the right. Moreover, states are asked to promote non-discrimination towards both indigenous individuals and communities.

Besides, through self-determination, indigenous peoples can exercise their right to development. Especially, indigenous peoples become entitled with the right to land and natural resources and with the right to a healthy environment. Finally, indigenous self-determination establishes and preserves the right of indigenous peoples to their cultural diversity, identity and integrity. Indeed, Professor Michael Reisman underlines that integrity of peoples is the element forming humanity within a community. Consequently, without self-determination that supports integrity, indigenous peoples are denied of their humanity. Moreover, former Special Rapporteur Anaya stresses the importance of cultural

identity and cultural diversity in order to preserve indigenous integrity, which, he argues, is impossible to safeguard without indigenous self-determination.\footnote{155}{S. James Anaya, \textit{Indigenous Peoples in International Law}, Oxford University Press, New York, 2004, p.129-156}

\section*{2.3 The Right to Development}

As previously argued, the right to self-determination is strictly connected to the right to development. As a matter of fact, self-determination cannot be fully reached without individuals and/or communities being able to manage their social, economic and cultural development.\footnote{156}{Prosper Nobirabo Musafiri, \textit{Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority?}, in \textit{International Journal on Minority and Group Rights}, Vol. 19, No. 4, 2012, p.506}

The right to development has both an individual and a collective dimension. As a matter of fact, according to Article 1 of the Declaration on the Right to Development, its subjects are both individuals and peoples.\footnote{157}{UN, \textit{The Declaration on the Right to Development}, UN Doc. A/Res/41/128 Annex, 1986, Article 1, available at: http://www.un.org/documents/ga/res/41/a41r128.htm (accessed 20 August 2018)} Moreover, the right to development is evidence of the constant and progressive evolution of human rights as its scope enshrines the realization of all civil, political, economic, social, and cultural rights.\footnote{158}{Arjun Sengupta, \textit{On the Theory and Practice of the Right to Development}, in Human Rights Quarterly, in Olivier De Shutter, \textit{Economic, Social and Cultural Rights as Human Rights}, Edward Elgar Publishing Limited, Cheltenham, UK, 2013, p.873} As far as indigenous peoples are concerned, it is one of the vital collective human rights that are guaranteed to indigenous communities in the 2007 UN Declaration on the Rights of Indigenous Peoples.\footnote{159}{UN, \textit{Declaration on the Rights of Indigenous Peoples}, UN Doc. A/RES/61/295, 2007, Articles 3, 17, 20, 23, 32, p.4-12}

The debate on the right to development at the international level officially started in 1986, when the UN General Assembly adopted the Declaration on the Right to Development. In the preamble, the principle of development is defined as a:

\begin{quote}
\textit{Comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active,}
\end{quote}
free and meaningful participation in development and in fair
distribution of benefit resulting there from.\textsuperscript{160}

Successively, within the Vienna Declaration and Programme of Action of
1993, international consensus about the existence and importance of
implementing a human right to development was reached. This was a relevant
step owing to the fact that having recognized the right to development as a human
right means enshrining in it the concepts of universality and inviolability.\textsuperscript{161} In
addition, in 1997, the Working Groups on the Right to Development was
established. Finally, in 2004, there was the creation of the High-Level Task Force
on the Implementation of the Right to Development (HLTF) entitled with the task
of providing for the core norm of the right to development.\textsuperscript{162}

The core norm of the right to development was thought to be composed
of three elements rather than a unique one. The HLTF identified these three
components namely with an enabling and healthy environment, social justice and
equity. The former aspect was successively detected as being the most vital
component of the right to development.\textsuperscript{163} Furthermore, although not openly
mentioned in none human rights instrument, Arjun Sengupta –former Independent
Expert on the Right to Development – has argued that the approach to
development cannot be separated from the protection of “the worst-off, the
poorest and the most vulnerable.”\textsuperscript{164} Thus, another aim and relevant aspect of the
right to development is the one of erasing poverty.

Besides, the principle of development had been argued to be made of a
primary end and principal means. Indeed, scholar Amartya Sen identifies these
two elements respectively with the “constitutive role” and the “instrumental role” of

\textsuperscript{160} UN, \textit{The Declaration on the Right to Development}, UN Doc. A/Res/41/128 Annex, 1986, Preamble, para.2
freedom. The former consists in the role of freedom in order to enrich the life of individuals, groups and indigenous peoples. Whereas, the latter deals with how rights promote freedom, which consequently results in the promotion of development. Furthermore, five categories of instrumental freedoms that, if implemented, will encourage development have been identified. These freedoms are, namely, political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security.\textsuperscript{165}

As a consequence, from a practical point of view, the right to development actually consists in full sovereignty over lands and natural resources, self-determination, participation and consultation, equality and non-discrimination, cultural identity, and the creation of favorable conditions for the enjoyment of other civil, political, economic, social and cultural rights.\textsuperscript{166} Besides, the right to development is entitled to have an added value. This added value consists in the fact that the right to development, to be wholly realized, demands the realization of all rights collectively, not merely the realization of human rights individually.\textsuperscript{167}

Within the indigenous discourse, the right to land and natural resources and the right to a healthy environment are fundamental for indigenous development, which brings to indigenous self-determination.\textsuperscript{168}

2.3.1 Indigenous Right to Land

Indigenous right to land was officially affirmed within the UN Declaration on the Rights of Indigenous Peoples in 2007.\textsuperscript{169}

The motivation why the recognition of this right is of such an importance is given by the relationship indigenous peoples have with their ancestral lands. As former Special Rapporteur José R. Martinez de Cobo clearly stated that:

for Indigenous Peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is...essential to understand the special and profoundly spiritual relationship of Indigenous Peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.\textsuperscript{170}

As a consequence, as the Permanent Forum on Indigenous Issues strongly recalled in 2007, land is the founding pillar of indigenous lives and cultures. Therefore, indigenous territories and natural resources are vital elements for the survival as distinct peoples of indigenous communities, both materially and culturally;\textsuperscript{171} consequently, also for the preservation of their identity.\textsuperscript{172}

In addition, the protection of the right to land of indigenous peoples is vital in the struggle against national policies that undermine indigenous land and natural resources management system and that approve expropriation of indigenous territories.\textsuperscript{173} Besides, indigenous land rights are relevant for the eradication of poverty, as argued by the former Independent Expert on the Right to Development Arjun Sengupta, and for conflict prevention between the states and the indigenous communities.\textsuperscript{174}

Moreover, scholar Aoife Duffy underlines that indigenous lands, territories and natural resources have been identified as essential for self-determination and

development of indigenous communities. Therefore, securing the right to land of indigenous peoples is fundamental for the achievement of other indigenous human rights, due to the added value of the right to development previously explained. In fact, the elements whose achievement and viability are mostly connected to land rights are indigenous culture, heritage, traditional knowledge, education, and cultural diversity and integrity.

As far as the 2007 UN Declaration on the Rights of Indigenous Peoples is concerned, it focuses on land rights both from an indigenous rights and a states’ obligations point of view. Articles 5, 8 and 27 are about states’ obligations towards indigenous peoples. On the one hand, Article 5 is about the prohibition of dispossession of indigenous communities from the land they are occupying; while, Article 8 is the prohibition of relocation of indigenous communities. On the other hand, Article 27 is the establishment and implementation of a fair process “to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.”

Indigenous land rights are the content of Articles 25, 26, 28, 29, 30, and 32 of the UNDRIP. Thus, the right to land of indigenous peoples is composed of the following rights. At first, the right to strengthen indigenous distinctive spiritual relation with ancestral land and natural resources, with a particular attention for the new generations’ spirituality. Moreover, the right to own, use, develop and control lands, territories and natural resources that indigenous peoples possess owing to traditional ownership. Further, Article 28 entitles indigenous peoples with the right to redress for land, territories and natural resources previously owned and taken by the state through dispossession and, or, relocation. Besides, indigenous peoples have the right to conserve and protect the environment and

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the fertility of their lands. Finally, indigenous communities have the right to decide the policies and strategies to implement for the use of their lands, territories and natural resources, in accordance with the principles of the right to development. All these rights enshrine and form both indigenous right to land and indigenous right to natural resources, which the UNDRIP treats as a whole unique right.179

International and regional systems of protection of human rights have broadly affirmed and protected indigenous peoples’ land right in their jurisprudence. As a matter of fact, jurisprudence has asserted that traditional possession of land by indigenous peoples is tantamount a state property title. In addition, jurisprudence also enshrined traditional possession with the right for indigenous communities to ask for official recognition and registration of a property title by the state.180 Examples of regional jurisprudence witnessing this affirmation are the merits of African Commission on Human and Peoples’ rights over the case 276/2003 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya181 and the final judgment of the Inter-American Court on Human Rights for the case Mayagna Indigenous Community of Awas Tingni v. Republic of Nicaragua.182 In particular, the latter is of great relevance due to the fact that it is the first case in favour of the indigenous right to land affirming its correlation with indigenous cultural life before the adoption of the UNDRIP, as it dates of 2001.

Nevertheless, at the national level the implementation of indigenous land rights is much more complicated, owing to the fact that “the differences between indigenous and national land systems and the negative financial consequences

indigenous land can have for states and transnational corporations have resulted strong opposition to such recognition.”

Historically, as Mattias Åhrén deeply explains in his work *Indigenous Peoples’ Status in the International Legal System*, European settlers in newly discovered lands used the *terra nullius* doctrine to occupy indigenous lands. The *terra nullius* doctrine was an “international law of the era” which “defined indigenous peoples’ lands as territories over which no one exercised political control”; consequently, “the European powers were free to occupy such lands.” Nevertheless, nowadays, the *terra nullius* doctrine has positively been judge erroneous and invalid in cases concerning indigenous lands by contemporary jurisprudence, as in the ICJ *Western Sahara* case (1975) and the *Mabo v. Queensland (No.2)* case of the Australian High Court (1992).

Alexandra Xanthaki reports and condemns how states try to deny indigenous peoples their right to land and the actual property on their ancestral territories and resources traditionally occupied. Indeed, currently, issues concerning lands’ property recognition to indigenous peoples are mainly connected to the individual conception of property, not devising the collective aspect of ownership attributed to indigenous communities. As a matter of fact, there are some Western states where collective ownership is not legally admitted. In these states, indigenous lands and territories are seldom divided and assigned to indigenous individuals. However, this action tends to weaken indigenous collective attachment to their ancestral lands. Moreover, in states where the native title – “the right to exclusive use and occupation of the land held pursuant

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to that title for a variety of purposes” – is applicable, national jurisdiction usually apply some critical limitations to the right in a way that indigenous land rights are not actually implemented. Furthermore, issues of proof of ancestral and continuous occupation of lands, entitling indigenous communities with lands’ ownership, arise due to a legal-system requirement to register the ownership title legally, blocking the effective application of the indigenous right to land. Finally, in some states, even though they recognize indigenous land rights, there is not a strong implementation of these rights in national legislation and jurisprudence.

To come to the conclusion, indigenous right to land is clearly affirmed and protected at the international and regional levels, both by legislation and by jurisprudence. However, to actually ensure safeguarding of this right, the large majority of states still have to implement national legislation in order to bring up to date their standards with respect to indigenous rights in general, and the indigenous right to land in particular.

2.3.2 Indigenous Right to a Healthy Environment

As previously argued, the right to a healthy and enabling environment is one of the three fundamental principles of the scope of the right to development, together with social justice and equity.

The formal recognition of the right to a healthy environment came up within the Stockholm Declaration of the United Nations Conference on the Human Environment of 1972. The Declaration connected environment to human rights for the first time, stating that men have the “right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and

well-being” and that mankind should “protect and improve the environment for present and future generations.”\(^{192}\)

A further vital step with respect to the right to a healthy environment was the UN Conference of Environment and Development (UNCED) held in Rio de Janeiro in 1992, the so-called Rio Conference. The aim of the Rio Conference was to establish standards, strategies and policies to fight environmental degradation and to promote environment-friendly development. Principle 1 of the Rio Declaration (1992) states, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”\(^{193}\)

However, the right to a healthy environment is still a non-binding principle. Nevertheless, the Stockholm and the Rio Declarations paved the way to national and regional legislation recognizing the right to a healthy environment. As a matter of fact, almost all regional systems of human rights protection took decisions over cases involving the violation of this right. Hence, also jurisprudence decided to protect the right to a healthy environment, even though it is not formally binding. Dramatically, although regional and national protection is becoming customary, what is lacking is the international recognition at the UN level of the right to a healthy environment as legally binding.\(^{194}\)

As far as indigenous peoples are concerned, environmental protection, environment-friendly lifestyle and sustainable development are three pillars of indigenous identity, owing to their unique connection with land and natural resources. In fact, the Rio Declaration focuses on indigenous practices as cornerstones of environmental preservation. Principle 22 actually argues that indigenous communities are vital for “environmental management and development because of their knowledge and traditional practices.” \(^{195}\)


\(^{193}\) UN, The Rio Declaration on Environment and Development, 1992, Principle 1, p.1


\(^{195}\) UN, The Rio Declaration on Environment and Development, 1992, Principle 22, p.4
Furthermore, this principle argues that indigenous development is vital for environmental protection and stresses it can be reached through states supporting indigenous identities and cultures.\textsuperscript{196}

In addition, Agenda 21 – a vast work program on global climate change, biological diversity, deforestation, and desertification for the 21\textsuperscript{st} century, approved by consensus in Rio – strongly underlines the importance of indigenous communities and their traditional knowledge for implementing environmental policies and practices. In particular, indigenous way of dealing with environment is affirmed to be vital for managing land sustainably, combating deforestation, and agriculture and rural development. Further, point 26 of the UN Overview of Agenda 21 is titled “Strengthening the Role of Indigenous Peoples” and affirms that states shall “enroll indigenous peoples in full global partnership,” that “indigenous lands need to be protected from environmentally unsound activities, and from activities the people consider to be socially and culturally inappropriate” and that “technologies to increase the efficiency of their resource management” have to be provided to indigenous peoples.\textsuperscript{197} Consequently, it can be asserted that indigenous communities are the subjects that need the most the international consolidation of the right to a healthy environment, owing to their strict connection to land and natural resources for their survival and identity.\textsuperscript{198}

As far as the path for the international affirmation of the right to a healthy environment is concerned, in March 2018, UN Special Rapporteur on Human Rights and Environment John Knox argued that time had come for formal recognition of this right in order to “protect who increasingly risk their lives to defend the land, water, forest and wildlife.”\textsuperscript{199} This statement ultimately arrived after years during which a great quantity of people defending the environment have been being killed. The most sadly famous cases are the murder of Isidro Baledenegro López, leader of the Tarahumara indigenous people of Mexico, and

\textsuperscript{196} UN, \textit{The Rio Declaration on Environment and Development}, 1992, Principle 22, p.4
\textsuperscript{199} Jonathan Watts, \textit{UN Moves Towards Recognizing Human Right to a Healthy Environment}, in \textit{The Guardian}, 2018
the killing of Berta Cáceres, co-founder of the Council of Popular and Indigenous Organizations of Honduras. Isidro Baleden Negro López and Berta Cáceres were just two of the millions of people mobilizing for the environment against climate change, toxic pollution, deforestation, biodiversity loss, land degradation, and freshwater shortage. Miserably, an increasing number of those people is dying. Research has shown that in 2016 at least 200 people lost their lives for the protection of the environment, only because they were activists. Data unfortunately presented that almost all these peoples were from developing or third world countries and 40% were indigenous.200

These deaths clearly paved the way for the UN Special Rapporteur to bring the issue at the attention of the international institutions. Environmental harm is increasingly causing problem for minorities and indigenous peoples. As a consequence, UN Environment launched training for judges, police and prosecutors in environmental law. Further, a special advice for companies to include human rights in investment planning has been proclaimed.201

John Knox has started a process to obtain the formalization of the human right to a healthy environment. However, the path is still long before it actually happens. The UN Special Rapporteur is thinking about a UN Declaration on the Right to a Healthy Environment. In the meantime, it is up to those national and regional legal systems that already recognize the right to a healthy environment to support environmental defenders and the minorities and indigenous peoples whose survival is connected to the protection of the environment.202

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2.4 Indigenous Cultural “Clashes”

As previously mentioned, scholars argue that indigenous collective rights may enter into conflict with individual human rights. Recalling the distinction that Will Kymlicka makes between collective rights that “are directed towards members of the group and those that aim to protect the group from society at large”\textsuperscript{203}, it is possible to identify the former set of rights as the one alleged of creating troubles with the protection of individual human rights.\textsuperscript{204} Scholars’ argument precisely focus on the fact that some individual human rights cannot be derogated in favor of collective ones. For instances, Martin Scheinin enumerates as fundamental non-derogable rights the right to life, the prohibition of torture and inhuman degrading treatment, the prohibition of slavery, the prohibition of arbitrary deprivation of liberty, and the right to non-discrimination.\textsuperscript{205}

However, there should not be a fixed formula for which a given individual right is always prior to collective rights because collective rights are fundamental for the survival of indigenous communities as such. Whether individual or collective rights prevail in a situation of conflict has to be decided on a case-by-case basis. As a matter of fact, jurisprudence support the case-by-case approach as it is possible to find merits where individual rights take precedence over collective one – as in \textit{Lovelace v. Canada} – and where collective rights are safeguarded over individual human rights – as in \textit{Kitok v. Sweden} and \textit{Apinara Mahuika v. New Zealand}.\textsuperscript{206}

Nevertheless, the Human Rights Council has identified certain individual human rights as being absolute with respect of collective ones, those are fundamental women rights.\textsuperscript{207} Moreover, within the international debate, a special position is hold by animal rights with respect to indigenous traditional cultural

\textsuperscript{204} Mattias Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, Oxford University Press, Oxford, 2016, p.126
\textsuperscript{206} Mattias Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, Oxford University Press, Oxford, 2016, p.128
practices. Women and animals’ rights can be referred to as indigenous cultural “clashes”.

2.4.1 Indigenous Women’s Rights

Women are entitled to equality before the law in all major human rights binging legal instruments. In particular, the treaty focusing on women’s rights is the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However, this instrument lacks a vital aspect for women’s rights. As a matter of fact, it does not enshrine any provision outlawing violence against women. It was only during the 90s that violence against women became a relevant issue at the international level. Indeed, in 1993, the UN adopted the Declaration on the Elimination of Violence against Women (DEVAW), which established the appointment of the first Special Rapporteur on Violence against Women, Radhika Coomaraswamy.


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208 General Assembly Resolution 34/180 of 18 December 1979
209 UN, Convention on the Elimination of All Forms of Discrimination Against Women, 1979
213 Council of Europe, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011, available at:
which established GREVIO, the independent expert body responsible for monitoring the implementation of the Convention.\textsuperscript{214}

In 2002, Radhika Coomaraswamy presented a report to the Commission on Human Rights where she identified culture as being the primary sources of violence against women, in general and not only related to indigenous women. Thus, it seems that women’s rights are always a clash with the dominant culture. The former Special Rapporteur accused culture and cultural relativism of being “an excuse to allow for inhumane and discriminatory practices against women in the community.”\textsuperscript{215} Further, Coomaraswamy argued that these cultural practices are nowadays counteracted by ideologies protecting women’s rights, independence and equality. However, it has been observed that these ideologies are too new and old beliefs still dominate the public opinion and ordinary lifestyles of different cultures, thus preventing the actual eradication of harmful practices to all women.\textsuperscript{216}

As far as indigenous women are concerned, their rights are violated both from the dominant society and within the indigenous communities. Thus, indigenous women suffer two-level discrimination and violence – for their being female and for their being indigenous\textsuperscript{217} because of colonial perceptions still settled within the dominant societies.\textsuperscript{218}

Taking into consideration the context of the dominant society, indigenous women deal with marginalization, exclusion, poverty, over-incarceration, rapes, sexual enslavement and a high number of murders.\textsuperscript{219} Sadly, research argues that it is also in highly developed countries, where human rights regime is claimed

\textsuperscript{219} Victoria Tauli-Corpuz, Indigenous Women’s Rights are Human Rights, in Cultural Survival Quarterly Magazine, 2018
to be a funding pillar, that indigenous women’s rights are broadly violated. As a matter of fact, in April 2018, after a 13-days trip, the UN Special Rapporteur on Violence against Women, its Causes and Consequences Dubravka Šimonović expressed her deep concern on Canada’s actions to really prevent discrimination and violence against indigenous women. Special Rapporteur Šimonović stated that indigenous women from First Nations, Metis and Inuit communities were suffering disadvantages due to “institutional, systemic, multiple, intersecting forms of discrimination not addressed adequately by the State.”

The two dimensions of indigenous women’s discrimination are in a sense linked. Indeed, Šimonović argued that the majority of cases of violence against indigenous women within the community is generally not denounced because of lack of trust in national institution, which is due to the broad fear from the part of indigenous women of suffering discrimination by national governmental and juridical bodies themselves.

Taking into analysis the reasons why discrimination of indigenous women occurs within the communities, most of the times these discriminations and violence are consequences and results of cultural practices and traditions. Indigenous practices and tradition are protected by collective rights at the international and regional level nowadays. However, as previously argued, in case of conflicts, individual women’s rights are put before collective rights by jurisprudence. Examples of indigenous cultural practices violating women’s rights are genital mutilation, child marriage and other types of bodily mutilation – such as the finger mutilation of the girls of the Dugum Dani people of New Guinea inflicted when a close relative dies with the aim of expressing grief.

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221 UN Human Rights Office of the High Commissioner, Canada: UN expert urges new measures to target gender-based violence, especially against indigenous women, 2018
As far as jurisprudence is concerned, Lovelace v. Canada is the first, and consequently the fundamental, case that established that cultural practices – indigenous ones too – cannot turn into a gender-based discrimination against women. The applicant of this case sued Canada before the Human Rights Committee because she lost Native Indian status for having married a non-Native Indian man. According to Canadian law, this would not have occurred if it were a man marrying a non-Native Indian. Once divorced the applicant asked to have her status back but Canada denied it. The Committee held that the denial of the applicant’s Native Indian status and the prohibition of returning to her reserve were gender-based violations of the applicant’s right to belong to a minority in relation with the rights to equality and non-discrimination.225

Indigenous women have taken part in the debate about the conflict between women’s rights and indigenous cultural collective rights. What can be evinced from their argumentations is that indigenous women believe that the cultural collective rights that can cause their discrimination, together with human rights, are part of the same whole and both have to be protected. This vision is different from the one presented by the majority of legal scholars that advocates that collective right and individual human rights are often at odds.226

Therefore, indigenous women are constantly fighting at the international level for finding a solution to the tensions between cultural collective rights and individual human rights. According to indigenous women, not only can culture be an excuse for violation of human rights, but also a tool for the promotion of rights. Indigenous women are trying to promote an approach where human rights are put in dialogue with local cultures of minorities and indigenous communities, not in opposition. Indigenous women aim is to promote gender equality and cultural

identity as vital elements for the full enjoyment of all human rights, both individually and collectively.\textsuperscript{227}

\subsection*{2.4.2 Indigenous Traditional Practices Against Animal Rights}

Oftentimes, within the Western society, indigenous peoples are referred to as violators of animal rights through some of their cultural practices, as hunting and religious sacrifices. However, the so-called “animal rights” are a creation of the Western society.\textsuperscript{228} Thus, animal rights provide for a cultural clash between the dominant society and indigenous cultures.

Indigenous people practicing hunting and other activities related to animals are commonly denigrated as savages by animal activists, who generally pertains to the dominant society. In truth, it can be highlighted that indigenous peoples possess a deep respect for animals and wildlife, which sometimes is greater than the one professed by animal’s rights supporters. As a matter of fact, on the one hand, indigenous communities, due to their vital connection to the environment, traditionally believe that animals should be respected as human beings because they live together in the same system based on reciprocal relationship. On the other hand, animal rights supporters tend to separate animals from humans in their arguments for animal protection, owing to their need to manage and control wildlife.\textsuperscript{229}

In particular, animal rights defenders are opposing to indigenous hunting practices of endangered species. Indeed, it is true that indigenous communities are traditionally hunting animals typical of their ancestral lands and, in those territories where nature is still at a wild stage, there are well-known endangered species, such as whales, seals and several varieties of felines. Moreover, research has shown that animal conservation and indigenous practices are not

\textsuperscript{227} UN Office of the Special Advisor on Gender Issues and Advancement of Women and the Secretariat of the UN Permanent Forum on Indigenous Issues, \textit{Briefing Note No. 6, Gender and Indigenous Peoples’ Human Rights}, 2010, p.2


always compatible. So, the concerned with respect to endangered animals is not unfounded. In particular, in recent years, the complaints of animal rights activists have been usually directed to Inuit communities in Canada because of seals and whales hunting and to African indigenous peoples – like the Bushmen of the Central Kalahari and the Hadza of northern Tanzania– due to their practice of hunting in protected animal reserves.

As far as this topic is concerned, it is vital to recall that hunting and other indigenous practices connected to animals, such as sacrifices to divinities, are an important part of indigenous culture, religion, spirituality and everyday way of life. These practices are enshrined in indigenous identity and, for this reason, should be looked at from the indigenous perspective. As a matter of fact, hunting and animal sacrifices in indigenous communities are not pure violent act like activists try to claim. On the contrary, such activities are essential for indigenous relationship with nature and their cessation would provoke such a shock that “their whole culture could be lost.” Consequently, these activities shall rather be considered indigenous human rights than violations of animal rights.

Grievously, in Africa, some states are denying indigenous tribes their right to hunt in order to increase the possibility that those tribes may become more “ordinary” with a sedentary rather than nomadic life. Consequently, the aim of these states is to have a more effective control over indigenous communities and to push them toward assimilation to the dominant society, which is a violation of the indigenous rights to self-determination and to cultural diversity.

According to Gordon Bennett, denying hunting should be considered a violation of Article 26.2 of the UN Declaration on the Rights of Indigenous Peoples. This article affirms that:

_acquire the rights 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._

As a matter of fact, for certain indigenous peoples, hunting is a resource traditionally used to survive constituting, therefore, an indigenous right to be protected within the scope of Article 26 of the UNDRIP. Indeed, no hunting for those communities would mean the end of their survival. As a consequence, this is an issue that should be taken under consideration by the international and regional systems of human rights protection.

Nevertheless, some issues of indigenous collective cultural rights regarding traditional practices connected to animals and wildlife have already been addressed by jurisprudence. For instance, the Human Rights Committee in the case _Kitok v. Sweden_ argued that reindeer husbandry is fundamental for the survival of the Saami people. Moreover, it argued that this practice is protected under Article 27 of the ICCPR. Besides, in the case _Lubicon Lake Band (Bernard Ominayak) v. Canada_, the Committee affirmed that the exploitation of land for their natural resources destroyed the environment where indigenous peoples were hunting and fishing, denying them of basic cultural practices vital for their survival. In this case, the Committee also found violation of Article 27 of the ICCPR.

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236 Gordon Bennett, _Hunting Must Be Regarded as a Human Right for Indigenous and Tribal Peoples_, in _The Guardian_, 2016  
As a consequence, indigenous practices dealing with animals have been increasingly protected by jurisprudence, witnessing that animal rights are considered by the international community as a mere invention of the Western society and that indigenous cultural practices have to be safeguarded in order to let indigenous identities survive.

2.5 The Right to Cultural Diversity

As far as indigenous rights are concerned, it is vital to focus on indigenous cultures. In fact, all previously analyzed rights of indigenous peoples are strictly connected to their cultures. Moreover, the depicted rights are also cultural expressions of indigenous communities. Indeed, in a broad sense, all indigenous rights can be considered cultural rights. Consequently, indigenous cultures are to be regarded as the most defining part of indigenous identities. The Expert Mechanism on the Right of Indigenous People (EMRIP) has provided a definition of indigenous cultures:

> Indigenous peoples’ cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous cultures are a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing,

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economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering.\textsuperscript{242}

However, this definition cannot be considered exhaustive due to the disparate natures and the broad diversities of indigenous communities and, consequently, of their cultures. Further, it is appropriate to argue that the right to cultural diversity is another indigenous right to protect.\textsuperscript{243}

Indeed, owing to the existence of different cultures, multiculturalism – in general and not only related to indigenous peoples – is a pillar of the international regime. In the last decades, it has been identified as a global priority to protect. As a matter of fact, nowadays, cultural pluralism is firmly supported by the international human rights regime and by the regional systems of protection.\textsuperscript{244}

\subsection*{2.5.1 Cultural Diversity in Human Rights Law}

Scholars such as Will Kymlicka and Jeremy Waldron paved the way for the philosophical debate on cultural diversity at international level. Their strong argumentations are based on the idea that there is more than one single culture worldwide. Consequently, they support cultural pluralism.\textsuperscript{245} Their work testifies the increasing awareness about the necessity of preserving cultural rights and of safeguarding culture in all its forms and diversities.\textsuperscript{246} Besides, they argue that identity is strictly connected to culture and, therefore, the latter shall be protected through the promotion of cultural pluralism and diversity, in order to maintain the distinct cultural identities present worldwide.\textsuperscript{247} To better understand what cultural

\begin{itemize}
\item \textsuperscript{242} UN, Expert Mechanism of the Rights of Indigenous Peoples, \textit{UN Doc. A/HRC/EMRIP/2012/3}, 2012, paras. 51-52
\item \textsuperscript{244} S. James Anaya, \textit{International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State}, in \textit{Arizona Journal of International and Comparative Law Vol 21, No. 1}, 2004, p.16
\item \textsuperscript{245} Will Kymlicka et al., \textit{The Rights of Minority Cultures}, Oxford University Press, New York, 1995
\item \textsuperscript{246} Anita Budziszewska, \textit{The Right to Culture in International Law}, in \textit{Diritti Umani e Diritto Internazionale Vol. 12 2/2018}, Il Mulino, Bologna, 2018, p.316
\end{itemize}
identity is, it has been defined as the personification of a culture, meaning the relationship between the individual, and/or the group, and its culture.\textsuperscript{248}

However, during the second half of the 20\textsuperscript{th} century, an international debate started about whether the universal character of human rights can effectively protect culture in the context of cultural pluralism.\textsuperscript{249} According to professor Francesco Francioni, human rights standards can safeguard cultural diversity and stresses that cultural relativism supporters make a mistake in thinking that culture is static. On the contrary, culture is a living condition of human life. As a consequence, cultural pluralism is a natural aspect of humanity to be protected within the human rights framework.\textsuperscript{250} Also, scholar Federico Lenzerini argues that, in the context of cultural pluralism, human rights should be considered as a forming part of cultures themselves.\textsuperscript{251}

As a matter of fact, international standards have been implementing human rights in the context of cultural pluralism, encouraging the diversity of cultures and their interaction, which occurs not only among states but also within them.\textsuperscript{252} Moreover, cultural pluralism has turned into a legal principle on which different legal instruments are based.\textsuperscript{253} Nonetheless, these legal instruments have still to be interpreted as an attempt to protect cultural rights.\textsuperscript{254}

Tracing the historical development of cultural rights, in particular of the right to cultural diversity, the first step to mention is the UNESCO\textsuperscript{255} Fourteenth General Conference of 1966 during which the UNESCO Declaration of the

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\textsuperscript{248}Yvonne Donters, \textit{Towards a Right to Cultural Identity?}, Intersentia, Antwerp, 2002, p.30
\textsuperscript{251}Federico Lenzerini, \textit{The Culturalization of Human Rights Law}, Oxford University Press, Oxford, 2014, p.120
\textsuperscript{255}United Nations Educational, Scientific and Cultural Organization
\end{flushright}
Principles of International Cultural Co-operation was adopted. Article 1 proclaims that “each culture has a dignity”, that “every people has the right and the duty to develop its culture” and that “all cultures form part of the common heritage belonging to all mankind.”256 This article stresses the importance of cultural diversity and pluralism, reflecting the UNESCO approach to cultures, whose protection is a pillar of the intellectual and moral solidarity of mankind, as can be evinced from the Preamble of the UNESCO Constitution of 1945.257

In the same year, the UN approved the adoption of the International Covenant on Civil and Political Rights (ICCPR) where Article 27 is about the respect for cultures of non-dominant communities – so, of minorities and indigenous peoples – and argues that they are entitled to “enjoy their own culture”.258 However, the article refers to the rights of individuals forming minority groups and not minorities per se. Nevertheless, successively, interpretation of Article 27 in HRC General Comment No. 23 (1994) argues that, although the article protects individual rights the obligation of states should be collective by nature.259

Moreover, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was also adopted in 1966. The Convention lists what the international community of that time identified as cultural rights to be protected and promoted in Article 15.1. These rights are namely the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit of the interests of intellectual property rights.260 However, this definition does not entail all aspects of cultural rights, it is a too general and reductive one.

260 UN, International Covenant on Economic, Social and Cultural Rights, 1966, Article 15.1
Indeed, this reductionist approach toward cultural rights is argued to depend on the fact that these rights were a neglected category with respect to civic, political, economic and social ones during that time within the UN.\textsuperscript{261} Also, the reason why they were neglected lies on cultural rights having always been perceived by states as politically inconvenient.\textsuperscript{262} In addition, the right to take part in cultural life enshrined in Article 15 of the ICESCR is to be interpreted in the context of the dichotomy state-individual, within which the ICCPR and the ICESCR were created. Consequently, individuals, and not groups, were entitled to take part in the “national” cultural life, meaning the one of the state – without considering the presence of different cultures within it, but only the dominant one.\textsuperscript{263}

Nevertheless, although the UN initially pursued such a reductionist approach toward cultural rights, UNESCO always aimed at realizing its mandate in safeguarding cultures. As a matter of fact, in 1976 there was the adoption of the UNESCO Recommendation on the Right to Participate in Cultural Life, which obliges the states party to the recommendation to ensure minorities their right to cultural life and to preserve their cultural identity.\textsuperscript{264}

Furthermore, in 1982, in the UNESCO Mexico City Declaration on Cultural Policies, the international community recognized the deep significance of culture.\textsuperscript{265} The Declaration deals with issues and principles of cultural identity, cultural dimension of development, culture and democracy, and cultural heritage.\textsuperscript{266} Article 1 enshrines cultural diversity affirming that “every culture” is the

\begin{itemize}
\item \textsuperscript{261} Manisuli Ssenyonjo, \textit{Economic, Social and Cultural Rights in International Law}, Hart Publishing, Portland, 2016, p.623
\item \textsuperscript{262} Anita Budziszewska, \textit{The Right to Culture in International Law}, in \textit{Diritti Umani e Diritto Internazionale Vol. 12 2/2018}, Il Mulino, Bologna, 2018, p.318
\item \textsuperscript{263} Ana Filipa Vrdoljak, \textit{The Cultural Dimension of Human Rights}, Oxford University Press, New York, 2013, p.35
\item \textsuperscript{264} Ana Filipa Vrdoljak, \textit{The Cultural Dimension of Human Rights}, Oxford University Press, New York, 2013, p.53
\item \textsuperscript{265} Manisuli Ssenyonjo, \textit{Economic, Social and Cultural Rights in International Law}, Hart Publishing, Portland, 2016, p.623
\end{itemize}
expression of the presence of a people and/or community in the world.\textsuperscript{267} Moreover, Article 2 argues that, “the assertion of cultural identity therefore contributes to the liberation of peoples.”\textsuperscript{268} In addition, Article 4 affirms that, “all cultures form part of the common heritage of mankind.”\textsuperscript{269} Finally, Article 10 stresses that “Culture constitutes a fundamental dimension of the development process.”\textsuperscript{270} UNESCO in this Declaration clearly affirms its commitment in protecting cultural diversity and in fighting against cultural-based discrimination. As a matter of fact, successively, the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore was adopted in 1989. The aim of the Recommendation is to protect and promote folklore, which is also defined as the traditional and popular aspect culture – in particular of sub-national ones.\textsuperscript{271} So, a first attempt to create a framework of protection for minority and indigenous cultures was provided by these legal instruments.

UNESCO instruments witness that the organization has always pursued its goal of protecting culture and cultural rights since its establishment in 1945 till nowadays, more than the UN did. Nevertheless, within the UN, a change of perspective towards cultural rights happened with the adoption of the 1992 UN Declaration Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Indeed, the Declaration urges the international community to implement norms in order to promote a deeper relation between minorities and the dominant society, while affirming minorities’ cultural diversity rights.\textsuperscript{272}

Another important step in cultural rights’ protection happened more recently. In 2001 the UNESCO Universal Declaration on Cultural Diversity was adopted. The Declaration officially affirmed cultural diversity as a common good to

\textsuperscript{267} UNESCO, Mexico City Declaration on Cultural Policies, in World Conference on Cultural Policies Final Report, 1982, Article 1, p.41
\textsuperscript{268} UNESCO, Mexico City Declaration on Cultural Policies, in World Conference on Cultural Policies Final Report, 1982, Article 2, p.41
\textsuperscript{269} UNESCO, Mexico City Declaration on Cultural Policies, in World Conference on Cultural Policies Final Report, 1982, Article 4, p.42
\textsuperscript{270} UNESCO, Mexico City Declaration on Cultural Policies, in World Conference on Cultural Policies Final Report, 1982, Article 10, p.42
preserve at the international level and at all other levels of jurisprudence. As a matter of fact, Article 1 underlines that cultural diversity is “the common heritage of humanity.”\textsuperscript{273} Moreover, it is vital to underline that the Declaration makes a relevant association between cultural diversity and human rights, dedicating a section to their interrelation. Article 4 states human rights are a fundamental guarantee for cultural diversity, whose defence is considered to be an “ethical imperative.”\textsuperscript{274} In addition, in Article 5, cultural rights are affirmed to be “integral part of human rights” and are defined as the enabling environment for cultural diversity.\textsuperscript{275} Finally, Article 6 provides for recommendation for states to move towards the real access to cultural diversity for everyone without any discrimination through the means of “freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form.”\textsuperscript{276} However, the Declaration is not legally binding, it is a soft law instrument. As a matter of fact, former Director General Koïchiro Matsuura defined the Declaration as an “ethical commitment” by member states.\textsuperscript{277}

Lastly, two more important achievements in the promotion of cultural diversity and the international affirmation of this right are the adoptions of the 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions and the 2007 UN Declaration on the Rights of Indigenous Peoples, about which more will be argued in the following part of the research from the perspective of indigenous cultural rights.

Besides, the Human Rights Council appointed the first Independent Expert in the field of Cultural Rights in 2009, reflecting the increasing attention on the issue at the international level.\textsuperscript{278} Moreover, the Independent Expert in the field of

\textsuperscript{274} UNESCO, \textit{Universal Declaration on Cultural Diversity}, 2001, Article 4
\textsuperscript{275} UNESCO, \textit{Universal Declaration on Cultural Diversity}, 2001, Article 5
\textsuperscript{276} UNESCO, \textit{Universal Declaration on Cultural Diversity}, 2001, Article 6
Cultural Rights Farida Shaheed in one of her reports (UN Doc. A/HRC/14/36) proposed a definition of cultural rights involving all rights connected to culture and identity, with the aim of putting an end to several debates connected to this topic:

*Cultural rights protect the rights for each person, individually and in community with others, as well as groups of peoples, to develop and express their humanity, their world view and the meaning they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and way of life.*

This draft definition, even though not deeply descriptive, is almost all-comprehensive and the international regime of the UN should take into consideration its official adoption.

Finally, UN Treaty Bodies like the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (CESCR) are increasingly incorporating cultural factors in their interpretations of articles of international legal instruments. Further, the same is happening for international and regional jurisprudence, within which the outcome of cases are influenced by cultural considerations. Some examples are provided in the following part when analysing the connection between intangible cultural heritage and human rights.

As far as the regional level is concerned, the African and the European systems of human rights protection have adopted instruments for the preservation of cultural pluralism and diversity. For instance, in 2005, there was the adoption of the Council of Europe Framework Convention on the Value of Cultural Heritage.

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These developments in jurisprudence witness the acknowledgement of cultural rights as human rights and of cultures as founding pillar for the survival of the identities of all societies worldwide.

Indigenous peoples’ cultural rights are analyzed in the following section with a particular focus on indigenous cultural heritage and on the instruments through which cultural heritage and cultural diversity are protected – among which the 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions and the 2007 UNDRIP.

Chapter 3
Indigenous Cultural Rights and Heritage

3.1 Indigenous Cultural Rights

As previously argued, cultural rights are of vital relevance as far as indigenous peoples are concerned. Cultural rights are the domain of human rights that enables individuals, groups, minorities and indigenous peoples to access to their cultures.\textsuperscript{283} Cultural rights are mainly divided in six categories in international legal instruments concerning this topic. These categories are education, language, religion, arts, autonomy and economy.\textsuperscript{284} The UN instruments concerning cultural rights have the aim of protecting culture, cultural diversity and pluralism, in particular with reference to minority and indigenous cultures. Moreover, they have and anti-discrimination approach as they require states to take action to effectively protect minority and indigenous cultural rights.\textsuperscript{285}

Why culture is of such an importance for indigenous communities has been deeply articulated by the Expert Mechanism on the Rights of Indigenous Peoples. Indigenous cultures are the founding pillars of indigenous identities self-determination and development.\textsuperscript{286} Therefore, as far as indigenous peoples are concerned, their cultures embed all aspects of their ways of life. Indeed, scholar Rodolfo Stavenhagen presented the indigenous idea of culture describing it as:

\textit{The sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups, \ldots a coherent self-contained system of values, and symbols as well as a set of practices that a specific cultural group...}

reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.²⁸⁷

A more detailed description that can be associated with the indigenous concept of culture is the definition of the term folklore – also called traditional and popular culture – in the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.²⁸⁸ Culture is defined as identity and it is argued that its transmission occurs mainly orally. Furthermore, it is stresses that its forms are of disparate nature, “among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”²⁸⁹

Indeed, the definitions above highlight the fact that, with respect to indigenous peoples, culture has to be perceived as the expression of their identity, their ways of thinking, their social organization, of the ecosystem they live in and of the biodiversity associated with their livelihood.²⁹⁰

UNESCO, in occasion of the International Year of Indigenous Languages programmed for 2019, has reported that indigenous cultures are more than 5 thousand for 370 million indigenous individuals spread all around the world in 90 countries, who speak more than 7 thousand languages or which 2680 are endangered. These data, even if they are few, actually testify the great variety of indigenous cultures present worldwide nowadays.²⁹¹ The enormous number of indigenous cultures spread all around the world reflects why the right to cultural diversity is of such an importance for the effective protection of cultures and of cultural rights.

However, although the international and regional implementation and protection of cultural diversity and of all cultural rights, indigenous communities

²⁸⁹ UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989, Article A
have increasingly reported their struggle for preserving their cultures against assimilation to the dominant society, both directly or indirectly imposed by states.\textsuperscript{292} This is why cultural rights hold a relevant position within the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples (2007).


Together with the 2001 UNESCO Universal Declaration on Cultural Diversity, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is another major international legal instrument that protects indigenous cultural rights. As a matter of fact, Dominic McGoldrick argues that the Convention tries to fit harmoniously human rights, indigenous peoples’ rights and several other fields of international law, such as trade law, environment law, and development law.\textsuperscript{293}

In general, the Convention identifies nine objectives for the protection of cultural expressions’ diversity. Its aims are, first of all, to protect the diversity of cultural expressions and to enables conditions for their flourishing. Moreover, the convention pursues the promotion of cultural dialogue and exchange, and the cultivation of interculturality. Furthermore, other goals are to foster respect for cultural diversity and to support the relationship between development and culture within minorities and indigenous peoples. In addition, the Convention recognizes culture and cultural expressions as part of peoples’ identity. Finally, states are entitled with the responsibility to protect cultural expressions’ diversity on their territories, and to strengthen international cooperation and solidarity in the field of cultural pluralism promotion.\textsuperscript{294}

As far as indigenous peoples are concerned, the state party to the Convention recognize, in the preamble, the relevance of indigenous traditional knowledge owing to its “positive contribution to sustainable development.” In addition, states argue for “the need for its adequate protection and promotion.”

Moreover, the preamble underlines “the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment.” This provision implicitly refers to the cultural expressions of indigenous peoples, as they often are the most discriminated and lowest part of the society.

Besides, Article 2.3 of the Convention proclaims equality, dignity and respect for all cultures, including minority and indigenous ones. Finally, Article 7.1, the one on the measures to promote cultural expressions, urges states to create an environment where individuals and groups, including minorities and indigenous peoples, can freely access to their cultural expressions without any discrimination.

What can be primarily understood by the Convention is the international reaffirmation of cultural diversity, together with its expression, as common heritage of mankind. Moreover, cultural expressions’ diversity is recognized to be the basis for development and identity of all individuals and communities.

As a consequence, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions identified and affirmed within a broader context the international protection of some basic indigenous cultural expressions.

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295 UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Preamble, para. 8
296 UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Preamble, para. 9
298 UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Article 2.3
rights – such as traditional knowledge, cultural role in development, cultural pluralism and culture as base for identity – before the adoption of the of the UN Declaration on the Rights of Indigenous Peoples, testifying that protection of indigenous cultures has already taken a place within customary international law.

3.1.2 Indigenous Cultural Rights and the UNDRIP

The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides for the protection of indigenous cultural rights, associated with the promotion of indigenous identities, cultures and cultural integrity.\(^{301}\)

The international community, in the preamble of the UNDRIP, recognizes that “all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.”\(^{302}\) Furthermore, the preamble underlines that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”\(^{303}\) These provisions testify that the UN has embraced the UNESCO approach toward cultures’ protection.

Besides, there are different articles concerning indigenous cultural rights. Article 3 entitles indigenous peoples to pursue their cultural development. It is enshrined in indigenous self-determination, which can only happen if development is realized, in particular the cultural one.\(^{304}\) As for Article 5, indigenous communities have the right to maintain their cultural institutions and the right to participate also in the cultural life of the dominant society of the state they live in, in order not to suffer discrimination.\(^{305}\)

Moreover, as far as the principle of non-discrimination is concerned, Article 8 prohibits indigenous assimilation to the dominant society and obliges states to

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implement mechanisms of prevention and redress for past actions concerning indigenous integrity, cultural values and assimilation.\textsuperscript{306} Furthermore, Article 9 affirms the right to belong to an indigenous community, or nation, and the right to practice the community, or nation, traditions and customs. In addition, the membership to an indigenous people and the execution of traditional cultural and religious practices must not be base for any kind of discrimination.\textsuperscript{307}

Besides, Article 11 entitles again indigenous peoples to practice their traditions and customs, while entitling them with the right to manage their cultural heritage, “such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.” Moreover, it obliges states for redress of all “cultural, intellectual, religious and spiritual property” taken from indigenous communities without free, prior and informed consent, which provide for violation of indigenous law and tradition.\textsuperscript{308}

In addition, as for Article 12, indigenous peoples have the right to practice their traditional religions through their spiritual customs and ceremonies. Indigenous communities are also entitled to protect their religious site and with the right to repatriation of indigenous human remains.\textsuperscript{309}

Moreover, Article 13 entitles indigenous peoples with the right to transmit to future generation their culture, traditional knowledge and practices, such as “histories, languages, oral traditions, philosophies, writing systems and literatures.” Further, they are implicitly granted the right to self-identification, through the right “to designate and retain their own names for communities, places and persons.”\textsuperscript{310}

Furthermore, Article 14 affirms that indigenous communities have the right to control their education systems. Secondly, indigenous peoples have the right to access to the state’s education system without discrimination. Finally, the states

307 UN, Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 2007, Article 9, p.6  
shall provide for support to indigenous educational systems in order that indigenous children can access to education in their own language.\textsuperscript{311}

According to Article 15, the international community recognizes indigenous dignity and diversity and argues that these elements shall be promoted through education and public information within the dominant society,\textsuperscript{312} with the aim of decreasing colonial stereotypes concerning indigenous peoples that are generally the basis for discrimination.

Furthermore, as for Article 31, it affirms the indigenous right to control and protect their cultural heritage and traditional knowledge, “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.” In addition, indigenous communities are given the right to manage the intellectual property rights that are applicable to their cultural heritage and traditional knowledge.\textsuperscript{313}

Article 33 recalls another time that indigenous communities are entitled with the right to self-identification and cultural membership. Moreover, it is argued that cultural membership and self-identification do not deny indigenous peoples to have their state’s citizenship. As a consequence, states are asked to issue citizenship to indigenous individual without any form of discrimination.\textsuperscript{314}

Finally, Article 34 reminds of the debate between collective rights and individual human rights in the context of culture. As a matter of fact, it affirms that indigenous peoples have “the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and (...) juridical systems or customs” but “in accordance with international human rights standards.”\textsuperscript{315} Consequently, the international community recognizes indigenous cultural rights and affirms that those rights

\textsuperscript{311} UN, Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 2007, Article 14, p.7
\textsuperscript{312} UN, Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 2007, Article 15, p.7
\textsuperscript{313} UN, Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 2007, Article 31, p.11
\textsuperscript{315} UN, Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 2007, Article 34, p.12
have to be enshrined in the human rights framework. For this reason, non-derogable individual human rights have to be protected and implemented within all cultures, even indigenous ones.

All the previously listed rights enshrined in the UNDRIP are indigenous cultural rights from which can be evinced that they are of disparate nature and do not refer only to culture itself. Rather, they embed different aspects of indigenous lifestyle that are part of their identity and integrity, such as land self-identification, governance and determination, and development. As it was previously argued, these elements cannot be safeguarded without the protection of indigenous culture, owing to their being part of indigenous cultural expressions.\(^{316}\) Therefore, the UNDRIP is the first international legal instruments that explicitly recognizes that the physical survival of peoples is dependent on their cultural survival.\(^{317}\)

Moreover, it is relevant to underline that the protection of cultural rights of indigenous peoples in the UNDRIP occurs both with a positive and a negative approach. As a matter of fact, the Declaration provides for cultural rights that provide for obligations for states, which consequently have to be implemented with direct action, and with rights entitled to indigenous peoples, with which the states shall not interfere.\(^{318}\)

To conclude the discourse on the importance of the UNDRIP for the safeguarding of indigenous cultural rights, it is vital to report that the UN Declaration on the Rights of Indigenous Peoples is a fundamental legal instrument in the context of the increasing interconnectedness among cultures, cultural heritage and human rights. This interconnectedness is identified with the increasing global interest in cultural traditions of minorities and indigenous peoples, the protection and promotion of cultural identity, and the preservation of


the diversity of cultural expressions. As a consequence, Professor Francesco Francioni argues that the rights enshrined in the UNDRIP are the synthesis of this interconnectedness, stressing that the Declaration’s “raison d’être is the preservation and development of the cultural identity of indigenous peoples, so closely linked to their natural environment and their material and intangible cultural heritage.”

To conclude, the UNDRIP clearly protects indigenous cultural rights on a broad scale. The major achievement of this Declaration is the fact that it correlates all indigenous rights to their related cultural aspect, demonstrating that indigenous survival is strictly dependent on the safeguarding of indigenous cultures, cultural expressions and traditional knowledge.

3.1.3 The Endorois Case – An Exemplary Case of Jurisprudence on Indigenous Cultural Rights

The case of the African Commission of Human and Peoples’ Rights 276/2003 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya is exemplary in the context the protection of indigenous cultural rights. Moreover, it made jurisprudence on the interconnectedness of the right to self-identification, the right to religious freedom and the right to culture within the indigenous debate.

The Endorois community alleged Kenya for violations of the African Charter on Human and People’s Rights owing to their removal from ancestral lands by the state. This action deeply damaged the Endorois with loss of cultural patterns, social institutions and religious sites. The African Commission found Kenya responsible for these violations with respect to “the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social...

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institutions and religious systems.”[^322] Moreover, the African Commission underlined that the survival of the indigenous community is strictly connected to its possibility of living according to “their own cultural patterns, social institutions and religious systems.”[^323]

In particular, the African Commission argued that – owing to Endorois culture, religion, and traditional way of life being deeply dependent on their ancestral lands – “without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights.”[^324] As a consequence, the Commission established that the eviction of Endorois from their ancestral lands resulted in a violation of the right to religious freedom. As a matter of fact, the removal from ancestral lands has meant losing the sacred grounds essential to the practice of Endorois’ religion, making “impossible for the community to maintain religious practices central to their culture and religion.”[^325]

Finally, the African Commission held Kenya responsible for violation of Endorois’ cultural rights on two grounds. On the one hand, the first ground of violation consists in the restrictions the Endorois have suffered with respect to the access to their cultural sites. While, on the other hand, the second ground is reflected in the damages to their pastoralist way of life that the community had to face.[^326]

In addition, in the merits on this case, the African Commission presented the dual-level meaning it generally gives to the protection of both human rights and indigenous rights. According to the Commission, not only is the safeguarding

of human rights implemented through not destroying, or weakening, indigenous peoples, but also with the real protection of their cultural identity in a positive way.\textsuperscript{327}

As a matter of fact, the African Commission had already identified in previous cases a dual dimension of Article 17 of the African Charter on Human and Peoples’ Rights, which states:

1. \textit{Every individual shall have the right to education.}

2. \textit{Every individual may freely take part in cultural life of his community.}

3. \textit{The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.}\textsuperscript{328}

On the one hand, the Commission interprets its mandate in order to protect individuals’ participation in the cultural life of their community and, on the other hand, the same mandate asks the Commission to verify that member states implement their obligation to promote and protect traditional values recognized as vital by minorities and indigenous communities.\textsuperscript{329}

Therefore, the merits on this case witness that African Commission understands culture as indigenous peoples' “spiritual and physical associations with ancestral land, knowledge, belief, art, law, morals, customs.” Further, culture is defined to be made of “material and spiritual activities and products." Finally, cultural identity is regarded as encompassing a community’s religion, language, and other fundamental aspects of everyday life.\textsuperscript{330} Thus, culture is seen as the

\textsuperscript{327} African Commission on Human and People’s Rights, 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 2009, para. 241


\textsuperscript{329} African Commission on Human and People’s Rights, 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 2009, para. 241

vital elements for indigenous survival and is recognized to be at the basis of all indigenous rights.

As a consequence, it is possible to affirm that the African regional jurisprudence is implementing and trying to protect indigenous collective and cultural rights from violations at the national level. The Inter-American system is implementing indigenous rights in a deeply comprehensive way too. All other regional systems of human rights protection should follow the same path in order to held states responsible for violation of indigenous rights.

3.2 Indigenous Cultural Heritage

In order to continue the analysis of indigenous cultures, cultural rights and of the various issues connected with this topic, it is vital to introduce the concept of cultural heritage. Presenting the notion of indigenous cultural heritage is vital for addressing the issues of misappropriation and misuse of indigenous cultural heritage, of reparation of indigenous cultural objects and of indigenous intellectual property.331

Generally, cultural heritage has a positive value. It can be material or intangible and is shared among individual and/or within communities as a common good. Indeed, as declared by UNESCO, cultural heritage has a universal positive value, because it has to be considered heritage of the whole mankind.332 Furthermore, cultural heritage’s value is given by it being part of and helping to form the identities of communities, in particular of indigenous ones. At the same time, it is the product of these identities that interact with creativity and the environment.333 For these reasons it is of vital importance as far as indigenous peoples are concerned.

3.2.1 Defining Tangible and Intangible Cultural Heritage

To deeply understand what constitutes indigenous cultural heritage, some terminological issues have to be presented. At first, early binding legal instruments on cultural heritage used the term “cultural property” as a synonym of the former, as in the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention – The Hague Convention (1954), the UNESCO Recommendation for the Preservation of Cultural Property Endangered by Public or Private Works (1968), the Convention for the Prevention of the Illicit Trafficking and Movement of Cultural Property (1970) and the UNESCO Recommendation for the Protection of Movable Cultural Property (1978).\(^{334}\) However, the term property implies ownership and the rights of possession connected to it.\(^{335}\) Nevertheless, “property” is a narrow concept with regard to cultural heritage, which cannot always have an “owner”.\(^{336}\) Therefore, Stefano Rodotà suggested to interpret cultural property as a “new form of ownership” that does not imply exclusive control.\(^{337}\) As a matter of fact, it is the economic value enshrined in the term “property” that brought to its disuse in favor of the term “heritage”.\(^{338}\) In particular, it has broadly recognized that this change of approach marks a passage from the individual right of cultural property, which was typical of the Western society, to the collective management of cultural heritage.\(^{339}\) Actually, cultural heritage can be generally identified with the “elements necessary for the maintenance over time of a certain cultural identity, important for the survival of a social group.”\(^{340}\)

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Secondly, it is vital to elaborate the difference between tangible and intangible cultural heritage. Tangible cultural heritage refers to all forms of materialization of culture.\(^{341}\) Further, UNESCO makes a distinction between movable cultural heritage, immovable cultural heritage and underwater cultural heritage when referring to tangible cultural heritage.\(^{342}\) Whereas, intangible cultural heritage refers to immaterial forms of cultural expressions. Although this distinction, intangible cultural heritage can be dependent or independent from tangible cultural heritage. On the one hand, intangible cultural heritage is dependent by tangible aspects when it consists in the cultural expressions that brought to the creation of the tangible piece of work. On the other hand, intangible cultural heritage is independent from the tangible when it “encompasses storytelling, songs, dances, among other forms of expression that cannot be ordinarily fixated in material ways.”\(^{343}\)

Even though part of the international community had always believed in protecting intangible cultural heritage\(^{344}\), its affirmation and protection at the international level arrived only in 2003 with the adoption by UNESCO of the Convention for the Safeguarding of the Intangible Cultural Heritage. As a matter of fact, in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, cultural heritage is identified only with its tangible aspects. Actually, Article 1 states that cultural heritage is to be considered as monuments, groups of buildings that are of “outstanding universal value from the point of view of history, art or science” and sites, which are of “outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.”\(^{345}\)

\(^{345}\) UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage*, 1972, Article 1
Therefore, the official UNESCO definition of intangible cultural heritage is enshrined in Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage (2003):

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.346

In addition, the article stresses that, among others, the expressions of intangible cultural heritage are oral traditions, performing arts, social practices, religious rituals, traditional knowledge and craftsmanship.347

Finally, the last terminological issue regards the use of the term “safeguarding” rather than “protection” as far as cultural heritage is concerned. Janet Blake stresses that safeguarding is a more comprehensive term with respect to protecting because not only does the former enshrines that cultural heritage is “protected from direct threats to it but also that positive actions that contributes to its continued survival must be taken.”348 The safeguarding approach is also present in UNESCO legal instruments. In fact, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage defines the action safeguarding implies in Article 2.3, which is identifies as the “measures aimed at ensuring the viability of the intangible cultural heritage (...) particularly

347 UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, Article 2.2
through formal and non-formal education, as well as the revitalization of the various aspects of such heritage." Indeed, these means have to primarily provide for positive protection and transmission.

Nevertheless, the majority of scholars and UNESCO itself use the two words as interchangeably when dealing with the topic of cultural heritage, even though they officially recognized the more comprehensive nature of “safeguarding.” This is why in this research the two terms are used as synonyms.

3.2.2 Characteristics of Intangible Cultural Heritage

The characteristics of the intangible cultural heritage have to be deeply analyzed in order to fully understand its nature, its framework of protection and the rights connected to it.

Scholars have broadly argued that intangible cultural heritage, in order to be considered as such, must be identified as meaningful by a community or a society. As a matter of fact, the value enshrined in intangible cultural heritage cannot be described as an objective one. Rather, it depends on the meaning is given to it. This meaning is derived from the cultural identity of the peoples bearing the intangible cultural heritage. Therefore, intangible cultural heritage’s main value is its connection with the cultural identity of a peoples, community and/or society. For instance, it is the sense of identity that is provided by intangible cultural heritage that makes it worthy of protection. As a matter of fact, Amanda Kearney affirms that the “ultimate intangible is human consciousness, (...) the human soul, the very substance of psychological

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353 Lucas Lixinski, Intangible Cultural Heritage in International Law, Oxford University Press, Oxford, 2013, p.9
engagement with human ‘being’, the most intriguing, yet unimaginable aspect of the human condition."  

In addition, intangible cultural heritage is not something static. On the contrary, it is a living entity, which is "under constant recreation." For this reason, its safeguarding must not be made only of negative actions providing for protection in the present times. Contrarily, it should aim at improving its preservation for and transmission to the future generations. Moreover, the safeguarding method should be flexible and able to adapt to the changes intangible cultural heritage naturally suffers. This approach reflects a forward-looking idea of intangible cultural heritage, which aim at protecting both its present and future. Moreover, it can be affirmed that it is the living entity of intangible cultural heritage the reason why commodification cannot be applied to the intangible, as it is done with tangible cultural heritage. As a matter of fact, commodification implies stasis and it can thus lead to the death of intangible cultural heritage.

Furthermore, authenticity is obviously another characteristic of intangible cultural heritage, as for tangible cultural heritage. Nonetheless, as far as authenticity is concerned, it shall be interpreted in a different way with respect to how it is thought in the context of tangible cultural heritage. In point of fact, authenticity of intangible cultural heritage must not enshrine originality, owing to the static nature originality embeds. As a consequence, also the idea of loss of authenticity has to be seen under a different perspective. Actually, it has to be understood as intangible cultural heritage being "no longer connected to the

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360 Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, in *The European Journal of International Law* Vol. 22 No. 1, 2011, p.113
cultural idiosyncrasy of the communities, groups, and/or individuals to which it culturally belongs, hence lacking its main distinctive element.”

Finally, a deep and vital interconnection exists between intangible cultural heritage and human rights. This thesis is strongly supported by Lenzerini and Francioni. The basis of this thesis is surely the fact that intangible cultural heritage is part of the cultural identity of a people, community and/or society. As a consequence, being cultural identity a recognized cultural human right, it results that intangible cultural heritage is a human right to protect. Therefore, safeguarding intangible cultural heritage means protecting human rights in general and cultural rights in particular.

As a matter of fact, not only the relationship between intangible cultural heritage and human rights has been recognized by almost the majority of scholars, but also it has been officially affirmed at the international and regional with its the legal recognition in some cases of jurisprudence by the regional systems of human rights protection, by some general comments of UN Treaty Bodies, and by international and regional legal instruments.

Indeed, an example is enshrined in the merits of the case *Moiwana Community v. Suriname* of the Inter-American Court of Human Rights, which decided that the state was responsible for violation of the right to humane treatment embedded in Article 5 of the Inter-American Convention on Human Rights. The violation of this right with respect to the indigenous community occurred due to, among other, the state having caused the inability for the Moiwanas of properly honoring their beloved dead. Indeed, the Court argued that:

*If the various death rituals are not performed according to N'djuka tradition, it is considered a profound moral transgression, which will not only anger the spirit of the individual who died, but also*

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361 Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, in *The European Journal of International Law* Vol. 22 No. 1, 2011, p.113
may offend other ancestors of the community. This leads to a
number of “spiritually-caused illnesses” that become manifest as
actual physical maladies and can potentially affect the entire
natural lineage. The N’djuka understand that such illnesses are
not cured on their own, but rather must be resolved through
cultural and ceremonial means; if not, the conditions will persist
through generations.\textsuperscript{365}

Therefore, not giving the possibility to a community to honor their dead according
to their traditional religious practices is a violation of the human right to humane
treatment. Moreover, being traditional rituals part of intangible cultural heritage,
their denial is a human rights violation. Besides, it is also important to report the
Separate Opinion of Judge Cançado Trindade, who stressed that the real way for
“safeguarding their right to life, encompassing the right to cultural identity, finds
expression in their acknowledged links of solidarity with their dead.”\textsuperscript{366} Thus,
according to Judge Cançado Trindade, the actual implementation right to life
indigenous peoples is strictly connected to the protection of their intangible
cultural heritage.

Furthermore, Lenzerini reports also the example of the Human Right
Council in its General Comment 22 (1993).\textsuperscript{367} Indeed, General Comment 22
argues that to actually implement the right to freedom of thought, conscience and
religion, which is enshrined in Article 18 of the International Covenant on Civil and
Political Rights, the respect for religious practices shall also regard:

\begin{quote}
customs as the observance of dietary regulations, the wearing of
distinctive clothing or head coverings, participation in rituals
\end{quote}

\textsuperscript{366} Inter-American Court on Human Rights, Separate Opinion of Judge A.A. Cançado Trindade, para. 92, p.29, in Moiwana Community v. Suriname, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs), 2005
associated with certain stages of life, and the use of a particular language customarily spoken by a group.\textsuperscript{368}

The elements listed in the General Comment are aspects that are part of the intangible cultural elements of communities, peoples, and societies. Therefore, General Comment 22 enshrines the connection between human rights and intangible cultural heritage, as the right to right to freedom of thought, conscience and religion is implemented only if the related intangible cultural heritage is safeguarded.

In addition, the General Comment 14 (2000) of the Committee on Economic, Social and Cultural Rights on Article 12 about the right to health enshrined in the International Covenant on Economic, Social and Cultural Rights argued that “health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines."\textsuperscript{369} Therefore, traditional practices of health care and approaches to medicine are identified to be elements of the intangible cultural heritage. In particular, this is vital as far as indigenous peoples are concerned. As a matter of fact, health care practices and traditional medicines of indigenous peoples are vital expressions of their traditional knowledge. As a consequence, this is another example of the legal recognition of the close link between intangible cultural heritage and human rights.\textsuperscript{370}

Finally, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005) – the Faro Convention – is considered to be the legal instrument recognizing the most the relationship between cultural heritage and human rights.\textsuperscript{371} As a matter of fact, in the Preamble, the Convention


\textsuperscript{370} Federico Lenzerini, Intangible Cultural Heritage: The Living Culture of Peoples, in The European Journal of International Law Vol. 22 No. 1, 2011, p.116

recognize “the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage.”\textsuperscript{372} In addition, in Article 1 the Convention openly states the connection between cultural heritage and human rights affirming that all rights related to cultural heritage are protected in the Convention as they are part of the right to participate in cultural life, which is enshrined in the Universal Declaration of Human Rights.\textsuperscript{373}

Not only do these cases of jurisprudence and interpretation witness the relationship between human rights and cultural heritage, but also that cultural rights have gained relevant importance within the international community. This is due to the fact that cultural heritage’s protection is a cultural right. As a matter of fact, UN Treaty Bodies’ interpretations are increasingly implementing cultural dimension within the application of all rights and merits of international and regional court are becoming more and more dependent on the cultural context within which the violations have occurred.\textsuperscript{374}

3.2.3 Issues Concerning Indigenous Cultural Heritage

Indigenous cultural heritage has suffered misuse and misappropriation since always. This is why cultural heritage is at the centre of various claims of indigenous peoples and these claims concern both tangible and intangible cultural heritage.

On the one hand, assertions related to indigenous tangible cultural heritage basically address the problems of repatriation of human remains, cultural and sacred objects, and of the management of cultural heritage as property.\textsuperscript{375} On the other hand, the reclamations dealing with indigenous intangible cultural heritage are related to how intellectual property rights are applied to indigenous traditional


\textsuperscript{373} Council of Europe, \textit{Council of Europe Framework Convention on the Value of Cultural Heritage for Society}, 2005, Article 1 (a)


knowledge and to their whole cultural rights claims, which are part of indigenous struggle for autonomy and self-determination.

What can be evinced from these assertions is that they challenge the Western approach to cultural heritage. Indeed, indigenous communities stress that it does not take into consideration the relevance and meaning indigenous peoples assign to their cultural heritage, but that it only considers the tangible part. As a matter of fact, Special Rapporteur Erica-Irene A. Daes in her *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (1993) highlights the importance of not dealing with indigenous cultural heritage as if it were cultural property or intellectual property. Furthermore, Deas strongly underlines that “for indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.”

Although nowadays indigenous cultural heritage is protected thanks to the UNDRIP and other legal instruments, in the past the property approach brought to the misappropriation and misuse of indigenous cultural heritage and objects. This is the reason why indigenous peoples have started claiming for return of and access to their cultural objects, which are relevant for their cultural practices and identities, that were taken without free, prior and informed consent. In this respect, fundamental are human remains and religious objects traditionally buried

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in the graves during the funeral rituals. As a matter of fact, the UN Declaration on the Rights of Indigenous Peoples entitles indigenous communities to ask for repatriation of human remains and ceremonial objects in Article 12. Nevertheless, repatriation of indigenous cultural objects and human remains was already state practice before the adoption of the UNDRIP.

Indeed, as far as the redress of cultural heritage is concerned, it is relevant to underline the vital role of NGOs in supporting indigenous communities to ask for repatriating their cultural objects spread all over the world in museums or private collections. Among the most influential there are the World Council of Indigenous Peoples, the International Indian Treaty Council, the International Work Group for Indigenous Affairs, Survival International, and Cultural Survival. Moreover, scholars James Nafziger and Alexandra Xanthaki have stressed the role of national legal system in the process of repatriation. On the one hand, some states have implemented legislation prohibiting the expatriation of indigenous heritage. On the other hand, some states have implemented laws favoring or obliging the repatriation of indigenous cultural heritage. In fact, national legislation protecting indigenous cultural heritage is vital due to the face that states are the subject entitled with the control and safeguarding of heritage from international law. As a consequence, indigenous cultural heritage can actually

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391 Lucas Lixinski, Intangible Cultural Heritage in International Law, Oxford University Press, Oxford, 2013, p.23
be protected only with the implementation of national legislation, which is implemented only if indigenous peoples struggle for it.\footnote{392 Brendan Michael Tobin, \textit{Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples’ Human Rights}, ARAN – Access to Research at NUI Galway, 2011, p.236}

Among the states where indigenous peoples live the most, Australia, Canada, New Zealand and the US are those where the national legal systems have deeply been implemented with legislation in favor of the repatriation of indigenous cultural heritage. As a matter of fact, in the US, the federal system provides indigenous communities with the most influential and comprehensive legislation worldwide, the Native American Graves Protection and Reparation Act (NAGPRA) of 1990.\footnote{393 James A. R. Nafziger, \textit{The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research}, in \textit{The Cultural Heritage of Mankind}, Hague Academy of International Law, The Hague, 2007, p.260} Although its early date of adoption, the NAGPRA provides for regulations on ownership and control of human remains and cultural objects, sanctions for non-authorized excavation and displacement and for illicit trafficking, a federal system of museums’ inventory of indigenous cultural heritage, and standards for repatriation.\footnote{394 James A. R. Nafziger, \textit{The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research}, in \textit{The Cultural Heritage of Mankind}, Hague Academy of International Law, The Hague, 2007, p.260-261}

Besides, at the international level, the International Council of Museums (ICOM) has enshrined provisions on repatriation of and respect for human remains and sacred objects in its Code of Ethics for Museums. Provisions 2.5, 3.7 and 4.3 concerning collections of and research on human remains and material of sacred significance must be consistent with the “interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known.”\footnote{395 ICOM, \textit{Code of Ethics for Museums}, 2013, Provision 2.5, p.3, and Provision 3.7, p.7, available at: http://musei.beniculturali.it/wp-content/uploads/2016/05/ICOM-Code-of-Ethics-for-Museums.pdf (accessed 03 September 2018)} Moreover, provision 4.3 stresses that human remains, and materials of sacred significance must be managed with standards “taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated.” Finally, these standards are asked to
respect “the feelings of human dignity held by all peoples.” However, these provisions are not legally binding but are only an ethical commitment.

In practical terms, this commitment in the repatriation framework from the part of ICOM has resulted in an increasing number of joint projects between museums and indigenous peoples with respect to issues that are linked to indigenous cultural heritage. In particular, this cooperation is working thanks to increasing indigenous consultation. This approach positively reflects the type of management museums should apply to indigenous cultural heritage according to the 1993 study of the former Special Rapporteur Erica Daes:

Indigenous peoples claim an interest in determining how these objects are interpreted. Museums are a major factor in forming public perceptions of the nature, value and contemporary vitality of indigenous cultures. Indigenous peoples rightly believe that museum collections and displays should be used to strengthen respect for their identity and cultures, rather than being used to justify colonialism or dispossession.

Moreover, the collaboration between indigenous peoples and museums has enriched the knowledge about indigenous management of their cultural heritage. As a matter of fact it has revealed that, from a museological point of view, indigenous communities have their own curatorial traditions and approaches to heritage preservation, which can be considered parts of indigenous cultural expressions. Basically, indigenous curatorial traditions enshrines the purpose of transmitting culture to the other and through time. Furthermore, indigenous curatorial traditions are embedded in larger cultural forms, such as religious beliefs and practices, traditional knowledge, social systems, artistic traditions, and

396 ICOM, Code of Ethics for Museums, 2013, Provision 4.3, p.8
the relationship with the lands and the environment.\textsuperscript{401} As a consequence, indigenous curatorial tradition are practices aimed at protecting both tangible and intangible cultural heritage.\textsuperscript{402}

Another issue connected to indigenous cultural heritage is, the forgery of indigenous artefacts. Non-indigenous persons are reproducing indigenous artefacts for economic purposes without free, prior and informed consent, violating respect for indigenous cultural heritage, both for the tangible aspect and its intangible meaning given to the artefacts by the indigenous communities.\textsuperscript{403}

In addition, cultural misinterpretation often affects indigenous cultural heritage. Cultural misinterpretation occurs when no information at all is provided regarding indigenous peoples’ cultural heritage. Otherwise, if there is information, cultural misinterpretation can happen when the given information does not reflect the meaning indigenous peoples assign to their cultural heritage.\textsuperscript{404}

Furthermore, another indigenous cultural heritage issue is strictly connected with territoriality.\textsuperscript{405} As previously affirmed, indigenous relationship with land is considered to be part of indigenous intangible cultural heritage. As a matter of fact, indigenous peoples express their connections with their ancestral lands through art and rituals, which are a vital part of their survival.\textsuperscript{406} In cases where indigenous peoples are denied of their right to land, they are denied of their cultural heritage too, because without this connection indigenous traditional knowledge derived from their relationship with land gets lost. Indigenous cultures and cultural heritage become at risk of extinction without their connection with

land.407 As a consequence, the protection of indigenous land rights is vital for the safeguarding of indigenous intangible cultural heritage. This relationship has also been acknowledged by the merits of the case Awas Tingni Community v. Nicaragua by the Inter-American Court of Human Rights.408 In this case Nicaragua was held responsible for violation of indigenous land rights. This violation put under threat the survival of the indigenous cultural heritage because the territories from which they were expatriated were the sources of the community’s cultural values.409

As far as cultural heritage is concerned, UNESCO is the UN specialized agency dealing with it. Not only does UNESCO protect it through the adoption of international legal instruments, but also with the action of the World Heritage Committee, which is the UNESCO organ whose mandate is the management of the World Heritage Sites, cultural and natural ones. Issues concerning indigenous peoples and UNESCO World Heritage Site will be discussed later.

Furthermore, UNESCO, with the adoption of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, established the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, the Representative List of the Intangible Cultural Heritage of Humanity and the Register of Good Safeguarding Practices, which are managed by the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage. The aim of these lists is to provide safeguarding for intangible cultural heritage.

However, these lists do not work in an appropriate way as far as indigenous intangible cultural heritage is concerned. As a matter of fact, the nomination for the inscriptions in these lists have to begin from states. Indigenous peoples themselves cannot propose a nomination of their intangible cultural

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408 Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs)
409 Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), p.36
Nevertheless, some states have been presenting nominations regarding indigenous intangible cultural heritage.

As a matter of fact, some indigenous intangible cultural knowledge has been inscribed in the List of Intangible Cultural Heritage in Need of Urgent Safeguarding in particular with proposals by states of South America and Africa, such as Colombian-Venezuelan llano work songs, the Dikopelo folk music of Bakgatla ba Kgafela in Kgatleng District, Ma’di bowl lyre music and dance, and Yaokwa, the Enawene Nawe people’s ritual for the maintenance of social and cosmic order, among the most recent ones. Moreover, Ethiopia proposed the nomination of the Gada system, an indigenous democratic socio-political system of the Oromo, to be added in the Representative List of the Intangible Cultural Heritage of Humanity, which was inscribed in 2016. However, no intangible cultural heritage is inscribed in the lists that is original of indigenous peoples from Canada, Australia, New Zealand, and the United States – withdrawing from its membership to UNESCO on 31st December 2018 –, states where different indigenous peoples with great intangible cultural heritage live.411

Finally, other issues connected to indigenous cultural heritage are the ones of intellectual property rights with respect to indigenous traditional knowledge and indigenous biodiversity rights,412 and the management of world heritage sites where indigenous peoples live,413 which will be analyzed in the following parts.

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413 Stefan Disko and Helen Tugendhat, World Heritage Sites and Indigenous People’s Rights, IWGIA, Copenhagen, 2014
3.2.4 UNESCO World Heritage Sites and Indigenous Peoples

In 1972, UNESCO adopted the Convention concerning the Protection of the World Cultural and Natural Heritage – the World Heritage Convention – with the aim of protecting heritage for the benefit of mankind. However, the Convention was adopted when indigenous peoples were not already considered subjects of international law. As a consequence, problems arose concerning the management of World Heritage Sites where indigenous peoples live; in particular, due to the fact that the free, prior and informed consent was not applied. As previously explained, indigenous territories are vital for their survival and self-determination and for their spiritual and cultural identity, integrity and well-being. Consequently, mismanagement of these territories can lead to dramatic consequences for indigenous peoples.

Problematic circumstances arose in all areas of the world. For instance, in Europe, the Sami people reported violation of their right within the Lapponian World Heritage Area. Moreover, as far as Africa is concerned, there have been different cases of indigenous people denouncing rights violations in World Heritage sites, among which the Endorois case in the Lake Bogoria area and the Twa case in the Kahuzi-Biega National Park are the most relevant. Furthermore, in Asia, less cases have been reported but violations have occurred in India, Thailand and the Philippines. Actually, the same happened in North America, particularly in Canada, and in South America, such as in the Canaima National Park. Whereas, in the Pacific area indigenous peoples have been, and some still are, strongly struggling against mismanagement of World Heritage sites, as in the Rapa Nui National Park and in the Wet Tropics of Queensland World Heritage Area.

414 UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage*, 1972
In order to fight this mismanagement of World Heritage Sites and to promote indigenous consultation and participation, the UN mechanisms dedicated to the protection and promotion of the rights of indigenous peoples – namely the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples – have urged for implementation of the UNDRIP in the Operational Guidelines for the Implementation of the World Heritage Convention.\(^{418}\)

In fact, former Special Rapporteur James Anaya dedicated a whole part on the indigenous issues connected to World Heritage Sites in his 2012 Report to the General Assembly on the need to harmonize activities within the United Nations that affect Indigenous Peoples.\(^{419}\) Anaya reported that:

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\text{Indigenous peoples have expressed concerns over their lack of participation in the nomination, declaration and management of World Heritage sites, as well as concerns about the negative impact these sites have had on their substantive rights, especially their rights to lands and resources.}\(^{420}\)
\]

In particular, the claims indigenous peoples have made towards the management of World Heritage Sites are related to the fact that they are being considered as a threat for the safeguarding of the sites. This view consequently has brought to the prohibition within the territories of World Heritage Sites of several of indigenous traditional practices regarding hunting, farming, husbandry, natural resources and other land-related activities resulting in “indigenous peoples’ dispossession of and alienation from their traditional lands and resources”\(^{421}\), which constitutes violation of several indigenous peoples’ rights, such as lands rights and cultural rights. In addition, indigenous community claim for their participation in the management of


these sites in order to apply their free, prior and informed consent. Indeed, the former Special Rapporteur denounced that “the Operational Guidelines for Implementation of the World Heritage Convention”, setting out the procedure for the inscription, management and conservation of World Heritage Site, “are silent on the issue of participation by indigenous peoples.”

Nevertheless, Anaya positively reported that UNESCO held a meeting with the Special Rapporteur and members of the Permanent Forum and the Expert Mechanism in order to launch the working on a policy dedicated to indigenous peoples. The scope of this policy is believed to affect indigenous peoples in three ways. First of all, UNESCO policies will promote reflection within the organization on “the effects of its existing programming on indigenous peoples”. Secondly, UNESCO will call for indigenous participation within its programs affecting indigenous communities in order to implement their rights in its agenda. Finally, indigenous policy will provide practical guideline for consultation with indigenous representatives. Ultimately, in 2018, UNESCO has launched its Policy on Engaging with Indigenous Peoples in the framework of the UNESCO 2030 Agenda for Sustainable Development.

Even though UNESCO recognizes the need to protect indigenous rights and to implement their participation in decision-making processes, it has declared that it is difficult to actually implement the rights enshrined in the UNDRIP in all the fields of work of the organization. This is due to the fact that some conventions and programs have their own independent intergovernmental governance structures.

Actually, this problem arises with respect to the World Heritage Convention, which is “a self-standing multilateral treaty with its own States Parties

and a separate intergovernmental governance structure." As a matter of fact, during the 24th session of the World Heritage Committee (WHC) held in 2000, the Working group on Indigenous Peoples convened the World Heritage Indigenous Peoples Forum that proposed to the WHC to establish the World Heritage Indigenous Peoples Council of Experts in order to make indigenous peoples’ representatives participant in the management of the World Heritage Sites. However, the proposal was dramatically dismissed by the WHC in 2001. Dramatically, within the WHC, almost no development has occurred since then as far as indigenous participation is concerned, as argued by former Special Rapporteur James Anaya.

In order to counteract this phenomenon, some positive support was given by the regional systems of human rights protection. For instance, the African Commission on Human and Peoples’ Rights adopted a resolution on the protection of indigenous peoples living in World Heritage sites within debate about Lake Bogoria, which was added to the World Heritage lists without the free, prior and informed consent of the Endorois community. Moreover, at the international level, the International Union for Conservation of Nature (IUCN) adopted a resolution on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in the context of the UNESCO World Heritage Convention during the 2012 IUCN World Conservation Congress.

To conclude, it is without any doubt that more has to be done at the international level, in particular within the World Heritage Committee, to actually protect indigenous peoples living in World Heritage sites. Hope is reserved in the

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influence of the UNESCO Policy on Engaging with Indigenous Peoples and in the increasing power indigenous peoples are gaining at international level, in order to push the World Heritage Committee to finally adopt a human rights-based approach implementing policies in accordance with the principles enshrined in the UNDRIP.  

Chapter 4
Indigenous Traditional Knowledge

4.1 Indigenous Intangible Cultural Heritage as Traditional Knowledge

The traditional knowledge of a community is part of its intangible cultural heritage. Consequently, it is of great importance for the survival and the identity of the community, in particular as far as indigenous peoples are concerned. However, international law does not provide for a formal definition of traditional knowledge. Nevertheless, it has been argued that the definition of folklore, or traditional popular culture, that is enshrined in the 1989 UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore can be used to identify how traditional knowledge is expressed within a community. This definition describes traditional knowledge as expressions “reflecting the expectations of a community in so far as they reflect its cultural and social identity”. Moreover, it is argued that traditional knowledge is expressed and transmitted orally. Finally, “its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

The first direct reference to traditional knowledge in an international legal instrument is in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions where, in the preamble, the states parties to the convention recognized:

437 UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989, Provision A
the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion.438

Furthermore, scholars have identified some general characteristics of traditional knowledge from an anthropological point of view. The oral nature of traditional knowledge is the main fundamental characteristic, which entails that traditional knowledge transmission only happens through direct experience and observation. In addition, its nature is holistic, intuitive and qualitative, rather than reductionist, analytical and quantitative, reflecting the non-material value and richness of traditional knowledge. Besides, the social context from where it mainly derives is one that strongly believe that all life-forms live in a mutual spiritual relation. Finally, it has a special connection with the environment where is comes from, both understood as territory and as community.439

Besides, scholars thought that making clear the meaning of the term traditional knowledge was necessary for its full understanding. As a matter of fact, scholar Russel Barsh stresses that the meaning of the word “traditional” when associated with knowledge, is not to be interpreted as synonym of antiquity, like seldom occurs, but as the way this knowledge is acquired, used and transmitted. Therefore, it “traditional” refers to the way knowledge is shared and learned within a community. This is particularly important for indigenous communities and cultures, whose process of transmission of knowledge is unique to each community, thus, being part of traditional knowledge itself.440

As a consequence, what can be evinced from the nature itself of traditional knowledge – as its being part of intangible cultural heritage, its being connected to

438 UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Preamble, para. 8
440 Russel L. Barsh, Indigenous Knowledge and Biodiversity, in Indigenous Peoples, their Environments and Territories, in D.A. Posey, Cultural and Spiritual Values of Biodiversity, IT Publications & UNEP, 1999, p.73
the environment and its being part of the identity of communities – is that traditional knowledge of indigenous peoples is to be properly safeguarded for the survival of their cultural identities, integrity, self-determination and development. As a matter of fact, indigenous traditional knowledge is protected through Article 31 of the 2007 UN Declaration on the Rights of Indigenous Peoples.

4.1.1 Traditional Knowledge and Intellectual Property

The main issue when dealing with traditional knowledge and its safeguarding is its relationship with intellectual property. As a matter of fact, traditional knowledge is usually protected through intellectual property rights. Intellectual Property (IP) is defined by the World Intellectual Property Organization (WIPO) as the “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.” Therefore, intellectual property rules aim at encouraging innovation and creativity through economic rights. Actually, Intellectual Property Rights (IPR) are the rights whose goal is to protect the interests of the creators of intellectual property and preventing its misappropriation and illicit use. As a consequence, Intellectual Property Rights are rights protecting the intangible and not the tangible. Furthermore, the intellectual property regime is supported by and based on Article 27.2 of the Universal Declaration of Human Rights (1948), which provides for “the protection of the moral and material interests resulting from any

scientific, literary or artistic production of which he is the author.” It is for these reasons that intellectual property rights have always been used for the protection of traditional knowledge.

The types of intellectual property rights that are used the most for safeguarding traditional knowledge are copyrights, for aspects of intangible cultural heritage, and patents, for biodiversity practices and traditional medicines. Nevertheless, problems may arise from their application.

Indeed, a relevant part of scholars supports the application of intellectual property to traditional knowledge owing to the economic development it can bring to societies, especially to indigenous ones. However, the majority of communities wants to preserve their traditional knowledge to safeguard their identity and creativity, not to gain economic wealth. In addition, another element considered inadequate refers to the limited amount of time, measured in decades, during which intellectual property provides for protection is broadly considered unsuitable with respect to the centenary, or even millennial, existence of traditional knowledge.

Moreover, another characteristic of intellectual property is that it is a form of private property, aspect that is opposite to the collective nature of traditional knowledge, in particular with respect to the one held by indigenous peoples. As a matter of fact, a debate started about whether the concept of ownership enshrined in IPR is adequate for the protection of traditional knowledge, owing to the fact that intellectual property rights envisage only one owner whereas traditional knowledge is “owned” by a whole community. The answer given within this debate is simple. Although intellectual property rights do not conceive

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collective ownership, they still help in the safeguarding of traditional knowledge with the implementation of remedial actions and with the establishment of legal precedents in jurisprudence.\textsuperscript{452}

Due to this individual approach to ownership, it has been argued that intellectual property is a product of Western society, where individual private property is a funding principle. Therefore, Western representatives of traditional knowledge holders at WIPO and the WTO have, theoretically, shaped intellectual property rights in a way to actually protect their traditional knowledge. On the contrary, the IP framework does not work within non-Western and indigenous communities. As a consequence, intellectual property can result in loss of authenticity of non-Western and indigenous traditional knowledge.\textsuperscript{453}

As disparate issues regarding traditional knowledge arise in the context of intellectual property right, in particular with respect to ownership, misuse and misappropriation as previously argued, some scholars have urged for the establishment of an \textit{ad hoc} framework of IPR dedicated only to traditional knowledge and to traditional cultural expressions. In particular, Drahos stresses that creating an international regulatory strategy based on a treaty on traditional knowledge would be the solution.\textsuperscript{454} The scholar argues that a system of \textit{ad hoc} international regulations would lead to the actual protection of traditional knowledge, which would result in being effective the most for the less developed, minor and indigenous communities that do not have the capacity and power to pursue enforcement actions in the IP regime against misappropriation and misuse.\textsuperscript{455}


Besides, some basic elements that can be the basis for this *sui generis* framework have already been identified. The most vital aspect to implement in the development of intellectual property rights dedicated to traditional knowledge is the maintenance of and respect for the customary rules of the holder communities used for the protection of their traditional knowledge. Moreover, the new standards should strongly prohibit the non-traditional uses and all form of exploitation of secret and sacred traditional knowledge in order to respect the will and culture of the holder communities. Furthermore, the framework should impose the obligation to respect the intrinsic meaning of traditional knowledge given by the bearer community in order to prevent misappropriation and distortion. Finally, the free, prior and informed consent by the bearer communities has to be asked and given before applying any form of intellectual property rights to their traditional knowledge.\footnote{Janet Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford, 2015, p.239}

This *sui generis* framework regarding traditional knowledge and intellectual property rights is what WIPO is trying to establish at the international level. Indeed, it has dedicated an entire area of research and study on the topic of traditional knowledge in order to draft a treaty on intellectual property rights to apply to traditional knowledge and traditional cultural expressions.\footnote{WIPO Website, *Traditional Knowledge*, available at: http://www.wipo.int/tk/en/ (accessed 07 September 2018)}

### 4.1.2 Intellectual Property Rights and Human Rights

Another aspect to deal with when analyzing the intellectual property regime in the context of traditional knowledge protection is its relationship with human rights. During almost all the 20th century, human rights and intellectual property rights had always been treated as two separate issues. Nevertheless, since the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the creation of the World Trade Organization (WTO) in 1994, scholars and the international community started examining the relationship between intellectual property rights and human rights.\footnote{Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, in Laurence R. Helfer, *Intellectual Property and Human Rights*, Edward Elgar Publishing Limited, Cheltenham, UK, 2013, p.5}
As a matter of fact, the Sub-Commission on the Protection and Promotion of Human Rights had studied the connection between intellectual property rights and human rights and successively adopted a resolution on this topic in 2000.\textsuperscript{459} The resolution promptly recalls that the legal basis of intellectual property rights are enshrined in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights. However, the Sub-Commission argues that the intellectual property framework is a human right that has to be "subject to limitations in the public interest."\textsuperscript{460} For this reason, in Article 2, the Sub-Commission denounces that the TRIPS Agreement – within the WTO economic regime – does not encompass the human rights aspect of intellectual property, underling the increasing amount of conflicts between intellectual property rights of the TRIPS regime and international human rights law.\textsuperscript{461} In this sense the TRIPS standards are not implementing the public interest according to the Sub-Commission. As a consequence, in Articles 3, 4, 5 and 6, the resolution strongly affirms the supremacy of human rights law over economic policies and agreements. Further, it asks for the implementation of a human rights approach in the establishment of economic programs connected to intellectual property rights at all levels of legislation, with the aim of preserving also their social function.\textsuperscript{462}

Successively, in the same year, the Secretariat of the World Trade Organization submitted a paper to the Committee on Economic, Social and Cultural Rights (CESCR) where the organization officially accepted human rights functional relationship with intellectual property rights and, consequently, their supremacy.\textsuperscript{463} As a matter of fact, paragraph 26 argues that human rights “will be

\begin{footnotesize}
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\item \textsuperscript{460} Sub-Commission on Human Rights, \textit{Intellectual Property Rights and Human Rights}, Resolution 2000/7, 2000, Article 1, p.2
\item \textsuperscript{461} Sub-Commission on Human Rights, \textit{Intellectual Property Rights and Human Rights}, Resolution 2000/7, 2000, Article 2, p.2
\item \textsuperscript{462} Sub-Commission on Human Rights, \textit{Intellectual Property Rights and Human Rights}, Resolution 2000/7, 2000, Articles 3-6, p.2
\end{enumerate}
\end{footnotesize}
best served (...) by reaching an optimal balance within the IP system and by other related policy responses.” Indeed, human rights are affirmed to be the properly means for “adjusting the existing rights or by creating new rights.”

As far as conflicts between human rights and intellectual property are concerned, the major fields where these occur are technology transfer to developing countries, biopiracy, patents for genetically modified organisms in the context of the right to food, health legal restrictions on patented pharmaceuticals, and the protection of indigenous cultures and identities.

Due to the fact that the official recognition of the relationship between human rights and intellectual property rights is pretty recent, it is possible to affirm that intellectual property rights is the less developed field of human rights. In fact, owing to there is not a whole international legal instrument dealing with this topic. Moreover, jurisprudence interpretations of Article 27.2 of the UDHR and Article 15.1 (c) of the ICESCR have generally been considered ambiguous by scholars.

Nevertheless, Laurence Helfer states that CESCR Statement on Human Rights and Intellectual Property (2001) and CESCR General Comment No. 17 provide for a partial human rights framework in the field of intellectual property. Furthermore, the scholar identifies the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the WHO proposal for the Medical Research and Development Treaty, and the WIPO Development Agenda and the proposed Access to Knowledge Treaty as the international instruments and drafts where human rights are applied to intellectual

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468 World Health Organization
property rights in order to broaden the discussed framework. However, it is vital to remind that this framework is still at its early stages of development.

Like within all debates at the international level, scholars – in particular the ones engaged in the field of economics – have argued that a human right framework for intellectual property would lead to the eradication of the intellectual property regime. On the contrary, more comprehensive scholars have argued that the human rights regime applied to intellectual property aims at protecting basic human interests within the intellectual property regime. As a consequence, its goal is not to suppress intellectual property but rather to struggle against an unbalanced regime. As a matter of fact, in a report on the topic of intellectual property by the Secretary-General of the Sub-Commission, human rights and intellectual property rights are asserted to be complementary:

*Human rights and the equitable treatment of authors and inventors, on the one hand, and public interest, on the other hand, remain the underpinnings of IP systems. (...) it would appear that these two conceptual starting points are complementary rather than mutually exclusive.*

Further, taking into consideration traditional knowledge within the human rights framework of intellectual property, an *ad hoc* regime of human rights dealing with intellectual property law has been proposed to the attention of the international community, in order to officially establish enforceable legislation.

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This approach is in line with the previously mentioned belief of scholars Peter Drahos and Janet Blake in the opportunity to create an international framework completely dedicated to traditional knowledge and intellectual property rights.\(^{473}\) Therefore, these two kinds of possible *sui generis* framework can be put together in order to create a human rights treaty on the protection of traditional knowledge through intellectual property rights. However, this contingency is extremely hard to occur – at least not in the near future.

To conclude, it is vital to underline that the debate about the interaction of intellectual property rights and human rights has increased with the affirmation of indigenous peoples’ rights.\(^{474}\) As a matter of fact, the UNDRIP, which is a human rights legal instrument – enshrines an intellectual property system dedicated to the protection of indigenous ownership of their arts, sacred works, traditional knowledge, traditional cultural expression, and biocultural knowledge.\(^{475}\)

### 4.1.3 Indigenous Traditional Knowledge and Intellectual Property Rights

The issue of intellectual property rights applied to traditional knowledge in the context of human rights is at the centre of a debate regarding how to deal with and to protect indigenous traditional knowledge.\(^{476}\) The great majority of scholars has argued that the intellectual property regime is inadequate as far as indigenous traditional knowledge and traditional cultural expressions are concerned.\(^{477}\) Moreover, this inadequateness is particularly due to the fact that the protection of indigenous traditional knowledge is connected to their collective


self-determination, development, survival, integrity and identity. Consequently, it is not perceived as something to transform into private property.\textsuperscript{478}

Actually, Johanna Gibson presented a comprehensive and well-elaborated explanation of the problems arising from the application of intellectual property rights to indigenous traditional knowledge, stressing that “Efforts at “protecting” traditional knowledge largely presume the objective to be the defence of that knowledge against misappropriation” Nonetheless, “the subject matter of protection for Indigenous and traditional groups is not necessarily captured within this conceptualization of the problem.” As a matter of fact, the intellectual property rights framework is believed to neglect “legitimate interests of communities, concerning customary management, cultural integrity, and traditional knowledge development.”\textsuperscript{479} Indeed, most of the time, the intellectual property regime is in contradiction to the needs of the majority of the indigenous traditional knowledge to protect, and to how the bearing communities protect themselves their traditional knowledge through customary law.

At the international and regional level, and partly on the national, consensus has been reached on which is the main problem connected to intellectual property. This is the wrong application of intellectual property rights resulting in the misappropriation and misuse of indigenous traditional knowledge.\textsuperscript{480} Moreover, as previously argued, the individual nature of intellectual property rights opposes to the indigenous understanding of heritage as of the community and as part of their collective rights. This approach causes failure in the protection of the sacred and secret knowledge of certain aspects of indigenous collective heritage.\textsuperscript{481}

Besides, as just pointed out previously, within this debate, it is vital to underline the existence of indigenous customary law designed by the communities themselves in order to protect their traditional knowledge without transforming it into private property as with IP. As a matter of fact, it has been stressed that only indigenous communities can be effective entities able to lead to “appropriate responses to access to and protection of traditional knowledge”, respecting at the same time the indigenous right to self-governance. Indeed, Blake reports, as an example of these customary laws, the way Aboriginals pursue the protection of their traditional knowledge. This framework is based on strict ancient rules that can be seen as a sort of custodianship of the values of the community, not of economic property, and that can be considered itself as part of the Aboriginal traditional knowledge. The existence, relevance of and respect for customary laws of indigenous communities protecting traditional knowledge has also been recognized by WIPO, which defines them to be well-developed, complex and, most importantly, effective.

Another aspect that results in a conflict between the IPR regime and indigenous traditional knowledge is the propaganda based on the economic wealth that can derive from intellectual property that certain states do in order convince indigenous peoples to apply intellectual property rights. On the contrary, tradition knowledge for indigenous peoples is an important source of creativity and innovation. So, the re-creation and replication of past traditions is a way of

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preserving their identity, but not necessarily for improving the economic situation of their communities.\textsuperscript{486}

In addition, relevant is the issue of authenticity when implementing intellectual property to indigenous traditional knowledge. As a matter of fact, when intellectual property rights are applied to traditional knowledge with the aim of preserving its authenticity, in reality this authenticity comes to an end. This is owned to the fact that traditional knowledge under intellectual property rights protection becomes fixed and restricted within fictional constructions, which are not suitable for the indigenous ways of safeguarding traditional knowledge.\textsuperscript{487}

Moreover, intellectual property rights do not embody the protection of indigenous practices that involve the transmission and sharing of the traditional knowledge within the community.\textsuperscript{488}

Nevertheless, although the intellectual property regime lacks of certain vital measures of protection adequate for indigenous traditional knowledge and cultural expression, a relevant part of scholars argues that owing to the fact that intellectual property rights are the main international legal regime protecting arts, scientific works, creativity and knowledge, it constitutes a “powerful legal shield and a powerful legal sword.”\textsuperscript{489} As a consequence, it is argued that the right approach is not to suppress intellectual property for indigenous traditional knowledge. Rather, a more suitable solution is to maintain the current intellectual property regime while adapting it to indigenous needs.\textsuperscript{490}

Traditional knowledge of indigenous peoples is not only derived from intangible cultural heritage. As a matter of fact, it also encompasses

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\item \textsuperscript{487} Johanna Gibson, \textit{Community and the Exhaustion of Culture – Creative Territories in Traditional Cultural Expressions}, Paper for the Workshop on the Protection of Traditional Knowledge and Culture, AHRC Copyright Research Network, Birkbeck University, London, 2005, p.8
\item \textsuperscript{488} Johanna Gibson, \textit{Community and the Exhaustion of Culture – Creative Territories in Traditional Cultural Expressions}, Paper for the Workshop on the Protection of Traditional Knowledge and Culture, AHRC Copyright Research Network, Birkbeck University, London, 2005, p.9
\end{itemize}
\end{footnotesize}
environmental and ecological practices, traditional healing and medicines, and biodiversity and natural resources management.\textsuperscript{491} Indeed, the Agenda 21 of the Rio Declaration on Environment and Development (1992) stresses that indigenous traditional knowledge in the field of environment and natural resource management are vital for reaching the aim of the Declaration. Consequently, it has to be protected and its efficiency increased.\textsuperscript{492}

In addition, the UN Convention on Biological Diversity (1992) stresses in the Preamble the recognition of a close and vital dependence of indigenous peoples’ traditional knowledge on biological resources. Furthermore, it is argued that benefits arise from “the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity.”\textsuperscript{493} Moreover, Article 8 (j) requires the state parties to protect and respect indigenous traditional knowledge and practices that are vital for the conservation of biological diversity and for its sustainable use worldwide.\textsuperscript{494}

Furthermore, the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the UN Convention on Biological Diversity argues, along the Preamble, the vital role of indigenous traditional knowledge in preserving genetic resources.\textsuperscript{495} In addition, Article 7 of the Protocol urges states – according to their national legislation – to take effective measures for the access to indigenous traditional knowledge in the field of genetic resources only with the free, prior and informed consent of the interested indigenous communities.\textsuperscript{496} Finally, references to

\textsuperscript{492} UN, \textit{Overview of Agenda 21}, 1992, Point 26, p.9-10
\textsuperscript{494} UN, \textit{Convention on Biological Diversity}, 1992, Article 8 (j), p.6
\textsuperscript{496} UN, 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, 2010, Article 7, p.7
indigenous peoples and their traditional knowledge are found in Articles 11, 12, 13, 14, 16, 21, 22, and 25 of the Nagoya Protocol.\textsuperscript{497}

Besides, the Commission on Intellectual Property Rights in its report on Integrating Intellectual Property Rights and Development Policy of 2002 dedicated a chapter on traditional knowledge and the first paragraph presents what traditional knowledge means with respect to environmental and biological issues:

\begin{quote}
Traditional knowledge has played, and still plays, a vital role in the daily lives of the vast majority of people. Traditional knowledge is essential to the food security and health of millions of people in the developing world. In many countries, traditional medicines provide the only affordable treatment available to poor people. In developing countries, up to 80\% of the population depend on traditional medicines to help meet their healthcare needs. In addition, knowledge of the healing properties of plants has been the source of many modern medicines.\textsuperscript{498}
\end{quote}

After having presented a broad description of indigenous traditional knowledge and of the issues concerning it, it is relevant to turn our focus on the topic of misappropriation, because of it being considered the main problematic consequence of the application of intellectual property rights. As a matter of fact, dramatically, research has shown that many businesses created and still are creating economic wealth through the misappropriation of traditional knowledge. Handcraft producers, textile manufacturers, music producers and pharmaceutical manufacturers have taken unauthorized possession of indigenous traditional knowledge in its various forms such as medicines, healing practices, songs, and pieces of art with the aim of obtaining intellectual property right on them for getting profits of intellectual property’s economic benefits.\textsuperscript{499}

\textsuperscript{497} UN, 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, 2010, Article 11-14,16,21-22, 25, p. 9-12, 15-19


\textsuperscript{499} WIPO, WIPO Intellectual Property Handbook, 2004, para. 2.261, p.56
Indeed, indigenous peoples have denounced that misappropriation of their traditional knowledge within the intellectual property right regime occurs in several ways. Firstly, the main cause of misappropriation is the unauthorized adaptation, reproduction and subsequent commercialization of indigenous traditional knowledge, whose economic benefits are not shared with the interested indigenous communities. Moreover, indigenous peoples accuse entities of the use of their traditional cultural expressions in a way that insults, degrades and offend the communities’ identities themselves. Thirdly, misappropriation of indigenous traditional knowledge is accused of happening through false indication of authenticity or origin. Finally, intellectual property law regime is accused of failing in acknowledging the sources of traditional creations and innovations, causing misappropriation of indigenous traditional knowledge and cultural expressions.

As a consequence, the problem still lies on the contemporary intellectual property framework. As a matter of fact, due to the disparate nature of traditional knowledge, its safeguarding is impossible within a framework made of a single intellectual property regime dealing with all field of protection. In fact, the Commission on Intellectual Property Rights also argues that the traditional knowledge to protect is of such a diversity, in particular with respect to indigenous one, that “a single all-encompassing sui generis system of protection for traditional knowledge may be too specific and not flexible enough to accommodate local needs.” Therefore, different systems should be established with specific mandate in order to dealing with the different fields of intellectual property protection and the different cultures to within which they are applied.

Indeed, at the national level, it is already possible to find intellectual property regime of disparate natures concerning the protection indigenous traditional knowledge and traditional cultural expressions. As a matter of fact, national frameworks are mainly of two types. On the other hand, more Western states, like Australia and Canada, have pushed indigenous peoples to use ordinary national intellectual property rights, in particular copyrights and patents,

to protect their traditional knowledge and cultural expressions. Nevertheless, on the one hand, states such as those of South America and the Philippines have implemented domestic *sui generis* intellectual property legislation that gives a deeper protection of indigenous traditional knowledge, in particular in the field of environmental friendly practices, thanks to the preservation of indigenous customary law in the IPR national framework.\(^{503}\)

As it can be obviously thought, jurisprudence – at all levels but in particular at the national one – has dealt with a myriad of cases of misappropriation of indigenous traditional knowledge due to the application of intellectual property rights.\(^{504}\) A relevant case to analyze is the *Milpurrurruru v. Indofurn Ltd.* case of the Australian Federal Court. Some Aboriginal artists sued Indofurn for selling carpets reproducing their artworks in the embroideries. The artists accused the company of unauthorized reproduction. One of the artists declared that the unauthorized reproduction of indigenous artworks within the aboriginal customary law was a responsibility of the artists, who traditionally could be also punished by death. When the trial started the company stated that the selling of those carpets and their embroideries were protected by copyrights. As a consequence, the court had to establish whether the copyright belonged to the company or to the artists. Nevertheless, by the end of the trial the company admitted that the artworks copied in the embroideries were covered by copyrights of the artists. The court held that authorize the reproduction of an artwork protected by copyright without the permission of the owner was an infringement of the law. In addition, the judge added an aggravating factor to the infringement, that is responsible the intentional reproduction of the artworks.\(^{505}\) In this case copyrights, so intellectual property rights were able to protect indigenous traditional knowledge and cultural heritage.


However, the intellectual property regime is not always efficient in protecting indigenous traditional knowledge. As a matter of fact, in the case of The Djalambu (Hollow Log) Ceremony, copyright played against the indigenous community involved. In the 60s, a couple video and sound recorded the Djalambu (Hollow Log) ceremony involving the Australian Daygurrgurr Gupapuyngu people. Some years later, Joe Neparrnga Gumbula, the son of the leader of the community who was recorded in the video, decided to use the image recordings in a video for a song of his band. The makers of the ceremony video recordings denounced Joe Neparrnga Gumbula for unauthorized use of a video, of which they owned copyright. From a legal point of view, they obviously won the case. Nevertheless, the indigenous community, after the discovery of the video and sound recordings, asked the couple to let concession over their use within the community as it is considered as a possible useful educational tool for the transmission of the ceremonial practice to the future generations. The community perceived the film as part of their traditional knowledge. However, the couple did not authorize the reproduction of the recording. As a consequence, in this case, the copyright did not permit the community to manage their own traditional knowledge.506

Finally, another example of ineffectiveness of intellectual property rights is reflected by the case-study of the Wik Apalech dancers, who found the unauthorized use of their images on postcards and CDs from their participation to the Laura Aboriginal Dance and Cultural Festival in 1995.507 Indeed, the Cape York Land Council informed the indigenous communities of this misappropriation in 1998. The Wik Apalech dancers were not at all pleased of the spread of a photograph depicting them with ceremonial dresses, bodypainting and headdresses. For the Wik people, these ceremonial elements are expressions of their cultural association, and consequently of its traditional knowledge. As a matter of fact, within the indigenous community, there is customary law protecting

507 Terri Janke, Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions, WIPO, 2003, p.87
elements of ceremonies and performing arts by the action of senior custodians. In addition, this customary law provides for punishment for unauthorized reproduction of ceremonial elements. Therefore, the Cape York Land Council asked for advice on how to deal with reproduction of the images of the dancers and intellectual property rights. In the end, the unauthorized use stopped through an agreement with the photographer. Nevertheless, it is important to highlight that if this case had been brought before the Australian Court, it would have faced unclear merits, which would not have preserved indigenous rights over their traditional knowledge. Indeed, according to the Australian law, performers’ intellectual property rights protect only sound and audiovisual recordings; whereas, it does not protect traditional knowledge from misappropriation through still photography.508

In conclusion, traditional knowledge and traditional cultural expressions of indigenous communities are not fully protected by the contemporary intellectual property rights framework. This is why WIPO created the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which sessions start with panels of representatives of indigenous peoples and local communities.509

4.2 WIPO and Indigenous Traditional Knowledge

Together with UNESCO, WIPO is the other UN specialized agency playing a role in the protection of indigenous intangible cultural heritage, in particular of its elements that can be associated to the sphere of traditional knowledge, and of some aspects of their biodiversity rights.

4.2.1 The World Intellectual Property Organization and Traditional Knowledge

The World Intellectual Property Organization was established with the adoption of the Convention Establishing the World Intellectual Property

Organization, which entered into force in 1970. Although its establishment can be considered recent, the basis of this organization dates back to the 19th century when the Paris Convention for the Protection of Intellectual Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886) were adopted.\textsuperscript{510}

The mandate of WIPO is fostering the promotion, creation, dissemination, use, and protection of “works of the human mind for the economic, cultural and social progress of all mankind” through international cooperation. Moreover, this protection is aimed at preserving the interests of creators and at providing access to the economic and cultural benefits creativity offers.\textsuperscript{511}

From the mere protection of works of creativity through intellectual property rights, the mandate of WIPO has broadened with the passing of time. As a matter of fact, WIPO has recently engaged in the process of international cooperation for development. Example of the organization’s engagement in development is the agreement with the WTO for which WIPO is entitled to assist developing countries in the implementation of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).\textsuperscript{512}

Moreover, WIPO has been implementing rules for the protection of traditional knowledge and traditional cultural expressions, in order to face and find a solution to the charges addressed towards the IPR regime of not being able to effectively protect traditional knowledge.\textsuperscript{513} As a matter of fact, in 2000, the organization established an Intergovernmental Committee on Intellectual Property and Genetic resources, Traditional Knowledge and Folklore (IGC).\textsuperscript{514} The mandate of this committee is to present to the WIPO General Assembly an

\textsuperscript{512} WIPO, \textit{WIPO Intellectual Property Handbook}, 2004, para. 1.18, p.6
\textsuperscript{513} WIPO, \textit{WIPO Intellectual Property Handbook}, 2004, p.56-64
international legally-binding instrument for the protection of traditional knowledge, biodiversity and folklore.\textsuperscript{515}

Although it cannot be considered an official definition, as previously argued, the organization has identified, in a broad and non-comprehensive manner, traditional knowledge as the cultural expressions enshrined in minorities and indigenous identities, which are practiced in traditional manner.\textsuperscript{516} Moreover, it is possible to protect traditional knowledge practiced nowadays by intellectual property rights within the WIPO regime; however, with an individual property approach that collides with indigenous collective identity. On the contrary WIPO argues that pre-existing traditional knowledge and traditional cultural expression cannot always be protected by intellectual property and it consequently becomes enshrined in the public domain, rather than in domain of its community.\textsuperscript{517}

Nevertheless, despite the technical difficulties, WIPO engaged in finding solutions to these issues. As a matter of fact, the work of WIPO on establishing an effective framework of intellectual property rights for traditional knowledge and traditional cultural expressions is extended over a period of more than 30 years. Moreover, a relevant part of this work has been done jointly with UNESCO.\textsuperscript{518}

Historically, the first step of the WIPO protection over traditional knowledge took place with the adoption of Article 15(4) on the intellectual protection of folklore added in the Berne Convention within the 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works.\textsuperscript{519} Furthermore, as far as folklore is concerned, Section 6 of the Tunis Model Law on Copyright for Developing Countries (1976) – which was adopted thanks to the actions of WIPO and UNESCO – is dedicated to the

\textsuperscript{516} WIPO, \textit{WIPO Intellectual Property Handbook}, 2004, para. 2.271, p.58
\textsuperscript{518} WIPO, \textit{WIPO Intellectual Property Handbook}, 2004, para. 2.277, p.60
safeguarding of works of national folklore.\textsuperscript{520} Besides, other national legislation on intellectual property concerning folklore were adopted through the support of WIPO.

Moreover, in 1992, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted by a Committee of Governmental Experts under the supervision of WIPO and UNESCO. According to this Model Provision, the protection of folklore through intellectual property rights can be effective only with implementation of rules at the national level. As a matter of fact, several states implemented regulations taking the Model Provision as basis. However, the majority of countries argued that more could be done.\textsuperscript{521} Indeed, a relevant quantity of states did not implement any legislation on traditional knowledge and IPR.

In addition, in 1997, UNESCO and WIPO held together the UNESCO-WIPO World Forum on The Protection of Folklore in Phuket. The aim of this forum was to achieve the adoption of a joint action plan of the protection of folklore. The states party to the forum recognized the need to “define, identify, conserve, preserve, disseminate, and protect folklore which has been a living cultural heritage of great economic, social, and political significance from time immemorial.”\textsuperscript{522} Furthermore, states argued that no adequate protection of folklore, consequently of traditional knowledge was reached through the intellectual property regime of the time, whose revision in order to fit this need was assigned to both WIPO and UNESCO. Finally, the action plan provided for the establishment of a Committee of Experts for the conservation and protection


of traditional knowledge with the goal of drafting an agreement for the *sui generis* protection of folklore, traditional knowledge and traditional cultural expressions.\(^{523}\)

Besides, during 1998 and 1999, WIPO conducted research on traditional knowledge through fact-finding missions in 28 different countries in order to identify the needs and expectations of traditional knowledge holders with respect to intellectual property. WIPO interviewed and consulted representative of minorities, indigenous peoples, local communities, NGOs, academics, researcher and private investors to have the broader picture possible on what means intellectual property with respect to traditional knowledge.\(^{524}\) The findings of this research has been used for issuing a report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders in 2001.

WIPO in this report recognizes the importance of traditional knowledge for development, environmental benefits, societies and cultures.\(^{525}\) Moreover, the organization argues that, although some elements of traditional knowledge can be protected through intellectual property law, its holistic nature, collective origination and oral transmission and preservation cannot be fully safeguarded by the intellectual property regime.\(^{526}\) As a matter of fact, WIPO tries the following conclusions as far as traditional knowledge’s protection through intellectual property is concerned.

At first, WIPO engages in the process of awareness-raising of the role of intellectual property in the field of traditional knowledge in particular within indigenous communities. Furthermore, WIPO stresses the need for prevention of unauthorized acquisition of traditional knowledge through the intellectual property regime. In addition, the organization argues for the implementation of cooperation between traditional knowledge holder, governments, NGOs and stakeholders at the international, regional and national levels. Moreover, WIPO engages in studying a new framework for collective acquisition, management and


enforcement of intellectual property rights as far as indigenous traditional knowledge is concerned, which is thought to take into consideration indigenous customary law. Further, in the long-term perspective, the organization wishes to be able to establish new intellectual property tools that will protect the fields of traditional knowledge not already protected by intellectual property rights, with particular reference to a *sui generis* system to safeguard collective aspects of traditional knowledge. Finally, WIPO stresses for the involvement of indigenous peoples within the organization.\footnote{WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions* (1998-1999), 2001, p.231-232}

The establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2000 witnesses the commitment of the organization in reaching these goals. The actual mandate of the Committed for the biennium 2018/2019 reflects that work to reach the effectiveness of intellectual property rights in the field of traditional knowledge is still long.\footnote{WIPO, *Agenda Item 18 – Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 2017, available at: http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf (accessed 11 September 2018)} As a matter of fact, the Committee is asked to continue working on the drafting of an intellectual property rights international legal instrument dedicated to traditional knowledge, traditional cultural expressions and genetic resources. Besides, through negotiation, the Committee is entitled with the task of getting to a common ground on “definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.”\footnote{WIPO, *Agenda Item 18 – Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 2017, p.1} In addition, the mandate entitles the Committee with the power to create groups of expert for the address of specific legal and technical issues and policies. Finally, the Secretariat of the Committee is asked to provide updated
studies on traditional knowledge and genetic resources negotiations within the intellectual property rights framework.\textsuperscript{530}

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is the body of the organization also dealing with indigenous issues.

\textbf{4.2.2 WIPO and Indigenous Peoples}

As it has been previously argued, in the debate about the protection of traditional knowledge with the use of intellectual property rights, indigenous peoples play a relevant role in the claims for a more suitable framework.

The involvement of indigenous peoples within WIPO policies and programs started during the fact-finding research of 1998 and 1999. As a matter of fact, indigenous peoples where asked to contributed with their opinions needs and expectations with respect to intellectual property rights as means for the protection of their traditional knowledge.\textsuperscript{531} The claims held by indigenous peoples to WIPO were strictly connected to their collectiveness. Indeed, indigenous peoples most vital claim was, and still is, to create a collective form of intellectual property, which will be more suitable for their collective way of life. Nevertheless, some communities positively expressed wish to have the chance of getting intellectual property protection for their traditional knowledge, in order to promote their economic development. Secondly, indigenous communities argued that intellectual property can be an effective tool for preventing the misappropriation and the unauthorized use of their traditional knowledge and traditional cultural expressions by others.\textsuperscript{532}

These argumentations presented to WIPO by indigenous representatives on intellectual property rights dealing with traditional knowledge reflect and give power to the belief of those scholars stressing that, even though the intellectual property regime does not provide for collective ownership, it can still be a means for traditional knowledge protection.

\textsuperscript{530} WIPO, \textit{Agenda Item 18 – Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore}, 2017, p.1-2
Another important issue dealt by the organization is the one of national legislation, indeed, although WIPO affirmed its commitment to the protection of indigenous traditional knowledge, it underlined that it is difficult to actually implement it without an adequate national intellectual property legislation. As a consequence, the organization decided to start a program with the scope of offering the help of its experts to states in order to create a suitable framework for the safeguarding of indigenous creativity and innovation derived from their traditional knowledge and traditional cultural expressions.533

In particular, as far as indigenous peoples’ claims to intellectual property management are concerned, the body of the organization whose mandate enshrines commitment to solving indigenous issues is the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. As a matter of fact, during its 7th session, in 2004, the Committee recognized the need for participation of indigenous representatives in order to actually implement a suitable traditional knowledge framework of IPR.534

Moreover, a document, registered as WIPO/GRTKF/IC/5/11, was submitted to the 4th session of the Committee that lists the organization guidelines concerning indigenous peoples. At first, the Committee recognized that indigenous communities have to be treated as separate entities with respect to the states they live in. However, the document recalls that the indigenous related issues should not deviate the Committee from its mandate, which shall always be focused on its intellectual property approach.535

By the time of the 7th session, held in 2004, the Committee underlined some positive developments in practical terms. As a matter of fact, some member states of the developing world used the WIPO funds to support the participation of

535 WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Participation of Indigenous and Local Communities, WIPO/GRTKF/IC/7/12, 2004, para.5, p.3
indigenous representatives in the programs of the organization. Furthermore, consultations of NGO representatives, in particular of indigenous ones, have been started within WIPO policies and interaction with external private stakeholders. Finally, the organization has been continuing working with the United Nations Permanent Forum on Indigenous Issues in order to come to a solution for the intellectual property protection of indigenous traditional cultural expressions and knowledge.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Participation of Indigenous and Local Communities, WIPO/GRTKF/IC/7/12, 2004, para.7, p.4}

Moreover, it is relevant to highlight the establishment by the WIPO General Assembly of the Voluntary Fund for Accredited Indigenous and Local Communities in 2005. During the following years, the Committee has always stressed, and still do stress, the importance of this program inviting all members of the Committee to contribute and to call upon all interested public and private entities to participate in the raising of funds.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Decisions of the Thirty-Seventh Session of the Committee, 2018, p.2, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_decisions.pdf (accessed 18 September 2018)}

Finally, on its 8\textsuperscript{th} session, the Committee launched the first WIPO Panel on Indigenous and Local Communities’ Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources, as established during the former session.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Information Note for Panel of Indigenous and Local Communities, WIPO/GRTKF/IC/8/INF/6, 2005, p.2, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_inf_6.pdf (accessed 17 September 2018)} The aim of this panel, which opens every session of the Committee since 2005, is to give the opportunity to indigenous representatives of present the traditional knowledge, traditional cultural expressions and genetic resources of their communities, underling the relationship with their cultural identity and community integrity. Furthermore, indigenous representatives are asked to explain how their customary law works for the protection of their cultural heritage and traditional knowledge. In addition, they are asked to report the communities’ experiences with misappropriation and misuse of their traditional knowledge and how they
dealt with the situation. Finally, they are asked to express their expectations from WIPO and the Committee and to suggest the fields where the organization should more work on.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Information Note for Panel of Indigenous and Local Communities, WIPO/GRTKF/IC/8/INF/6, 2005, p.3}

Besides, as already reported, within the mandate of the Committee, in the Biennium 2018/2019 \textit{ad hoc} groups of experts are going to be established. The decisions of the 37th sessions provide that the indigenous caucus nominates two experts to take part in the \textit{ad hoc} experts’ groups.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Decisions of the Thirty-Seventh Session of the Committee, 2018, p.3}


On the one hand, the draft articles on traditional cultural expressions recognized the UNDRIP and support the involvement of indigenous peoples in WIPO policies. The free, prior and informed consent by indigenous peoples is enshrined as primary action to undertake when intellectual property has to be applied to indigenous traditional cultural expressions. Moreover, the draft document underlines that the international legal instrument that will derive from
the adoption of this draft must not in any form violate indigenous rights.\textsuperscript{544} Furthermore, draft Article 4 entitled indigenous peoples to be the primary beneficiaries of the legal instruments.\textsuperscript{545} As for Article 5, only alternative 3 option 1 explicitly considers indigenous peoples.\textsuperscript{546} Finally, Article 15 urges the provision by member states for resources to allocate to indigenous communities in order to implement capacity-building projects to foster their economic, social and cultural development, and to implement the intellectual property appropriate mechanism designed together with the indigenous communities within WIPO.\textsuperscript{547}

On the other hand, the draft articles for traditional knowledge share with the former the same preamble. Moreover, Article 1 alternative 4 on misappropriation argues that it always occurs when there is no free, prior and informed consent by indigenous peoples.\textsuperscript{548} Further, the same draft article reports alternatives to the definition of secret traditional knowledge, a topic particularly felt as vital by indigenous peoples, of which the most adequate for indigenous issues is alternative 3, affirming that secret knowledge is part of traditional knowledge but it is “held and regarded as secret by applicable indigenous [peoples]” through “their customary laws, protocols, practices under the understanding that the use or application of the traditional knowledge is constrained within a framework of secrecy.”\textsuperscript{549} As for draft article 4 on beneficiaries, it is the same of the articles regarding traditional cultural expressions. Article 14 argues that the legal instrument cannot be an excuse for derogation of indigenous peoples’ rights.\textsuperscript{550} Finally, article 16 is on the transboundary nature of traditional knowledge and it argues that when traditional knowledge is common to more indigenous

\textsuperscript{544} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Cultural Expressions: Draft Articles}, 2018, Preamble, p.2-3
\textsuperscript{545} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Cultural Expressions: Draft Articles}, 2018, Article 4, p.8
\textsuperscript{546} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Cultural Expressions: Draft Articles}, 2018, Article 5, p.9-10
\textsuperscript{547} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Cultural Expressions: Draft Articles}, 2018, Article 15, p.24
\textsuperscript{548} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Knowledge: Draft Articles}, 2018, Article 1, p.4
\textsuperscript{549} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Knowledge: Draft Articles}, 2018, Article 1, p.5
\textsuperscript{550} WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, \textit{The Protection of Traditional Knowledge: Draft Articles}, 2018, Article 14, p.25
communities that live in different countries, those countries have to cooperate in order to effectively protect traditional knowledge through the implementation of the instrument’s legislation.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, The Protection of Traditional Knowledge: Draft Articles, 2018, Article 16, p.27}

What can be evinced from the work of the 37\textsuperscript{th} session of the Intergovernmental Committee on Intellectual Property and Genetic Resources is that WIPO is surely increasingly trying to develop an intellectual property framework suitable for indigenous peoples’ traditional cultural expressions and traditional knowledge. Nevertheless, at the present days, this system is still a draft that cannot be applicable in any ways. As a consequence, it is hard to commit states to implement national legislations more favorable of indigenous issues with respect to intellectual property. However, it must be argued that some states already approved \textit{sui generis} intellectual property national laws and regulations for the protection of traditional knowledge.\footnote{WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Proposal for the Terms of Reference for a Study on Existing Sui Generis Systems for the Protection of Traditional Knowledge, 2018, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_16.pdf (accessed 18 September 2018)} Examples of states that have implemented \textit{sui generis} traditional knowledge laws are, among others, Brazil, Ecuador, Egypt, Ethiopia, Peru, the Philippines, the Russian Federation, and Thailand.\footnote{Berkman Klein Center for Internet & Society at Harvard University Website, Traditional Knowledge, available at: https://cyber.harvard.edu/cx/Traditional_Knowledge (accessed 20 September 2018)} Nevertheless, it is vital to always recall that this implementation only derived from voluntary basis.
Conclusion

This dissertation has tried to answer to the following questions. Which rights are indigenous rights? Are these rights really protected at all levels? To this aim, it has been conducted a research on the history of the affirmation of indigenous peoples’ rights at the international, regional and national levels. This investigation was held through the analysis of indigenous peoples' claims, human rights international legal instruments, jurisprudence of international and regional courts, General Comments by UN Treaty Bodies and national legislation.

The international community has recognized in the course of the last decades the rights with which indigenous peoples are entitled. This recognition was made official in 2007 with the adoption of the UNDRIP. First of all, all indigenous rights have been affirmed to be collective ones. As a matter of fact, an individualistic approach does not protect the rights of indigenous peoples because of their identity being built on their lifestyle based on collectivity. Moreover, indigenous peoples are entitled with the rights to self-determination, self-identification and self-governance, as without them they cannot enjoy all their other rights.

Connected to the right to self-determination, the right to development has been recognized to indigenous communities. This right is the basis of indigenous land rights. Indeed, the right to land and natural resources is vital for the survival of indigenous peoples. This is due to the fact that indigenous communities have a deep relationship with their ancestral lands, which are consequently fundamental for their identities and cultures.

As a consequence, indigenous self-determination is vital for the implementation and protection of indigenous rights as a whole, which have been identified to possess a cultural dimension. This is why indigenous rights are all cultural rights. For instance, the dissertation is mainly based on a cultural perspective. As a matter of fact, the majority of the thesis focuses on indigenous cultural rights, cultural heritage and traditional knowledge protection.

All indigenous rights are affirmed in the UNDRIP, declaration that has been declared as vital to implement by all regional systems of human rights protection.
and all UN agencies. Moreover, all states, even those that voted against its adoption, have now recognized its importance. This gives to the UNDRIP a strong legal status although it is an instrument of soft-law, so not legally binding per se.

However, are these rights really implemented? The answer to this question is not simple. As a matter of fact, the implementation is effective on the majority of grounds but not at all levels of legislation at the same time and not for all indigenous rights.

As far as the right to self-determination is concerned, its implementation is effective at the international and regional levels. Nevertheless, although all states have recognized indigenous self-determination, its implementation is not granted within all of them. The same happens with the right to development. Moreover, this phenomenon also occurs with the right to non-discrimination. In particular, women’s discrimination is not respected by states as reported by the studies of the UN Special Rapporteur on Violence against Women, its Causes and Consequences Dubravka Šimonović. Thus, states should actually implement these rights to protect indigenous communities and women.

On the contrary, the right to a healthy environment is protected by customary law of national legislations and regional systems of protection of human rights. Whereas, at the international level there is not its official recognition. Therefore, the official affirmation at the international level may be implemented in order to push more states to respect this right.

Besides, cultural rights have a more complicated implementation at all levels of law enforcement. As a matter of fact, some distinctions have to be presented. First of all, as far as the right to cultural diversity is concerned, it is recognized at all levels and its application does not entail particular difficulties. Nonetheless, some states still have an assimilation approach towards indigenous peoples. Indeed, some policies of assimilation have been conducted from Western states with respect to hunting and religious practices involving animals, as they are considered to violate animals’ rights. On the contrary those practices are fundamental for indigenous physical and cultural survival; consequently, their denial means a lack of implementation of indigenous rights.
Secondly, the right to protect cultural heritage of indigenous peoples has a troubled fulfillment. As a matter of fact, it happens at varying degrees. The protection of tangible cultural heritage arrives primarily from the policies of UNESCO. As a consequence, tangible cultural heritage protection is affirmed to be a vital goal to pursue by the international community. Also, regional systems of protection of human rights, namely the African Commission of Human and Peoples’, the Council of Europe and the Inter-American Commission on Human Rights, have committed to fulfill tangible cultural heritage protection through the adoption of regional treaties and jurisprudence. At the national levels tangible cultural heritage is protected through the inscription of indigenous heritage to the World Heritage Lists. However, this is still state practice on voluntary-base, which does not have legal causes and consequences.

In addition, problems concerning effective safeguarding of indigenous cultural rights arise within World Heritage Sites. Indeed, indigenous peoples are not participating in the management of the World Heritage Sites they live in. As a consequence, decisions of the World Heritage Committee on those sites are violating the free, prior and informed consent assigned to indigenous peoples by the UNDRIP. In addition, former Special Rapporteur James Anaya has accused in a report the World Heritage Committee to pursue policies and programs within its sites that endanger the survival of indigenous peoples. Therefore, the action of the World Heritage Committee is not supporting the protection of indigenous rights both at the international level, as it is a body of UNESCO, and at the national level, where World Heritage Sites are. In order to remedy this lack, the WHC must implement indigenous participation in the management of World Heritage Sites.

Moreover, in strict relation with the right to protect tangible cultural heritage, there is the right to repatriation of indigenous human remains and sacred object. This right is affirmed at the international level by the UNDRIP. Further, the regional systems have committed to its implementation. Finally, this right is actually implemented at the national level. Without national legislation, repatriation of indigenous human remains, and sacred objects cannot occur. As a matter of fact, there are various examples of national legislation effectively fulfilling the
right. For instance, the US NAGPRA legislation is one of the most exhaustive one. This is particularly true for Western states and all other states should try to implement a more comprehensive legislation on the topic.

Furthermore, as far as intangible cultural heritage is concerned, its protection is principally dealt with at the national level and at the international level by UNESCO and WIPO. Whereas, at the regional level jurisprudence has given its contribution to the topic. As far as the national level is concerned, it is important to highlight that the protection of intangible cultural heritage is protected if all other rights of indigenous peoples are not violated. Indeed, the deep relationship of indigenous culture to all rights makes their implementation a basis for the safeguarding of indigenous intangible cultural heritage. As a matter of fact, regional jurisprudence has identified some cases where national legislations were violation indigenous rights, as the ones to land, to freedom of religion and to humane treatment, which caused the inability for indigenous peoples to safeguard their intangible cultural heritage.

Besides, the evaluation of the effectiveness of UNESCO and WIPO work on the safeguarding of intangible cultural heritage requires deep concerns. UNESCO protection of intangible cultural heritage is directed to this heritage in general. Its policies and programs of safeguarding are issues by the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage that functions as the WHC through the implementation of intangible heritage lists. Nevertheless, it still works on voluntary basis of states whether to inscribe indigenous intangible cultural heritage to these lists. As a matter of fact, it can be noted that at the national levels South American and African states have broadly nominated diverse indigenous cultural heritage to protect. On the contrary, Western states have not nominated yet any indigenous intangible cultural heritage, although a great indigenous presence on their territories.

Finally, WIPO deals with the aspect of intangible cultural heritage that are traditional knowledge, traditional cultural expressions – or folklore – and biodiversity rights. The safeguarding of WIPO is based on intellectual property rights. intellectual property rights such as copyrights and patents are used for the protection of traditional knowledge in order to fight against its misappropriation.
However, the intellectual property framework does not provide for an adequate protection of traditional knowledge and traditional cultural expressions of indigenous peoples. This is why intellectual property rights entail an individual ownership of the traditional knowledge once safeguarded under intellectual property. Indeed, indigenous peoples do not conceive individual ownership and have been asking for a collective one. Moreover, intellectual property rights have been accused of having favored misappropriation and misuse of indigenous traditional knowledge by non-indigenous businesses. Therefore, the current intellectual property regime does not offer actual implementation of the protection of indigenous traditional knowledge and cultural expression. Indeed, WIPO is aware of its unsuitability for indigenous issues this is why its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is working with indigenous representatives in order to create a sui generis system of intellectual property rights enshrining indigenous claims and indigenous rights. The approach of why ad hoc standards is still based on an economic approach and less on a human rights one. As a consequence, the international level is still not able to provide effective implementation of intellectual property rights in a way suitable for indigenous peoples. While, the regional systems of human rights protection are not dealing with this aspect of indigenous cultural rights. Finally, nowadays, the effective protection of traditional knowledge, cultural expression and biodiversity rights through intellectual property rights occurs only of states have decided to implement in their national legislation sui generis standards creating an ad hoc intellectual property framework able to accommodate indigenous claims. Western states do not seem to be inclined to the adoption of sui generis standards. Whereas, South American states and the Philippines created an indigenous comprehensive intellectual property rights framework.

In order to come to the conclusion and to answer to the questions posed by this dissertation, indigenous peoples’ rights are of disparate natures, but they are all collective rights. Indeed, individual human rights are not full-comprehensive of indigenous needs. Moreover, all indigenous rights are based on culture. As a consequence, cultural rights are vital for indigenous physical and spiritual survival.
Secondly, the official recognition of indigenous rights has occurred at all levels of the existing legal systems. As a matter of fact, at the international level, indigenous rights gained official recognition in 2007 with the adoption of the UN Declaration on the Rights of Indigenous Peoples. Besides, at the regional level the recognition is reflected by jurisprudence of the systems of human rights protection, in particular of the Inter-American, African and European ones, which have been implementing the rights enshrined in the UNDRIP. Finally, at the national level, the recognition of indigenous peoples’ rights is witnessed by the endorsement of the UNDRIP even by those states that in 2007 voted against its adoption.

To conclude, implementation is generally reached at all levels of law enforcement and in almost all fields. Nonetheless, vital lacks have to be addressed. Those are the denial of national recognition of indigenous land right, the inadequateness at the international and national level of the intellectual property regime, discrimination at the national level and the application of the principles of participation and free prior and informed consent at both national and international levels. The regional level always implements indigenous rights and implemented them also before the UNDRIP adoption.

As a consequence, indigenous rights are not effectively and adequately protected at the international, regional and national levels. Indeed, it is vital to find solutions for improving this implementation and making it fully exhaustive. Otherwise, indigenous rights will never effectively put under comprehensive protection. Further, if implementation is not reached, their promotion will face troubles before happening. However, positive hope for the achievement of all-comprehensive implementation is built on the increasing power of indigenous peoples at the international level, which already manifests a substantial improvement in the lives of indigenous peoples with respect to the past century.
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