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The Right to Land of Indigenous Peoples in Latin-America: collectivity, culture and territory

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Abstract

Questa tesi si propone l'obiettivo di analizzare il diritto alla terra delle popolazioni indigene dell'America Latina, nell'ottica culturale della loro specificità. In particolare, si tenterà di vedere come il riconoscimento della proprietà collettiva apra la strada ad una comprensione interculturale dei diritti delle popolazioni indigene.

Per lo sviluppo di questo tipo di ricerca si partirà dalla comprensione del diritto umano alla terra e alla sua articolazione per le popolazioni indigene, soggetto di questa tesi. In particolare, la prima parte di questo elaborato si propone di analizzare il diritto umano alla terra da una prospettiva internazionale, all'interno della quale diverse dinamiche ne limitano l'esercizio. Il diritto alla terra è riconosciuto e maturato nella cornice dei diritti riconosciuti alle popolazioni indigene, fortemente legate alla terra, non solo per la loro sopravvivenza fisica, ma anche per la loro sopravvivenza culturale. Tuttavia, il diritto alla terra è stato riconosciuto come fondamentale per la sopravvivenza di altri segmenti della popolazione, i quali, a causa di dinamiche di discriminazione ed espropriazione si ritrovano in uno stato di estrema vulnerabilità e povertà, nonché marginalizzazione.

La terra rappresenta l'oggetto di interessi diversi che sono inseriti nella logica del profitto e del guadagno. Ciò nonostante, i Relatori e il lavoro interpretativo dei Comitati delle Nazioni Unite, in particolare del Comitato per i diritti economici, sociali e culturali, ne hanno riconosciuto il legame fondamentale per la realizzazione di altri diritti umani, tra i quali il diritto al cibo, all'acqua, ad un'abitazione adeguata, all'eguaglianza di genere. Per concludere in modo accurato questa prima parte di ricerca, nonostante non rappresentino soggetto di analisi, saranno brevemente esaminate le popolazioni rurali, che diventano rilevanti nel momento in cui si tenta di identificare e articolare il diritto umano alla terra. La prospettiva internazionale delineata diventa ancora più rilevante nel momento in cui si andrà a definire il legame che unisce il diritto alla terra e la cultura dei soggetti in questione. Questa discussione sarà oggetto di esame nel secondo capitolo di questo elaborato, che vedrà delle riflessioni iniziali in merito agli standard internazionali e che successivamente si propone di entrare nel merito del diritto alla terra delle popolazioni indigene in America Latina, analizzando nel dettaglio la caratteristica collettiva e culturale di questo particolare diritto, nel contesto del sistema interamericano di protezione dei diritti umani.

A livello internazionale, si è riconosciuta e protetta la particolare forma di proprietà collettiva di cui godono le comunità indigene, riconosciuta, in modo particolare, nella

Dichiarazione delle Nazioni Unite sui diritti delle popolazioni indigene, che diventa, in congiunto ad altri strumenti internazionali, quali le Convenzioni ILO, punto di riferimento per il lavoro della Corte Interamericana.

All'interno del contesto interamericano, la Corte ha svolto un ruolo pionieristico nel riconoscimento del diritto collettivo alla terra, nella sua giurisprudenza. In particolare, nella sentenza emessa in riferimento al caso della comunità indigena Awas Tingni contro lo Stato del Nicaragua, la Corte, attraverso un'interpretazione evolutiva dell'articolo 21 della Convenzione Americana dei diritti umani, ha dichiarato che il diritto alla proprietà collettiva sulla terra della comunità è riconosciuto e protetto in virtù dell'articolo 21, che tutela il diritto alla proprietà individuale, adottando così una nuova forma di proprietà che si svincola dal concetto tradizionale di proprietà individuale. La giurisprudenza della Corte Interamericana, in merito al diritto alla terra, diventa elemento di riflessione e riferimento per la giurisprudenza della Commissione Africana, in particolare in relazione al caso Endorois. L'analisi di questi due casi di studio diventa l'opportunità per sottolineare sia le differenze che i punti di forza di entrambi i sistemi giuridici, nell'ottica di una prospettiva che mira a elevare la giurisprudenza della Corte interamericana su un piano di sviluppo del riconoscimento dei diritti delle popolazioni indigene più robusto.

L'analisi della giurisprudenza della Corte Interamericana permette di entrare nel ruolo culturale che assume la terra, che diventa tale per cui la sua protezione e difesa è stata più volte confermata. In particolare, si riconosce come nello stesso riconoscimento del diritto alla terra, sia imprescindibile il riconoscimento di un legame particolare con la cultura. Negare l'accesso alla terra, o il riconoscimento del diritto collettivo alla terra è negare il diritto di poter praticare cultura, tradizioni e spiritualità indigene. Questo legame tra cultura, terra e ambiente, più volte confermato e riconosciuto, anche a livello internazionale, apre la porta a un dialogo interculturale, che si rende fondamentale per la preservazione del carattere distinto e distintivo delle comunità indigene, che molto spesso rischiano l'"estinzione" a causa dell'assimilazione alla cultura e alla società dominante.

L'ultima e terza parte si propone di approfondire questo dialogo interculturale entrando nel concetto di "*interculturalidad*", specifico del contesto latino-americano e di come questo sia diventato il centro della discussione nel momento in cui ci si relaziona con i diritti delle comunità indigene. Questo concetto è entrato nel linguaggio giuridico per riconoscere la diversità culturale che le comunità indigene portano con sé, arricchendo il panorama culturale con la loro particolare visione del mondo.

L' "*interculturalidad*" è stata assunta in strumenti costituzionali, quali quelli di Bolivia ed Ecuador, in particolare, abbracciando pienamente la visione indigena, e sta sempre più affermandosi anche nel sistema Interamericano di protezione dei diritti umani. In particolare, si tenterà di radicalizzare il legame tra cultura e ambiente attraverso il concetto di "*buen vivir*" e il concetto di "*interculturalidad*", che la visione indigena e la storia indigena di colonizzazione e discriminazione portano con sé, e di come la natura elevata a soggetto giuridico, diventi fonte di diritti e doveri. All'interno di questo discorso interculturale, si noterà l'effetto che lo stile di vita indigeno ha sull'ambiente e sulla preservazione degli ecosistemi, in particolare con una breve riflessione della "traditional knowledge" indigena e dell'effetto che quest'ultima ha sulla conservazione della biodiversità, reiterando come la terra, quale base per la vita indigena sia precondizione per la protezione della "traditional knowledge" e il suo utilizzo.

List of abbreviations

ACHPR: African Charter on Human and Peoples' Rights

ACHR: American Convention on Human Rights

ADRIP: American Declaration on the Rights of Indigenous Peoples

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CERD: Committee on the Elimination of Racial Discrimination

CESCR: Committee on Economic, Social and Cultural Rights

ECOSOC: Economic and Social Council

EMRIP: Expert Mechanism on the Rights of Indigenous Peoples

FAO: Food and Agriculture Organization

FPIC: Free, Prior and Informed Consent

GC: General Comment

GEF: Global Environmental Facility

GR: General Recommendation

HRC: Human Rights Council

IACHR: Inter-American Commission of Human Rights

IACtHR: Inter-American Court of Human Rights

IASG: Inter-Agency Support Group

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

IK: Indigenous Knowledge

ILO: International Labour Organization

NGO: Non-Governmental Organization

OAS: Organization of American States

TCE: Traditional Cultural Expressions

TK: Traditional Knowledge

TRR: Traditional Resource Rights

UN: United Nations

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

UNEP: United Nations Environmental Program

UNESCO: United Nations Educational, Scientific and Cultural Organization

UNHCHR: United Nations High Commissioner for Human Rights

WIPO: World Intellectual Property Organization

Introduction

The scope of this dissertation is the analysis of the right to land of indigenous peoples in its cultural perspective. Specifically, I am going to see how the recognition of collective property paves the way for an intercultural understanding of indigenous peoples' rights. To support this argument, I will draw upon international, regional and national legal systems.

Land as a human right has had little space of recognition. From a legal perspective, land falls within land laws and land tenure.[1] The discourse around land has taken the form of individuating and commoditising entitlements to land, where access and ownership are conceived in liberal-market terms.[2] This way of conceiving land rights does not enter the economic system to eradicate social inequalities, rather it facilitates the expansion of the market since land is treated as a commodity aiming at profit-making.[3]

Another element that is important to stress is land conceived in terms of property rights. The notion of property rights concerns the rules that regulate the relationship between the individual and the object of the property. With reference to land this comprehends a bundle of rights with reference to the right to benefit from the use of the land, the right to manage land, the right to derive income from the use of land, the right to allocate it, inherit it or transfer it, the right to exclude others from using it.[4] Conflict around property rights to land are not rare and tend to increase discrimination and poverty levels. Moreover, when the framework that regulates property rights to land is inadequate, privileging the wealthier and more powerful, commodification of the land may lead to concentration of landownership and social inequalities.[5]

Therefore, the recognition of land as human right changes the perspective, the content and also the scope, because it goes to the foundation of inequalities in order to eradicate them. Specifically, the human right to land is foundational and vital for indigenous peoples, the subject of this dissertation, as well as for other segments of the population, who are very vulnerable to issues regarding the management, access and use of land.

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[1] FAO (2002), "Land tenure and rural development", *FAO Land Tenure Studies*, Rome
[2] Gelbspan, Thea and Nagaraj, Vijay K. (2012), "Seeding hope? Land in the International Human Rights Agenda: Challenges and Prospects", *Working paper International Network for economic, social and cultural rights (ESCR-NET)*, p. 9
[3] Ibid.
[4] FAO (2002), "Land tenure and rural development", *FAO Land Tenure Studies*, Rome
[5] UN (2015), "Land and Human Rights: Standards and Applications", HR/PUB/15/5/Add.1, p. 53

These issues are going to be discussed in the first chapter, with specific reference to indigenous peoples. We will see that for indigenous peoples, land is the source of cultural identity. Their issues began to gain momentum in the international arena during the 1960s, at the time of decolonization after a long process for the recognition of their rights, in particular the right to self-determination and the right to land. The specificity of indigenous groups from other groups and from groups intended as minorities, lies in the fact that their fights for the right to land are embedded in their identity as culturally linked to land. Moreover, in the framework of the human right to land, other human rights depend on its protection, namely the right to food, the right to water, the right to adequate housing and the right to gender equality. These human rights are not only valuable for the construction of the human right to land as such, but also for indigenous peoples. Land rights have also developed in relation to rural populations, which are going to be discussed briefly at the end of this chapter so as to give a more accurate framework on the debate around the human right to land.

The relationship between land and culture of indigenous peoples is going to be subject of the second chapter. The first part is going to provide us with the international framework, which is going to be fundamental for the analysis of the Inter-American system of protection of human rights. Specifically, I will look at how land and culture are framed within international legal instruments, in particular the UNDRIP and the ILO Conventions, which are considered texts of reference for the Inter-American Court. The second part of the chapter is dedicated to the Inter-American system of human rights, drawing from the main Inter-American human-rights instruments, and from the jurisprudence of the enforcement mechanisms of the system, namely the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.

We will see that the link between land and culture of indigenous peoples needs the recognition of a new approach to their rights, i.e. an intercultural approach. This perspective opens the way for a more comprehensive, inclusive and past-reparatory way of protecting indigenous peoples' rights, within a system that in history has, not only, neglected them, but also discriminated them, colonized them and assimilated them to the dominant culture.

The first ruling on indigenous land rights was the case of Awas Tingni, now leading case in matters concerning indigenous peoples' right to land. From this case on, the jurisprudence of the Inter-American Court has developed an innovative system of

protection, which is considered the most robust compared to the African system of protection of human rights, which is also concerned with indigenous peoples' rights.

Given the need to develop and intercultural approach to indigenous peoples' culture, in the third chapter we will see how this approach has developed in Latin-America, namely *interculturalidad*.

Interculturalidad has to be understood as a revolutionary notion that developed along with indigenous movements, who were looking for a more equitable relationship between the dominant culture and indigenous groups. The aim of *interculturalidad* is to uproot the structural discrimination system within which indigenous groups movements have fostered and pushed for change. This approach is more visible in the Constitutions of Bolivia and Ecuador that adopted it as principle, and as interpretative method in the jurisprudence of the Inter-American Court of Human Rights. Specifically, the intercultural interpretation allows for a more comprehensive, relational perspective on human rights protected in the American Convention on Human Rights, enriching, this way, indigenous peoples' rights.

The second part of the chapter is going to focus on the interrelation between *interculturalidad* and *buen vivir*. As it is intended, *buen vivir* is central to *interculturalidad* because it promotes the *interculturalización* of the State. The central element of *buen vivir* is Pachamama or otherwise said, nature. The revolutionary aspect is that, as we will see, nature is elevated in the Andean Constitutions as subject entitled to rights. This novelty is profoundly related to the cosmovision of indigenous groups, who live in symbiosis with nature, considering it as the place where human beings flourish. It is evident that the western notion of land, nature and environment cannot and does not work within indigenous philosophies and their way of act and live in the world. Moreover, in the analysis of the Constitutions it will be clear how *buen vivir* and *Pachamama* promote a new conception of development, which moves away from the western notion and creates a unique one based on Andean cosmovision, where the centre is sustainability, social equality and ecological justice. The chapter ends with a brief discussion about how the indigenous way of conceiving the land, nature and the environment, their practices and traditional knowledge have positive impact in the safeguard of ecosystems.

CHAPTER 1: THE HUMAN RIGHT TO LAND

For the purpose of the analysis of the human right to land I will begin by considering what it is that makes land subject of analysis and concern within human rights law. I will take into consideration the subjects, in relation to which the human right to land has mainly developed, namely indigenous peoples, which are going to be the subject of my analysis, and giving the cross-cutting nature of the right to land, I will look at how the protection of land is fundamental for the protection of other human rights.

1. What is at stake?

Why is land so fundamental? The answer to this question is rather complicated. The intricacy of the topic is due to a series of variables that make it difficult to articulate a human right to land and what is at stake goes beyond the conception of land as an economic tool.[6] We will see that for a specific segment of the population, namely indigenous peoples, land is not a commodity, or merely a commodity, but also the core element that identifies them both as peoples and human beings.[7] Policies and legislations of States have great impact and the consequences on land affect both people (economically, socially, culturally) and the environment.[8]

Land is the subject as well as object of interest, both of the people that need it to live, and of those, who want to make profit out of its use. The scope for the use of land is obviously different, according to the need of peoples. Yet, the consequences of its use vary greatly, because most of the times land is not conceived as a subject central for the drafting of a new human right, therefore protecting the segments of the population that could be the most vulnerable if availability or/and access to land is denied, but as a contested means of economic profit.[9] And these consequences will define, more or less, the path that the world, governments and international institutions are taking to safeguard the lives of thousands of peoples and the environment itself.

[6] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 4
[7] UN, HRC, *Study on the right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human right focus*, 27 March 2020, A/HRC/EMRIP/2020/2, para. 1
[8] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 4
[9] FIAN (2017), "The Human Right to Land", *FIAN International*, p. 13

Land, considered as a commodity,[10] can be the object of rivalry, especially in conflict and post-conflict situations[11], where people that are in areas of war are dispossessed of their land and with it, their homes and means to survive, in the name of territorial control and natural-resource exploitation.[12] The situation is even more fragile because most of the times the poorest and marginalised do not hold security of tenure,[13] and the difficulty to secure land and/or return of land (in post-conflict scenarios) could be the fuse that ignites more conflict and violence.[14]

Another aspect that revolves around land is its unequal distribution. Rights over land are at the core of economic and social reforms, which hit particularly the most vulnerable areas, as for example rural areas, where the population is subject to poverty.[15]. Unequal distribution of land mirrors the lack of agrarian reform contributing, this way, to increase poverty and social exclusion.[16] Another subject heavily hit by the unequal access to land and lack of its availability are women, that face heavy discrimination.[17] The vulnerability of the situation, among other overarching concerns, is evident in the *Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security* (Tenure Guidelines) drafted by the Food and Agriculture Organization (FAO), whose work contributes to the strengthening of international standards and setting of responsible practises related to the management of land in the context of the right to food.[18] These Guidelines are intended to pursue the sustainability of land management, poverty eradication, social stability, housing security, rural development, environmental protection and social and economic development as means to secure and protect the right to food,[19] influencing, both nationally and internationally, the practice of States.

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[10] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 11
[11] Gilbert, Jérémie (2013), "Land rights as human rights: the case for a specific right to land", *SUR – International Journal on Human Rights*, vol. 10, n. 18, p. 116
[12] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 12
[13] Gilbert, Jérémie (2013), "Land rights as human rights: the case for a specific right to land", *SUR – International Journal on Human Rights*, vol. 10, n. 18, 115
[14] Ibid., 116
[15] Ibid.
[16] De Schutter, Olivier (2010), "The Emerging Human Right to Land", *International Community Law Review*, vol. 12, n. 3, 328
[17] Ibid., 330
[18] FAO (2012), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 38th Special Session of Committee on Food Security, preface vi
[19] Ibid., 1.1

In understanding the situation of uncertainty surrounding land, a more recent phenomenon, known as 'land grabbing' is creating more precariousness as far as the livelihoods of people is concerned.[20] Land grabbing is a recent phenomenon, related to the 2007-8 crisis, whose main target lands are Africa, Latin America, Asia and some countries in East Europe.[21] Land grabs are very much important in the debate related to land, because lives of the poorest portions of the population depend on the availability of and accessibility to land and its underground resources. The lands (and waters) grabbed are used for the production of biofuels, which contribute greatly to environmental destruction.[22] This context of uncertainty has put the basis for the creation of several land rights movements, claiming the recognition and therefore affirmation of a right to land.[23] Pressure on land is rising quickly: the growth of the rural population associated with severe degradation of land, deforestation, large-plantation cultivations, intense farming and infrastructure-building all contribute to the scarcity of land.[24] Within this framework, a crucial role is also played by climate change, which puts further pressure on the debate.[25]

Many of the issues concerning land have been put forward by both social movements and grassroots movements. Even though the perspective and interests may be different between the two, there are many common demands.[26]

The first group of demands concerns the claim for the right to participate in policymaking and governance in relation to land;[27] the second group refers to the right to free expression and freedom of association;[28] a third group of demands concerns the rights to adequate housing, security of land and prohibition of forced eviction and displacement,[29] which have been closely linked to the special relationship that indigenous

[20] Gilbert, Jérémie (2013), "Land rights as human rights: the case for a specific right to land", *SUR – International Journal on Human Rights*, vol. 10, n. 18, pg. 116
[21] Nino, Michele (2016), "Land Grabbing, sovranità territoriale e diritto alla terra dei popoli indigeni", *Diritti Umani e Diritto Internazionale*, vol. 10, n. 1, p. 187
[22] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 9
[23] Gilbert, Jérémie (2013), "Land rights as human rights: the case for a specific right to land", *SUR – International Journal on Human Rights*, vol. 10, n. 18, pg. 116
[24] De Schutter, Olivier (2010), "The Emerging Human Right to Land", *International Community Law Review*, vol. 12, n. 3, p. 307
[25] FIAN (2017), "The Human right to land", *FIAN International*, p. 6
[26] Gelbspan, Thea and Nagaraj, Vijay K. (2012), "Seeding hope? Land in the International Human Rights Agenda: Challenges and Prospects", *Working paper International Network for economic, social and cultural rights (ESCR-NET)*, p. 5
[27] Ibid.
[28] Ibid., p. 6
[29] Ibid.

peoples have with their land;[30] a fourth group refers to environmental rights, sustainable development and the right to conserve biodiversity.[31] The correlation between securing indigenous land rights and positive conservation outcomes has been expressed in the 2016 report of Special Rapporteur Victoria Tauli-Corpuz, who stated that positive conservation results are often better achieved through securing tenure to indigenous peoples rather than through States' projects of protected areas.[32] The contribution of indigenous peoples' knowledge, innovations and practices for the conservation and customary use of biological diversity is expressed under article 8 (j) of the Convention on Biological Diversity, which recognises their close relationship with and dependency on biological resources.[33] And, the last group of demands focuses on the right to economic self-determination, to push for small-scale economic activities.[34]

Each of the variables that I attempted at describing above create a situation where the realization of a human right to land is impelling, particularly for those populations, which land and the environment are fundamental as sources of cultural and spiritual life, i.e. indigenous peoples, which are going to be subject of this dissertation.

2. Indigenous peoples

Indigenous peoples were among the first, who promoted and pushed for the recognition of land rights. However, the process was long and complicated. They were not recognized neither legal status nor any rights and thus they were subject to the existing patterns of colonization. Their issues began to gain international recognition from the 1960s.[35] Before that, in 1923, the indigenous leader Cayuga Chief Dakesh, representative of the Six Nations of the Iroquois came to Geneva asking for a hearing. He was denied reception, even though the European audience proved to be welcoming and receptive. A

[30] Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, 29 July 2016, A/71/229, para. 25
[31] Gelbspan, Thea and Nagaraj, Vijay K. (2012), "Seeding hope? Land in the International Human Rights Agenda: Challenges and Prospects", *Working Paper International Network for economic, social and cultural right (ESCR-NET)*, p. 6
[32] Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, 29 July 2016, A/71/229, para. 65
[33] Teran, Maria Yolanda (2016), "The Nagoya Protocol and Indigenous Peoples", *The International Indigenous Policy Journal*, vol. 7, issue 2, pg. 2
[34] Gelbspan, Thea and Nagaraj, Vijay K. (2012), "Seeding hope? Land in the International Human Rights Agenda: Challenges and Prospects", *Working Paper International Network for economic, social and cultural right (ESCR-NET)*, p. 7
[35] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 2

second attempt was made by the Maori indigenous leader W.T. Ratana, who first travelled to London to King George V and then to the League of Nations, in 1925, but was denied access on both occasions. He was petitioning against the breakdown of the Treaty of Waitangi, which gave sovereignty of the lands to the Maori community.[36]

The concern for indigenous peoples arose as part of a wider place of discussion that had to do with those groups who were subject to colonisation and its legacies.[37] Evidence of the advancement of the international community towards indigenous peoples' issues was with ILO (International Labour Organization). ILO was the first international organization addressing indigenous issues and it developed two international instruments.[38] The first was adopted in 1957, ILO Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries no. 107.[39]

ILO Convention no. 107 is the result of a number of studies, which reflect the inevitability of the assimilation of indigenous groups to the dominant culture and dominant society.[40] This aspect is also reflected in Convention 107, article 2.1, which states that 'Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries', underlying this philosophy of assimilation and integration. However, ILO Convention no. 107 came to be regarded as anachronistic and new discussion for the revision of the Convention took place in the late 1980s.[41]

The second, ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries,[42] replacing the previous one – ILO Convention 107 - was adopted in 1989, entered into force in 1991, and was ratified by 23 countries.[43] This Convention is important from the point of view of recognizing, among others, collective

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[36] Ibid.
[37] Anaya, S. James (2004), "Indigenous Peoples in International Law", Oxford University Press, p. 53
[38] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 3
[39] International Labour Organization (ILO), *Convention on Indigenous and Tribal Populations*, C07, 26 June 1957
[40] Niezen, Ronald (2003), "The Origins of the International Movement of Indigenous Peoples", in *The Origins of Indigenism: Human Rights and the Politics of Identity*, Berkeley, Los Angeles, London, University of California Press, p. 37 and 38
[41] Anaya, S. James (2004), "Indigenous Peoples in International Law", Oxford University Press, p. 59
[42] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[43] ILO, *Ratification of C169* – Indigenous and Tribal Peoples Convention, 1989 (No. 169)

rights over indigenous peoples' lands and territories and cultural rights, even though it reflects some of the difficulties encountered by those involved in its drafting.[44] Specifically, the difficulty surrounded the notion and conception of indigenous peoples, in particular the word 'peoples'.[45]

One of the most cited definition of indigenous peoples was given by José R. Martínez Cobo in his study – the Cobo's Study on the Problem of Discrimination against Indigenous Populations. In 1971, Martínez Cobo was appointed as Special Rapporteur by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to conduct a comprehensive study on discrimination against indigenous peoples.[46] The working definition that he provided described indigenous peoples as:

"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 in 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, social institutions and legal systems"[47]

The definition provided by the Special Rapporteur highlights different elements that all contribute to the identification of indigenous peoples as such, namely occupation of ancestral lands, common ancestors, culture, language and residence.[48] Some of the factors identified by Martínez Cobo are also present in the definition, adopted by ILO Convention no. 169, of who shall be recognised as indigenous, a definition that was not clear in the preceding Convention no. 107. In indicating to whom the Convention applies, article 1.1(b) states:

"peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the

[44] Niezen, Ronald (2003), "The Origins of the International Movement of Indigenous Peoples", in *The Origins of Indigenism: Human Rights and the Politics of Identity*, Berkeley, Los Angeles, London, University of California Press, p. 38
[45] ILO (2009), "Indigenous and Tribal Peoples' Rights in Practice. A guide to ILO Convention No. 169", *International Labour Standards Department*, p. 25
[46] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 4
[47] Henriksen, John B. (2008), "Key Principles Implementing ILO Convention No. 169", *Programme to Promote ILO Convention No. 169*, p. 5
[48] Ibid., p. 6

time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[49]

In contrast, article 1.1(a) describes "tribal peoples" as:

"peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."[50]

There are dissimilarities concerning the two groups. Specifically, the elements that characterise indigenous groups are historical continuity, territorial occupation and distinct social, economic, cultural and political institutions. Notwithstanding these differences, there are no legal implications because both groups are entitled to the same rights under the Convention.[51] This definition has been criticised by indigenous groups and was later clarified by the Report of the Working Group of Experts on Indigenous Populations, which stated that the definition provided by the Convention should be understood in a wider context that goes beyond the requisite of colonial experience in order to be considered as indigenous.[52]

The 1980s and 1990s were years of great international momentum regarding indigenous issues. The Martínez Cobo's Study established, in 1982, the first ever mechanism only concerned with addressing indigenous issues: The Working Group on Indigenous populations,[53] which was then abolished in 2007 and replaced by the Expert Mechanism on the Rights of Indigenous Peoples.[54] Within the realm of the United Nations (UN), a number of initiatives were taken to raise awareness about indigenous peoples issues, including the establishment of a Voluntary Fund for Indigenous Populations in 1985, the "International Year of the World's Indigenous People" in 1993 and in the same

[49] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[50] Ibid.
[51] Henriksen, John B. (2008), "Key Principles Implementing ILO Convention No. 169", *Programme to Promote ILO Convention No. 169*, p. 7
[52] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 6
[53] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 4
[54] United Nations Economic and Social Council, Department of Economic and Social Affairs, "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, 2009, p. 3

year the proclamation of the "International Decade of the World's Indigenous Peoples", which was followed by the second International Decade of the World's Indigenous Peoples, proclaimed in 2004.[55] Always within the UN system, two mechanisms are worth mentioning: the establishment in 2002 of the Permanent Forum on Indigenous Issues, with the mandate to deal with issues related to economic and social development, culture, the environment, education, health and human rights;[56] and the Special Rapporteur on the rights of indigenous peoples established in 2001 by the Commission on Human Rights (now the Human Rights Council), with the mandate to identify systems, means and methods to overcome obstacles that could prevent the effective and full protection of the human rights of indigenous peoples.[57]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is another fundamental document concerning the discussion about indigenous peoples' rights. It is a non-binding document, which was adopted by the General Assembly and provides for an important framework for indigenous peoples' human rights.[58] Notwithstanding the importance of the document, it does not give a definition of indigenous peoples, but it identifies them as the beneficiaries of the rights contained in the Declaration.[59] The text of the Declaration states the rights and human rights of indigenous peoples and sets a standard regarding States' accountability.[60] Even though, the Declaration is non-legally binding, some of the aspects of its provisions can be considered as a reflection of norms of international customary law.[61] It can be noted how indigenous peoples and indigenous peoples' rights have gained international attention throughout the years. The negotiations that brought to the adoption of the UNDRIP

[55] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 4

[56] UN, Economic and Social Council (ECOSOC), *Establishment of a Permanent Forum on Indigenous Issues*, 28 July 2008 with resolution E/2000/22, para. 2

[57] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 5

[58] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295

[59] Henriksen, John B. (2008), "Key Principles Implementing ILO Convention No. 169", *Programme to Promote ILO Convention No. 169*, p. 5

[60] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 198

[61] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, by S. James Anaya, 11 August 2008, A/HRC/9/9, para. 41

covered a period of time of more than two decades and saw the active engagement of States, indigenous peoples and independent experts.[62]

Before moving on to the relationship between land and other human rights, I deem it necessary to concentrate on the rights of indigenous peoples contained in the above-mentioned documents, specifically the right to self-determination, as forerunners for the others and for the purpose of this dissertation the right to land.

2.1 Indigenous peoples' rights

To continue the discussion on indigenous peoples I will proceed by analysing the right to self-determination, that can be considered as a pre-condition for the exercise of other human rights.[63] Indigenous peoples were not recognized neither legal status nor any rights and thus they were subject to existing patterns of colonization, during the early years of the 20th century according to which their lands were considered *terrae nullius*.[64] The debate on land rights enters into the subject of territoriality, which is considered one of the most important elements of state's sovereignty.[65] This relationship creates conflicts and tensions and its implications are most visible in the treatment reserved to indigenous peoples and their right to self-determination.[66] Considering land inhabited by indigenous peoples as *terra nullius* implied the availability of possible occupiable and colonisable land,[67] notwithstanding their presence on it. So, it can be argued that the way indigenous peoples were treated, as uncivilised and unorganised demonstrated the way racism and discrimination were put in place by governing powers. According to Joshua Castellino, the right to self-determination of indigenous peoples would be applied so as to achieve a form of decolonisation, and therefore to argue whether a group is entitled to this right, it is necessary to examine whether such group has been subjected to forms of colonisation.[68] However, the implications of the right to self-determination for indigenous peoples are

[62] Ibid., para. 34
[63] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, United Nations Publication, p. 192
[64] Anaya, S. James (2004), "Indigenous Peoples in International Law", Oxford University Press, p.29
[65] Castellino, Joshua (2005), "The 'Right' to Land, International Law and Indigenous Peoples" in *International Law and Indigenous Peoples*, The Raoul Wallenberg Institute Human Rights Library Volume 20, Martinus Nijhoff Publishers Leiden/Boston, p. 89
[66] Ibid.
[67] Ibid., p. 96
[68] Ibid., p. 108

relevant for different reasons, first of all the definition of what and who constitutes a 'people'.

As for the documents, within which the rights of indigenous peoples are enshrined, the UN Charter, The International Covenants, the ILO Conventions and the UNDRIP, even though not all legally binding, are important to mention. The UN Charter, when enunciating the purposes and principles of the UN, recognises the right to self-determination:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;[69]

Self-determination is acknowledged to be a principle of customary law and also a norm of *jus cogens*.[70] The use of the term 'peoples', in the article, makes reference to the collective character of such right, intended as a right that is enjoyed by all human beings in their way of living as engaged to constitute communities.[71] According to Anaya, self-determination has a constitutive aspect, which lies in the creation of processes by the governing authority that are guided by the governed people and an ongoing aspect, according to which the people may live and develop freely on a continuous basis, regardless changes affecting the governing institution.[72] Moreover, Anaya adds to these, the remedial aspects, which are most concerned with processes of decolonization.[73]

As for the International Covenants, they consist in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UDHR is considered as a forerunner for the codification of the following International Covenants, encompassing first and second-generation rights. Both the ICCPR and ICESCR are binding upon States parties to the Covenants, therefore creating international legal obligations.[74] According to both Covenants the right to self-determination states:

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[69] *The Charter of the United Nations*, San Francisco, 26 June 1945, art. 1.2
[70] Carreau, D. and Marella, F. (2016), "Diritto Internazionale", Giuffrè Editore, p. 69, para. 33
[71] Anaya, S. James (2004), "Indigenous Peoples in International Law", Oxford University Press, p. 100
[72] Ibid., p. 105
[73] Ibid., p. 107
[74] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 201

"All peoples have the right to self-determination. By virtue of that right, they can freely determine their political status and freely pursue their economic, social and cultural development."[75]

The importance of this right is noteworthy and visible in the fact that it is the first article of both Covenants. The UDHR and the International Covenants do apply to indigenous peoples, who are entitled to the human rights enshrined in the documents as all human beings all over the world do.[76] With regard to the ILO Conventions, especially revised ILO Convention 169, there is no provision addressing the right to self-determination. More precisely, the term 'peoples' – as used in ILO Convention 169 – shall not be construed as having any implications with regard to the right to self-determination.[77] However, with the adoption of the UNDRIP, the international community has acknowledged the right to self-determination to indigenous peoples and that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[78] This article mirrors the provisions contained in article 1 of both 1966 International Covenants and it is deemed compatible with the notion of the States' principle of territorial integrity and unity.[79] Moreover, the right to self-determination in the Declaration shall be intended as a universal, inalienable, indivisible, but, above all, a foundational right, the prerequisite for the enjoyment of all other human rights and indigenous peoples' rights in the Declaration.[80]

As far as the right to land is concerned, both ILO Conventions and the UNDRIP enshrine land rights. For the purpose of this analysis I will only focus on ILO Convention 169, as it replaced ILO Convention 107.

ILO Convention 169 provides standards and protection relating to the environment, development, and direct participation of indigenous peoples in matters

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[75] Xanthaki, Alexandra (2007), "Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land", Cambridge University Press, New York, p. 132

[76] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 202

[77] Henriksen, John B. (2008), "Key Principles Implementing ILO Convention No. 169", *Programme to Promote ILO Convention No. 169*, p. 38

[78] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295, art. 3

[79] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, by S. James Anaya, 11 August 2008, A/HRC/9/9, para. 37

[80] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum, (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 20

affecting their lives, territories and rights.[81] The second section of the document concerns land rights. As I anticipated at the end of the 1st paragraph of this dissertation, indigenous peoples have a special relationship to the land and the territories where they live: they have a deep cultural and spiritual meaning,[82] as it is stated in art. 13 of the Convention,[83] which also specifies that the term 'land' embraces forests, rivers, mountains, coastal areas, the surface and the sub-surface.[84] Art. 14 refers to the right to ownership and possession of the land.[85] This right carries an historical element with it, because it refers to the lands that indigenous peoples have traditionally occupied and a collective as well as individual element, since the concept of land encompasses both the land that the community uses and that the individual uses, for example for a home.[86] Furthermore, it puts emphasis on the action of governments with regard to the procedures to identify and protect the lands and the implementation of mechanism to resolve land claims.[87]

Art. 15 concerns natural resources. Indigenous peoples have the right to the management, use, protection and conservation of these resources, the right to consultation and benefit from resources' exploitation as well as compensation, when damages occur.[88] And finally, art. 16 deals with displacement of indigenous peoples from their lands.[89]

As far as the UNDRIP is concerned, art. 26.1 states:

> "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired"[90]

Moreover, the Declaration provides recognition for a number of rights linked with lands and territories, namely, the right to use and develop those lands and territories that they possess traditionally, the right to strengthen their spiritual relationship with the land,

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[81] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 200
[82] ILO (2009), "Indigenous and Tribal Peoples' Rights in Practice. A guide to ILO Convention No. 169", *International Labour Standards Department*, p. 91
[83] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[84] ILO (2009), "Indigenous and Tribal Peoples' Rights in Practice. A guide to ILO Convention No. 169", *International Labour Standards Department*, p. 91
[85] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[86] ILO (2009), "Indigenous and Tribal Peoples' Rights in Practice. A guide to ILO Convention No. 169", *International Labour Standards Department*, p. 94
[87] Ibid., p. 95-96
[88] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[89] Ibid.
[90] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295

the right to redress, and the right to protection and conservation of the environment.[91] The relationship that indigenous peoples have with land is peculiar of their "denomination", in the sense that they express their belonging to the land not only as a means to survive but also for their spiritual and cultural well-being.[92] For indigenous rights, this is of particular relevance, since their cultural traditions and practices are deeply connected with the land. This concept is reflected also in the General Comment (GC) on the rights of minorities of the Human Rights Committee,[93] where commenting on article 27 of the ICCPR, it recognizes that the enjoyment of the rights to which the article is related, for indigenous groups, may consist in a way of life in close association to land and its resources, intended as not to enter in conflict with State's sovereignty.[94]

Land rights of indigenous peoples are going to be further analysed in the second chapter, in relation to collective and cultural rights. Yet, to conclude, I would like to point out that indigenous peoples are bearers of all the rights that individuals are entitled to and of special rights granted to them by the above-mentioned documents.

To continue the analysis on the human right to land, I deem it necessary to dwell upon other human rights, (the right to food, the right to water, the right to housing and the right to gender equality), whose realization could be jeopardized, if the human right to land is not recognised and which have relevance, of course, for indigenous peoples as well.

3. Land and other human rights

Land is recognised as being central for the realization of other human rights. The International Covenants, the work of the Special Rapporteurs and the interpretative work of treaty bodies, namely the Committee on Social, Economic and Cultural Rights (CSECR) that monitors the implementation of the ICESCR and the Committee on the Elimination of Discrimination Against Women (CEDAW) that monitors the implementation of the Convention on Elimination of All Forms of Discrimination Against

[91] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum, (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 33

[92] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295, art. 25

[93] UN, Human Rights Committee, *General Comment No. 23: the rights of minorities (art. 27)*, 26 April 1994, CCPR/C/21/Rev. 1/Add. 5, para. 7

[94] Ibid., para. 3.2

Women,[95] have to be bore in mind when analysing the links between land and the right to food, the right to water, the right to housing and the right to gender equality.

The concept of land as a human right has also been subject to the studies and guidelines of the Food and Agriculture Organization in two directions: in the context of the right to food, well-elaborated in the *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* of 2004 and, more focused on land, in the *Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security* of 2012.[96]

The complexity of the intersecting component of the right to land are going to be discussed below, with reference to the right to food, the right to water, the right to housing and the right to gender equality.

3.1 Land, food and water

As land is instrumental for the enjoyment of a number of other human rights, including the right to adequate food, the latter needs special attention, since the consequences deriving from its negligence affect particularly the segments of the population that strictly depends on it.

The right to food was first recognized by the UDHR in article 25.1, where it states that the achievement of an adequate standard of living, among other elements, is in relation to food. The right to food enshrined in the UDHR holds special importance because the UDHR has been accepted by all countries.[97]

In 1966, the ICESCR was adopted. In this treaty, article 11 enshrines "the right of everyone to an adequate standard of living for himself and his family" covering the right to food.[98] The article states that the right to food is an important component for achieving an adequate standard of living, together with clothing and housing, and states parties to the Covenant should take measures and implement specific projects to respect, protect

[95] UN (2017), "Basic Facts about the United Nations", *United Nations Department of Public Information*, New York, p. 199 and 201 available at: https://www.un-ilibrary.org/content/books/9789210584906/read
[96] FAO (2004), *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the 127th Session of the FAO Council, November 2004; FAO (2012), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the context of National Food Security*, 38th Special Session of Committee on Food Security, 11 May 2012
[97] Golay, C. and Özden, M. (2005), "The Right to Food", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 10
[98] Özden, Melik (2014), "The Right to Land", *Human Rights Programme of the Europe – Third World Centre (CETIM)*, p. 55

and fulfil the right to adequate food.[99] Analysing the right to food, the CESCR in its General Comment (GC) on the right of adequate food (n. 12) states that the right to adequate food is indivisibly linked to human dignity.[100] It adds, moreover, that the right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement[101]. The light is pointed on the accessibility of available food, which is not always possible to grant, especially for the most vulnerable as well as impoverished segments of the population. Accessibility not only refers to the economic possibility of affording food, but also physical accessibility to land and its resources, which is of special importance for indigenous peoples.

The Special Rapporteur on the right to food, Jean Ziegler, defined the right to food as the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear[102] drawing upon article 11 of the ICESCR and GC no. 12. One of the elements upon which I would like to point the light is the cultural element, rather cultural acceptability, within the definition, which for indigenous peoples is of particular relevance. Activities to obtain culturally appropriate foods may include traditional activities, such as hunting or fishing, which, in turn, rely on access to land and its resources. If access is denied, then the practice of these activities is jeopardized.[103]

FAO, whose mandate is to defeat hunger and increase food security, developed *The Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (Right to Food Guidelines)[104] specifically focused on the right to adequate food, dedicating a number of these guidelines to land, water and natural resources. The Right to Food Guidelines identify four pillars for the

[99] The International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN doc. A/RES/21/2200 A, art. 11
[100] UN, CESCR, *General Comment No. 12 (1999): The right to adequate food (art.11)*, 12 May 1999, E/C.12/1999/5, para. 4
[101] Ibid., para. 6
[102] Report by the Special Rapporteur on the right to food, Mr Jean Ziegler, 7 February 2001, E/CN.4/2001/53, para. 14
[103] Knuth, Lidija (2009), "The right to adequate food and indigenous peoples. How can the right to food benefit indigenous peoples?", *FAO*, Rome, p. 16-17
[104] FAO (2004), *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by 127th Session of the FAO Council, November 2004

achievement of security of food: availability, stability of supply, access and utilization.[105] They recognise the interdependent, interrelated character of human rights,[106] giving substance to the fact that the realization, promotion and protection of the right to adequate food depends on and is also promoter of the realization, promotion and protection of other human rights. As for access to assets and resources, the Right to Food Guidelines promote the role of the State in taking action through positive and effective measures to protect and fulfil the right to food, dedicating a specific guideline to the full and equal right to own land.[107]

The realization of the right to food is intrinsically linked to the realization and protection of the right to water, which is protected under article 11 and 12 of the ICESCR. It is interesting to notice that article 11 states that the parties to the Covenant "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"[108]. GC no. 15 on the right to water states that the word "including" refers to the fact that the list of human rights that contribute to the fulfilment of the right to an adequate standard of living is to be understood in the wider sense, as being open and not exhaustive,[109] i.e. including the right to water. The Special Rapporteur on the right to food previously mentioned confirmed that the right to food includes the consubstantial right to drinking water,[110] which is recognised as a human right required to the realization of other human rights.[111]

Water is necessary to fulfill a number of other purposes, such as cultural practices, as we can and will observe, in the second chapter, for the Endorois community in the case brought before the African Commission on human and peoples' rights against Kenya.[112] In analysing violation of article 17(2) and 17 (3) of the African Charter on Human and

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[105] Ibid., para. 15
[106] Ibid., para. 19
[107] Ibid., para. 8.10
[108] The International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN doc. A/RES/21/2200 A, art. 11
[109] UN, CESCR, *General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, E/C.12/2002/11, para. 3
[110] Report by the Special Rapporteur on the right to food, Mr Jean Ziegler, 7 February 2001, E/CN.4/2001/53, para. 32
[111] Final Report of the Special Rapporteur, El Hadji Guissé on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, 14 July 2004, E/CN.4/Sub.2/2004/20, para. 23
[112] African Commission on Human and Peoples' Rights, Communication No. 276/03 – Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welafare Council) v. Kenya

Peoples' Rights (ACHPR), the African Commission recognized cultural rights as centred on Lake Bogoria.[113]

Water is also linked to the environment, so as to ensure sustainable use of water, to prevent it from contamination.[114] The right to adequate food and the right to water have a special connection to land, since it becomes fundamental to produce food and to secure livelihoods. This intersected connection is also recognized in the FAO Tenure Guidelines, where it is expressed the link between land, fisheries and forests and the management and use of other natural resources, for instance water and mineral resources.[115] Nowadays, a new phenomenon known as 'water grabbing' is also taking place.[116] This puts pressure on the realization of the right to adequate food, because access to water and land resources is more and more denied, and therefore the necessity for a human right to land is becoming more relevant and more compelling.

3.2 Land and housing

The right to adequate housing is protected under article 11 of the ICESCR. The connection between housing and land is found in the term 'adequate', which is well-described in the GC no. 4 in a set of standards, with which states parties to the ICESCR need to comply.[117] There are certain standards by which adequacy is determined: economic, cultural, climatic, ecological factors; nevertheless, there can be defined certain aspects, which can be applied to each context[118]. The importance of housing related to land rises in the context of forced evictions. As GC no. 7 describes, 'the term "forced evictions" is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'[119].

Forms of eviction take place in context of armed conflicts, internal displacements, refugee movements, but also in connection with urban development related to the

[113] Ibid. para. 250 and 251
[114] UN, CESCR, *General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, E/C.12/2002/11, para. 6
[115] FAO (2012), *Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security*, 38th Special Session of Committee on Food Security, iv preface
[116] FIAN (2017), "The Human Right to Land", *FIAN International*, p. 5
[117] UN, CESCR, *General Comment No. 4: The Right to adequate housing (art. 11 (1) of the Covenant)*, 1991, para. 7
[118] Ibid., para. 8
[119] UN, CESCR, *General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions*, 1997, para. 3

construction of facilities, infrastructures, urban renewal and beautification, the clearing of land for agricultural purposes or big events.[120] Again, when talking about forced evictions, we do refer to the importance that land acquires for, mainly, economic purposes. Many segments of the population suffer from illegal forms of eviction and as a consequence they are prevented from enjoying their rights. Land taken to build infrastructures or to be rendered available for agriculture, or as the object of conflict over who has their rights over a specific piece of land has important consequences for the livelihoods of certain segments of the population. Victims of forced eviction are put in life– and health-threatening situations, as they cannot have access to food, education, health care in addition to the condition of extreme poverty and life dangers they face.[121]

The process of forced eviction itself is carried out in a violent, repressive way, particularly for women and girls, who suffer from violence, sexual abuse, with, at times, life-long psychological consequences.[122] The right to adequate housing is particularly relevant, in relation to women, and the Special Rapporteur on adequate housing reported that specific groups of women can be particularly vulnerable due to a combination of factors,[123] and the impact of multiple forms of discrimination.[124] The major obstacles they face in relation to housing is discrimination and violence, which take different forms and conditions. In particular, the Special Rapporteur noticed how existing cultural ideas and structures,[125] existing or (non-existing) national laws prevent women from being able to have access to housing.[126]

In this reflection, indigenous groups suffer massively from the lack of adequate housing. The Special Rapporteur, Leilani Farha, transmitted two years ago, a report on indigenous peoples and housing.[127] Within the report, the link between the right to adequate housing and the right to land is well expressed.[128] The struggles they face with

[120] Ibid., para. 6
[121] UN, Human Rights Office of the High Commissioner (2014), "Forced Evictions", Fact Sheet No. 25/Rev. 1, p. 1
[122] Ibid.
[123] Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination, Miloon Kothari, 27 February 2006, E/CN.4/2006/118, para. 30
[124] Ibid., para. 31
[125] Ibid., para. 37
[126] Ibid., para. 46
[127] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 17 July 2019, A/74/183
[128] Ibid., para. 4

regard to housing are varied and intersected: from land- and water-grabbing, forced evictions and displacement, climate change and homelessness.[129]

The report submitted by the Special Rapporteur recognizes and declares the interdependency between the right to housing and the UNDRIP,[130] stating that land rights are also connected to the right to housing.[131] Moreover, articles 21 and 23 of the Declaration recognize the right to improvement of their economic and social conditions and the right to development, both including housing.[132] GC no. 4 states that the right to housing should be interpreted as the right to live somewhere in security, peace and dignity,[133] recognizing in the adequacy standards, the legal security of tenure, including 'occupation of land or property'.[134]

Discrimination plays the bigger role in undermining the enjoyment of indigenous peoples of the right to adequate housing, which, as the Special Rapporteur states, has ancient roots in the history of indigenous peoples.[135] In particular, the right to housing for indigenous peoples becomes even more fundamental, when forced to leave their territories, they are not able to seek redress nor a solution for their condition of homelessness.[136] This condition of homelessness acquires specific meaning for indigenous peoples, as it is defined within the variegated number of difficulties they face and deprivations they experience.[137] To this situation, land-grabbing and forced evictions contribute to this vulnerability in two ways: first, with the non-recognition by States of land rights and secondly, with the non-implementation of measures to protect land rights, when recognized.[138] A special attention should be given to indigenous women, who experience, with relation to the right to housing, intersecting forms of discrimination.[139] The Special Rapporteur recognises in the patriarchal power structures, the core elements

[129] Ibid., para. 5
[130] Ibid., para. 6
[131] Ibid., para. 7
[132] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295, artt. 21; 23
[133] UN, CESCR, *General Comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)*, 1991, para. 7
[134] Ibid., para. 8(a)
[135] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 17 July 2019, A/74/183, para. 17
[136] Ibid., para. 18
[137] Ibid., para. 25
[138] Ibid., para. 33
[139] Ibid., para. 45

of the lack of protection of their right to housing,[140] which together with violence, put indigenous women in an extreme vulnerable position.

3.3 Land and gender equality

The significance of land rights as human rights is particularly relevant in relation to the relationship between man and women. Gender inequality lies at the heart of women's vulnerability.[141] Patriarchy and the schemes that come with it impede the fulfilment of equality as a substantive component of women's rights, leaving it as a formality, rather than treating it as an expression of actions.[142] General Recommendation (GR) no. 21 adopted by CEDAW puts under the microscope the very complex relationship that women within their marriages live, especially, in some specific countries of the world.

The centrality of land in combating discrimination is evident especially because land-related discrimination does not take only one form, i.e. gender-related discrimination, but also it varies according to a variety of intersecting characteristics.[143] Intersectionality plays a key role in understanding the number and the variety of ways in which women suffer from discrimination: race, ethnicity, religion, culture, economic status, among others. These are not to be understood as separate components, but as intrinsically connected aspects that affect women all together.[144]

GR No. 21 on equality in marriage and family relations[145] states firstly how culture and tradition shape the way of thinking within the society, influencing, as a consequence the behaviour of both men and women.[146] In particular, it recognizes the link between discrimination in gender and the right to land, perceived as the unequal distribution of land within programs of agrarian reforms.[147] Not always are the rights of women respected, nor are they, at least, equal to that of men and this, in relation to land, has important consequences, because it could affect negatively the ability of women to provide for themselves and their families, in terms of housing, nutrition and independence.

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[140] Ibid., para. 46
[141] Women and ESCR Working Group (2016), "The intersection between land and women's economic, social and cultural rights", *ESCR-Net*, p. 2
[142] Ibid., p. 5
[143] Ibid., p. 4
[144] Ibid.
[145] UN, CEDAW, *General recommendation No. 21: Equality in marriage and family relations*, 1994
[146] Ibid., para. 3
[147] Ibid., para. 27

Equality in marriage and family comprises also two main targets: 1. equality in marital power and 2. elimination of discrimination in inheritance. As for the first target, equality in marital power, this means dismantling the concept that men are the only head of the household, thus enabling women to become themselves heads of their households, and as a consequence enjoying the same right as men in relation to property, land and productive resources, being able to have access to financial and legal support;[148] as for the second target, the concern lies at the need to ensure equality in inheritance no matter the gender of the heirs, with particular focus on women, as they could not enjoy, at the same level as men, of the benefits deriving from inheritance, with regard to land and productive resources, such as agricultural investments.[149]

"[…] Rural women play a crucial role in maintaining and improving rural livelihoods and strengthening rural communities. […] Several United Nations conferences have recognized the role of rural women in agriculture, rural development, food and nutrition and poverty reduction"[150]. The role of rural women is also stressed in the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, which highlights both their condition of vulnerability and discrimination but also their value and role as producers of economic profit not only for their families but the society as a whole.[151]

Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women reiterates once again the weight of discrimination as the obstacle that prevents women from enjoying the right to participate in and benefit from rural development.

For this category, land is crucial, and a means of subsistence and life. GR no. 34 on the rights of rural women adds that 'the importance of rural women's empowerment, self-determination and position in decision-making and governance must not be ignored. When it is, States jeopardize their own progress'[152]. Here, the focus is incisive and precise. It highlights the importance, the depth, the profound significance of the presence and action of rural women.

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[148] UN-Women and OHCHR (2020), "Realizing Women's Rights to Land and Other Productive Resources", New York and Geneva, p. 55

[149] Ibid., p. 57

[150] UN, CEDAW, *General Recommendation No. 34 on the rights of rural women*, 7 March 2016, CEDAW/C/GC/34, para. 3

[151] UN, HRC, *United Nation Declaration on the Rights of Peasants and Other People Working in Rural Areas*, A/HRC/RES/39/12, 28 September 2018, 13th preambular paragraph

[152] UN, CEDAW, *General Recommendation No. 34 on the rights of rural women*, 7 March 2016, CEDAW/C/GC/34, para. 6

The connection with land is essential to their very existence and their work is necessary for different reasons: they contribute to the fulfilment of the right to food, in the context of food security, reducing malnutrition, hunger and poverty;[153] they play a vital role in protecting the environment and endemic species using sustainable farming practices.[154] For them to be able to be independent, many obstacles need to be overcome, such as the access to markets and markets facilities,[155] the possibility of having advanced technological equipment and instruments to cut labour time and effort.[156] Within the GR, a light is pointed on indigenous women, as they suffer from discrimination in relation to ownership and possession of and control over land, water, forests, fisheries, aquaculture and other resources.[157] The role of the State in ensuring the elimination of discrimination in all aspects related to the lives of rural women is very much established as necessary and of primary importance.

The rights of rural women are part of a broader discussion concerning the rights of peasants and the rural population. Peasants and the rural populations are not focus group of my dissertation. However, I have decided to present their contribution because it helps to provide a more accurate framework with regard to the right to land.

4. The right to land of rural populations

The right to land has developed also in relation to the rural population. In this respect the General Assembly adopted in 2018 the Declaration on the Rights of Peasants and Other People Working in Rural Areas.[158] The final study conducted for the drafting of this Declaration identified specific groups of rural people to be protected: smallholder farmers, landless people working as tenant farmers or agricultural labourers, fisher folk, hunters and gatherers and peasant women.[159]

These groups suffer from a number of vulnerabilities, all connected to human rights.[160] One of the first reasons is expropriation of land, forced evictions and displacement, to which major insecurity is added by 'land-grab', through which

[153] Ibid., para. 63
[154] Ibid., para. 60
[155] Ibid., para. 70
[156] Ibid., para. 73
[157] Ibid., para. 59
[158] UN, HRC, *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, A/HRC/RES/39/12, 28 September 2018
[159] Final Study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, A/HRC/19/75, 24 February 2012, para. 10
[160] Ibid., para. 24

governments and companies seek to make profit to export food or grow biofuels.[161] This phenomenon puts at great threat these groups because first they do not enjoy from anything in the process and secondly because it forces them to leave their land and go elsewhere, without protection or certainties.[162] To this, we must consider the weight of gender discrimination. Women, in rural areas, face great discrimination in relation to access to and control over land, water, and natural resources.[163]

The relevance of this issue is also highlighted in the report that the CESCR has elaborated in relation to the right to land. It openly expresses the interest and concern over groups, to which women are part, more vulnerable than others, declaring how land becomes the instrument, through which the weight of discrimination can be alleviated ensuring, therefore equality between man and women.[164] UN bodies insist on the responsibility and role of governments in making steps towards the establishment of a more equal behaviour, according to which men and women enjoy the same rights.[165] However, in some countries, discrimination is envisaged in national legislation, with particular reference to family law and succession law.[166]

Another factor to be considered is, in some instances, the absence of agrarian reforms and the need for rural development policies, also in relation to irrigation and seeds. Agrarian reform would promote security of tenure and access to land[167] and development policies would increase productivity and also access to seeds in agriculture.[168] Within the spectrum of these uncertainties, lack of minimum wage and nets for social protection put even more in danger the lives of these groups, because they are not able to provide for themselves nor for their families.[169] Peasants and other rural groups have tried to fight discrimination and exploitation. Yet, governments have continued to treat them as criminals, arresting or detaining them.[170]

Article 1.3 of the United Nation Declaration on the Rights of Peasants and Other People Working in Rural Areas states that the Declaration applies also to indigenous

[161] Ibid., para. 25
[162] Ibid., para. 26
[163] Ibid., para. 29
[164] UNHCHR Report, 11 July 2014, E/2014/86, para. 35
[165] Ibid., para. 38
[166] Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, A/HRC/19/75, 24 February 2012, para. 29 and 30
[167] Ibid., para. 31
[168] Ibid., para. 36
[169] Ibid., para. 38
[170] Ibid., para. 42

peoples.[171] Moreover, the right to land is enshrined in article 17.1. The articulation of the right in the Declaration is very innovative, because it takes into consideration both the individual and the collective aspect of the right to land; it elevates land as fundamental to achieve the right to an adequate standard of living; it focuses on eliminating discrimination on the ground of gender and marital status; it prohibits unlawful evictions and displacements; it provides for fair compensation whenever and for whatever reason the subjects of the right are deprived of their land and it insists on the role of the State to take positive, effective measures to respect, protect and fulfill the right to land, considering also sustainability related to the environment.[172]

To conclude, I would like to stress, based on the above considerations, how the human right to land has a cross-cutting nature that involves different groups of peoples. For the purpose of this dissertation, I will only focus on indigenous groups, as already stated and in the second chapter I will enter the regional level of protection of human rights, in this case the Inter-American system of protection of human rights. Specifically, I will enter in more detail into the discussion concerning the relationship between land and culture, that as understood, has a deep meaning for indigenous communities.

[171] UN, HRC, *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, 28 September 2008, A/HRC/RES/39/12
[172] Ibid., art. 17

CHAPTER II: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE RIGHTS TO LAND AND CULTURE OF INDIGENOUS PEOPLES

For the purpose of this dissertation, in the analysis of the right to land in the cultural perspective of indigenous peoples, I deem it necessary to dwell upon the interrelation of indigenous peoples' rights to land and culture, in their collective aspect. The first part of the chapter is dedicated to the international framework with regard to the rights to land and culture of indigenous peoples, drawing from international instruments, in particular the UNDRIP. The international framework is fundamental in providing reference for the regional framework, i.e. the Inter-American system of protection of human rights, which is going to be subject of the second part of this chapter. The second part will focus on the rights to land and cultural of indigenous peoples, drawing from the main Inter-American human rights instruments and from the jurisprudence of the IACHR and the IACtHR.

1. The International framework

For this first part, I will focus on the main international instruments with regard to the right to land, on which I have extensively concentrated in the first chapter. As understood, indigenous peoples are entitled to human rights as all individuals do, as well as they are bearers of special rights.

The framework of reference is provided by both binding and non-binding documents. The UDHR is considered as the foundational document as far as human rights are concerned, which encompasses both first- and second-generation rights, i.e. civil and political rights as contained in the ICCPR and economic, social and cultural rights as contained in the ICESCR.[173]

Specifically, for the analysis of the right to land, ILO Convention no. 169 and the UNDRIP, to a greater extent, are going to be the reference. Notwithstanding, the non-binding nature of the UNDRIP, it is one of the most important, comprehensive documents

[173] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 201

related to indigenous peoples' rights, giving a balance between individual and collective rights.[174]

As far as the right to culture of indigenous peoples, in addition to the International Covenants, ILO Convention no. 169, and the UNDRIP, UNESCO is going to provide us with more reference.

1.1 The right to land

As stated before, land is at the core of indigenous peoples' cultural identity.[175] Their ways of life, traditional knowledge and other cultural practices and traditions find their expression in land and natural resources. The land is not only conceived as means of subsistence or as economic tool. They have a deep spiritual relationship with the land, with which they feel at one.[176] This relationship and attachment to the land has been recognised by ILO Convention no. 169, in particular in article 13.1, which states that this relationship is of collective nature.[177]

The collective right to land has been recognized also in the UNDRIP. The way it does it is by declaring in art. 1 that indigenous peoples are entitled to all human rights that they can enjoy both as individuals and as a collectivity.[178] Therefore, it affirms rights of individual character, but also rights of collective character in relation to the lands, territories and resources (art.26), languages and oral traditions (art. 13), spiritual and religious traditions (art. 12), cultural traditions and customs (art. 11), among others.[179] It is affirmed that the Declaration sets a precedent in the way it gives importance and prominence to indigenous collective rights.[180] The recognition of collective rights to indigenous peoples, in particular the collective right to land, is crucial and vital because individual titling might be a limited, partial way to protect them and would not permit the full expression of their identity.[181] Moreover, not recognizing collective rights may

[174] Ibid., p. 198
[175] Ibid., p. 53
[176] Ibid.
[177] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989
[178] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum, (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 15
[179] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples by S. James Anaya, 11 August 2008, A/HRC/9/9, para. 38
[180] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum, (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 15
[181] Ibid.

negatively affect their existence and well-being, forcing them to be assimilated to the dominant society, and their culture would simply disappear.[182]

As understood, indigenous cultures have their centre in the land and the relationship with it. There is no separation between culture and land or culture and the environment. Rather they see themselves as part of nature and of the environment.[183] The way indigenous cultures should be understood is in a holistic and comprehensive way that takes into consideration different elements: lands and languages, spirituality, social institutions and traditional knowledge. These components are to be intended as indivisible and strictly interrelated.[184]

The right to culture, in particular the right to exercise it collectively is going to be subject of the following analysis, starting from the very conception of culture and the international framework that regulates it.

1.2 The right to culture

Culture is defined by United Nations Economic, Scientific, Cultural Organization (UNESCO) as "*a human experience, […] we recognize it as the totality of ways by which men create designs for living. It is a process of communication between men; it is the essence of being human. […] Culture is everything which enables men to be operative and active in his world, and to use all forms of expression more and more freely to establish communication among men."*[185] One of the aspects that most stands out and has been reiterated in the Statement of cultural rights as human rights of UNESCO, is the danger of culture assimilation, homogeneity and uniformity, which deny the richness of cultural traditions.[186]

In speaking about African cultural diversity, UNESCO has recognised these dangers as particularly relevant for indigenous peoples, because their cultural claims are tied to the movement of emancipation of colonial peoples based on the right of peoples to self-determination.[187] In fact, the denial of access to lands for indigenous peoples'

[182] Ibid., pg. 24
[183] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 52
[184] Ibid. 53
[185] United Nations Educational, Scientific and Cultural Organization (1970), *Cultural Rights as Human Rights – Studies and Documents on Cultural Policies*, Geneva, p. 105-106 available at: http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf
[186] Ibid.
[187] Ibid., p. 28

cultures puts them in danger of extinction.[188] This risk has also been stressed by the Permanent Forum on Indigenous Issues (PFII), stating that "*land is the foundation of the lives and cultures of Indigenous peoples all over the world. (…) Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples' particular distinct culture is threatened*."[189]

As it can be evinced, there is a strong link between cultural rights and land rights in this definition. This close relationship has been widely recognized. In particular is worth-mentioning ILO Convention no. 169[190] and the UNDRIP.[191] Article 13, within the Convention and article 25, within the Declaration, both recognise the spiritual and sacred meaning that land has as a source of culture and tradition and the responsibility of State to consider this relationship as fundamental in the process of recognising collective land rights and their violations.[192] If land is considered the source of their culture, then loss of lands prevents them from practice it and ultimately it could threaten their own survival as a people and their distinctiveness as a community.[193]

In history, indigenous groups have had little space to put forward their demands, because they were left out from the discussions and negotiations that brought to the drafting of the first human rights instruments,[194] namely the UDHR adopted in 1948, the ICCPR and the ICESCR both adopted in 1966. Nonetheless, these documents are relevant for cultural rights: the UDHR encompasses the recognition of cultural rights, among others, for the development of the individual (art. 22) and the right to participate in cultural life (art. 27).[195] The ICESCR recognises cultural rights in art. 15 with regard to the right to take part in cultural life.[196] Where the UDHR and the ICESCR focus more on

[188] Gilbert, Jérémie (2010), "Custodians of the land: indigenous peoples, human rights and cultural integrity" In M. Langfield, W. Logan, and M. Nic Craith, eds. *Cultural diversity, heritage and human rights: intersections in theory and practice*, Routledge, London
[189] Ibid.
[190] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, art. 13
[191] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295, art. 25
[192] ILO (2009), "Indigenous and Tribal Peoples' Rights in Practice: a guide to ILO Convention 169", *International Labour Standards Department*, p. 91
[193] Ibid.
[194] Isa, Gómez Felipe (2014), "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights", *Human Rights Quarterly*, vol. 36, no. 4, p. 725 and 726
[195] UN, General Assembly, *Universal Declaration of Human Rights*, resolution 217 A, 10 December 1948, available at: https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
[196] The International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN doc. A/RES/21/2200 A

the art and science, the ICCPR addresses in art. 27 the question of cultural rights for minorities.[197]

It was through the interpretation given by the Human Rights Committee in its GC no. 23 that indigenous peoples could find space for the protection of cultural rights. Article 27 determines the rights of minorities to enjoy, practice and profess their culture, religion and use their language, individually or in community with others. It recognises the way indigenous peoples live and practice their culture, as profoundly imbedded in their lands and territories.[198] Even though the language of the article is in negative terms,[199] it recognises a right, which State parties to the ICCPR are under obligation to respect, protect and fulfill, adopting therefore positive measures,[200] meaning that States need to put in place measures to make possible the enjoyment of such right.[201] Moreover, it protects the individual right of minorities, even though they can enjoy it "in community with the members of their group".[202]

General Comment no. 23, in relation to cultural rights, specifically identifies the way indigenous peoples live their culture, as embodied in the way they conduct their lives, connected with traditional activities, such as hunting and fishing.[203] It can be observed that culture, as conceived by the GC, consists also of activities, which are fundamental for the survival of indigenous cultures, as stated before. It can be argued that culture is valued as a way of life consisting of different types of activities, rather than conceiving it as a type of good to be accessed or consumed by a certain category of "consumers".[204] This is important because it turns people into producers of culture, into active promoters of activities, ways of life that give continuity and better specify the content of what

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[197] Gilbert, Jérémie (2010), "Custodians of the land: indigenous peoples, human rights and cultural integrity" In M. Langfield, W. Logan, and M. Nic Craith, eds. *Cultural diversity, heritage and human rights: intersections in theory and practice*, Routledge, London

[198] UN, Human Rights Committee, *General Comment No. 23: The rights of minorities (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 3.2

[199] Yupsanis, Athanasios (2013), "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee", *Hague Yearbook of International Law*, vol. 26, p. 362

[200] UN, Human Rights Committee, *General Comment No. 23: The rights of minorities (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 6.1

[201] Yupsanis, Athanasios (2013), "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee", *Hague Yearbook of International Law*, vol. 26, p. 367

[202] The International Covenant on Civil and Political Rights, 16 December 1966, art. 27

[203] UN, Human Rights Committee, *General Comment No. 23: The rights of minorities (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7

[204] Yupsanis, Athanasios (2013), "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee", *Hague Yearbook of International Law*, vol. 26, p. 370

cultural rights protect.[205] Nonetheless, the Human Rights Committee, recognizing indigenous cultural rights, has somehow treated them as minorities, even though indigenous peoples have strongly objected and rejected any attempt to consider them minorities, despite existing common features between the two groups.[206] Another aspect related to culture introduced by GC no. 23 is the participatory element in decisions that may affect indigenous peoples.[207]

According to Jérémie Gilbert, the notions of cultural heritage and cultural diversity help to understand the relationship between cultural rights and land rights, within a human rights perspective.[208] Cultural heritage is defined as encompassing tangible – artefacts, such as museums, libraries, archives - and intangible cultural heritage – practices, skills, knowledge, such as language, art, dance, music, intellectual property.[209] For indigenous peoples cultural heritage is embedded in the preservation of the land. As stated before, indigenous culture has its source in the land and the natural world, therefore the notion of cultural heritage is connected to the notion of territoriality.[210]

The notion of cultural diversity began to gain attention with increasing concerns around globalization during the 1990s, as it was thought to threaten the survival of the world's cultural diversity.[211] The diversity of indigenous' cultural identity is clear in the just-concluded reflections concerning art. 27 of the ICCPR. In this respect another UN Committee has recognized it: The Committee on the Elimination of Racial Discrimination (CERD). CERD, in GR no. 23, calls upon States to recognise and respect indigenous distinct cultures, promoting their preservation and value them as an enrichment to the States' cultural identity, through positive measures that tackle discrimination, unequal

[205] Ibid., p. 371
[206] Ibid., p. 374
[207] UN, Human Rights Committee, *General Comment No. 23: The rights of minorities (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7
[208] Gilbert, Jérémie (2010), "Custodians of the land: indigenous peoples, human rights and cultural integrity" In M. Langfield, W. Logan, and M. Nic Craith, eds. *Cultural diversity, heritage and human rights: intersections in theory and practice*, Routledge, London
[209] Logan, William (2012), "Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice", *International Journal of Heritage Studies*, p. 4
[210] Gilbert, Jérémie (2010), "Custodians of the land: indigenous peoples, human rights and cultural integrity" In M. Langfield, W. Logan, and M. Nic Craith, eds. *Cultural diversity, heritage and human rights: intersections in theory and practice*, Routledge, London
[211] Logan, William (2012), "Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice", *International Journal of Heritage Studies*, p. 5

participation in public life and ensuring that economic, social developmental projects are compatible with their cultural characteristics.[212]

The statements contained within this GR recognise the notion of cultural diversity as wells as cultural integrity extended to indigenous groups.[213]

Affirmation to the world's diverse cultures and their distinctiveness is central to UNESCO's Universal Declaration on Cultural Diversity,[214] which recognises the protection of cultural diversity as an ethical imperative inseparable from the commitment to human rights, in particular those of indigenous groups and minorities.[215] In particular, the Declaration is defined to be "*the founding act of a new ethic for the twenty-first century, providing the international community, for the first time, with a wide-ranging standard-setting instrument to underpin its conviction that respect for cultural diversity and intercultural dialogue is one of the surest guarantees of development and peace*".[216] Cultural diversity is thought to challenge the universality of human rights, even though the purpose is precisely the opposite: opening a new space to enrich this universality and not to undermine it.[217] Cultural diversity is not only related to the diversity of cultures, but also to the diversity within cultures, recognising therefore the diversity of diversities.[218]

In relation to the recognition of the diversity and distinctiveness of indigenous cultures, the UNDRIP reiterates how protecting indigenous land rights entails the protection of their systems of values, beliefs, traditions and cultures.[219] It recognises the richness that indigenous cultures bring to the global cultural diversity and their preservation in face of dominant cultural streams,[220] that can threaten their continuous cultural existence. Within the protection of cultural traditions and aspects specific to indigenous communities, the UNDRIP stresses elements, such as archaeological and

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[212] UN, Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII on the rights of indigenous peoples*, 1997, para. 4
[213] Anaya, S. James (2004), "Indigenous Peoples in International Law", Oxford University Press, p. 131
[214] *Universal Declaration on Cultural Diversity*, adopted by the 31st session of the General Conference of UNESCO, Paris, 2 November 2001
[215] Ibid., art. 4
[216] Logan, William (2012), "Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice", *International Journal of Heritage Studies*, p. 5
[217] Report of the Special Rapporteur on the field of cultural rights, Karima Bennoune, 25 July 2018, A/73/227, para. 7 and 8
[218] Ibid., para 8
[219] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295, 10th preambolar paragraph
[220] Ibid., art. 8

historical sites, artefacts, ceremonies, arts, literature,[221] spiritual and religious traditions,[222] languages, oral traditions,[223] and finally, the educational systems.[224]

As understood, indigenous groups' demands throughout the evolving discourse of human rights law opens a new path more open to diversity, more inclusive. An inclusive universality takes into consideration the dynamics affecting indigenous peoples and their cultural systems, which break with traditional notions of cultures and open the door for a more intercultural approach to human rights.[225] It is clear to state that indigenous groups represent both a challenge and a possibility for the human rights system. A challenge because their claims break with traditional notions of individual property of land and traditional notions of culture, and a possibility because the door opened by them leads the way to embrace their cosmovision, in the effort not to assimilate or eliminate them, but to fully embrace them in their cultural distinctiveness, because "culture is always plural".[226]

One last point to be stressed, but which is key to understand indigenous peoples culture is that indigenous people's culture is practiced and expressed in a collective way.[227] As land and nature are considered to be collective assets, the same is for their cultural values, practices and actions that they see are in function of the group and not the individual.[228] In order to continue the discussion on indigenous peoples' culture, I deem it necessary to focus on the right to cultural identity and two of the elements that are part of indigenous peoples' right to cultural identity.

1.3 The right to cultural identity

Cultural identity is related to the protection of cultural diversity.[229] Its conception is often linked more broadly with cultural rights. To recall the main international

[221] Ibid., art. 11
[222] Ibid., art. 12
[223] Ibid., art. 13
[224] Ibid., art. 14
[225] Isa, Gómez Felipe (2014), "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights", *Human Rights Quarterly*, vol. 36, no. 4, p. 728
[226] Report of the Special Rapporteur on the field of cultural rights, Karima Bennoune, 25 July 2018, A/73/227, para. 56
[227] Ibid., para. 53
[228] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 52
[229] Odello, Marco (2012), "Indigenous peoples' rights and cultural identity in the Inter-American context", *The International Journal of Human Rights*, vol. 16, no. 1, pp. 31

instruments related to culture, that can also be useful in the definition of cultural identity, worth mentioning are the UDHR, the International Covenants, the ILO Conventions, the documents related to the UNESCO framework and the UNDRIP.[230]

With regard to the UDHR, art. 27.1 affirms the right of everyone to take part in cultural life,[231] which is also stated in art. 15 of the ICESCR.[232] As far as ILO Convention no. 169 is concerned, its content provides for more understanding of indigenous peoples' cultural rights that goes beyond the traditional meaning of culture to include most aspects of indigenous cultures.[233]

The work of the UNESCO has been fundamental with regard to culture and cultural identity. In 1982, it proclaimed the right to cultural identity in the World Conference in Cultural Policies. Moreover, relevant in the discussion is also the 2001 UNESCO Declaration on Cultural Diversity, and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[234]

The 2001 UNESCO Declaration on Cultural Diversity helps to clarify the close relationship between culture, cultural rights, as well as identity, diversity and cultural pluralism, whereas the 2005 Convention on the Promotion of the Diversity of Cultural Expression affirms that cultural diversity "forms a common heritage of humanity and should be cherished and preserved for the benefit of all, is indispensable for peace and security at the local, national and international levels, and is important for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights is indispensable for peace and security at the local, national and international levels."[235]

Given the framework of reference, I will now dwell upon the definition of the right to cultural identity, which is a complex one, given the meaning of culture and identity. In the preceding paragraph, with regard to the right to culture, I stated that UNESCO identifies culture as a human experience, involving the creativity of men in order to be able to be active, operative, and use freely all forms of expression to achieve

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[230] Ibid., p. 27

[231] UN, General Assembly, *Universal Declaration of Human Rights*, resolution 217 A, 10 December 1948, available at: https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

[232] The International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN doc. A/RES/21/2200 A

[233] Xanthaki, Alexandra (2007), "Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land", Cambridge University Press, New York, p. 201

[234] Ibid., p. 199-200

[235] Piergigli, Valeria (2014), "The right to cultural identity", *Annuaire international de justice constitutionnelle*, vol. 29(2013), pp. 600

communication.[236] Moreover, the notion of identity attached to culture expresses a close link to self-concept, i.e. the way in which one identifies oneself.[237] This notion applies to indigenous peoples in the sense that cultural identity can be valued as element in the definition of specific rights that indigenous peoples claim both internationally and nationally.[238] In this regard the UNDRIP encompasses cultural elements that are indispensable for the protection of indigenous peoples' rights, as well as it provides for the protection of their distinct cultural identity. Indigenous cultural identity has been defined by the EMRIP as follows:

> "Indigenous culture is 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, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering."[239]

This definition gives us the possibility to see that indigenous cultures have to be intended holistically, as ensemble of different elements, that all concur to define their identity. Two main elements that define indigenous cultures are land and languages. Land has been extensively discussed in the previous pages and in the preceding chapter, whereas indigenous languages are going to be discussed below.

1.3.1 Indigenous languages

Among the elements that mark indigenous culture, there are indigenous languages. Language refers to the ability of communicating with each other, either verbally or in writing. It is vehicle of meaning through which values, symbols, beliefs and intangible elements of culture are conveyed.[240] This is true, and particularly true, I might add, for indigenous peoples. For these groups, languages are deeply connected to their cultural

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[236] United Nations Educational, Scientific and Cultural Organization (1970), *Cultural Rights as Human Rights – Studies and Documents on Cultural Policies*, Geneva, p. 105-106 available at: http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf

[237] Odello, Marco (2012), "Indigenous peoples'rights and cultural identity in the Inter-American context", *The International Journal of Human Rights*, vol. 16, no. 1, p. 29

[238] Ibid., p. 32

[239] United Nations Human Rights Office of the High Commissioner and Asia Pacific Forum, (2013), "The United Nations Declarations on the Rights of Indigenous People, A Manual for National Human Rights Institutions", HR/PUB/13/2, p. 13

[240] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 57

identity. They are markers of distinctiveness and cohesiveness as a people and embody values, concepts, history, knowledge and information.[241] These aspects render language particularly valuable because it is the main mechanism of transmission between generations and also vulnerable because indigenous languages, among others, face threats of extinction.[242] It is estimated, as a matter of fact, that the majority of world's languages (to give a percentage, 96%) are spoken by very few people (3%). A great majority of these languages are indigenous ones and are in danger of becoming extinct.[243]

These risks put emphasis on the role of States in revitalizing and retaining indigenous languages. This is more visible in situations where indigenous languages are not recognized in legislation and in the education system, which often faces obstacles and difficulties, when bilingual programmes are adopted.[244] Loss of indigenous languages is often increased when national constitutions recognise only mainstream language as national language and its exclusive use in educational policies.[245] It should be pointed out that loss of indigenous languages, does not only entail merely the loss in itself. For indigenous peoples, loss of their languages entails also loss of traditional knowledge and cultural diversity. Since most of these languages exist only verbally and cannot be retrieved once they are no longer spoken, the loss has to be intended as comprehensive of every cultural element as indigenous culture is understood holistically. This means that languages are linked to the lands that indigenous groups inhabit, they form part of the individual and the collective identity, giving sense of belonging and community.[246]

Specifically, languages are linked to both the right to self-determination and the right to land. Art. 3 of the UNDRIP enshrines the right to self-determination, by virtue of which indigenous peoples may freely pursue their cultural development.[247] This entails all those aspects and rights necessary for indigenous peoples to promote their cultural

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[241] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 32
[242] Ibid., para. 33-34
[243] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 57
[244] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 36
[245] Ibid., para. 37
[246] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 58
[247] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295

development. Having established that language is component of indigenous cultures, they are therefore part of the array of rights that the Declaration sets out, with specific reference to the right to self-determination.[248] In this sense, languages are element as well as form of expression of the right to self-determination. It is also the vehicle through which collective juridical and political methodology is expressed. Some submissions to the EMRIP have gone so far as to state that indigenous peoples' control over their languages can be a tool in their decolonization.[249]

Connected to the right to self-determination and its realization is the link between indigenous cultures, languages and the right to land, territories and resources. This relationship has been recognized in the report by the Special Rapporteur on indigenous peoples and their relationship to land.[250] The report reiterates the uniqueness of indigenous cultures, as they are profoundly relational with regard to lands and territories: indigenous groups live in symbiosis with the land and every living thing therein. This relationship manifest itself in elements of their cultures, such as language.[251] Language serves both as element of protection of their lands during ceremonies and rituals[252] and as the repository of indigenous traditional knowledge.[253]

In the UNDRIP, besides the right to self-determination and the right to land, language rights are also enshrined in art. 13, which affirms the right of indigenous peoples to revitalize, use, develop and transmit to future generations their histories, languages , oral traditions, philosophies, writing systems and literatures; in art. 14 with regard to the educational system, where indigenous groups have the right to provide education in their own language and in art. 16, which states the right to establish their own media in their own language.[254]

As previously stated, indigenous languages are part of the vast group of languages in danger of extinction. The role of States has been reiterated by the EMRIP with regard to the revitalization of indigenous languages in conjunction with indigenous peoples

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[248] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 20

[249] Ibid., para. 22

[250] Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes on Indigenous Peoples and their relationship to land, 11 June 2001, E/CN.4/Sub.2/2001/21

[251] Ibid., para. 13-14

[252] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, footnote 20

[253] Ibid., para. 43

[254] UN, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 13 September 2007, A/RES/61/295

themselves.[255] Notwithstanding the involvement of States and the agency of indigenous groups, UNESCO has also created a programme on safeguarding endangered languages – Atlas of the World's Languages in Danger – and proclaimed 2019 the International Year of Indigenous Languages.[256] We will see that the permanence, rather the reference to indigenous languages in the Constitutions of Bolivia and Ecuador are important, precisely for the significant scope that they have.

1.3.2 Indigenous spirituality

Indigenous spirituality is important not only as element of indigenous cultural identity, but also as element referred to land and territories. The land is the core of this spirituality, it is the place where indigenous peoples connect with the spirit of the earth, in intimate relationship with the environment.[257] Indigenous spirituality entails more than a healthy spirit, it is to be understood as the relationship with the universe, which is unique to them. It defines their link with the environment as custodians of the land and it is through spirituality that indigenous peoples build relationship, give meaning and purpose. It is an integral part of the cosmovision of indigenous peoples.[258]

The elements of indigenous spirituality are their relationship with ancestors and spirits, social relations, respect for nature and the link with their land, territories and resources. Indigenous spirituality can be practiced through ceremonies and rituals and it entails a close connection between culture and nature, especially the land. Finally, it is transferred through generations.[259]

In ILO Convention 169, spirituality is present in the text as a value which highlights specifically certain indigenous rights: in art. 5 within the section dedicate to general policy, in art. 7 with regard to the right to development, in art. 13 concerning the right to land and in art. 32 about international agreements, contact and cooperation with other indigenous groups across borders.[260]

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[255] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 67
[256] UNESCO (2018), "UNESCO policy on engaging with indigenous peoples", 201 EX/6, p. 30
[257] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 59
[258] Ibid., p. 60
[259] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 56
[260] ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989

The UNDRIP affirms indigenous peoples' rights to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, and to maintain, protect and have access in privacy to their religious and cultural sites (art. 12).[261]

To conclude, I would like to reiterate how indigenous cultures need to be understood holistically. This means that land, languages and spirituality, among other elements are deeply and intimately connected to this whole. This universal, cultural connection with the world requires a type of approach that takes into consideration their diversity. The type of approach required to understand, respect indigenous cultures is intercultural because often people with different cultural backgrounds tend to enter into conflict, as there is little space left for dialogue and understanding.[262] This is particularly true for indigenous peoples because as their history demonstrates, they are likely to face assimilation to the dominant culture and discrimination and loss of culture, languages and spirituality, among other components, due to loss of lands. This approach is going to be defined in the third chapter, in its Latin-American specificity, *interculturalidad*.

Younger generations are vital for the survival of the community's cultural integrity and identity, because they will be the ones transmitting it to future generations. The element of continuity, not only over time, but within the present time is definitely determinant to sustain and promote the cosmovision of indigenous groups, always remembering that the concept of universality of human rights is not in opposition to cultural diversity, it is precisely the opposite, i.e. the attempt to promote cultural diversity to live in a global, more inclusive concept of universality of human rights leads the way to a more open world, where indigenous cultures contribute greatly. The UNESCO work with indigenous peoples is in great synergy with the rights enshrined in the UNDRIP, where promotion of cultural integrity and identity is one of the key objects of the guidelines promoted by UNESCO when engaging with indigenous peoples.[263]

The international framework on the land and cultural rights is reference for the regional systems, in particular, for this dissertation, the Inter-American system of protection of human rights,[264] as we will see in the following pages.

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[261] UN, HRC, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 30 April 2012, A/HRC/EMRIP/2012/3, para. 58

[262] Logan, William (2012), "Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice", *International Journal of Heritage Studies*, p. 4

[263] UNESCO (2018), "Policy on engaging with indigenous peoples", 201 EX/6, para. 68

[264] MacKay, Fergus (2002), "Guide to Indigenous Peoples' rights in the Inter-American human rights system", *International Work Group for Indigenous Affairs (IWGIA)*, Copenhagen, p. 29

2. The regional framework: The Inter-American system

Indigenous peoples are entitled to human rights as all individuals do. The Inter-American system of protection of human rights and its framework do not fall out of the discussion.

The Organization of American States (OAS) was established in 1948 with the signing of the OAS Charter and is composed of 35 member States of the Americas.[265] In this system, human rights are protected under two interconnected frameworks: the first is based on the OAS Charter and the Declaration on the Rights and Duties of Man and the second on the American Convention on Human Rights (ACHR), which is a legal binding document to only those States who have ratified it, whereas the Declaration is applicable to all 35 member States.[266] The Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have established that despite the legal nature of the Declaration, it constitutes a source of international obligations for the member States of the OAS.[267]

Besides these documents, relevant for indigenous peoples, are also the 1988 Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights (known as the Protocol of San Salvador), which recognises a series of rights, among which, the right to a healthy environment,[268] and the American Declaration on the Rights of Indigenous Peoples (ADRIP). This latter document was adopted on June 15, 2016 and recognises both individual and collective rights.[269] Despite its non-binding nature, the ADRIP is thought to become reference for the interpretation of the ACHR and other Inter-American documents.[270]

As far as the enforcement mechanisms are concerned, relevant are the IACHR and the IACtHR. The former was established in 1960 and monitors the implementation of both the Declaration on the Rights and Duties of Man and the ACHR. Whereas, the IACtHR was established by art. 33 of the ACHR and has two main functions, namely

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[265] OAS Website: http://www.oas.org/en/about/who_we_are.asp

[266] MacKay, Fergus (2002), "Guide to Indigenous Peoples' rights in the Inter-American human rights system", *International Work Group for Indigenous Affairs (IWGIA)*, Copenhagen, p. 22

[267] IACHR, Basic Documents in the Inter-American system, introduction: http://www.oas.org/en/iachr/mandate/Basics/introduction-basic-documents.pdf

[268] MacKay, Fergus (2002), "Guide to Indigenous Peoples' rights in the Inter-American human rights system", *International Work Group for Indigenous Affairs (IWGIA)*, Copenhagen, p. 26

[269] OAS, *American Declaration on the rights of indigenous peoples*, adopted at the third plenary session held on 15 June 2016, AG/RES. 2888 (XLVI-O/16), available at: http://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf

[270] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 112

advisory and contentious. However, the Court can only exercise its contentious jurisdiction, if States parties to the ACHR have specifically registered a declaration of consent, otherwise they cannot be subject to the proceedings before the Court.[271]

Having established the main relevant documents and enforcement mechanisms for the protection of indigenous peoples' rights, I now will dwell upon the protection of collective rights, in particular, the rights to land and culture within the Inter-American system of protection of Human Rights.

2.1 The right to land in Inter-American instruments

The ADRIP is very clear in the recognition of collective rights. It addresses them openly in article VI, recognizing indigenous peoples as the beneficiaries of the rights enshrined in this article. In particular, it recognizes the right to collective action, the right to their own cultures, to profess and practice their religious beliefs, to use their languages and to their territories, lands and resources,[272] which in the context of this dissertation is going to be very important. The above-mentioned article is encompassed in Section Two of the document, which titles "Human rights and collective rights", and it is precise in declaring the plurality of collective rights, which indigenous peoples enjoy collectively, as a community. The article mentions: collective action; juridical, social, political and economic systems or institutions; cultures; spiritual beliefs; languages; lands, territories and resources.[273]

Collective rights are held by a group, and not by a single individual. In the context of land rights the IACtHR recognized that "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community."[274] Values and meanings coming with collective responsibility are deeply embedded in indigenous societies and cultures and influence and guide the behaviours of each member of the community in their relationship with other members and also in carrying out their activities, with a spirit of service. The concept of relationship

[271] MacKay, Fergus (2002), "Guide to Indigenous Peoples' rights in the Inter-American human rights system", *International Work Group for Indigenous Affairs (IWGIA)*, Copenhagen, p. 32-33
[272] OAS, *American Declaration on the rights of indigenous peoples*, adopted at the third plenary session held on 15 June 2016, AG/RES. 2888 (XLVI-O/16), Section two, art. VI, available at: http://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf
[273] Ibid.
[274] The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on merits and reparations of August 31, 2001), para. 149

is very strong and powerful within indigenous groups, and it is such that it is one of the characteristics that distinguishes them, based on mutual trust and service and on the recognition of the value and worthiness of each member of the community. The institutions and social structures of these groups are very unique and have as their core the family unit.[275]

The meaning of collectiveness specific for indigenous groups is to be found, as said above, in their unique way of life, in their system of values, in their cultures, built over time. Time plays an important role, because the importance of "communality" or "collectivity" dates back to 'time immemorial'[276], something that persist over the changing of generations, remaining deeply rooted in the core of what indigenous peoples are.

Collective rights need to be differentiated from individual rights, i.e. those rights to which only individuals are entitled, and also from those rights, whose entitlement is individual while their exercise and interest are collective.[277] There is, then, a difference that needs to be underlined and recognized for the protection of these communities.

For a right to be collective, it must be applied to a collectivity, it must be applied to a legally protected collective good and its interest must be collective in nature.[278] The IACHR has recognized collective rights to juridical conditions of groups or organizations of peoples as in the case of indigenous peoples and communities.[279] It went far so as to establish and develop the notion that individual and collective rights do not oppose each other, rather they complement each other with the objective of rendering effective the enjoyment of human rights as a whole.[280] In particular, this reciprocity is determined when individuals have their rights protected, yet within the protection of the rights of the collectivity.[281]

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[275] UN, HRC, Study on the Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, 16 August 2012, A/HRC/21/53, para. 53-54
[276] UN, General Assembly, The situation of human rights and fundamental freedoms of indigenous people, 12 August 2004, A/59/258, para. 14
[277] Nuila H. Andrea (2018), "Collective Rights in the United Nations Declaration on the Rights of Peasants and Other People working in Rural Areas", *FIAN International*, pg. 2
[278] Ibid., pg. 2
[279] OAS, IACHR, "La situación de los derechos humanos de los indígenas en las Américas", OEA/Ser.L/VII. 108, Doc. 62, 20 October 2000, chapter III, para. 6
[280] Ibid.; Johnston, Darlene M. (1989), "Native Rights as Collective Rights: A Question of Group Self-Preservation", *Canadian Journal of Law and Jurisprudence*, vol. 2, no. 1, pg. 19
[281] OAS, IACHR, "La situación de los derechos humanos de los indígenas en las Américas", OEA/Ser.L/VII. 108, Doc. 62, 20 October 2000, chapter III, para. 6

The IACHR has supported greatly the recognition and implementation at the national level of collective rights, as the IACtHR did and keeps doing.[282] Recognizing collective rights is important because otherwise States would fail to effectively protect the communities, which these rights are applied to.[283]

In some countries these reforms have been applied to constitutions.[284] The Constitution of the Republic of Ecuador of 2008 recognized collective rights to '*comunas, comunidades, pueblos y nacionalidades indígenas*'[285] in a number of different articles of the Constitution, as well as the Political Constitution of the State of Bolivia of 2009.[286] Domestic courts also have a role in operationalizing the rights contained in the ADRIP, but also the rights of indigenous peoples in general, possibly through the use of the latter as an interpretative instrument to their decisions and judgments.[287]

Besides the ADRIP, the IACHR and the IACtHR have elaborated, through work of interpretation, on art. 21 of the ACHR that protects the individual right to property, a body of jurisprudence that came to comprehend the collective right to land of indigenous peoples.[288] Art. 21 of the ACHR provides:

> "Everyone has the right to the use and enjoyment of his property"[289]

A similar provision is also contained in art. XXIII of the American Declaration on the Rights and Duties of Man that stated that every person has the right to "*own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home*." Both provisions have to be understood as applying to property regimes that derive from indigenous peoples' customary land tenure,

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[282] OAS, IACHR, "*Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon region*", OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 27; OAS, IACHR, "*Access to Justice and Social Inclusion: The Road towards strengthening Democracy in Bolivia*", OAS/Ser.L/V/II. Doc. 34, 28 June 2007, para. 244

[283] Nuila H. Andrea (2018), "Collective Rights in the United Nations Declaration on the Rights of Peasants and Other People working in Rural Areas", *FIAN International*, pg. 6

[284] Ibid., para. 53

[285] Constitution of the Republic of Ecuador of 2008, art. 57

[286] Constitution of Bolivia (Political Constitution of the State), 7 February 2009, art. 91, art. 218, art. 222, art. 304, art. 349, art. 394

[287] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples by S. James Anaya, 11 August 2008, A/HRC/9/9, para. 54

[288] Toro Huerta, Mauricio Iván (2010), "El derecho de propriedad colectiva de los miembros de comunidades y pueblos indígenas en la jurisprudencia de la corte interamericana de derechos humanos", *Anuario Mexicano de Derecho Internacional*, vol. X, p. 52

[289] Anaya, S. James and Williams, Robert A. Jr. (2001), "The Protection of Indigenous People's Rights over Lands and Natural Resources Under the Inter-American Human Rights System", *The Harvard Human Rights Journal*, vol. 14, p. 8

independently of whatever property regimes are recognized by States' laws. This is important because not recognising indigenous traditional systems of land tenure would perpetuate the history of discrimination that affected indigenous peoples in the past.[290]

Moreover, indigenous land tenure is based on an understanding of property as collective and is derivative of rights among community members, i.e. land ownership is vested on the community and not on the individual.[291]

To understand the development of a body of jurisprudence concerning the collective right to land, I will first analyse the case of Mayagna (Sumo) Awas Tingni v. Nicaragua, the first ruling regarding indigenous peoples' right to land, making a brief comparison with the African system of protection of human rights.

3. A case in focus: Awas Tingni

The right to property pursuant to article 21 of the ACHR is of individual nature, yet it has specific importance for indigenous peoples and tribal peoples because the guarantee of protection of land rights is the fundamental basis for their economic, cultural and spiritual development. The special relationship that indigenous and tribal peoples have with the land has been recognised by the IACtHR in its jurisprudence.[292]

As said above, collective rights need changing and reforms, and indeed, regional courts, such as the IACtHR, play a fundamental role. The IACtHR and the IACHR have elaborated significant jurisprudence with respect to land rights and collective human rights of indigenous peoples, through the competent and wide interpretation of the provisions and articles contained and protected in the ACHR.

The most ground-breaking, pioneering judgement delivered by the IACtHR in relation to the recognition of land rights and their collective aspect is the Case of the Indigenous Community Mayagna (Sumo) Awas Tingni v. the state of Nicaragua, of 2001, which paved the way for the understanding of collective land rights.[293]

Awas Tingni is an indigenous community pertaining to the Mayagna Sumo ethnic group, which lives in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic

[290] Ibid.
[291] Ibid., p. 9
[292] OAS, IACHR, "Indigenous and Tribal People's Rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American Human Rights system", OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, para. 55
[293] Toro Huerta, Mauricio Iván (2010), "El derecho de propriedad colectiva de los miembros de comunidades y pueblos indígenas en la jurisprudencia de la corte interamericana de derechos humanos", *Anuario Mexicano de Derecho Internacional*, vol. X, p. 59

Coast of Nicaragua.[294] The concerns over Awas Tingni Community's land have intensified over the years, because of the situation of vulnerability they live in, due to the lack of delimitation of their territories by the Nicaraguan Government,[295] even though both the Constitution of Nicaragua and Law No. 28, which regulates the Autonomy Statute of the regions of the Atlantic Coast of Nicaragua, recognize collective land rights to the indigenous community.[296]

In 1992, the Awas Tingni Community signed a contract with Maderas y Derivados S.A. (MADENSA) for the management of the forest.[297] In 1994, The Community, the State, represented by MARENA (the Ministry of Environmental and Natural Resources) and MADENSA signed an agreement, which MARENA undertook to avoid undermining the Community's land claims.[298] This trilateral agreement provided for timber harvesting of an area of 43,000 hectares.[299] In 1995, the Ministry of Environmental and Natural Resources approved a forest management plan submitted by Sol del Caribe S.A. (SOLCARSA), a Korean-owned company and in the same year the Regional Coordinator of the RAAN signed an agreement with SOLCARSA corporation authorising the beginning of logging operations.[300] In 1996, the State, through MARENA, granted a 30-years concession to SOLCARSA to utilize and manage an area covering 62,000 hectares in the RAAN, within the lands claimed by the Community.[301]

The Awas Tingni Community protested against the SOLCARSA initiative arguing that the land in question formed part of the traditional territory owned by the Community.[302] The Community first submitted a letter to MARENA, in July 1995

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[294] The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgment on Merits, Reparations and Costs of August 31, 2001), para. 103 (a)

[295] "Complaint of the Inter-American Commission on Human Rights submitted to the Inter-American Court of Human Rights in the case of Awas Tingni Mayagna (Sumo) Indigenous Community against the Republic of Nicaragua" (2002), *Arizona Journal of International and Comparative Law*, Vol. 19, No. 1, pg. 25, para. 18

[296] Political constitution of Nicaragua, 1987, chapter VI, art. 89; Law No. 28 "Statute on the Autonomy of the Regions of the Northern Atlantic Coast of Nicaragua" published in the official newspaper La Gaceta No. 238 on October 30, 1987, art. 36

[297] The case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 103 (h)

[298] Ibid., para. 103 (i)

[299] Anaya, S. James and Grossman Claudio (2002), "The case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International Law and Comparative Law*, vol. 19, No. 1, pg. 3

[300] The Case of Mayagna Awas Tingni (Sumo) v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 103 (j)

[301] Ibid., para. 103 (k)

[302] Anaya, S. James and Grossman Claudio (2002), "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International and Comparative Law*, vol. 19, no. 1, pg. 3

requesting that no further steps be taken to grant concession to the SOLCARSA corporation.[303] However, following no response from the government, the Community filed two amparo remedies with the Nicaragua judicial system in September 1995 and November 1997, yet failing to succeed both times.[304] The Community decided, then to petition to the Inter-American Commission on Human Rights in October 1995 and finally the case was brought before the Inter-American Court of Human Rights in June 1998 by the Inter-American Commission against the State of Nicaragua.[305] The Inter-American Commission presented the case for the Court to decide whether the State violated articles 1 (Obligation to respect rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights.

In the merits, the Court proceeded by analysing violation of article 25 of the American Convention, finding the State of Nicaragua in breach of the above-mentioned article, due to the lack of effective procedure to land titling and demarcation, even though legislation, referring to the protection of collective rights to land, does exist in Nicaragua.[306] However, the revolutionary aspect of the merits (and of the judgment, in its totality) concerns the reasoning of the Court with regard to article 21 of the American Convention, protecting the right to property. The Court first reiterated that article 21 protects private property. Yet, it went on by analysing the meaning of the word property, defining it both in its material aspects, as well as in its more abstract, intangible aspects.[307] It further stated that human rights treaties are living instruments, whose interpretation adapts itself to the evolution of times and living conditions.[308]

The Court, then, affirmed, through article 29 (b) of the American Convention, that any provision set forth within the Convention has autonomous meaning and therefore shall not be restricted by the meaning attributed to them by domestic legislations of State Party to the Convention.[309] Upon these premises, through an 'evolutionary interpretation' of the American Convention on Human Rights, the Court declared that article 21 protects the right to collective property of indigenous communities,[310] further specifying its content by affirming that the beneficiary of this right is the community, the group and not

[303] The Case of Mayagna Awas Tingni (Sumo) v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 103 (ñ)
[304] Ibid., para. 103 (p) and (r)
[305] Ibid., para. 1
[306] Ibid., para. 122 and 127
[307] Ibid., para. 144
[308] Ibid., para. 146
[309] Ibid., para. 147
[310] Ibid., para. 148

the individual and as such, indigenous peoples enjoy the right to live and to own freely their land, precisely because of the presence of a special relationship that ties them with their territories and forms the basis of their culture, spiritual beliefs, and economic survival.[311] The Court recognized how this special relationship with land, makes of land not merely an economic asset, but most importantly a spiritual and cultural subject that they need to preserve for future generations.[312]

In its reasoning the Court goes further by stating that indigenous peoples' customary law should be included, when defining collective rights, embracing them in the right to property, protected under article 21 and as a result of these customary practices, ownership of the land should be sufficient, for those indigenous groups that lack property titles, to have them officially recognized.[313] This understanding of the right to collective property is very much innovative because the act of recognising collective ownership lies in the ancestral use and occupation of the lands by the indigenous community according to their customary practices and not in an official act of the State. Therefore, its recognition by the State is not the prerequisite to the existence of such a right, rather it is merely the externalization of a right, which indigenous groups are already a bearer of.[314] In arriving at these conclusions, the Court required the State of Nicaragua to make the necessary steps to carry out delimitation, demarcation and titling of the Community's territories,[315] abstain from pursuing actions that could be detrimental to the Community itself[316] and monetary reparations to be paid by the State to the Community.[317]

This case is considered a landmark case in the jurisprudence of the Inter-American Court of Human Rights thanks to the recognition, in the merits, of the applicability of article 21 to the collective property of land of indigenous peoples and the protection of these lands under such article of the American Convention on Human Rights, which provides for individual protection. The Court's interpretation embraced the

[311] Ibid., para. 149
[312] Ibid.
[313] Ibid., para. 151
[314] Caligiuri, Andrea (2015), "Il contributo della giurisprudenza della Corte Interamericana dei diritti umani in tema di tutela dei diritti territoriali dei popoli indigeni", *Diritti Umani e Diritto Internazionale*, vol. 9, no. 2, p. 436
[315] The Case of Mayagna Awas Tingni (Sumo) v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 153
[316] Ibid.
[317] Ibid., para. 167

way of conceiving property of indigenous communities, marking a new path in the understanding of the rights and the status of the world's indigenous peoples.[318]

What is also interesting to notice is that the overall structure of the Inter-American system of protection of human rights is individual in character, i.e., individuals are entitled to the rights recognised in the provision of the American Convention. Yet, it has developed robust jurisprudence with respect to land rights, which has been point of reference for the judgements delivered by the organs of the African system of protection of human rights. The African Charter on Human and Peoples' rights may seem to be more capable of protecting collective rights because it tends to mirror the way society is conceived in the African continent. However, the African system of protection of human rights is recent in nature. The African Charter was adopted in 1981 and envisaged the creation of the Commission, which was established in 1989. The African Court on Human and Peoples' rights was established in 2004, whereas the Inter-American court was established in 1979. The foundation of the African system is more recent in comparison with the Inter-American system and in perspective, the Inter-American system is more equipped to analyse and recognise indigenous land rights, not only interpreting its provisions in a revolutionary way, but also with the recent adoption, in 2016, of the American Declaration on the rights of indigenous peoples.

3.1 A comparison with the African system: the Endrois case

The rights of indigenous peoples in the African continent are very contested and within national states, there is reluctance to recognize them.[319] This is why the communication submitted by the Endorois community represents a ground-breaking decision, shedding the light on indigenous rights.[320] The Case brought some issues to the surface and the African Commission on Human and Peoples' Rights (ACHPR) came to deliver a decision on important matters, such as the definition of who indigenous groups are, land rights, the right to cultural integrity and the right to development.

As far as the case is concerned, the complaint was submitted by the Centre for Minority Rights Development and Minority Rights Group on behalf of the Endorois

[318] Anaya, S. James and Grossman, Claudio (2002), "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International and Comparative Law*, vol. 19, no. 1, p. 11

[319] Gilbert, Jérémie (2001), "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights", *The International and Comparative Law Quarterly*, vol. 60, No. 1, p. 246

[320] Ibid.

indigenous people against the State of Kenya in November 2009 to the African Commission on Human and Peoples' rights. The complainants alleged violations resulting from the displacement and evictions carried out by the State of Kenya, with consequences resulting in the denial of their freedom to practice their religion, culture, intrinsically linked to land, specifically Lake Bogoria.[321] The Endorois community has been forcibly evicted from their ancestral lands because of the creation of the Lake Hannington Game Reserve in 1973, and the re-gazetting of Lake Bogoria Game Reserve in 1978, when they have been denied access to their land and to Lake Bogoria, specifically, ever since.[322] The dispossession of their land has caused the impossibility for the indigenous community to practise its religion, its culture, which has its core in Lake Bogoria, a communal site of ceremonies, the territory where their ancestors keep living and the place essential to preserve and protect their community, their traditions, their rituals. Not to speak about the fact that the land, its resources and the lake constitute the primary form of survival for the entire community.[323]

For these reasons, the complainants alleged violations of articles 8 (the right to practice religion), 14 (the right to property), 17 (2) and (3) (the right to culture), 21 (the right to free disposition of natural resources) and 22 (the right to development).

As for the merits, the African commission started by deciding whether the Endorois community is to be considered a community.[324] It declared that the concept of "people" and "indigenous communities" are contested and controversial terms and that is precisely why the African Charter on Human and Peoples' Rights does not give a precise definition. This is because of the lack of a common definition and also consensus internationally and domestically as to which community, or group is to be considered as such.[325] The commission decided to apply four criteria articulated by the Working Group of Experts on Indigenous Populations/Communities to define and identify indigenous peoples, namely the use and occupation of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups and an experience of subjugation, marginalisation,

[321] African Commission on Human and Peoples' Rights, Communication No. 276/03 - Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endrois Welfare Council) v. Kenya, para. 1
[322] Ibid., para. 3
[323] Ibid., para. 6
[324] Ibid., para. 145
[325] Ibid., para. 147

dispossession, exclusion or discrimination.[326] The commission clearly found in culture and its traditions and beliefs a unique basis, which form a distinct feature of 'indigenousness'.[327]

The African Commission, then, proceeded to analyse the articles, which the Endorois community declared the State of Kenya to have violated. The Commission found the State in violation of article 8, the right to practice religion, of the African Charter on Human and Peoples' rights, declaring that the Endorois spiritual beliefs and ceremonial practices constitute a religion,[328] and that the State, in forcibly evicting the community, violated their rights not allowing them to practice it in the sacred place – Lake Bogoria - central to their religious beliefs.[329] The Community made reference to the culture integrity of their group,[330] claiming that the State violated their right to culture (17) and to practice their religion (8). The state of Kenya was also found in violation of article 14 of the African Charter, which protects the right to property. The way this right was drafted, the language used, is very interesting because it does not make any reference to whether the right protects private and/or collective property, enabling the Commission to apply the right both to private and collective property.[331] Moreover, it avoids using subjects, but focuses the attention on the right itself.[332]

The reasoning of the Commission in analysing violations of the above-mentioned article began by determining what is considered to be a 'property right', within the context of indigenous communities and whether this right needs special protection.[333] In doing so, the Commission took into consideration its own jurisprudence and also international case law stating that land and the territories of indigenous community are to be considered property and as such it is protected under article 14 and that these lands and its resources need special measures for their protection.[334] It is not only a matter of respecting the right contained in article 14, but also of protecting it, meaning that the State must refrain from taking actions that could possibly violate it.

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[326] Ibid., para. 150
[327] Ibid., para. 151
[328] Ibid., para. 168
[329] Ibid., para. 173
[330] Ibid., para. 16
[331] Talbot, Michael (2017), "Collective Rights in the Inter-America and African Human Rights Systems", *Georgetown Journal of International Law*, Vol. 49, No. 1, p. 186
[332] Ibid., p.177
[333] African Commission on Human and Peoples' Rights, Communication No. 276/03 - Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endrois Welfare Council) v. Kenya, para. 185
[334] Ibid., para. 186 and 187

The Commission stated that denying access to the Endorois because the State believed it was discriminatory was not the reason why it could carry out forced eviction, because, on the contrary, positive discrimination could actually redress imbalance.[335] Moreover, granting only access to ancestral lands would not be an efficient and effective way to protect their rights, because indigenous communities would only be passive beneficiaries.[336] Instead, the protection of property rights in the context of communal ownership makes indigenous peoples able to engage with the State and/or third parties as active stakeholders.[337] Thus, the Commission found the State of Kenya in violation of article 14, on the basis of proportionality, i.e. the encroachment was not proportionate to any public need and not in accordance with national and international law.[338] The recognition of the collective form of ownership was at the centre of the claims brought by the Endorois community, and its recognition by the Commission is important for two reasons: first, because it creates a precedent within the African system of protection of indigenous rights, marking a starting point in its jurisprudence and second because it aligns with international standards in relation to the recognition of indigenous rights, moving away from the traditional, individual, western approach to property rights and creating new space for the assimilation of other forms of property.

In its analysis about the encroachment of the aforementioned articles, the African Commission made reference to the jurisprudence of the Inter-American Court of Human Rights and to other international instruments, such as the UNDRIP.[339] This "jumping" from one jurisprudence to the other is sign of the attempt of the Commission to draw inspiration from more robust jurisprudence and somewhat accelerate the development of an African system of protection of indigenous rights.[340] Looking at the Inter-American system, specifically in the Case Mayagna (Sumo) Awas Tingni, the Court was more reluctant to make reference to external sources of law and relied mostly on its own jurisprudence. Moreover, making specific reference to the right to property, protected under article 14 of the African Charter and under article 21 of the American Convention, the way the rights were drafted indicate a difference, which is evident in the merits of

[335] Ibid., para. 196
[336] Ibid., para. 204
[337] Ibid.
[338] Ibid., para. 238
[339] Claridge, Lucy (2019), "The approach to UNDRIP within the African Regional Human Rights System", *The international Journal of Human Rights*, vol. 23, no. 1-2, p. 272
[340] Talbot, Michael (2017), "Collective Rights in the Inter-American and African Human Rights Systems", *Georgetown Journal of International Law*, vol. 49, no. 1, p. 187

both the African Commission and the Inter-American Court: the Inter-American Court resorted to article 29 of its Convention, enabling it to interpret article 21 as to comprehend collective rights, whereas the African Commission was able to recognize them without requiring any interpretation, helped by the language of the right itself. This can be interpreted as an advantage that the African system enjoys over the American system.

Lastly, the African Commission analysed the breaching of article 22 of the African Charter, the right to development. It stated that the violation of the above-mentioned article should be evaluated with a two-fold approach, which is both constitutive and instrumental, stating that a violation of one entails a violation of the other as well.[341] It stated the scope of the right to development, which requires the freedom from the part of the community to freely choose where to live,[342] and that the State of Kenya put the Endorois in a situation that prevented them from having this choice.[343] The African Commission specifically focused on the lack of consultation with the community in such an important matter as land is, declaring that the State did not obtain the free, prior and informed consent to proceed with the project,[344] which is greatly supported and affirmed by UN bodies. For these reasons, it declared the State of Kenya in breaching of article 22 of the African Charter.

The case in question reflects on the one hand the advantages that the African system of protection of human rights could possibly "exploit" in face of the Inter-American system, and on the other the fact that its jurisprudence is very recent and not consolidated. The case-law of the Inter-American system proves to be more equipped, prepared and robust, as we will see below.

4. Drawing conclusions: the right to land in the jurisprudence of the IACtHR

The jurisprudence elaborated within the Inter-American system has created a protection system for indigenous land rights starting from the interpretation of art. 21 of the ACHR, that, as stated, protects the right to property.[345] As understood in the Mayagna

[341] African Commission on Human and Peoples' Rights, Communication No. 276/03 - Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endrois Welfare Council) v. Kenya, para. 277
[342] Ibid., para. 278
[343] Ibid., para. 279
[344] Ibid., para. 291
[345] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 123

(Sumo) Awas Tingni v. Nicaragua case, the Court was able to recognise collective ownership of the land according to art. 29 (b) of the ACHR, which recognises the *pro homine* principle. This principle corresponds to the prohibition to interpret in a restrictive way the provisions set forth in the Convention. This allows for an extensive interpretation of the rights contained in the Convention with the possibility of drawing reference from international instruments.[346]

In later judgements, the Court has reiterated that the collective right to the land means that ownership is centred on the group, rather than on the individual, as it first stated in the Mayagna (Sumo) Awas Tingni case. The right to land of indigenous peoples is a collective right, whose beneficiary is the respective indigenous group.[347] It is opinion of the Court that individual rights do not collide with collective rights. There is, on the other hand a strict complementarity between the two.[348] In the Sawhoyamaxa Case, it added that disregarding specific ways of use and enjoyment of property, springing from specific cultures, use and traditions would turn illusory the protection under art. 21 of the ACHR for millions of peoples. This view goes beyond the notion of individual subject to embrace the notion of collective subject.[349] The notion of collective subject is mirrored in collective forms of reparations, destined to the group as a whole and not to the members of the group.[350]

Another element that emerges from the jurisprudence of the Court is that the collective ownership of the land is based on the recognition of a special, spiritual, cultural relationship with ancestral lands and not on State's recognition.[351] The element upon which this is based is traditional occupation of the lands. This traditional occupation is constructed starting from the collective memory of the group, specifically it finds its foundation in indigenous customary law to which the Court attributes a specific juridical value.[352] In this regard, history is important in determining both the recognition as

[346] Ibid., p. 117
[347] Russo, Anna Margherita (2016), "El Derecho Transcostitucional de la Diversidad: la "especialidad indigena" en el desarrollo interamericano del derecho de propiedad", *Inter-American and European Human Rights Journal*, vol. 9, no. 1, p. 111
[348] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 124
[349] Ibid.
[350] Russo, Anna Margherita (2016), "El Derecho Transcostitucional de la Diversidad: la "especialidad indigena" en el desarrollo interamericano del derecho de propiedad", *Inter-American and European Human Rights Journal*, vol. 9, no. 1, p. 111
[351] The Case of Mayagna Awas Tingni (Sumo) v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para 149
[352] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 125

indigenous groups and the traditional and ancestral use and occupation of land over time.[353] In addition, possession of traditional territory is recorded in the historical memory of the community and breaking their relationship with it would entail the loss of their culture and ultimately loss of diversity, above all because it all refers to a physically and culturally determined geographical area.[354]

The organs of the Inter-American system have reiterated that the American Convention is violated every time traditional lands are considered State's lands due to the fact that indigenous peoples did not possess a formal property title o did not proceed to its registration.[355] In this sense, the recognition of collective rights within the Inter-American system of protection of human rights goes hand in hand with the titling, the demarcation and the delimitation of such geographical area corresponding to the ancestral and traditional territory.[356] In the case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua,[357] the Court reiterated the duty of the State to carry out titling, delimitation and demarcation of the land of the Community, describing its geographical extent as the area where the Community lives and carries out its daily activities.[358] To determine the extent of this area, the Court has referred to the historical occupation of such land, studying documents of different nature, from the language of the names to traditional, cultural, healing practices therein.[359] The lack of titling, delimitation and demarcation is cause of great uncertainty among the members of the Communities because one of the main implications of this norm is that the State cannot grant concession to third parties for the exploration or exploitation of natural resources within the territory of a specific group, without prior and effective consultation with the Community.[360]

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[353] OAS, IACHR, "Indigenous and Tribal People's Rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American Human Rights system", OEA/Ser. L/V/II. Doc. 56/09, 30 December 2009, para. 35

[354] The Case of Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (Ser. C) No. 125 (Judgement on Merits, Reparations and Costs of June 17, 2005), para. 216

[355] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 125

[356] OAS, IACHR, "Indigenous and Tribal People's Rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American Human Rights system", OEA/Ser. L/V/II. Doc. 56/09, 30 December 2009, para. 78

[357] The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H. R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001)

[358] Ibid., para. 153

[359] OAS, IACHR, "Indigenous and Tribal People's Rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American Human Rights system", OEA/Ser. L/V/II. Doc. 56/09, 30 December 2009, para. 79

[360] Ibid., para. 103

Moreover, indigenous land rights based on traditional ownership and use persist even in cases of loss of lands due to external factors. In this case they have the right to restitution and when restitution is not possible than they have the right to alternative lands. These alternative lands must have similar characteristics to the lands lost with regard to both the territorial extension and qualitative features to make possible the flourishing of the life of the indigenous group.[361]

Another element of interest is that when individual property rights and collective rights of indigenous peoples are or seem to be in opposition, the Court must assess a balance.[362] In the Case of the Saramaka People v. Suriname,[363] the State of Suriname granted land concessions for forestry and mining to third parties in the area of the territory possessed by the Saramaka People, without their full, and effective consultation.[364] In assessing violation of article 21, the Court analysed the possible restrictions to be applied to the article, the right to consultation and obtain consent and the right to the benefits deriving from the concession. While, on the one hand, exploration or extraction activities carried out in the territory of the Saramaka people could affect them in a greater or lesser degree, it is opinion of the Court that the interpretation of article 21 should not be so strict so as to prevent the State from ever granting any concession to third parties.[365] The Court recalled the case of the Yakye Axa Indigenous Community v. Paraguay in determining somewhat a balance between the rights of the indigenous community and the right of the State to grant concession, declaring that the State can restrict article 21 under four conditions: 1. restrictions must be previously established by law; 2. they must be necessary; 3. they must be proportional and 4. their purpose must attain a legitimate goal in a democratic society.[366]

Therefore, exploitation and extraction activities can be carried out, yet within a balancing between the rights of the indigenous groups and other individual rights. This balance must take into consideration the fact that these projects of extraction and

[361] Caligiuri, Andrea (2015), "Il contributo della giurisprudenza della Corte interamericana dei diritti umani in tema di tutela dei diritti territoriali dei popoli indigeni", *Diritti umani e Diritto Internazionale*, vol. 9, no. 2, p. 436-437
[362] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 126
[363] The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (Ser. C) No. 172 (Judgement on Preliminary Objections, Merits, Reparations and Costs of November 28, 2007)
[364] Ibid., para. 124
[365] Ibid., para. 126
[366] Ibid., para. 127

exploitation must not deny the cultural and social life of the indigenous group.[367] In fact, to make sure that restrictions do not entail the denial of the survival of the group, the State must ensure the effective participation of the community into the exploration or exploitation plan, it must guarantee that they will receive reasonable benefits deriving from such plan and it must previously analyse and assess the environmental and social impacts of the activities to be carried out.[368] The balance that the Court must assess follows two main phases: first, effective participation of the indigenous community to the decision-making process must be guaranteed and second, the community must be guaranteed the right to participate in the benefits deriving from natural resources exploitation.[369]

Effective participation refers to the process of consultation that must be culturally appropriate, meaning that traditional ways of de cision-making must be taken into consideration in order to achieve an agreement with the indigenous community. Moreover, with regard to large-scale development or investment projects the State must also obtain their free, prior and informed consent.[370] With regard to benefit-sharing, the right to obtain just compensation translates into the right to share in the benefits deriving from the restriction or deprivation of the right to the community to use and enjoy their lands and natural resources.[371]

To conclude the analysis on the jurisprudence of the Court concerning the right to land of indigenous peoples, it is worth reiterating that in the leading case Awas Tingni, through the adoption of a cultural perspective, it turned the right to land into a key right to develop "the" right of indigenous peoples, within the Inter-American framework.[372] The special relationship that indigenous peoples have with their lands requires first, the protection of communal property, in which the cultural identity of the group has its foundation and second, the guarantee of the possession, use and enjoyment of such lands, i.e. to guarantee a number of other rights that are connected to the culture of the group.[373]

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[367] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 127
[368] The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (Ser. C) No. 172 (Judgement on Preliminary Objections, Merits, Reparations and Costs of November 28, 2007), para. 129
[369] Posenato, Naiara (2018), "La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali", *DPCE online*, p. 128
[370] Orellana, A. Marcos (2008), "Saramaka People v. Suriname", *The American Journal of International Law*, vol. 102, no. 4, p. 845
[371] Ibid.
[372] Russo, Anna Margherita (2016), "El Derecho Transconstitucional de la Diversidad: la "especialidad indígena en el desarrollo interamericano del derecho de propriedad", *Inter-American and European Human Rights Journal*, vol. 9, no. 1, p. 113
[373] Ibid., p. 114

5. The right to cultural identity in the Inter-American system

Within the Latin-American context, culture has been used as instrument of oppression and discrimination in the name of national identity.[374] At the time of independence from the Spanish colonization, Latin-American leaders built what they defined as national identity and dominant culture, without taking into the discourse indigenous peoples and their cultures.[375] Even though Spanish colonizers had left the continent and colonization had ended, the new leaders were subject to a new form of dependency or subjugation because their minds were that of the colonizers.[376] This minds' colonization was accompanied by the racist and discriminatory practices of the daily lives. During Spanish rule, indigenous peoples were mostly exterminated.[377] The idea was the creation of a Spanish economic, political, social and cultural dominance, and as a result indigenous peoples were either destructed or assimilated.[378] Current Latin-American cultures are the results of an ongoing process of fought and conquered recognition. As already stated, during colonization, indigenous peoples and their cultures suffered from heavy discrimination and extermination. Nonetheless, Spanish colonizers were not able to transfer Spanish culture in its "original" form, as it became to be influenced and changed through contact with indigenous cultures.[379]

After independence, the main objective was the creation of a national identity accompanied and sustained by the dominant culture, which still denied its indigenous "nature". This was done through processes of assimilation and "*blanqueamiento*", which consisted in "turning white" local peoples as European standards promoted racist practices.[380] According to Catherine Walsh, the policy of "*blanqueamiento*" worked both in its physical and in its more cultural aspect slowly westernising Latin-America.[381] Nonetheless, culturally, Latin-America felt the need to affirm its identity and its own

[374] Stavenhagen, Rodolfo (2002), "La diversidad Cultural en el Desarrollo de las Américas. Los pueblos indígenas y los estados nacionales en Hispanoamérica", *Organización de Estados Americanos*, para. 36
[375] Ibid.
[376] Ibid., para. 37
[377] Ibid., para. 22
[378] Ibid., para. 27
[379] Ibid., para. 32
[380] Ibid., para. 40
[381] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (De)Coloniales de nuestra época", Universidade Andina Simon Bolivar and Abya Yala Editions, Quito, p. 26

culture,[382] which tried to distance itself from being merely the container of a transformed western culture.

The cultural heterogeneity that Latin-America came to be part of, had a role in the definition of a Latin-American culture, including the element of "*mestizaje*".[383] "*Mestizaje*" has to be intended not only as a miscegenation and a cultural blend, but as Catherin Walsh states, a "political discourse"[384], based on the concept of 'race' and power relations. These discourses and practices of "structural racism"[385] began to be challenged by indigenous groups' movements across Latin-America, in the last two decades, together with the presence of emerging indigenous organizations.[386]

The ACHR does not contain the right to cultural identity, yet, in recent years, it has developed within the work of the Inter-American Court of Human Rights and its case law.[387] The jurisprudence of the Inter-American Court provides insight of how international standards (and other regional standards too) are fundamental and important. This is to say that the IACtHR considers human rights treaties as living instruments, whose interpretation must consider changes over time and present-day conditions.[388] It also takes into consideration the evolution of international declarations, resolutions, rules and treaties that form the *corpus juris* for the interpretation of the provisions set out in the ACHR. This evolution in the interpretative rule of the Court is in conjunction, as previously stated in the Case Mayagna (Sumo) Awas Tingni, with art. 29(b) of the ACHR, which states that no provision in the convention should be interpreted as restricting the enjoyment or exercise of any right or freedom contained in the Convention. This is why the Court is able to consider international documents, such as ILO Conventions, the UNDRIP, as well as national legislations of American states in its work.[389] Therefore, it

[382] Stavenhagen, Rodolfo (2002), "La diversidad Cultural en el Desarrollo de las Américas. Los pueblos indígenas y los estados nacionales en Hispanoamérica", *Organización de Estados Americanos*, para. 42
[383] Ibid., para. 48
[384] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (De)Coloniales de nuestra época", Universidade Andina Simon Bolivar and Abya Yala Editions, Quito, p. 27
[385] Stavenhagen, Rodolfo (2002), "La diversidad Cultural en el Desarrollo de las Américas. Los pueblos indígenas y los estados nacionales en Hispanoamérica", *Organización de Estados Americanos*, para. 79
[386] Ibid., para. 78
[387] Cançado Trinidade, Antônio Augusto (2009), "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in *Multiculturalism and International Law* edited by Sienho Yee and Jaques-Yvan Morin, Martinus Nijhoff Publishers, Leiden – Boston, p. 477
[388] Odello, Marco (2012), "Indigenous peoples' rights and cultural identity in the Inter-American context", *The International Journal of Human Rights*, vol. 16, no. 1, p. 34
[389] Ibid.

is important to bear in mind the discussion about culture and land within the international framework that took place in the previous pages.

The right to cultural identity of indigenous peoples has to be intended as a collective right, which communities enjoy together, and which affects every aspect of their lives. In the Case Mayagna (Sumo) Awas Tingni v. Nicaragua, that has been extensively discussed previously, the Court recognised land as a source of material and spiritual element of their culture, which they must enjoy to "preserve their cultural legacy and transmit it to future generations",[390] and not merely as a possession. The cultural legacy, which the court refers to in the judgement[391] is embedded in the element of preservation, which clearly refers to the legacy of past generations and conservation, intended as not merely the exploitation of the land and natural resources where they live, but rather as the protection and therefore preservation of this environment, as this mirrors a specific cultural aspect of their lives: the integration of the human being with the environment.[392] This aspect is also specified in one of the latest reports of the IACHR, where it expresses its concerns about environmental damages, which, in turn, put at risk not only the culture, but ultimately the life of indigenous groups.[393] Moreover, the element of cultural identity in the present case can also be evinced in the fact that the Court, in its reasoning took into consideration indigenous peoples' customary law.[394]

In the case Akye Axa v. Paraguay, the judgement concerned the forced displacement of the members of two indigenous communities due to the commercialization of their land by the State. This displacement forced them to live in precarious living conditions. From the Court's decision it can be ensued that the return of the land to the communities aimed at the survival of the cultural identity of the members of the group, protecting their right to life, including their right to cultural identity.[395] In

[390] The Case of Mayagna Awas Tingni (Sumo) v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 149
[391] Ibid., para. 141
[392] Cançado Trinidade, Antônio Augusto (2009), "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in *Multiculturalism and International Law* edited by Sienho Yee and Jaques-Yvan Morin, Martinus Nijhoff Publishers, Leiden – Boston, p. 486
[393] OAS, IACHR, (2019), "Indigenous and Tribal Peoples of the Pan-Amazon Region: Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region", OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 292
[394] Cançado Trinidade, Antônio Augusto (2009), "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in *Multiculturalism and International Law* edited by Sienho Yee and Jaques-Yvan Morin, Martinus Nijhoff Publishers, Leiden – Boston, p. 487
[395] Ibid., p. 488

this judgement the right to cultural identity was analysed as a component of the right to life. Specifically, judge Burelli, in his partially dissenting opinion, listed a number of human rights, beside the right to life, that can be useful in the protection and promotion of indigenous cultural identity.[396]

In the case of the Sawhoyamaxa Indigenous Community v. Paraguay, the Court reflected on the notion of culture, declaring that within the indigenous context this notion embraces a specific way to see, be and act in the world, the source be it the land, because it forms part of their cosmovision, of their religiousness and their cultural identity.[397] Moreover, it also stated that conceiving only one way of using and disposing of property would render the protection under article 21 illusory, embracing, as a consequence, uses of land and territory that emerge from culture and beliefs.[398]

The importance of this fundamental relationship, this sacredness and spirituality was also recognised in the Saramaka case, where the Court found how land is not only connected to the indigenous group's cultural identity, but also to history.[399] There is a past, present and future dimension which forms part of their cultural heritage and patrimony, and for which the preservation of their distinctiveness is vital. Cultural heritage for indigenous peoples is to be understood as the ensemble of both tangible and intangible cultural heritage.[400] It is embedded in their relationship with the territory, which includes the protection and preservation of the environment in which they live.[401] Indigenous peoples' cultural heritage is a holistic concept, which is based on the sacredness and spirituality of the land as well as an intergenerational concept with a past, present and future dimension.[402]

The work of the Court in recognizing the right to cultural identity to indigenous peoples has been important, because, even though the right is not contained in the American Convention, the court has been able to incorporate it and construct it in its

[396] Odello, Marco (2012), "Indigenous peoples' rights and cultural identity in the Inter-American context", *The International Journal of Human Rights*, vol. 16, no. 1, p. 41
[397] The Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (Ser. C) No. 146 (Judgement on Merits, Reparations and Costs of March 29, 2006), para. 118
[398] Ibid., para. 120
[399] The Case of the Saramaka Peoples v. Suriname, Inter-Am. Ct. H.R. (Ser. C) No. 172 (Judgements on Preliminary Objections, Merits, Reparations, and Costs of November 28, 2007), para. 82
[400] UN, HRC, Study on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, 19 August 2015, A/HRC/30/53, para. 5
[401] Ibid., para. 6
[402] Ibid.

jurisprudence through its case-law as an important provision to be protected,[403] in conjunction with others explicitly protected under the American Convention.

Despite its elaboration within the case-law of the IACtHR or its promotion at international level, the right to cultural identity does not held clear definition *per se*. Legally, this is of particular importance, since law defines legal obligations and rights for practical purposes. Cultural identity, based on the notion of culture, denotes a concept that is more comprehensive, i.e. it includes traditional cultural expressions, such as artefacts, intellectual production, traditions and in addition to these elements, also languages, land ownership and use of natural resources, legal traditions. The list of elements that concur to the composition of a right to cultural identity can be further extended, taking into consideration the indivisibility and interdependency of human rights.[404]

Given the complexity of the definition of the right as such, cultural identity can be identified as a 'complex' human right, as both the terms culture and identity hold complex realities and it is also usually mentioned along with other rights (in the cases presented before, land rights are one example). Moreover, the content concerning cultural identity draws from other disciplines, such as anthropological studies. Notwithstanding the lack of a legal definition of cultural identity, the interpretative work of the Courts based on other human rights can provide solutions for the protection of cultural rights as well as the cultural identity of individuals and, in our case, groups and communities.[405]

Notwithstanding these progresses, indigenous cultural existence is under threat of extinction because of assimilation programs and policies throughout Latin American national states over time.[406] In several Latin-American countries, indigenous peoples face discrimination on a cultural, religious and ethnic ground.[407] The forms that discrimination can take have profound consequences in their lives. The recognition of identity with culture and environment is expressed and recognised with respect to the Amazonian region, which comprises the states of Bolivia, Brazil, Colombia, Ecuador, Guyana, French

[403] Cançado Trinidade, Antônio Augusto (2009), "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in *Multiculturalism and International Law* edited by Sienho Yee and Jaques-Yvan Morin, Martinus Nijhoff Publishers, Leiden – Boston, p. 498

[404] Odello, Marco (2012), "Indigenous peoples' rights and cultural identity in the Inter-American context", *The International Journal of Human Rights*, vol. 16, no. 1, p. 41

[405] Ibid., p. 42

[406] Faundez, Julio (2009), "Access to Justice and Indigenous Communities in Latin America", University of Warwick, p. 3

[407] OAS, IACHR, "Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon region", 29 September 2019, OAS/Ser.L/V/II. Doc. 176, para. 38

Guyana, Peru, Suriname and Venezuela.[408] In this region, the Inter-American Commission declared how the cultural and spiritual integrity of indigenous groups is intimately bound to the biodiversity of the environment, where they live.[409] Therefore, any action taken to damage this environment and the communities has direct effects on the ability of these groups to practice their cultural and spiritual tradition. The right to cultural and spiritual identity is recognised to be collective in character,[410] with a special attachment to land and the environment. Any project affecting their lands, will, in turn, affect their right to cultural identity and integrity and severing this link entails the risk of a cultural loss with the resulting loss of diversity.[411]

The approach, according to which, this diversity is preserved and protected is intercultural, because it takes into account the coexistence of diversity of cultures and it is regarded to be the most appropriate when studying the relationships among groups that practice different cultures.[412] In this sense, States, to effectively protect the rights of indigenous peoples, should not forget the cultural distinctiveness of these groups[413] and in mainstreaming this approach, the entire national institutional structure should undergo a series of changes, from education to health services.[414] Nonetheless, intercultural dialogue opens the way to a more inclusive juridical space, where indigenous peoples can address their claims and demands in a context that already recognises their existence and also their cultural distinctiveness, not dismissing them merely as a 'minority'.

In the next chapter, we will see how this intercultural approach is going to play out in the Inter-American system of protection of human rights and in the Constitutions of Bolivia and Ecuador. The premise is that the intercultural approach adopted takes the name of *interculturalidad*, which is specific of the Latin-American region.

[408] Ibid., Appendix 1, p. 199
[409] Ibid., para. 142
[410] Ibid., para. 293
[411] Ibid., para. 295
[412] Ibid., para. 43
[413] Ibid., para. 44
[414] Ibid., para. 45

CHAPTER III – INTERCULTURALIDAD AND BUEN VIVIR: AN INDIGENOUS PERSPECTIVE ON HUMAN RIGHTS

Drawing from the observations of the preceding chapter, i.e. the need to adopt an intercultural approach when dealing with indigenous peoples' rights, this last chapter will explore this approach in its specificity: "*interculturalidad*" in Latin-America. I will do so by going further into the claims of indigenous peoples and the relationship between land and culture. I will investigate how *interculturalidad* is revealed in the jurisprudence of the IACtHR, specifically, from the cases Awas Tingni and Akye Axa to Lhoka Honhat. The former cases give us the basis of the adopted intercultural approach that in the Akye Axa, we will see, can be evinced in the recognition of the cultural origin of the right to land, so as to reconciliate for past discriminations and oppressions. From here, we are going to see, in the case Lhaka Honhat where the land and, especially the environment are going to be the main characters of the judgement, how this intercultural perspective is going to be enriched, giving and intercultural approach not only to the recognition of the right to land, but also to other human rights. Successively, I will enter the national system and specifically try to analyse how *interculturalidad* plays out in national contexts, within juridical systems as well as within daily-lives practices. I will go through the analysis of the two national Constitutions of the states of Bolivia and Ecuador that proclaimed themselves to be intercultural and pluricultural states. Continuing with the analysis of these two Andean Constitutions, I will focus on the relationship between *buen vivir* and *interculturalidad* and how the concept of *buen vivir*, which is key concept of *interculturalidad*, brought about great changes with specific reference to the rights of nature, which are core to *buen vivir*. I will conclude with a brief analysis of how the rights of nature, springing from indigenous cosmovisions, play out in practice looking at the dynamic, active participation of indigenous peoples in environmental projects and the role of traditional knowledge in protecting biodiversity.

Before going into the discussion, I would like to dwell upon the notion of *interculturalidad*.

1. The notion of *interculturalidad*

In Latin-America, *interculturalidad* developed around the 1980s and more prominently around the 1990s with claims made by indigenous movements, with regard

to their condition of structural discrimination, claiming from States more equitable, intercultural relationships between the dominant class – the white-mestizo – and indigenous groups.[415]

Interculturalidad is both concept and practice. It refers to the exchange among cultures on the basis and in conditions of equality.[416] It pushes for the construction of relations beyond ethnic and cultural differences and especially it breaks with the hegemony of the dominant culture,[417] to include the traditionally-excluded and discriminated cultures – the indigenous and also afro cultures – to build more inclusive and respectful societies.

The novelty brought by *interculturalidad* is that it breaks with common views about how cultural differences are conceived and regulated within national systems in their political, social and economic aspects. In this regard, a differentiation between multiculturalism and *interculturalidad* is necessary.

Multiculturalism is associated with the word tolerance[418] in the sense that it refers to the existence of a variety of cultures within the same space,[419] without them having any relationship whatsoever. In this sense it is more a descriptive concept, because it is limited to describing the reality of a given geographical area, be it local, regional, national or international.[420] Tubino stresses the difference between *interculturalidad* and multiculturalism by saying that "multiculturalism promotes tolerance, interculturalism dialogue".[421] A multicultural society lives without the necessity of interaction among cultures, in this sense it avoids possible conflict. However, it does not affect the conditions of inequality that persist among social groups, leaving intact existing structures.[422]

Interculturalidad, on the other hand, goes further so as to transform and revolution existing structures. It aims at imploding the colonial structures of power, as Catherine

[415] Rodríguez Cruz, Marta (2018), "Construir la interculturalidad. Políticas educativas, diversidad cultural y desigualdad en Ecuador", *Íconos. Revista de Ciencias Sociales*, no. 60, p. 218
[416] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 41
[417] Ibid.
[418] Tubino, Fidel (2013), "Intercultural Practices in Latin American Nation States", Journal of Intercultural Studies, vol. 34, no. 5, p. 617
[419] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 42
[420] Ibid.
[421] Tubino, Fidel (2013), "Intercultural Practices in Latin American Nation States", Journal of Intercultural Studies, vol. 34, no. 5, p. 617
[422] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 43

Walsh states,[423] by re-building, re-founding the State in all its aspects, functions and sectors. The type of relations that *interculturalidad* promotes are built on a symmetrical axis, where the centre is the encounter among cultures.[424] This encounter is profoundly revolutionary because it aims at overturning power relations, discrimination and racism[425] so as to de-colonize existing political, social, economic, cultural structural patterns that in Latin-America have been put in place since Spanish colonization.

Interculturalidad has to be intended more as a verb than a noun, because it is not merely about recognizing it, rather, about a process and a project that involves actions at all levels of society.[426] The system that *interculturalidad* tries to create is one where cultural differences are celebrated to build bridges, relationships based on mutual respect, understanding and enrichment.[427]

According to Walsh, the challenge that *interculturalidad* poses is "not the concealment of inequalities, contradictions and conflicts within the society or the same colonial matrix, rather working with and intervene in them."[428] From this, the idea is that *interculturalidad* entails new economic models of development, new forms of understanding democracy and the re-invention of the State itself.[429]

Catherine Walsh suggests three types of *interculturalidad*. Relational *interculturalidad* refers to the exchange among cultures, which can take place both in conditions of equality and in conditions of inequality. The problem posed by this perspective is that it conceals or underplays conflict and power relations that remain intact and continue existing beyond this cultural exchange. Functional *interculturalidad* refers to *interculturalidad* as being functional to the existing system, therefore not bringing any change with regard to the asymmetry of relations and cultural and social inequalities. This perspective makes *interculturalidad* a tool for a new form of dominance. Critical *interculturalidad* is embedded in and starts from the structural-colonial-racial problem.[430] It enters a system, which, in Latin-America, is hierarchically developed: at the top the

[423] Ibid.
[424] Cruz Rodríguez, Edwin (2013), "Estado Plurinacional, interculturalidad y autonomia indígena: Una reflexión sobre los casos de Bolivia y Ecuador", Revista Via Iuris, no. 14, p. 61
[425] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 45
[426] Ibid.
[427] Ibid., p. 46
[428] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 47
[429] Cruz Rodríguez, Edwin (2013), "Estado Plurinacional, interculturalidad y autonomia indígena: Una reflexión sobre los casos de Bolivia y Ecuador", Revista Via Iuris, no. 14, p. 61
[430] Walsh, Catherine (2010) "Interculturalidad crítica y educación intercultural", in J. Viaña, L. Tapia, C. Walsh, *Construyendo Interculturalidad Crítica*, III-CAB, La paz, p. 78

white and the "*blanqueados*" and at the lower levels indigenous peoples and afro-descendants.[431] This model of organization is clearly discriminatory and *interculturalidad* in its critical perspective enters this power relationship to re-build and re-found more equitable and fair relationships, where the axis is not vertical but horizontal. A revolution that promotes on-going and mutual exchange, where conflict is not avoided, rather faced with the objective of learning possible negotiation strategies on the basis of constant dialogue.

This way of conceiving *interculturalidad* grows from the conviction that the challenge involves the revolution of society as a whole, and not only the indigenous and afro populations, but also those white-mestizo people at the top of the pyramid.[432]

This way of understanding *interculturalidad* is specific of the Latin-American context, where the significance of *interculturalidad* is in uprooting the structures of colonialism to which indigenous peoples have been historically subjected so as to re-found the State taking into consideration the indigenous element. In Europe, *interculturalidad* refers to the integration of migrants and ethnic minorities, and play as a vehicle of universal principles, assuming the existence of an egalitarian condition among participants.[433]

1.1 *Interculturalidad* in the jurisprudence of the IACtHR

The way *interculturalidad* plays out in the Inter-American system of protection of Human Rights is in the intercultural method that the Inter-American Court of Human Rights (the Court) has developed starting from the case Mayagna Sumo Awas Tingni v. Nicaragua, taking into consideration the different cosmovisions of indigenous peoples.[434] In the case under consideration, the Court adopted the indigenous tradition in establishing that Nicaragua had violated the right to land of the indigenous community. Specifically, it determined the recognition and protection of collective property under article 21 of the American Convention of Human Rights (American Convention). The Court interpreted article 21 of the American Convention in light of the relationship that indigenous groups

[431] Ibid.
[432] Ibid., p. 79
[433] Aman, Robert (2017), "Colonial Differences in Intercultural Education: On Interculturality in the Andes and the Decolonization of Intercultural Dialogue", *Comparative Education Review*, vol. 61, no. S1, p. 106-107
[434] Lopez, Melisa (2011), "El método intercultural de elaboración de la jurisprudencia: instrumento privilegiado para un enfoque plural de los derechos humanos", available at http://www.institut-gouvernance.org/docs/etudecidh_es.pdf , p. 15

have with their land and the way they live on that land, which constitutes the fundamental basis of their cultures, spiritual life, integrity and economic survival.[435] It went further so as to elevate indigenous customary law as legal source to determine that possession of the land suffice for indigenous peoples' lacking land property titles and recognition of that possession.[436] The intercultural method, therefore, develops from the application of cultural, traditional and legal systems specific to indigenous peoples.

The case Yakye Axa v. Paraguay[437] elucidates even better the content of this methodology, where the Court links for the first time the right to land and natural resources to the culture of the indigenous group.[438] The Court took into consideration the cultural diversity of indigenous peoples and used it as instrument to enrich the content of the American Convention and the interpretation of the provisions protected therein,[439] operating a balance between the right to land to indigenous groups and the right to property, without automatically giving predominance to the former.[440] The intercultural aspect emerges in its reconciliatory aspect[441], according to which the Court recognises the specificity of indigenous rights to land, as a way to remedy past oppressions.[442]

Within the intercultural method and comprehension of human rights, the case of the Indigenous Communities of the Lhaka Honhat Association v. Argentina[443] gives more light and content to this interpretation, by enlarging the protection of indigenous rights with the inclusion of article 26 of the American Convention, protecting economic, social, cultural and environmental rights (ESCER),[444] for the first time, marking a milestone in the protection of indigenous rights. The case concerns the claims for the recognition of

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[435] The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H. R. (Ser. C) No. 179 (Judgement on Merits, Reparations and Costs of August 31, 2001), para. 149
[436] Ibid., p. 151
[437] The Case of Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (Ser. C) No. 125 (Judgement on Merits, Reparations and Costs of June 17, 2005)
[438] Lopez, Melisa (2011), "El método intercultural de elaboración de la jurisprudencia: instrumento privilegiado para un enfoque plural de los derechos humanos", available at http://www.institut-gouvernance.org/docs/etudecidh_es.pdf, p. 27
[439] Fuentes, Carlos Iván (2006), "Universalidad y diversidad cultural en la interpretación de la Convención Americana sobre Derechos Humanos: Innovaciones en el caso de la Comunidad Indígena Yakye Axa", *Revista CEJIL*, no. 2, p. 73
[440] Baldin, S. and De Vido, S. (2019), "Strumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità", *DPCE online*, p. 1313
[441] De Sousa Santos, Boaventura (2012), "Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad", in Sousa Santos, B. and Exeni Rodríguez, J.L. *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala, pp. 33-34
[442] Baldin, S. and De Vido, S. (2019), "Strumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità", *DPCE online,* p. 1314
[443] The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020)
[444] Ibid., para. 195

land ownership by indigenous communities belonging to the Wichí (Mataco), Iyiwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples in Argentina and the effects of environmental damages on their cultural identity, as a consequence of illegal logging activities, livestock and fencing promoted by the Criole population that had been occupying their traditional lands.

These indigenous communities alleged violations of the collective right to land (art. 21) and the right to a healthy environment, to adequate food, to water and to take part in cultural life (art. 26). The right to indigenous communal property is consolidated part of the jurisprudence of the Court and in the case under consideration it found Argentina in violation of article 21 of the American Convention with regard to 1) the right to have access to adequate procedures and to the obligation to guarantee rights and to adopt domestic legal provisions;[445] and 2) the non-compliance with the obligation to ensure adequate mechanisms for a FPIC of the indigenous communities.[446]

The interesting aspect of this case is the reasoning of the Court with regard to the interpretation of article 26 of the American Convention, enriching not only the protection of indigenous rights under the Convention, but also the intercultural content of the provisions protected therein. The first operation of the Court in the case was the separate analysis of the content of the rights protected by article 26 and then the analysis of the interdependence of such rights in the light of the specificity of indigenous peoples.

The Court relied on its Advisory Opinion OC – 23/17 to clarify the content of the right to a healthy environment, which defined it as a right that constitutes universal value, that is fundamental for the existence of humankind, and as an autonomous right it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.[447]

[445] Ibid., para. 168
[446] Ibid., para. 184
[447] Ibid., para. 203; Advisory Opinion OC – 23/17 (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Inter-Am. Ct. H.R., November 15, 2017, para. 59 and 62

As designated the content of the right to a healthy environment reveals a certain degree of the Court to recognise the rights of nature as part of the protection of indigenous groups' development, survival and way of life, in strict connection with the protection of their right to communal ownership of the land and the protection of and access to natural resources,[448] which, in turn, as established by the jurisprudence of the Court, protects the cultural life and identity of indigenous groups. Specifically, it declared that the interrelation between the right to a healthy environment and human rights, in the light of the collective ownership of the land, is linked to the protection of and access to natural resources that are found in their lands.[449] It is important to notice how there is a close relationship between the right to a healthy environment and the right to collective ownership of the land, which, in the present case, both constitute rights, whose violation has great consequence on the lives of indigenous peoples. This relation has been emphasised, even though with different perspectives, in the partially dissenting opinion of judge Humberto Antonio Sierra Porto, and in the separate opinion of judge Eduardo Ferrer Mac-Gregor Poisot.

Judge Sierra Porto based his analysis on the fact that violation of art. 21 of the ACHR should have been analysed in relation to art. 26, and not separately as it can be evinced from the judgement.[450] Drawing from the jurisprudence of the Court, he reiterated that the scope and content of the right to cultural identity and the right to a healthy environment always tied with the right to collective property of the land, where the notion of property includes the natural resources linked to their culture. Therefore, the right to cultural identity and environmental rights are considered as inseparable and inherent elements of the right to communal property of indigenous peoples.[451]

As far as the separate opinion is concerned, the judge based his analysis on the conceptualization of the terms 'land' and 'territory', where the latter comes to include land as one of the elements that identify it, along with water, environmental protection, the resources upon which indigenous peoples base their diet and the relationship with the territory as element of their cultural identity.[452] Therefore, drawing from international

[448] Advisory Opinion OC – 23/17, Inter-Am. Ct. H.R., November 15, 2017, para. 48
[449] Ibid.
[450] *Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto* on the case Lhaka Honhat (our land) associastion v. Argentina Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 19
[451] Ibid., para. 18
[452] *Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot* on The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 12

instruments, land denotes more the material possession of the land, whereas territory encompasses both the spiritual and cultural dimensions.[453]

The Court analysed then what the right to a healthy environment entails: the obligation of States to respect the right and ensure it by preventing violations,[454] which, as a consequence of environmental damages, could severely affect the lives of vulnerable groups of the society, namely indigenous groups.[455]

With respect to the right to food, the Court resorted to the UN General Comment no. 12 on the right to food and to other instruments[456] to determine its content as a right protecting access to food that permits nutrition that is adequate and appropriate to ensure health.[457] With regard to the right to water, the Court found its link to other rights, in particular the right to take part in cultural life. With regard to indigenous groups, it stressed the ancestral use of water in the framework of their habits and customs and specified its content by referring to the interpretation of the CESCR.[458]

With regard to the right to take part in cultural life, the Court included also the right to cultural identity. States parties must ensure the integral development of their people - including the cultural aspect, the incorporation and participation of the most vulnerable categories of the population to take part in the cultural life of the nation to achieve full integration with the national community and the preservation and enrichment of cultural heritage of the American peoples.[459] The Court specified that "integral development", "incorporation", "participation", "integration", "preservation" should be understood in light of cultural diversity and the respect for the cultural life of indigenous communities.[460] To enrich the content of the right under consideration, the Court took into consideration the Constitutions of Latin-American States that protect cultural identity

[453] Ibid., para. 20 and 28
[454] The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 207
[455] Ibid., para. 209
[456] Specifically, the OAS Charter, the American Declaration of the Rights of Duties of Man, the Protocol of San Salvador, the Universal Declaration of Human Rights, the ICESCR, the Argentine National Constitution
[457] The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 216, 217, 218, 219
[458] Ibid., para. 224 and 230
[459] Ibid., para. 231
[460] Ibid., footnote 234

and diversity of indigenous communities,[461] and the contributions given by UNESCO and the CESCR.

Regarding the analysis of these rights I would like to point out how the reference provided by the international community is particularly valuable with regard to the protection of the rights to food, water and culture, since, as I elaborated extensively in the first chapter, land is fundamental for their realization with particular reference to indigenous peoples.

The second part of the merits of the Court were dedicated to the interdependence of the four above-mentioned rights in light of indigenous specificity. There is a close interdependence between the environment and other human rights.[462] Threats to the environment may have a negative impact on the right to food, as well as on the right to water and the right to take part in cultural life. These rights are vulnerable to environmental damages and the role of the State should be that of preserving, respecting and protecting the cultural heritage of all communities when developing environmental policies and programs.[463] As the right to food is a cultural manifestation of peoples, and, therefore requires an integral approach with interdependence between civil, political, economic, social and cultural rights,[464] the Court relied on ILO Convention 169, the UNDRIP and the American Declaration on the Rights of Indigenous Peoples[465], which under article XIX protects the right to a healthy environment, specifying that indigenous peoples have the right to "live in harmony with nature and to a healthy, safe and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision and collective well-being."[466]

With the adoption of the provisions contained in the above-mentioned instruments, with particular reference to the American Declaration on the Rights of Indigenous People, the Court adopted an intercultural approach in the development of its reasoning. If *interculturalidad* is a project that is embedded in the historically-excluded groups of society, namely indigenous groups, then the adoption of rights that promote indigenous cosmovision and way of life paves the way for the recognition and adoption

[461] Ibid., para. 236
[462] The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 244
[463] Ibid., para. 245
[464] Ibid., para. 246
[465] Ibid., para. 247-248
[466] *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), June 15, 2016, art. XIX (1)

of other ways of conceiving the environment, i.e. as a spiritual being, part of the cultural life of the group. Indigenous groups' management of natural resources should also be viewed in pragmatic terms, promoting the protection and preservation of the environment itself.[467] This recognition was done through the recognition that indigenous traditional practices have a positive impact on environmental conservation.

The Court relied also on the interpretation of UN bodies recognising that indigenous groups' cultures are connected to a particular way of life associated with traditional activities carried out within traditional lands and to the quality of the environment in which they live. Again, the Court interpreted the right to food in light of the indigenous cultural dimension.[468]

The Court, in assessing State's responsibility, refers to the cultural pertinence of the recognition of indigenous collective property and ownership of their ancestral lands: this recognition should be appropriate so as to recognise specific forms of the right to use and enjoyment of property based on culture, traditions, customs and beliefs of the indigenous community. This has great impact because Argentina was found in violation of article 21, which protects collective property.[469] The degradation of the environment, as consequence of the activities carried out by the criollo population, forced the indigenous group to incorporate in their diet new industrialized foods.[470] In this regard the Court reiterated that culture has an evolutive, dynamic nature according to which indigenous groups could change their cultural patterns. However, the contact between indigenous groups with other human groups does not take away the cultural nature of respective groups and the dynamicity of culture cannot deny harm to cultural identity, as in the case of the indigenous communities in question.[471]

Within the case under consideration, *interculturalidad* emerges in different ways: 1) in the way the reasoning of the Court assesses the content of the rights at issue. The lenses used to develop the arguments of the Court are the ones that take into consideration the specificity of indigenous peoples, their cultures, traditions, way of life and cosmovisions, i.e. leaving a State-focused perspective on law towards a comprehension

[467] The Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 400 (Judgement on Merits, Reparations and Costs of February 6, 2020), para. 250
[468] Ibid., para. 251-254
[469] Ibid., para. 279
[470] Ibid., para. 282
[471] Ibid., para. 284

of the indigenous conception of the world;[472] 2) through the adoption of international (such as ILO Convention 169), regional (American Declaration on the Rights of Indigenous Rights) and national (constitutions) instruments for the interpretation of the provisions of the American Convention, that contain specific provisions on indigenous peoples. This way of elaborating on the provisions of the American Convention is not only a matter of interpretation as intended under article 29, but as a real attempt at reading them opening the Inter-American jurisdictional system to different ways of seeing and acting in the world;[473] 3) recognising the *agency* of indigenous peoples in the protection, conservation and preservation of the environment through their traditional practices and knowledge, adopting principle 22 of the Rio Declaration to enforce this argument and 4) the institution of a Fund for Cultural Harm, which is a first as form of reparation for the Inter-American Court, and openly addresses damage to cultural identity in its material and immaterial way.[474] This form of reparation can be seen as a reparatory way to conciliate past discriminatory practices.

The environment is subject to this judgement as much as nature is central to the cosmovision of indigenous peoples. Nature is central to what is known as *buen vivir*, which is one of the central axis of *interculturalidad*. The notion and relationship between *buen vivir* and *interculturalidad* are going to be discussed in the second part of this chapter. However, before deepening the conversation about *buen vivir* and *interculturalidad*, I would like to enter now the national framework and analyse how *interculturalidad* plays out in the constitutions of Bolivia and Ecuador.

1.2 *Interculturalidad* in the constitutions of Bolivia and Ecuador

The recognition of the right to land and of collective rights of indigenous groups poses challenges to the existing juridical systems of the States of Latin-America.[475] The wave of constitutional reforms in Latin-America since the mid-1980s involves, at

[472] Lopez, Melisa (2011), "El método intercultural de elaboración de la jurisprudencia: instrumento privilegiado para un enfoque plural de los derechos humanos", available at http://www.institut-gouvernance.org/docs/etudecidh_es.pdf, p. 7
[473] Ibid., p. 11
[474] Marciante, Manfredi (2020), "The right to a healthy environment under the ACHR: an unprecedent decision of the Inter-American Court of Human Rights", *DPCE online*, vol. 43, no. 2, p. 3003
[475] Russo, Anna Margherita (2016), "El derecho transconstitucional de la diversidad: La especialidad indígena en el desarrollo interamericano del derecho de propriedad", *Inter-American and European Human Rights Journal*, vol. 9, no. 1, p. 99

different levels, all national States.[476] In particular, it is interesting to see how *interculturalidad* plays out in the Constitutions of Ecuador and Bolivia. Both constitutions are extremely revolutionary, in the sense that they introduce profound changes in the ways of thinking the State and form part of a transformative constitutionalism,[477] recognizing both States as plurinational.

The Constitution of Ecuador of 2008 is the result of years of fights for the inclusion and recognition of indigenous rights and represents the attempt at making *interculturalidad* both a political project and the answer to indigenous claims,[478] through policies aiming at overturning the society and its institutions as a whole.

In the Constitution, *interculturalidad* is articulated under art. 1, enunciating: "Ecuador is a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular." *Interculturalidad* is a principle listed in varied subject matters of the Constitution. In particular, the linguistic and communication field (artt. 2; 16), the educational field (artt. 27; 28), the healthcare system (art. 32), indigenous rights (art. 57), the responsibility of the citizenship to promote unity and intercultural relationships (art. 83), the principle of participation in democracy (art. 95), the national council of equality (art. 156), electoral participation (art. 217), the territorial organization of the State (artt. 249; 257), the development regime (art. 275), the system of *buen vivir* (artt. 340; 343; 347; 358; 376; 378), international relations (art. 416) and the system of Latin-American integration (art. 423).

Interculturalidad is not a tool to define the State, rather it is referred to designate the society, to promote dialogue and equal relationships among groups. If *interculturalidad* is a social project and process, then the plurinational character of the State needs *interculturalidad*.[479]

Plurinationality and *interculturalidad* complement each other: plurinationality affirms and describes the reality of the State, whereas *interculturalidad* works at the social level. In this way the transformations that *interculturalidad* brings are accompanied by the plurinational character of the State, which stresses unity and integration rather than

[476] Uprimny, Rodrigo (2011), "The Recent Transformation of Constitutional Law in Latin-America: Trends and Challenges", *Texas Law Review*, vol. 89, p. 1587

[477] De Sousa Santos, Boaventura (2012), "Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad", in Sousa Santos, B. and Exeni Rodríguez, J.L. *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala, p. 12

[478] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 52

[479] Baldin, S. and De Vido, S. (2019), "Strumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità", *DPCE online*, p. 1316

division.[480] This complementarity is highlighted within the juridical field, where *interculturalidad* is employed as parameter in the work of judicial bodies, including the constitutional court.[481]

The work of the constitutional court is embedded and must take into consideration the intercultural element of the constitutional instrument, employing an intercultural interpretation, which, in decisions regarding indigenous justice, must be applied "to applicable norms in order to avoid an ethnocentric and monocultural interpretation".[482] The adoption of an intercultural interpretation of indigenous justice recognises the existence and adoption of juridical pluralism,[483] which is not in opposition to the unitary character of the State, rather to the concept of homogeneous State.

Juridical pluralism has at its centre in the co-existence of different legal frameworks, namely the national and the indigenous, pointing at *interculturalizar* the juridical system so as to turn it a non-subordinate one (i.e. with equality among different juridical systems).[484] The subject matter of intercultural interpretation declares four principles to take into consideration when reasoning on indigenous matters: historical continuity, according to which indigenous groups are present with differentiated identities, making use of their traditions, cultures, laws, juridical-political-religious institutions, established on indigenous territory where they exercise self-government; cultural diversity, according to which, the function of norms is not only concerned with the relation between State and citizenship, but also with identities among populations; *interculturalidad*, intended as dialogue between epistemic differences that, within hegemonic positions, are intended as cognitive struggles that have to do with the way different peoples produce and apply knowledge as instruments to communicate within and with each other; and intercultural interpretation according to which the interpretation of reality starts from cultural diversity.[485]

Article 1 of the Bolivian Constitution designates Bolivia as a "Social Unitary State of Communitary Plurinational Law, free, independent, sovereign, democratic,

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[480] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 96

[481] Constitutional Court of Ecuador, judgement no. 113-14-SEP-CC, case no. 0731-10-EP, 30 July 2014, p. 10

[482] Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, 21 september 2009, art. 66

[483] Solano Paucay, V.M. (2018), "El argumento interpretativo intercultural en la Corte Constitucional", *Artículo de Investigación. Revista Killkana Sociales*, vol. 2, no. 4, p. 35

[484] Walsh, Catherine (2012), "El pluralismo jurídico: el desafío de la interculturalidad", *Novamérica*, no. 133, p. 36

[485] Constitutional Court of Ecuador, judgment no. 004-14-SCN-CC, case no. 0072-14-CN, 06 August 2014, p. 19-20

intercultural, decentralized and with autonomies. Bolivia founds itself in the plurality and political, economic, juridical, cultural and linguistic pluralism, within the integrative process of the country." It is worth noting that the accent, in the description of the Bolivian State, is placed more on the plurinational aspect, which requires the State to build an intercultural society from indigenous and peasants' communities.[486]

Interculturalidad is also articulated with reference to the composition of the Bolivian population (art. 3), to the scope and functions of the State (artt. 9; 10), to the educational system (artt. 17; 78; 79; 80; 91; 93; 95; 96), to the healthcare system (art. 18), to indigenous rights (art. 30), to social security (art. 45), to culture (artt. 98; 100), to the judiciary body and the constitutional plurinational court (art. 178), to the agri-environmental jurisdiction (art. 186), to the Ombudsman' s office (art. 218) and to land and territories (artt. 394; 395). *Interculturalidad*, as model for the development of the articulation of differences, has been reiterated also within the Constitutional Plurinational Court of Bolivia. Within the constitutional framework, *interculturalidad* in Bolivia is projected towards decolonization in order to strengthen plurinational identities under a process that articulates plurality within unity.

Interculturalidad is intended as tool to build social cohesion and coexistence among peoples and nations, starting from the respect and diversity of cultures, which aims at the creation of a decolonized plurinational system, created from a process of encounter among different types of knowledge. Plurinational *interculturalidad* is founded in the juridical equality of cultures and is projected towards indigenous cosmovisions. In fact, the principles of *interculturalidad* and plurinationality are the lenses through which the Bolivian constitution recognises and incorporates collective rights and rights of indigenous and peasant peoples.[487]

The Bolivian Plurinational Constitutional Court determined that intercultural interpretation is founded in the axiomatic value of the Constitution.[488] The recognition of the Bolivian Constitution by the Court allowed it to stress that *interculturalidad* and pluralism are recognized as elements for the re-foundation of the Bolivian State, from which the axiomatic value of the Constitution acquires new light. Both concepts will enlighten every infra-constitutional act, including decisions regarding indigenous peoples.

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[486] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 85

[487] See Constitucional Plurinational Court of Bolivia, judgment no. 0698/2013, 3 June 2013

[488] Constitutional Plurinational Court of Bolivia, judgment. No. 1422/2012, 24 September 2012, para. IV5

In the light of conflict between collective rights and individual rights, the Court must operate an assessment on the basis of the intercultural and plurinational character of the State. In this sense, it developed the "*vivir bien* paradigm", as specific guideline for intercultural interpretation, from which the highest plural values of the State enlighten acts and decisions of indigenous justice, constituting, therefore, a guarantee to avoid disproportionate decisions contrary to the axiomatic guidelines of the Plurinational State of Bolivia. The Court identified the following elements of the above-mentioned paradigm: 1) axiomatic harmony, which implies that decisions taken within indigenous jurisdiction mirror and comply with the highest plural values of the Bolivian State; 2) decisions in compliance with each cosmovision, through an intracultural assessment aiming at determining harmony and correspondence with each own indigenous cosmovision; 3) respect for traditional proceedings and norms employed by each indigenous groups or nation; 4) proportionality and strict necessity, according to which the Court will assess the nature and gravity of the facts in relation to the imposed sanction, evaluating whether the decision was absolutely necessary within the framework of inter- and *intraculturalidad*.[489]

The paradigms and principles guiding the work of the Ecuadorian and Bolivian Courts respectively reflect a different way of using *interculturalidad* as the instrument, process and project for the re-constitution of the State itself, including the constitutional sphere, where the Courts operate a balance within a system of juridical pluralism. De Sousa Santos provides for types (grades) of relations between different legal systems within the same juridical space: 1) denial of the existence of another type of justice (i.e. indigenous justice); 2) distant coexistence, according to which there is no contact between the two forms of justice – the dominant and the indigenous; 3) reconciliation, as a type of relation where indigenous justice finds some space in the form of compensation for past oppression and repression committed by the dominant justice and 4) *convivialidad*, as a type of relation that puts the dominant and the indigenous justice on an equal, horizontal axis, within a process of mutual enrichment.[490]

Reconciliation has been achieved insofar as both the Ecuadorian and Bolivian Constitutions adopt the intercultural approach to re-think and re-found both States,

[489] Ibid.

[490] De Sousa Santos, Boaventura (2012), "Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad", in Sousa Santos, B. and Exeni Rodríguez, J.L. *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala, p. 33-34

starting from the recognition of cultural diversity.[491] It is clear that the proposed and supported path is that of *convivialidad*.

As I anticipated, and as it can be evinced by the novelties brought about by these Constitutions, I will now further detail the discussion about *interculturalidad* and *buen vivir*.

2. *Interculturalidad* and *Buen Vivir*

Catherine Walsh defines *buen vivir* as a holistic, philosophical concept based on indigenous cosmovisions.[492] From an indigenous perspective, *buen vivir* (*sumak kawsay* in kichwa language in Ecuador and *suma qamaña* in aymara language in Bolivia) has its source on Mother Earth, which protects, nourishes and feeds its inhabitants – spiritually, culturally, physically, emotionally, existentially – to live. Therefore, there is no division between man-woman and nature: the balance, development and survival of society are found within this harmonic and integrative relationship.[493]

Buen vivir is constituted of four principles: 1) relationality, which affirms the integral coexistence with cosmos; 2) correspondence, according to which every component of reality correspond with each other; 3) complementarity, according to which no entity or action or event exists in isolation, rather they coexist in a complementary way, necessary for the affirmation of a superior and integral identity. It points at the presence of the "other" to be complementary and not necessarily irreconcilable; and 4) reciprocity, which does not concern only human relationships, but every type of relationship – be it among humans, between humans and nature, between human and divine. It is the pragmatic expression of the principles of correspondence and complementarity.[494] Within this discussion, the land, this element of fundamental importance for indigenous groups, intended as source of culture and spirituality, as subject that interacts with every element and every being of the cosmos, is well integrated

[491] Montalván Zambrano, Digno (2019), "El pluralismo jurídico y la interpretación intercultural en la jurisprudencia constitucional de Ecuador y Bolivia", *Revista Ratio Juris*, vol. 14, no. 29, p. 155
[492] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 213
[493] Walsh, Catherine (2009), "Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época", Universidad Andina Simón Bolívar, ediciones Abya-Yala, Quito, p. 216
[494] Ibid., p. 217-218

into the indigenous conception of *buen vivir*, intended not as a tool for economic profit, rather it goes hand in hand with the notion of life that *buen vivir* carries with itself.[495]

To be precise, it is necessary to bear in mind that the concepts of *sumak kawsay* and *suma qamaña* are specific of certain indigenous populations' cosmovisions, because there are different declinations of the same concept, according to the indigenous cosmovision in question. In this work, the reference is to *sumak kawsay* and *suma qamaña* included in the Constitutions of Ecuador and Bolivia, respectively. Something worth noting in the language used is that, *buen vivir* (in Ecuador) and *vivir bien* (in Bolivia) do not fully grasp the Andean conception of the world, that signifies something more than merely a way of living. Serena Baldin defines the cosmovision starting from world's images, life's evaluations and orientation of the will.[496]

World's images refer to the way in which we interact with nature, things, people, divinities. In the Andean cosmovision this means that people are aware that they have a more passive and subordinate role, within a cosmocentric idea of order, which is in opposition to the western anthropocentric idea of the world. Life's evaluations concern those principles that guide human behaviour. The Andean idea is based on complementarity among men-women, individuals-nature and hierarchy, whereas in the western world, human conduct is founded upon individuals as masters of their own destiny, that act with defined strategies to achieve fixed and predetermined aims. Lastly, orientation of the will refers to the psychic sphere of the human being and everything that moulds it. In the ancestral cosmovision this translates into a specific attitude towards nature: peoples build a collective relationship with the environment insofar as every action, both individual and collective, has great consequences in the world that is understood to be integrated and interdependent. This view and understanding of nature are opposed to the Western idea, that treats nature as object of study within the realm of science.[497]

The differences between the Western and the Andean visions lie also in other aspects, such as education, economy, democracy, society, religion/spirituality and technology. Education is intended in the ancestral idea as oral transmission with a fundamental, strong symbolic and personal value (here lies the importance of the

[495] Schavelzon, Salvador (2015), "Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes", Abya-Yala, Quito, p. 217
[496] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 68
[497] Ibid.

preservation, retention of indigenous languages discussed in the previous chapter, part of their identity defined within a cosmocentric view of the world) and in western culture as centred on the intellect. In the Andean idea, economy is centred on the element of reciprocity, democracy is intended as participatory and consensual, as opposed to the western representative one. Society is based on the life of the community and not on the individual as it is in the West. Lastly, indigenous spiritual life is to be understood as opposed to religion and to the way religion is practiced in the West and technology is founded upon traditional symbolic knowledge in the ancestral world, in opposition to technology based on the use of instruments in the West.[498]

Buen vivir as just examined refers to the harmonious existence among every element part of this existence. In the *Plan Nacional para el Buen Vivir 2009-2013*, in Ecuador, *sumak kawsay* is defined as *vida plena* (life in fullness),[499] in fact *sumak* means fullness, sublime, excellent, magnificent, beautiful and *kawsay* life, live, live together, *estar siendo* and *ser estando*.[500] In the same document, *buen vivir* expresses "the fulfilment of necessities, the achievement of a dignified quality of life and death, to love and be loved, the healthy blossoming of all people, in peace and harmony with nature, and the indefinite prolongation of human cultures."[501] The term identifies life in harmony with nature and the collectivity, where everyone and every dimension of life – social, environmental, economic, political, cultural – are interconnected.[502]

In Bolivia, *vivir bien* is defined in the *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* of 2012 as the "civilizing and cultural horizon alternative to capitalism and modernity that stems from the cosmovisions of original indigenous nations and peoples and peasants and from intercultural and Afro-Bolivian communities, and it is conceived in the context of *interculturalidad*. It is realised in collective, complementarity and solidarity form, integrating in its practical realization, among others, those social, cultural, political, economic, ecological and emotional dimensions, to allow the harmonious encounter among the totality of human beings, components and resources of Mother Earth. It means living in complementarity, in harmony and balance with

[498] Ibid., p. 69
[499] *Plan Nacional para el Buen Vivir 2009-2013*, República del Ecuador, Quito, p. 32
[500] Bagni, Silvia (2014), "Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador", in Baldin, S. and Zago, M. *Le sfide della sostenibilità: il buen vivir andino dalla prospettiva europea*, Filodiritto Editore, Bologna, p. 77
[501] *Plan Nacional para el Buen Vivir 2009-2013*, República del Ecuador, Quito, p. 10
[502] Baldin, Serena (2015), "La tradizione giuridica contro-egemonica in Ecuador e Bolivia", *Boletín Mexicano de Derecho Comparado*, año XLVIII, no. 143, p. 487

Mother Earth and society, in equity and solidarity, eliminating inequalities and mechanisms of dominance. It is living well among us, with everything that surrounds us and with ourselves."[503]

Always within the ancestral cosmovision described in the previous pages, in which *buen vivir* has its origins, it is important to say that the notion of *desarollo* (development) does not exist in the indigenous world. The notion of a lineal process that foresees stages of development is not present, as well as there are no categories that stem from development, such as under-development, as there are in the Western world.[504] In the understanding of *desarrollo*, *buen vivir* is opportunity for a new, collective model of development, which is based on the realization of new equilibriums stemming from indigenous visions.[505] *Buen vivir* aims at transforming the mechanisms according to which the relationship between nature and society works. In an integrated world, nature and society accompany one other in a co-evolutive process and cannot be understood separately. This relationship, based on the values of emancipation that the indigenous cosmovision carries with itself, is understood holistically and this means that economic policies take into account cultural diversities, equality and the safeguard of the environment in order to respect the life's cycle of nature.[506]

The notion of *buen vivir* is considered to pertain to seven conceptual frameworks: the first one is the indigenous or chthonic juridical tradition that highlights the holistic relationship between the human being and nature; the second one refers to *buen vivir* as an alternative model of development in opposition to the western one; the third one sees in the Andean cosmovision a new way to govern a country; *buen vivir* can be included in the stream of Latin-American *nuevo constitucionalismo*; it defines a new constitutional semantics; it identifies and carries new knowledge that in the construction of an epistemology of the South needs to be taken into consideration and eventually *buen vivir* goes beyond economic policy.[507] Serena Baldin defines it as a concept of counter-hegemonic juridical tradition, founded in the cosmovision of historically-excluded and

[503] Plurinational Legislative Assembly, Law no. 300, 15 October 2012, *Ley Marco de la Madre Tierra y Desarrollo integral para Vivir Bien*
[504] Acosta, Alberto (2008), "El Buen Vivir, una oportunidade por construir", *Revista Ecuador Debate*, no. 75, p. 34
[505] Walsh, Catherine (2010), "Development as Buen Vivir: Institutional arrangements and (de)colonial entanglements", *Development*, no. 53, p. 18
[506] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 71
[507] Ibid., p. 23

discriminated people.[508] In this way, *buen vivir* promotes, incorporates and enriches the project of the *interculturalización* of the State.

From the constitutional standpoint, *buen vivir* is incorporated in both the Andean Constitutions of Bolivia and Ecuador, starting from the preambles. The Ecuadorian Constitution poses the objective of reaching *buen vivir* through a new form of citizenship based on diversity and harmony with nature. Whereas in the Bolivian Constitution, *buen vivir* (*vivir bien* in the Constitution) is defined as the element that has to guide respect and equality among people, principles of sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution and redistribution of the social product.[509]

According to Serena Baldin, in the two constitutional texts, *buen vivir* is expressed in two different ways: as a normative principle and as guiding principle of public policies.[510]

As normative principle, *buen vivir* is accomplished through the rights. In the Ecuadorian Constitution, *buen vivir* is found within the set of rights that the State has to grant.[511] The list of rights is contained in Title II of the Constitution, which opens with Chapter I concerning the principles of application of the rights that follow. Art. 11 states that every principle and every right are inalienable, fundamental, interdependent and of equal hierarchy.[512] It is articulated, moreover among the duties of the State (art. 3), and right after in Chapter II dedicated to the rights of *buen vivir*. In this section *buen vivir* is declined into a set of rights: the right to water (art. 12); the right to food (art. 13); the right to a healthy environment (artt. 14, 15); the right to communication and information (artt. 16, 17, 18, 19, 20); the right to culture and science (artt. 21, 22, 23, 24, 25); the right to education (artt. 26, 27, 28, 29); the right to habitat and housing (artt. 30, 31); the right to health (art. 32); the right to work and social security (artt. 33, 34). It is interesting to note that the above-listed rights are part of 3rd generation of rights. *Buen vivir* is then incorporated within the section dedicated to the rights of nature (art. 74). On *buen vivir* rely also the duties and responsibilities of citizens, that have to promote common good

[508] Ibid., p. 24
[509] Constitution of the Republic of Ecuador of 2008; Political Constitution of the State of Bolivia, 7 February 2009
[510] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 78
[511] Bagni, Silvia (2014) "Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador", in Baldin, S. and Zago, M. *Le sfide della sostenibilità: il buen vivir andino dalla prospettiva europea*, Filodiritto Editore, Bologna, p. 81
[512] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 78

and put common interest before individual interest, according to *buen vivir* (art. 83, n. 7). This article is connected to art. 85, where public policies and services are oriented towards *buen vivir* based on the principle of solidarity.[513]

The immediate perception is that *buen vivir* promotes a collective way of life, in all its sectors, distancing itself from the western, liberal way of conceiving the State and the citizen, as an individual being. In fact, it imposes specific obligations on States and responsibilities upon individuals and collectivities so as to achieve integral development of the skills of people.[514] The principles of *buen vivir* listed at the beginning of the paragraph are well present along the entire constitutional instrument and permeate every aspect of society, including the promotion and creation of a new subject of rights, i.e. nature.

The Ecuadorian Court has stated that *sumak kawsay* is part of the structure of the state. On *sumak kawsay* relies the state's project that leads the society to *buen vivir*. It is based on the maintenance of the equilibrium among the human being, natural resources and development, within a framework of rationality and balance. To achieve this aim, the State guarantees its inhabitants the access of constitutional rights and specifically constitutes the framework of economic social and cultural rights, not merely as a declaratory enunciation, rather as a whole that leads to their realization, where the State has a leading role.[515]

The Bolivian Constitution[516] considers an extended list of rights. Art. 13 states that rights are inviolable, universal, interdependent, indivisible and progressive, that the rights present in the constitutional text will not be intended as denying other rights not included, and that the classification of the rights in the document does not determine any hierarchy, and any superiority.[517] The draft constitution was more innovative compared to the present document that resembled more the Ecuadorian text. The draft included a distinction between rights considered as the most fundamental and rights considered as fundamental.[518]

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[513] Constitution of the Republic of Ecuador of 2008
[514] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 78
[515] Constitutional Court of Ecuador, judgement no. 0006-10-SEE-CC, case no. 0008-09-EE of 25 March 2010, p. 9
[516] Political Constitution of the State of Bolivia, 7 February 2009
[517] Ibid.
[518] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto comparato*, Giappichelli Editore, p. 80

In the Constitution, *vivir bien* is placed before the section concerning rights, in Title I, Chapter II dedicated to the principles, values and scope of the State. Art. 8 c. 1 declares that "the State assumes and promotes as ethical-moral principles of the plural society: *ama qhilla*, *ama llulla*, *ama suwa* (don't be lazy, don't lie and don't steal), *suma qamaña* (*vivir bien*), *ñandereko* (harmonious life), *teko kavi* (good life), *ivi maraei* (land without evil) and *qhapaj ñan* (path or noble life)". The second clause refers to the values to reach *vivir bien*, namely, unity, equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equal opportunities, social and gender equality in participation, common welfare, responsibility, social justice, distribution and redistribution of social products and goods.[519]

The constitutional plurinational court of Bolivia has reiterated *vivir bien* as essential value and primordial aim of the State. It has defined the *vivir bien* paradigm as interpretative intercultural guideline of fundamental rights. The parameters adopted for this paradigm are a) axiomatic harmony, according to which indigenous jurisdiction's decisions must guarantee the materialization of the highest plural values, using the method of intercultural ponderation; b) decision taken according to each cosmovision; c) harmonious rituals with proceedings, laws traditionally used according to the cosmovision of each nation and indigenous peoples and d) proportionality and strict necessity.[520]

Having described *buen vivir/vivir bien* as normative principle, we are going to examinate it as guiding principle of public policies.

In the Ecuadorian constitution, art. 3 states the fundamental duties of the States, among which the planning of national development, eradication of poverty, promotion of sustainable development, equal distribution of resources and wealth to achieve *buen vivir*. *Buen vivir* has a central role as guiding principle in Title VI of the text, the *Régimen de Desarrollo* (development regime/scheme). It is worth noting that the word "*desarrollo*" (development), as already stated, does not exist in the indigenous cosmovision.[521] According to the ancestral vision, the idea is that every living being is part of *Pachamama* and finds its completeness within it.[522] In this regime, *buen vivir* is the objective and the

[519] Political Constitution of the State of Bolivia, 7 February 2009
[520] Constitutional Plurinational Court, judgement no. 1422/2012, 24 September 2012
[521] *Plan Nacional para el Buen Vivir 2009-2013*, República del Ecuador, Quito, p. 32
[522] Baldin, Serena (2015), "La tradizione giuridica contro-egemonica in Ecuador e Bolivia", *Boletín Mexicano de Derecho Comparado*, año XLVIII, no. 143, p. 492

principle. In art. 275, the development plan is defined as the ensemble of the economic, political, socio-cultural, environmental systems that guarantee the realization of *buen vivir* or *sumak kawsay*. It is defined as scope of the regime, for the realization of which the State (art. 277), people, collectivities and nationalities (artt. 275, 278) have both rights and responsibilities that everyone has to exercise in the framework of *interculturalidad*, of the respect for diversity and harmonious coexistence with nature. Among the responsibilities of the State, it is interesting to note that the State is called to guarantee the rights of people, collectivities and nature (art. 277). This group of subjects recalls the aspect of the collectivity that permeates the entire document.[523] It is not about the individual, rather about the person, the human being within a collectivity, in harmony with nature in order to achieve a common good. The 'subject', in the Andean Constitutions is profoundly relational, is conceived as part of a whole, extremely interconnected in all its aspects.[524] Evidently, this breaks with neo-liberal conceptions of what is intended as 'subject' of rights.

Finally, the Ecuadorian Constitution recognises the *Régimen del buen vivir* (*buen vivir* scheme/regime), which is divided into two chapters: in the first one about Inclusion and Equity, *buen vivir* is associated to social rights (such as education, health, social security, habitat and housing, culture, social communication, science, technologies, innovation and ancestral knowledge etc.) and in the second chapter concerning Biodiversity and natural resources, *buen vivir* is associated to nature (declined into biodiversity, ecosystem and natural resources).[525]

Along the constitutional text, *buen vivir* can be found within the section dedicated to collective organization (art. 97) and the one dedicated to the organization of the territory (artt. 258 and 250). *Buen vivir* is also key for the economic system (art. 283) and the means and ways of production (art. 319).[526]

Along the Bolivian Constitution, *vivir bien* as guiding principle of public policies is articulated within the educational system (art. 80) and the economic organization of the State (artt. 306, 313). Art. 80 affirms that education aims at the integral development of

[523] Bagni, Silvia (2014) "Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador", in Baldin, S. and Zago, M. *Le sfide della sostenibilità: il buen vivir andino dalla prospettiva europea*, Filodiritto Editore, Bologna, p. 84
[524] Maldonado, Daniel Bonilla (2019), "El constitucionalismo radical ambiental y la diversidad cultural en América Latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia", *Revista Derecho del Estado*, no. 42, p. 17
[525] Constitution of the Republic of Ecuador of 2008
[526] Ibid.

people and the strengthening of critical social conscience in life and for life. Education is oriented toward individual and collective formation, the development of competences, aptitudes and intellectual and physical abilities; toward conservation and protection of the environment, biodiversity and land to reach *vivir bien*. Art. 306 states that the economic model is plural, aiming at the improvement of quality of life and *vivir bien* of the people of Bolivia. Art. 313 establishes a series of purposes in order to eradicate poverty, economic and social exclusion to realise *vivir bien* in its multiple dimensions.[527]

For the purpose of this dissertation I will focus on the axis central to *buen vivir*: nature (or Pacha Mama). Having understood that nature and the rights of nature are central to *buen vivir*, I would like to further detail the analysis in what the rights of nature consist in, going into further detail about the Ecuadorian and Bolivian constitutions.

3. The rights of nature

One of the most innovative aspect of these Constitutions is the introduction of a new juridical and political subject: nature. According to the indigenous perspective and cosmovision, nature is composed of four basic elements: water, air, land and fire.[528] In the two constitutional texts, nature is given legal status.

However, the notion of nature as entitled to rights is not foreign to the western world and dates back to the debates brought to life by one of the most important authors on the topic: Christopher Stone and his book "Should Trees Have Standing?" of 1973. He was one of the first who advanced the notion of nature having rights.[529] In his work, he writes:

> "The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"- those who are holding rights at the time. […] There is something of a seamless web involved: there will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights"."[530]

[527] Political Constitution of the State of Bolivia, 7 February 2009
[528] Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador (CODENPE) (2011), "Pachamama", *Serie: Diálogos de Saberes*, Quito, p. 60-61
[529] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto Comparato*, Giappichelli Editore, p. 149
[530] Acosta, A. and Martínez, E. (2017), "Los Derechos de la Naturaleza como puerta de entrada a otro mundo posible", *Revista Direito y Práxis*, vol. 8, no. 4, p. 2932

The writer is proposing for oceans, forests, rivers, and natural objects – the environment as a whole - to have legal rights.[531] Even though Stone essay's assumptions are considered as a response to the US Court of Appeals' decision, in California, to reject the request of the Sierra club to prevent the construction of a ski resort in the Sierra Nevada Mountains, he was the first scholar to raise question about whether nature should be recognized the right to stand in court.[532] Distant from the indigenous conception and perception of nature, the idea of entitling rights to nature was and is matter of concern also in the western world.

On the other hand, in Latin-America, Godofredo Stutzin stands out as author about environmental law with its essay "La Naturaleza de los Derechos y los Derechos de la Naturaleza" at the end of the 1970s, where he affirms the necessity of recognising nature as integral part of environmental conflict, allowing it to take itself the defence of the ecosystem. Earth includes every animated and inanimate element of the natural world and in safeguarding these elements, nature exercises both the right to life and integrity and the right to property, since the damaged part is both representative part of Earth and integral part of its patrimony.[533]

With regard to Ecuador, a variety of actors pushed for the recognition of the rights of Nature. From an environmental standpoint, Ecuador has high levels of biodiversity and many ONGs are actively involved in the issues affecting this diversity. In particular, the Community Environmental Legal Defence Fund (CELDF), a non-governmental organization, had a significant role in the Constitutional Ecuadorian process. Lastly, another promoter for the recognition of the rights of Nature is former president of the Ecuadorian Constituent Assembly, Alberto Acosta, who besides being an economist, always defended environmental stances.[534]

These contributions, including the considerations of Stone and Stutzin, are relevant in the constitutional construction of the rights of Nature in both the Andean legal systems.

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[531] Ibid.
[532] Cano Pacharroman, Lidia (2018), "Rights of Nature: Rivers that Can Stand in Court", *Resources*, vol. 7, no. 13, p. 1
[533] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto Comparato*, Giappichelli Editore, p. 150
[534] Gudynas, Eduardo (2009), "La ecología política del giro biocéntrico en la nueva Constitución de Ecuador", *Revista de Estudios Sociales*, no. 32, p. 40-41

In the Ecuadorian Constitution, nature is celebrated in the preamble and constitutes a new rights holder.[535] Nature or *Pachamama* is the place where life is realised and produced. The juridical statute of Nature is included in Chapter VII, "*Derechos de la naturaleza*". The biocentric idea is included in art. 71, that affirms that nature or Pachamama, the place where life is reproduced and realised, has the right to integrally have its existence, its maintenance, the regeneration of its life cycles, structure, functions evolutive processes respected. This right can be enforced by every person, community or people.[536] The way the constitution incorporates environmental matters represents a break with their general incorporation as 3rd generation rights or social, economic and cultural rights.[537] Moreover, it entails a change in perspective: from an anthropocentric to a biocentric one. This means that nature is not considered merely as an object functional to the welfare of the human being.[538]

Even more innovative is the following article in the Constitution. Art. 72 introduces the right to restoration (*derecho a la restauración*). The restoration means the re-integration of life's systems that can be deteriorated, damaged or contaminated by human development and industrial activities, through the adoption of measures that are going to restore environmental conditions, similar to the previous ones.[539] Moreover, restoration is independent from the obligation of the State to compensate individuals and collectivities that depend on the affected natural systems.[540] Therefore, nature is the only beneficiary. The right to restoration is the most important novelty of Ecuador, considered the "biocentric turn" that has great implications in environmental management and policy. This means that actions to restore damaged ecosystem of the country could be required.[541]

Art. 73 affirms measures of precaution and restriction to the activities that can lead to the extinction of species, destruction of ecosystems or permanent alteration of natural cycles. Moreover, it establishes the prohibition to introduce organisms and organic and inorganic material that can permanently modify the national genetic patrimony. Art. 74 states that every person, community, people and nationalities have the right to benefit

[535] Constitution of the Republic of Ecuador of 2008, art. 10
[536] Ibid., art. 71
[537] Gudynas, Eduardo (2009), "La ecología política del giro biocéntrico en la nueva Constitución de Ecuador", *Revista de Estudios Sociales*, no. 32, p. 37
[538] Bagni, Silvia (2014) "Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador", in Baldin, S. and Zago, M. *Le sfide della sostenibilità: il buen vivir andino dalla prospettiva europea*, Filodiritto Editore, Bologna, p. 86
[539] Ibid., 152
[540] Constitution of the Republic of Ecuador of 2008, art. 72
[541] Gudynas, Eduardo (2009), "La ecología política del giro biocéntrico en la nueva Constitución de Ecuador", *Revista de Estudios Sociales*, no. 32, p. 42

from the environment and from natural richness, which enable them to reach *buen vivir*. In addition, environmental services will not be susceptible to appropriation; their production, performance, use and exploitation will be regulated by the State.[542]

The rights of nature contained in the aforementioned provisions are to be understood in conjunction with others that affirm both prohibitions and positive obligations. For example, the prohibition to apply biotechnologies that could be dangerous or experimental, the prohibition to use chemical, biological and nuclear weapons, as well as genetically modified organisms; the prohibition to carry out extractive activities of non-renewable resources in protected areas, the prohibition of estate and concentration of land and the prohibition of appropriation of genetic resources linked to biodiversity.[543]

However, it is possible to notice how this biocentric turn is jeopardized by provisions such as art. 401, which affirms that only exceptionally and in case of national interest motivated by the Republic's presidency and approved by the national Assembly, it is possible to introduce seeds and genetically modified crops; and art. 407 which reiterates the prohibition of extractive activities of non-renewable resources. However, it establishes also that exceptionally these resources can be exploited based on motivated request by the president of the Republic and with prior declaration of national interest by the national Assembly.[544]

Nature is also articulated within the *régimen de desarrollo* and *régimen del buen vivir*. As far as the former is concerned, nature and environmental matters are linked to economic, political, socio-cultural and environmental systems, to promote *buen vivir* and *sumak kawsay*.[545] Indeed, nature is intended as a central axis of *buen vivir*, and this is detected also in Title VII dedicated to the *régimen del buen vivir* of the constitution. Chapter II of Title VII about biodiversity and natural resources is divided into seven sections dedicated to nature and environment, biodiversity, natural patrimony and ecosystems, natural resources, land, water, biosphere, urban ecology and alternative energies.[546]

[542] Constitution of the Republic of Ecuador of 2008
[543] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto Comparato*, Giappichelli Editore, p. 153
[544] Ibid.
[545] Constitution of the Republic of Ecuador of 2008, art. 276
[546] Ibid., Title VII, Chapter II

In the Bolivian Constitution, nature or *Pachamama* is recognised in the preamble and is key to *vivir bien*. The juridical statute of nature is regulated within law nr. 071 of 21 December 2010 *Ley de Derechos de la Madre Tierra*. The constitutional basis of such *Ley* is established in art. 33, which affirms that "everyone has the right to live in a healthy environment, protected and balanced. The exercise of such right must allow individuals and collectivities of this generation and of future generations, and also other living beings, to develop in a regular and permanent way." To be noticed is that, in contrast with Ecuador, which establishes nature as subject in the constitutional text, Bolivia recognises the subjectivity of nature in a norm of ordinary rank.[547]

Art. 1 of the *Ley* enunciates the object of such norm: the recognition of the rights of Mother Earth as well as the obligations and duties of the State and the society. Art. 2 states the normative principles, namely harmony, collective good, guarantee of regeneration of Mother Earth, respect and defence of the rights of Mother Earth, non-commodification of natural systems and *interculturalidad*.[548] Within the document, nature (Mother Earth) is defined as the dynamic, living system composed of the indivisible community of all life systems and living beings, interconnected, interdependent and complementary, that share a common destiny. Mother Earth is considered as sacred from and indigenous perspective. Art. 5 establishes the juridical statute of Mother Earth, i.e. it adopts the character of collective subject of public interest. Chapter III of the *Ley* lists the rights of nature. Specifically, the right to life, to diversity of life, to water, to clean air, to balance, to restoration and life free of contamination (art. 7).[549] As it is in the Ecuadorian constitution, noteworthy is art. 7 that recognises the right of nature to restoration, stating that it concerns the right to effective and appropriate restoration of the life's systems affected by human activity, both directly and indirectly.

In the *Ley Marco de la Madre Tierra y Desarrollo integral para Vivir Bien*[550] the above-mentioned principles and rights are integrated and enriched. The purposes of the *Ley Marco* are determination of the principles that regulate the access to the components, areas and life's system of Mother Earth; the establishment of the aims of integral development that regulate the conditions to reach *vivir bien* in harmony and balance with

[547] Baldin, Serena (2019), "Il Buen Vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto Comparato*, Giappichelli Editore, p. 155
[548] Plurinational Legislative Assembly, Law no. 071, 21 December 2010, *Ley de Derechos de la Madre Tierra*
[549] Ibid.
[550] Plurinational Legislative Assembly, Law no. 300, 15 October 2012, *Ley Marco de la Madre Tierra y Desarrollo integral para Vivir Bien*

Mother Earth; the guidance of political norms, plans and strategies and lastly, the definition of the institutional system to operationalise integral development. In addition to this, and to specifically reiterate the importance of land for indigenous peoples and how the recognition of the land rights to indigenous peoples opened the path for the embracement of their way of living and acting in the world, art. 16 of the aforementioned norm encompasses the right to conservation of the components, areas and life's systems of Mother Earth within the framework of integral and sustainable management. According to this article, the Bolivian State will promote actions to guarantee the sustainable use of the land according to social, economic, productive, ecological, spiritual principles.[551]

Moreover, this law recognises that land and territory (art. 28), along with biological and cultural diversity (art.23), agriculture, fishery and livestock (art. 24), forests (art. 25), mining and hydrocarbons (art. 26), water (art. 27), air and environmental quality (art. 29), energy (art. 30), waste management (art. 31), climate change (art. 32) and intracultural and intercultural education (art. 33), the elements, the basis upon which integral development in harmony with Mother Earth realize *buen vivir*.[552]

As far as the enforcement of the rights of nature is concerned, it can be enforced by anyone as it is stated under art. 71 of the Ecuadorian Constitution. In 2011 the first judgement was delivered on the Vilcabamba river.[553] Two American citizens, exercising the principle of universal jurisdiction, took legal action in favour of nature, specifically in favour of the Vilcabamba river. The case concerned the construction of a road between Vilcabamba and Quinara, without considering and evaluating environmental consequences, which badly affected nature.[554] The Provincial Court of Justice of Loja expressed its judgement taking into consideration the rights of nature contemplated within the Ecuadorian Constitution (art. 71), reiterating that the importance of Nature is such that any argument in its regard is considered succinct and redundant and that any damage that it suffers are "generational damages", that affect not only present but also future generations.[555] The Court finally assessed violations of the right of Nature contemplated under art. 71, ordering the Provincial Government to fulfill and carry out the

[551] Ibid.
[552] Plurinational Legislative Assembly, Law no. 300, 15 October 2012, *Ley Marco de la Madre Tierra y Desarrollo integral para Vivir Bien*
[553] Provincial Court of Justice of Loja, judgement nr. 11121-2011-0010, 30 March 2011
[554] Ibid., p. 1
[555] Ibid., p. 3-4

recommendations and dispositions prepared by the deputy secretary of Environmental Quality, among which the ecological restoration of the site.[556]

This represents the first ruling operationalising the provisions contained in art. 71 of the Constitution, which establishes that every citizen can defend the rights of nature in court when violated and the first ruling on environmental matters, specifically rivers. The jurisprudence on violations of the rights of nature is very recent and, in the making, since the first rulings regard Ecuador, India, New Zealand and Colombia.[557] Recognising the rights of nature poses a set of challenges. In the above-mentioned case, the obstacle is compliance, both for the fact that it was the first ruling and also because of the lack of a compliance mechanism once violation was assessed and the rights of nature recognised.[558] Another challenge is given by the balance between development and rights of nature. Evidently, an anthropocentric perspective of development has proven to cause more environmental damages. However, what prevails? What has to be given up in terms of development to respect the rights of nature? The assessment is going to be challenging in the future for the courts that will come to judge on these matters.

Adopting the *buen vivir* philosophy to development entails a life in harmony, where development is not even envisioned.[559] Therefore, both the Bolivian and Ecuadorian Constitutions have opened a new path, a new perspective that, on the one hand, could shift the way of how development is conceived – from a perspective that is more 'utilitarian', in the sense that nature is protected insofar as the human being has the right to exist - and on the other will pose a number of questions and challenges to be assessed on a case-by-case perspective.

Sure enough, the rights of nature encompass the transition from nature as object, exploited and useful insofar as the human being needs it, from nature as subject of rights that has its own values independently from the utility that it can have for human beings. The change in perspective does take into consideration and comes from, evidently, indigenous peoples' relationship with their lands.[560]

The indigenous world, its economy, culture, way of life have direct relationship with nature – their life is functional to the well-being of the elements of nature – which is

[556] Ibid., p. 5
[557] Cano Pecharroman, Lidia (2018), "Rights of Nature: Rivers That Can Stand in Court", *Resources*, vol. 7, no. 13, p. 6
[558] Ibid., p. 9
[559] Ibid., p. 10
[560] Acosta, A. and Martínez, E. (2017), "Los Derechos de la Naturaleza como puerta de entrada a otro mundo posible", *Revista Direito y Práxis*, vol. 08, no. 4, p. 2931

why any damage caused to one of its elements or nature as a whole affect directly the well-being of the entire group. The conservation of biodiversity is not limited at the protection of ecosystems and natural species, but it is also functional to their survival as a group in strict connection with the environment.[561]

I would like to point out that Ecuador and Bolivia can be conceived as forerunners in what Serena Baldin defines "ecological ethnicity".[562] The constitutions of these two Andean countries promote a juridical system specific to the region, which affirms indigenous principles and philosophies incorporated into *buen vivir*, in order to put the basis for a new understanding of sustainable development. Ecological ethnicity is based on a common cosmovision of the relationship between human beings and nature and it is considered to be adequate to oppose the effects of neoliberal globalization.[563]

Moreover, another distinctive feature is that it is clear how the ecological, biocentric vision permeates both constitutional texts. This perspective has its centre in *buen vivir* and nature and tries to push for a much-needed change with regard to development policies, aiming at re-founding the States on the basis of sustainability, social equality and ecological justice.[564]

As can be evinced, recalling the thread that links this dissertation, land is central of *buen vivir* as much as it is centre of nature, due to the fact that both *buen vivir* and its core – *Pachamama* – stem from indigenous cosmovisions and as such land, but more precisely land rights are the basis upon which indigenous peoples can live, flourish and develop according to their cultures and visions of the world. Nature is central axis of *buen vivir* and nature itself, along with other elements, incorporates land as one of its pillars, which is recognized within the Constitutions, through the recognition of nature as entitled to rights and through the recognition of land rights to the indigenous communities of both countries.[565] Recognition of indigenous peoples' land rights are important not only for their survival, based on intersecting and interrelated values, but also because their recognition in national Constitutions paved the way for the embracement of their cosmovisions. To conclude, I would like to analyse how the involvement of indigenous

[561] Acosta, A. and Martínez, E. (2017), "Los Derechos de la Naturaleza como puerta de entrada a otro mundo posible", *Revista Direito y Práxis*, vol. 08, no. 4, p. 2934
[562] Baldin, Serena (2019), "Il Buen vivir nel costituzionalismo andino. Profili comparativi", *Ricerche di Diritto Comparato*, Giappichelli Editore, p. 15
[563] Ibid.
[564] Ibid., p. 30
[565] Constitution of the Republic of Ecuador of 2008, artt. 57-60-257; Political Constitution of the State of Bolivia, 7 February 2009, artt. 30-311-403

peoples in policies regarding the safeguard of nature is important, given their traditional practices, knowledge and cosmovisions.

3.1 The role of indigenous peoples in the protection of ecosystems

According to recent studies, indigenous peoples are affected by climate change in a way that is specific to them, due to a combination of factors: 1) indigenous peoples are among the poorest peoples in the world; 2) they depend on the natural resources of the land they inhabit; 3) they live in geographical areas that are most vulnerable to climate change.[566] In fact, most indigenous groups of the world cover 24% of land worldwide, which contains 80% of the world's biodiversity;[567] 4) the degradation of the environment forces indigenous groups to migrate; 5) gender inequality is exacerbated within indigenous communities; and 6) limited agency and lack of recognition of indigenous institutions.[568]

The underlying challenge is that there is a special relationship that ties indigenous peoples to their lands and environment, which is cultural and spiritual. Therefore, any damage caused to their environment is a damage caused to indigenous groups themselves.[569] This cultural relationship is one of the two key aspects, along with traditional knowledge that empower indigenous groups as agents of change with regard to climate change and the protection of ecosystems.[570] The recognition of indigenous peoples' rights, the enforcement of these rights, the respect for the principle of FPIC, recognised by Inter-American system of protection of human rights[571], the introduction within legal documents both regionally – the American Declaration on the rights of indigenous peoples[572] – and nationally – the Constitutions of Bolivia and Ecuador – of the philosophies of the indigenous cosmovisions that are deeply embedded in nature, the participation and action of indigenous peoples within national development plans, all

[566] ILO (2017), "Indigenous Peoples and Climate Change. From Victims to Change Agents through Decent Work", *Green Initiative Policy Brief*, p. 2
[567] Etchart, Linda (2017), "The role of indigenous peoples in combating climate change", *Palagrave Communications*, p. 2
[568] ILO (2017), "Indigenous Peoples and Climate Change. From Victims to Change Agents through Decent Work", *Green Initiative Policy Brief*, p. 3
[569] Indigenous Peoples and the Environment, Leaflet no. 10, p. 2, available at: https://www.ohchr.org/Documents/Publications/GuideIPleaflet10en.pdf
[570] ILO (2017), "Indigenous Peoples and Climate Change. From Victims to Change Agents through Decent Work", *Green Initiative Policy Brief*, p. 3
[571] As in the Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (Ser. C) No. 172 (Judgement on Preliminary Objections, Merits, Reparations and Costs of November 28, 2007), para. 137
[572] In particular, the right to a healthy environment protected under art. XIX of the American Declaration on the rights of indigenous peoples

contribute to the empowerment of indigenous groups as agents. Yet, practically, there is still reluctance because of a game of interests played on indigenous lands.

As understood, indigenous lands are home of the most biodiverse environments on the planet, rich in natural resources and therefore very attractive from an economic perspective. However, the way development is intended has great impact on the lives of these peoples and also on climate change, which is concern of everybody living on the planet. The way indigenous peoples have been involved is, among others, through the co-management of protected areas as in the case of the Bolivian Sustainability of Protected Areas Project, where the value of the management of indigenous peoples was taken in great consideration as active agents in the promotion of sustainable development and management projects[573] and the implementation of community management plans as in the case of the Biodiversity Conservation Pastaza Project in Ecuador.[574]

This project is of particular interest because it provides for an insight in the way indigenous peoples can be included and become agents: first, indigenous peoples' traditional knowledge is combined with practises with modern technology, having the possibility to take direct management of the project itself; secondly, the participation in carrying out territorial zoning and encourage sustainable development using traditional indigenous know-how, and traditional ways of accessing and managing natural resources; thirdly, strengthen the environmental administration capacity of local communities.[575] The project was carried out with principles of active consultation and participation of indigenous groups the respect for their cultural dimension and the outcomes were higher than expectations, because the indigenous communities, through implementation of their plans, have created and Inter-Community Biological Conservation Zone.[576]

3.2 Indigenous or Traditional Knowledge

As stated above, traditional knowledge (TK) is, along with indigenous cultural practices, means that empowers indigenous groups to be agents of change in matters

[573] The project can be accessed at this link: https://www.thegef.org/project/sustainability-national-system-protected-areas
[574] Sobrevila, Claudia (2008), "The role of Indigenous Peoples in Biodiversity Conservation. The Natural but Often Forgotten Partners", *The World Bank*, p. 30
[575] The project can be accessed at this link: http://documents1.worldbank.org/curated/en/541531468770076872/pdf/multi0page.pdf
[576] GEF (2008), "Indigenous Communities and Biodiversity", *The World Bank*, p. 24, available at: https://www.thegef.org/sites/default/files/publications/indigenous-community-biodiversity_0.pdf

concerning climate change and the protection and preservation of ecosystems and biodiversity.

There is not a clear definition of traditional knowledge, yet it usually associated with indigenous peoples. The UN has defined it as "the complex bodies and systems of knowledge, know-how, practices and representations maintained and developed by indigenous peoples around the world, drawing on a wealth of experience and interaction with the natural environment and transmitted orally from one generation to the next."[577] TK is imbedded in community practices and institutions, relationships and rituals; it is profoundly linked to indigenous communities' identities, their experiences with the natural environment, their territorial and cultural rights. Moreover, they put great effort in passing this knowledge to future generations as this preserves and maintains their culture and identity. TK is related and closely linked to the right of self-determination of these peoples, as they have the right to manage their heritage, knowledge, and biodiversity. In order to do so, the right to land, territories and natural resources must be fully recognized and realized.[578]

The term "traditional knowledge" is often associated with "indigenous knowledge" (IK), and they are usually used interchangeably. IK refers to a specific body of knowledge, which is associated with a specific people and a specific environmental locality, involving an understanding or possession of information, facts, ideas, truths and principles. Examples of IK are architectural and building principles, as well as healing practices, cosmologies and calendars.[579]

The United Nations Environmental Program (UNEP) has given a definition of indigenous knowledge taking into consideration the variety of knowledge system's existing in different indigenous communities:

"Indigenous Knowledge (IK) can be broadly defined as the knowledge that an indigenous (local) community accumulates over generations of living in a particular environment. This definition encompasses all forms of knowledge – technologies, know-how skills, practices and beliefs – that enable the community to achieve stable livelihoods in their environment. A number of terms are used

[577] United Nations Economic and Social Council, Department of Economic and Social Affairs (2009), "State of the World's Indigenous Peoples", ST/ESA/328, New York, *United Nations Publications*, p. 64
[578] Ibid., p. 65
[579] Rÿser, Rudolph C. (2011), "Indigenous Peoples and Traditional Knowledge", Berkshire Encyclopedia of Sustainability 5/10, *Ecosystem Management and Sustainability*, available at: http://www.academia.edu/841635/Indigenous_and_Traditional_Knowledge

interchangeably to refer to the concept of IK, including Traditional Knowledge (TK), Indigenous Technical Knowledge (ITK), Local Knowledge (LK) and Indigenous Knowledge System (IKS)."[580]

The World Bank has also given a definition of IK, identifying it as the "social capital of the poor", whose importance lies in the fact that it provides for their survival, food and shelter. Obviously, this definition is in function of and directly directed to the solutions for development.[581]

Another distinction needs to be made between TK and folklore. TK comes to refer to knowledge associated with the environment, identifying it with "a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use."[582] Whereas, folklore is intended, in indigenous communities, as a living and evolving component of their cultural identity. Specifically, folklore can take different forms: performing arts, such as music and dancing; history and mythology; designs and symbols and lastly, traditional skills, handicrafts and artworks.[583] UNESCO's Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted in 1989, gives the definition of folklore based on the totality of tradition-based creations of a cultural community. The values of folklore are transmitted orally and encompass, among other forms, language, music, customs and arts.[584] The first document that made specific reference to TK was the UNESCO Convention on the Protection and Promotion of Cultural Diversity of 2005. In its preamble, it mentions it as source of intangible and material wealth specifically referring to indigenous peoples.[585]

As it can be understood there are more than one definition of TK and among these definitions, there is not a generally accepted one. The World Intellectual Property

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[580] Ibid.
[581] Ibid.
[582] Dutfield, Graham (2003), "Protecting Traditional Knowledge and Folklore", *International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development*, Geneva, p. 20, available at: https://www.ictsd.org/sites/default/files/downloads/2008/06/cs_dutfield.pdf
[583] Ibid.
[584] UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Paris, November 15th, 1989 available at: http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html
[585] Macmillan, Fiona (2017), "The Problematic Relationship between Traditional knowledge and the Commons", in *Cultural Heritage. Scenarios 2015-2017* edited by S. Pinton and L. Zagato, Venice, Edizioni Ca'Foscari, p. 676

Organization (WIPO) uses Traditional Cultural Expression (TCE) as synonym for folklore[586] and identifies TK as:

> a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.[587]

This definition includes and is based on knowledge, know-how, practices about traditional medicines, traditional hunting or fishing techniques and traditional methods of animal migration patterns and water management.[588] Something that needs clarification is the term "traditional". The term is not associated with antiquity, rather "traditional" refers to the way this knowledge is acquired and used. Traditionality lies at the heart of the process of acquiring and sharing knowledge, which is unique to each indigenous culture. It should be pointed out that the knowledge in question is rather new, in the sense that what one generation passes to the other is uncomplete knowledge: TK develops incrementally with each generation adding to the stock of knowledge.[589]

According to WIPO, TK can be found in a variety of contexts: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge, among others.[590] For the purpose of this dissertation, I am going to focus on the role of TK on biodiversity-related issues, including the protection of ecosystems and biodiversity.

As previously stated, indigenous peoples inhabit areas, where the most diverse biodiversity is found. The agency of indigenous peoples goes beyond the mere fact of being managers or co-managers of the land and the environment they inhabit. Their skills and techniques can provide valuable information to the global community as far as biodiversity species and their protection are concerned.[591] In fact, the issues that concern TK intersect many of the topics that refer to global environmental issues, from biodiversity conservation, to natural resource management and to climate change

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[586] WIPO (2020), "Intellectual Property and Traditional Resources, Traditional Knowledge and Traditional Cultural Expressions", edited by World Intellectual Property Organization, Geneva, p. 15, available at: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf
[587] Ibid., p. 13
[588] Ibid., p. 14
[589] Dutfield, Graham (2003), "Protecting Traditional Knowledge and Folklore", *International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development*, Geneva, p. 23, available at: https://www.ictsd.org/sites/default/files/downloads/2008/06/cs_dutfield.pdf
[590] WIPO Website: https://www.wipo.int/tk/en/tk/
[591] IASG (2014), "The Knowledge of Indigenous Peoples and Policies for Sustainable Development: Updates and Trends in the Second Decade of the World's Indigenous Peoples", *Thematic Report towards the preparation of the 2014 World Conference on Indigenous Peoples*, p. 3

observation, mitigation and adaptation.[592] These cross-cutting links have been affirmed by the Convention on Biological Diversity of 1992. The objectives of this legally binding treaty are contained in art. 1, specifically the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits deriving from the use of genetic resources.[593]

There are specifically two articles of the Convention that provide for clear understanding between traditional knowledge and the issues above-mentioned: art. 8(j) and art. 10(c). Art. 8(j) states that each State party to the Convention shall:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;[594]

Art. 8(j) should be read in conjunction with art. 10, (among other provisions of the Convention) which states that customary uses of biological resources should be in accordance with traditional cultural practices.[595] Art. 8 recognizes the importance of indigenous communities in the preservation of biodiversity as well as the sharing of the benefit from its use. Moreover, what is even more important, as far as this dissertation is concerned, is the role of land. TK and resources are central to indigenous peoples' identity and the management of these resources becomes, then, to have great significance. Recognition of land rights are precondition for the use of genetic resources found therein. Internationally, the notion of Traditional Resource Rights (TRR) has taken place as a unifying concept to express the views and concern of indigenous peoples. This concept brings together a number of international binding and non-binding documents. The rights which TRR refers to are human rights, land and territorial rights, cultural rights, environmental rights, collective rights, among others.[596]

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[592] Ibid., p. 4
[593] Secretariat of the Convention on Biological Diversity (2005), "Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety", 3rd edition, Montreal (Canada), p. 5
[594] UN, *Convention on Biological Diversity*, 5 June 1992 (entered into force in 29 December 1993) available at: https://www.cbd.int/doc/legal/cbd-en.pdf
[595] UNEP, *Traditional Knowledge and Biological Diversity*, UNEP/CBD/TKBD/1/2, 18 October 1997, para. 8
[596] Ibid., para. 45-46

TK provides for information about historical land-use practices. This aspect is fundamental because information about the landscape, how it changed over time and how indigenous peoples managed to preserve it, enables development restoration programs.[597] As it has been stated many times, TK proves to be fundamental in conservation, management and sustainable use of natural resources. In this sense, co-operation between TK and modern technologies can prove to be successful. Another element important in the debate is restoration, or more precise ecological restoration. Within this discourse TK, the relationship between indigenous peoples and the environment prove to be a valuable contribution.[598] Moreover, putting indigenous peoples at the center of the implementation of global goals related to sustainable development, delivers a triple win: it brings together the realization of human rights, the conservation and sustainable use of biodiversity and lastly, the maintenance of ecosystems to manage climate change.[599] The importance of TK has also been recognized in the United Nations Convention to Combat Desertification, of 1996, which focuses on countries that face significant drought and desertification.[600]

On the whole, it has been reiterated that TK has significant impact on the issues related to the environment and it can be used in conjunction with modern sciences to develop focused projects concerning restoration, climate change mitigation and adaptation, even though some scholars are skeptic about the scientific validity of TK.[601]

[597] Uprety, Yadav et al. (2012), "Contribution of traditional knowledge to ecological restoration: practices and applications", *Écoscience*, vol. 19, no. 3, p. 232
[598] Ibid., p. 234-235
[599] Forest Peoples Program (2020), "Local Biodiversity Outlooks 2: The contributions of indigenous peoples and local communities to the implementation of the Strategic Plan for Biodiversity 2011-2020 and to renewing nature and cultures. A complement to the fifth edition of the Global Biodiversity Outlook", *Forest Peoples Program*, England, p. 31
[600] Rÿser, Rudolph C. (2011), "Indigenous Peoples and Traditional Knowledge", Berkshire Encyclopedia of Sustainability 5/10, *Ecosystem Management and Sustainability*, available at: http://www.academia.edu/841635/Indigenous_and_Traditional_Knowledge
[601] Uprety, Yadav et al. (2012), "Contribution of traditional knowledge to ecological restoration: practices and applications", *Écoscience*, vol. 19, no. 3, p. 226

Conclusions

The purpose of this dissertation was the analysis of the right to land within the cultural specificity of indigenous peoples. Specifically, the attempt was to understand how the recognition of collective ownership of indigenous peoples paved the way for an intercultural understanding of their rights, with specific reference to the Latin-American context.

The recognition of a human right to land is more compelling than ever. With regard to indigenous land rights, land is not merely defined as a parcel of land, rather it comprises forests, waters, natural resources. It is clear to conclude that the damages that land suffer, are damages that extend to the natural world therein. As I have reiterated many times, land (and the natural resources found therein) is source and expression of indigenous peoples' cultures and this implies that denial and access to it, implies the loss of cultural diversity. In face of this cultural loss, many indigenous peoples are forced to leave, most of the times they are forced to be assimilated to the dominant society, losing this way their indigenous identity. Yet, the recognition of land rights to indigenous peoples at the international level has been important and fundamental, since the standards promoted internationally are also adopted both at the regional and national level, providing regional and national Courts with framework of reference.

In this sense, legal instruments such as the ILO Conventions, the UNDRIP have been adopted so as to form part of the *corpus juris* of regional legislations and instruments, such as the one of the Inter-American system of protection of human rights. The Inter-American system, with regard to indigenous peoples, has developed a robust jurisprudence, starting from the leading case – Awas Tingni – that has come to recognise not only the right to land to indigenous peoples, but also its specificities. This is to say that the Court has reasoned on matter concerning land, with a view at the elements that have a role in its protection: culture, spiritual beliefs, traditional knowledge. I would like to state that recognising the right to land paves the way for the recognition and protection of indigenous peoples' survival as a cultural group that has its own identity. Cultural identity is composed of different intersected elements. Most, if not all of these elements have their source on land and on the natural environment. That is why spirituality and languages are important components of indigenous cultural identity. They are not only linked to the land, but also provide the stock of knowledge that indigenous peoples pass on from generation to generation. In analysing these aspects, one question came to mind:

Is it possible to consider land within the realm of cultural rights, besides or instead of considering it a matter of "property"? The term property that I have just used makes reference to art. 21 of the ACHR, which protects the right to individual property that I have analysed in this dissertation. Land rights are not only a matter of property but also a matter of cultural identity. This has also been recognised in the Inter-American system. The right to cultural identity has developed along with the right to land, stemming from the same cases concerning matter of land ownership of indigenous peoples. This is of significant importance because the cultural identity of indigenous peoples or rather its recognition has pushed for the development of a new perspective on human rights: an intercultural perspective.

This perspective is fundamental because it provides for the recognition of their cultural diversity, without dismissing their specificity and identity. In the Latin-American context this has translated into the term "*interculturalidad*". The approach has more evidently developed in the realm of the Constitutions of two Latin-American countries and less evidently or, rather, from a more interpretative approach in the IACtHR. The recognition of collective ownership of the land along with the recognition of the fact that land is element of cultural identity of these peoples paves the way for an intercultural approach to human rights, as the jurisprudence of the IACtHR has demonstrated, and for the foundation of new State's constitutional models as in the case of Bolivia and Ecuador. In a sense the recognition of land rights to indigenous peoples, after years of suffering and fights, led to the comprehension of their identity and their way of life, socially and culturally and the constitutional developments of Bolivia and Ecuador would have not taken place, if land rights to indigenous peoples had not been recognized first. The changes brought about by this recognition are revolutionary and vital for the group taken into consideration.

The same reasoning is applicable to the jurisprudence of the IACtHR. The recognition of land rights with Awas Tingni paved the way for the construction of an intercultural method that includes their cosmovisions, their ways of life and promotes for the development of a more inclusive society, recognizing the right to collective ownership as its basis and enriching its spectrum with the protection of other rights, as can be evinced in the Lhaka Honhat judgement. What is interesting in this judgement concerns not only the merits but also the forms of reparations. In the light of *interculturalidad*, this judgement puts the emphasis on the historical element of structural discrimination that has characterized the lives of indigenous peoples for years. And it does so, on the basis

of the recognition, in the jurisprudence, of land rights, as can be evinced in previous judgments and from that by adopting the cosmovisions of these peoples in its reasoning. The change in perspective that *interculturalidad* promotes has a counter-hegemonic scope in the sense that it de-structuralise existing patterns of dominance and discrimination, by promoting a comprehension of law that takes into consideration the indigenous vision of the world and by promoting indigenous agency with regard to issues concerning environmental matters, as it was recognised in the case.

The intercultural element in the constitutional framework of Latin-America is particularly specific of Ecuador and Bolivia, even though also Colombia can be considered as a bridge towards the construction of an intercultural State. *Interculturalidad* is not recognised in the Constitution of the State, rather it is evinced through the rulings of the Colombian Constitutional Court.[602] In the Constitutional texts of Bolivia and Ecuador diversity is conceived as the foundation of the State, which embraces the cosmovision of indigenous peoples and this is particularly visible in the use of indigenous language in order to fully grasp the meaning that somehow is partially lost in the Spanish expression *buen vivir/vivir bien*. *Buen vivir* has its source in the land and territories that indigenous peoples inhabit, and the core of this relationship is nature.

Buen vivir entails a life holistically understood and lived in harmony with every element, be it human, natural or divine. This relationship with the universe as an all-embracing one is composed of the elements that the indigenous cosmovision carries with itself. It is worth noting that *buen vivir* is present in the two Constitutions as normative principle and as guiding principle of public policies. This is also of great importance, because it implies that the meanings that *buen vivir* brings are incorporated as guiding elements of the juridical system of the State as well as of its governance as far as public policies are concerned. In this debate *interculturalidad* and *buen vivir* are sides of the same coin, because as *interculturalidad* is a subversive concept, *buen vivir* is the element through which this revolution can be put in place. *Buen vivir* has its origin in the subaltern culture of indigenous peoples and this has a great revolutionary scope. Something that is central to *buen vivir* is the relationship that indigenous peoples have with the natural world. In the Constitutional texts this has turned into the recognition of nature as entitled to rights. The subjectivity of Nature (or Pachamama, where life reproduces and

[602] Bagni, Silvia (2017), "Estudio introductorio sobre el deslinde conceptual del Estado intercultural", in *Lo Stato Interculturale: una nuova eutopia?* edited by S. Bagni, Dipartimento di Scienze Giuridiche, Bologna, p. 8, available at: http://amsacta.unibo.it/5488/1/volume_intero.pdf

flourishes) moves the perspective away from an anthropocentric to a biocentric perspective. Juridically, it can be observed that this recognition does come with two predominant difficulties: the first one relates to the fact that jurisprudence on these matter is very recent (as stated, only four countries have rulings concerning the rights of nature, Ecuador, India, New Zealand and Colombia) and the other on the lack of compliance mechanisms. It is interesting, however, to notice that two out of the four countries are Latin-American countries, showing that a new approach to development is possible. Nature and its components are particularly important for the lives of indigenous peoples as well as their agency in combating climate change, in the preservation and restoration of natural sites has been recognised.

The incorporation of principles like *buen vivir* within the Constitutions of Bolivia and Ecaudor, and the intercultural interpretative approach of the IACtHR are valuable for different reasons: first, they represent living proof of the developments that have been taken place with regard to indigenous rights; second, advancements such as establishing nature as subject entitled to rights, valuing traditional knowledge, the sustainable way of life that indigenous groups live, traditional practices all come to have a role in the protection of the environment, i.e. the consequence is not perceived and lived only by indigenous groups, but to a greater extent by humanity as whole, in the fight against climate change, environmental damage and sustainable development. This can be evinced by looking at how the indigenous population is distributed in the world and the land they occupy: indigenous groups of the world cover 24% of land worldwide and contain 80% of the world's biodiversity. This data is important because it provides insight on how indigenous groups agency in the protection of the environment is not to be underestimated.

A special feature of the involvement of indigenous peoples in environment-related issues is traditional knowledge. Even though there is no clear internationally accepted meaning of the expression, traditional knowledge proves to be relevant in the preservation of biodiversity and in the protection of the environment in a world at the time of climate change. What changes the facts is the role of States in promoting this new perspective and approach to issues that do not only affect the areas that indigenous peoples inhabit, but also the global community as a whole. The preservation of ecosystems and restoration of damaged natural sites can be successful if traditional knowledge and modern science work together. Indigenous peoples have profound knowledge of the sites and their

knowledge can prove to be a useful tool in the management of environmental-related projects.

This cooperation should be examined more in detail as it can open the door for more sustainable ways to develop, without further damaging the natural environment. I would like to advance a reflection that comes from the readings that I have done for this dissertation. *Interculturalidad* expresses a concept that aims at eradicating and uprooting the conditions of structural discrimination and power relations that neglected their rights and fundamentally, their right to land. In this sense, I think that traditional knowledge and the recognition of its value promote an intercultural approach that recognises indigenous peoples' agency and knowledge and does not merely dismiss them on the basis that their rights have been recognised and that, that should suffice for them. In this discourse the role of the State is fundamental, the way it puts in place policies and projects should be directed towards this kind of idea.

Moreover, traditional knowledge and its protection as well as preservation is not possible if the recognition of land rights is not assured and guaranteed. This recognition is fundamental, because it makes us understand that at the basis of the very notion of indigenous peoples there is the land and from the land stems the life as intended by indigenous peoples. From the recognition of land rights to the foundation of intercultural states and intercultural approach to human rights, we have come full circle and it can be stated that land and its recognition to indigenous peoples provide the basis of the discussion, that, otherwise would not have been possible since land has such significance and land rights such profound implications.

Is it possible to "export" this intercultural model beyond the Latin-American context? *Interculturalidad* is peculiar characteristics of the Latin-American juridical system,[603] yet it would be interesting to investigate this perspective. The question posed refers to those contexts of social pluralism originated by migratory flows, for example the European Union. It is true that the Constitutional foundations of Bolivia and Ecuador are specific of the area. Notwithstanding, is it possible to conceive an intercultural approach to the management of migration? The intercultural state promotes differences within a context where diversity does not imply the confinement of the cultural identity of the

[603] Baldin, S. and De Vido S. (2019), "Strumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità", *DPCE online*, p. 1320

minority, rather it becomes one of the possible expressions of belonging to that community of the State.[604]

To conclude, I deem it necessary to reiterate how the jurisprudence of the IACtHR has developed towards the involvement and inclusion of indigenous peoples' history and cosmovisions, and how its work can provide reference for other regional courts. From a human-right perspective this is particularly important because it renders the system more dynamic and more 'prepared' to deal with indigenous peoples' issues (and possibly, in other contexts more prepared to engage with migratory flows). These results are relevant in the discussion of human rights because they prove to be enriched, more inclusive and comprehensive. Yet, the system is also going to face some challenges, because the recognition of rights according to an intercultural perspective stemming from indigenous history, life and culture, is not based on a western way of understanding human rights, rather on a unique new perspective, that is going to require constant dialogue, where the axis is horizontal and interlocutors on an equal footing.

[604] Bagni, Silvia (2017), "Estudio introductorio sobre el deslinde conceptual del Estado intercultural", in *Lo Stato Interculturale: una nuova eutopia?* edited by S. Bagni, Dipartimento di Scienze Giuridiche, Bologna, p. 12, available at: http://amsacta.unibo.it/5488/1/volume_intero.pdf

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